

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 2 – Exempt information

89. Part 2 of the Act sets out the categories of information which are exempt from the general entitlement to information held by Scottish public authorities. Other than for those exemptions which are defined in section 2 as being absolute exemptions, the public interest test in that section must be considered. Part 5 of the Act sets out certain provisions covering periods after which information ceases to be exempt.

Section 25 – Information otherwise accessible

90. This section provides an absolute exemption for information which is otherwise accessible to the applicant. The exemption covers information which is available on the payment of a fee or charge, and information available by virtue of other legislation. An example would be birth, death or marriage certificates available under other legislation. The exemption also sets out that information (other than information which the authority is statutorily obliged to make available, or information held by the Keeper of the Records) cannot be exempt on the basis that is reasonably obtainable merely because it is available from the authority which holds it – unless it is made available in accordance with that authority's publication scheme and any payment required is specified in or determined in accordance with the scheme.
91. Section 25(2)(b)(ii) sets out the circumstances when information held by the Keeper of the Records of Scotland is to be taken to be reasonably obtainable, and hence exempt.
92. Essentially, the exemption provides that the full provisions of the Act need not apply to information which is otherwise accessible to the applicant.

Section 26 – Prohibitions on disclosure

93. This section provides an absolute exemption (i.e. the public interest test does not apply) for information the disclosure of which by a Scottish public authority is subject to a prohibition on disclosure. An authority withholding information from disclosure under the terms of this exemption would be expected to state what enactment or Community obligation etc. prevented its disclosure.

Section 27 – Information intended for future publication

94. Section 27 provides that information may, in certain circumstances, be exempt if it is information intended for future publication. The public interest test in section 2 applies.

Section 28 – Relations within the United Kingdom

95. This section exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and other such administrations as defined in the section. The public interest test in section 2 applies.

Section 29 – Formulation of Scottish Administration policy etc.

96. This section exempts as a class information held by the Scottish Administration if it relates to the formulation of Scottish Administration policy; and sets out the circumstances when statistical information and factual background information may be exempt. The public interest test in section 2 applies.

Section 30 – Prejudice to effective conduct of public affairs

97. This section exempts information if its disclosure would prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers, or where its disclosure would inhibit substantially the free and frank provision of advice or exchange of views. The public interest test in section 2 applies.

Section 31 – National security and defence

98. This section exempts information if exemption is required for the purpose of safeguarding national security; and information the disclosure of which would, or would be likely to, prejudice substantially the defence of the British Islands. The public interest test in section 2 applies.

Section 32 – International relations

99. This exemption protects information whose disclosure would substantially prejudice the effectiveness of the conduct of international relations. The public interest test in section 2 applies.

Section 33 – Commercial interests and the economy

100. This section protects against the disclosure of commercially sensitive information, including trade secrets. It also protects against the disclosure of information which could be damaging to the economic interests of the United Kingdom. The public interest test in section 2 applies.

Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations

101. This section covers a range of information associated with investigations carried out by Scottish public authorities. The public interest test in section 2 applies.

Section 35 – Law enforcement

102. This exemption covers a range of information relating to law enforcement. It also applies to information relating to relevant civil proceedings brought by or on behalf of Scottish public authorities. The public interest test in section 2 applies.

Section 36 – Confidentiality

103. Essentially section 36(1), to which the public interest test in section 2 applies, provides an equivalent in Scotland for information for which “legal professional privilege” may be claimed in England.

104. Section 36(2) exempts absolutely information obtained from another person if its disclosure would constitute a breach of confidence actionable by that person or any other person.

Section 37 – Court records, etc.

105. This section provides an absolute exemption for information (except information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976) contained in court records of proceedings or other relevant legal documents, where that information is held by a Scottish public authority solely because it is contained in such a document.

Section 38 – Personal information

106. This section deals with personal information (much of which may in any event be available to the individual concerned under the Data Protection Act 1998). Section 38(1) exempts absolutely personal data, of which the applicant is the subject, personal census information and the health records of a deceased person. Section 38(1)(b) exempts personal data relating to a third party (i.e. not the applicant), but only if it meets either of the conditions mentioned in section 38(2) and (3). This is an absolute exemption in circumstances where the conditions in section 38(2) and (3) are met. Where these conditions are not met the public interest test at section 2 applies.

Section 39 – Health, safety and the environment

107. Section 39(2) exempts information if that information is required to be made available by virtue of environmental information regulations (EIRs) made under section 62. Environmental information is exempt if an authority is obliged to release the information requested in accordance with those regulations or would be so obliged but for an exemption under those regulations. Access to environmental information held by a Scottish public authority will be available first under those regulations, rather than under the Act. However, the Act would still continue to have some significance as regards environmental information, since it places a duty on public authorities to consider the release of that information which is exempt under the EIRs, where it is in the public interest so to do. The public interest test in section 2 applies.

Section 40 – Audit functions

108. This section exempts information, the disclosure of which would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's auditing functions. The section relates to the audit of the accounts of other public authorities, or examinations into the economy, efficiency and effectiveness with which they use their resources in the discharge of their public functions. The section would not extend to the internal auditing functions of authorities. The public interest test in section 2 applies.

Section 41 – Communications with Her Majesty, etc. and honours

109. This section exempts as a class information relating to communications with Her Majesty, the Royal Family or the Royal Household; or relates to the award of any honour or dignity by Her Majesty. The public interest test in section 2 applies.