

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 4 – Enforcement

Section 47 – Application for decision by Commissioner

118. This section sets out the circumstances in which an applicant can apply to the Scottish Information Commissioner for a decision as to whether a Scottish public authority has dealt with a request for information in accordance with Part 1 of the Act. Application to the Commissioner will be available where an applicant is dissatisfied with a notice given under section 21(5) or (9) following a review by the authority of its original decision, or where the public authority concerned failed to give such a notice. Section 47(2) sets out the form in which an application is to be made to the Commissioner, and the information which must be included in any application. An application must be in writing or in another form capable of being used for subsequent reference. Section 47(4) sets out the timescales within which any such application must be made. The Scottish Ministers may, by regulations, extend this timescale. Such regulations will be subject to affirmative resolution.

Section 48 – When application excluded

119. Under this section, an applicant will not be able to appeal to the Commissioner for a decision under section 47(1) as respects a request for review made to the Scottish Information Commissioner, a procurator fiscal, or the Lord Advocate (to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland).
120. Section 48 excludes appeal to the Commissioner for a decision under section 47(1), but the Commissioner, the Lord Advocate and procurators fiscal are subject to the other duties and obligations set out in this Act.

Section 49 – Commissioner's decision

121. This section sets out the Commissioner's obligations in relation to an application made in accordance with section 47(1), providing this is not excluded by section 48. The Commissioner is not obliged to make a decision if he or she is of the opinion that the request is frivolous or vexatious, or has been withdrawn or abandoned. However, the Commissioner is still obliged to provide notification with reasons.
122. In any other case the Commissioner must invite comments from the authority and reach a decision within four months (or such other period as is reasonable in the circumstances) of receiving the application. The Commissioner may also mediate a settlement between the applicant and the authority.

123. Where the Commissioner finds that an authority has not dealt with a request in accordance with Part 1 of this Act, such a decision notice must contain details of the failure, the remedy and the time within which such action must be taken. Such timescales must not expire before the end of the period within which an authority may appeal to the Court of Session under section 56.

Section 50 – Information notices

124. This section enables the Commissioner to obtain from a Scottish public authority information (including unrecorded information) that he or she requires to deal with an application under section 47 or to determine on whether an authority has complied, or is complying, with the provisions of the Act or a code of practice issued under section 60 or 61. A written notice under this section is referred to as an “information notice”.
125. Sections 50(2) and (3) specify the contents of an information notice, which must include the time within which the information is to be given and details of any right of appeal which may be available to the authority under section 56. The time limit specified in the notice must not expire before the time for an authority to appeal under section 56 expires. Should an authority decide to exercise the right of appeal under that section, then the notice need not be complied with before that appeal is concluded.
126. Sections 50(5) and (6) set out that an authority is not required to supply the Commissioner with information relating to communications between a legal adviser and client (or a person representing a client) about the client’s compliance with the Act or about any proceedings arising from it.
127. Section 50(7) provides that the information requested by the Commissioner in an information notice cannot be withheld on the basis of any obligation to maintain secrecy, or of any other restriction on disclosure. This is subject to the limitation relating to the professional legal adviser and client relationship set out at section 50(5).

Section 51 – Enforcement notices

128. This section enables the Commissioner to issue an “enforcement notice” to a Scottish public authority which the Commissioner is satisfied has failed to comply with a provision of Part 1 of the Act. The notice specifies the steps the authority is to take in order to comply.
129. An enforcement notice must also set out the time by which these steps must be taken and details of any right of appeal which may be available to the authority under section 56. The time limit specified in the notice must not expire before the time for an authority to appeal under section 56 expires. Should an authority decide to exercise the right of appeal under that section, then the notice need not be complied with before that appeal is concluded.
130. The Commissioner can also cancel an enforcement notice.

Section 52 – Exception from duty to comply with certain notices

131. This section sets out the conditions under which the First Minister can, after consulting the other Scottish Ministers, sign and give a certificate to the Commissioner stating that the First Minister has, on reasonable grounds and after such consultation, formed the opinion that there has been no failure to comply with section 1(1) and that the information requested is of exceptional sensitivity.
132. Under section 52(1) such a certificate can apply only to a decision or enforcement notice given to the Scottish Administration and where the information in question is exempt by virtue of section 29, 31(1), 32(1)(b), 34, 36(1) or 41(b).

133. The certificate must be issued within 30 working days of the Commissioner's notice being given to the Scottish Administration or, where an appeal is brought on a point of law under section 56, of the day on which the cause is finally determined.

Section 53 – Failure to comply with notice

134. This section sets out the sanctions for non-compliance with a decision notice, information notice or enforcement notice issued by the Scottish Information Commissioner, providing that the Court of Session may hold a Scottish public authority in contempt of court.
135. Where an authority fails to comply with any notice issued by the Commissioner, the Commissioner will be entitled to refer the matter to the Court of Session.
136. In relation to information notices (which, under section 50, allow the Commissioner to obtain information to support consideration of cases appealed to his or her office), an authority will be deemed to have failed to comply with the notice where it knowingly or recklessly makes a false statement.
137. Where the Commissioner refers an authority to the Court of Session, the authority will be entitled to offer a statement of defence, including presenting witnesses.

Section 54 – Powers of entry and inspection

138. This section introduces schedule 3 which makes provision for the Commissioner's powers of entry and inspection.

Section 55 – No civil right of action against Scottish public authority

139. This section ensures that the legislation does not create any right to sue for damages for breach of a statutory duty. It does not affect the Commissioner's powers in section 53(1).

Section 56 – Appeal against notices under Part 4

140. This section provides that an appeal against the Commissioner's decision, on a point of law, can be made to the Court of Session in the circumstances listed.