

# **FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

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## **EXPLANATORY NOTES**

### **THE ACT – AN OVERVIEW**

3. The Act:
  - provides a right of access to information held by Scottish public authorities;
  - creates exemptions from the duty to disclose information; and
  - establishes the arrangements for enforcement and appeal.
4. The Act is in seven Parts.

### **Part 1 – Access to information held by Scottish public authorities**

5. This Part:
  - provides for the general right of access to information held by Scottish public authorities and specifies the conditions which need to be fulfilled before an authority is obliged to comply with a request;
  - describes the effect of the exemptions in Part 2 on the obligations under section 1;
  - describes the application of the public interest test (section 2);
  - provides for the Act to cover the authorities, persons or office-holders specified in schedule 1 and publicly-owned companies and includes a power to specify further persons as public authorities for the purpose of the Act;
  - allows Scottish public authorities to charge fees in accordance with regulations made by the Scottish Ministers;
  - provides for time limits for complying with a request;
  - makes special provision relating to records transferred to the Keeper etc.;
  - requires Scottish public authorities to provide advice and assistance to applicants;
  - requires Scottish public authorities to state the basis for refusal of a request; and
  - requires Scottish public authorities to adopt and maintain a publication scheme and to publish information in accordance with it.

### **Part 2 – Exempt information**

6. This Part sets out the circumstances in which information is “exempt information” for the purposes of the Act. Some of the exemptions apply to a class of information; others rely on the application of a test of substantial prejudice or other consequences of disclosure.

### **Part 3 – The Scottish Information Commissioner**

7. This Part creates the office of “Scottish Information Commissioner” (the Commissioner). It places a duty on the Commissioner to promote good practice and Scottish public authorities’ compliance with the Act, their publication schemes and codes of practice. The Commissioner is also obliged, where he or she considers it expedient, to disseminate information to the public about the operation of the freedom of information (FOI) regime. The Commissioner is permitted to charge fees for services provided. This Part also enables the Commissioner to make “practice recommendations” specifying what a Scottish public authority should do to comply with the codes of practice, and requires the Commissioner to lay annual reports before the Scottish Parliament.

### **Part 4 – Enforcement**

8. This Part sets out arrangements for an applicant, who is not satisfied with the response of a Scottish public authority to a request for information, to apply to the Commissioner for a decision on whether the authority has acted in accordance with the provisions of the Act. Subject to certain conditions, the Commissioner is under a duty to reach a decision. The Commissioner is also given powers to mediate between parties to an appeal.
9. This Part also describes the investigative and enforcement powers of the Commissioner. The Commissioner’s powers of entry and inspection are set out in schedule 3. This Part confirms that the Act does not give rise to any right of compensation from a Scottish public authority for breach of statutory duty. However, judicial review or appeal to the Court of Session on a point of law may still be available. This Part also provides for the circumstances in which a certificate may be issued by the First Minister, after consulting the other Scottish Ministers, in respect of a decision notice or enforcement notice issued by the Commissioner regarding the disclosure of exempt information. The effect of such a certificate is that the Scottish Administration need not comply with the Commissioner’s notice.

### **Part 5 – Historical records**

10. This Part defines certain exemptions which will cease to apply when information reaches a specified age. Records would cease to be exempt after certain specified periods, with the majority of the exemptions falling away after 30 years. For the purposes of this Part, records that are over 30 years old are described as “historical records”. A smaller number of exemptions fall away after 60 and 100 years, while the remainder remain to be considered in perpetuity. This Part also describes how the Scottish Ministers may amend the time periods.

### **Part 6 – Codes of practice**

11. This Part requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities on how they should fulfil their functions under the Act, including the practices which authorities should follow when dealing with requests for information. It also requires the Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities on the keeping, management and destruction of their records.

### **Part 7 – Miscellaneous and supplemental**

12. This Part:
  - provides a power to make regulations relating to environmental information;
  - provides for the disclosure of information by the Commissioner to the Scottish Public Services Ombudsman and the UK Information Commissioner;
  - provides a power to repeal or amend existing statutory bars to disclosure;

*These notes relate to the Freedom of Information (Scotland)  
Act 2002 (asp 13) which received Royal Assent on 28 May 2002*

- creates an offence of altering etc. records with intent to frustrate a right of access;
  - saves existing powers of Scottish public authorities to disclose information;
  - makes provision in respect of defamation;
  - provides as to prosecutions in cases involving the Scottish Parliament, the Scottish Administration and the Scottish Parliamentary Corporate Body;
  - amends the Public Records (Scotland) Act 1937;
  - adds the Commissioner to the list of persons liable to investigation under the Scottish Public Services Ombudsman Act 2002; and
  - details procedures for the giving of notices under this Act.
13. [Part 7](#) also sets out the commencement provisions for the Act. During the period between Royal Assent and the date all the provisions have come into effect, the Scottish Ministers must make annual reports to the Parliament on progress towards full commencement.