

Explanatory Memorandum to
The Public Audit (Wales) Act 2004 (Relaxation of Restriction on Disclosure)
Order 2005.

2005 No. 1018

1. This explanatory memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. Description.

This Order is made under section 54(6) and (7) of the Public Audit (Wales) Act 2004 (“the Act”). It makes provision for the relaxation of restrictions in section 54 of the Act on the disclosure of information obtained:

- by the Auditor General for Wales; or,
- an auditor appointed by him under section 13 of the Act to audit the accounts of local government bodies in Wales; or,
- any person acting on either of their behalf

when exercising any of his or their functions under:

- Part 2 of the Act; or
 - Part 1 of the Local Government Act 1999 (which establishes the Best Value regime for certain local government bodies),
- or
- when undertaking a study under section 145C of the Government of Wales Act 1998.

All the relevant functions are all concerned with one of the following:

- the audit of accounts of local government bodies in Wales (as defined in section 12 of the Act); or
- the audit of Best Value Performance Plans (known in Wales as Improvement Plans); or
- studies into economy, efficiency and effectiveness of local government bodies in Wales or registered social landlords in Wales; or
- the inspection of best value compliance by relevant local government bodies in Wales.

Section 54 incorporates an overall presumption against disclosure of such information, subject to exceptions. These circumstances are set out in section 54(2)(a) to (j). Under section 54(3) and (4) a person commits an offence if he or

she discloses information in contravention of subsection (2), and is punishable by a term of imprisonment or a fine or both.

This Order replicates, in so far as they apply to Wales, the amendments to the parallel disclosure provisions in section 49 of the Audit Commission Act 1998 which have been brought into effect from 1 January 2005 by the Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004 No. 3363 (“the Freedom of Information Order”). The Freedom of Information Order reflects decisions made by the Government in respect of a number of pieces of primary legislation (including section 49 of the Audit Commission Act 1998), resulting from a wide-ranging review of statutory bars to disclosure in primary legislation undertaken during 2004. The Freedom of information Order was drafted during the autumn, after the Act received Royal Assent. The Order received the approval of Parliament on 9 December 2004.

Article 2(3) of this Order removes public authorities within the meaning of the Freedom of Information Act 2000, or persons acting on their behalf, from the restriction on the disclosure of information contained in section 54. “Public authorities” for this purpose would include the Auditor General for Wales and his staff and a local government body and its employees.

Article 2(4) then clarifies the relaxation in disclosure provisions in respect of such public authorities by inserting a new section 54A in the Act. Information may be disclosed by or on behalf of such authorities:

- in any of the circumstances specified in section 54(2) (as amended);
- in respect of a programme of studies agreed between the Auditor General for Wales and the National Assembly for Wales in respect of improving the economy, efficiency and effectiveness of registered social landlords in the exercise of their functions; and,
- in any other circumstances except where disclosure would be prejudicial or would likely to be prejudicial to the effective performance of the statutory functions of the public authority making the disclosure (or on whose behalf it is made).

The provisions of this Order referred to at the first two bullet points of the previous paragraph, taken together, ensure that information can still be disclosed in all the circumstances in which it could have been disclosed under the original wording of section 54 (if in force). The provision reflected in the final bullet point then goes on to create a very wide new category of circumstances in which information can lawfully be disclosed.

The penalty for unauthorised disclosure under the amended disclosure provisions within section 54A is a fine and not imprisonment.

3. Matters of special interest to the Joint Committee on Statutory Instruments.

Section 54 of the Act, in so far as circumstances in Wales are the same as those in England, reflects the provisions of section 49 of the Audit Commission Act 1998. The objective of this is to avoid inconsistency between England and Wales as regards criminal sanctions imposed by primary legislation. At the same time as the Public Audit (Wales) Bill was progressing through Parliament, the Department for Constitutional Affairs (DCA) was undertaking a review under the Freedom of Information Act of statutory bars to the disclosure of information in primary legislation. The review encompassed section 49 of the Audit Commission Act 1998.

In order to anticipate and reflect the substance of legislative changes that might be made to section 49 subsequent to the Act receiving Royal Assent, sections 54(6) to (8) were added during its Parliamentary passage. The provisions give the Secretary of State for Wales the power to amend or repeal the preceding provisions of section 54. The power can only be used if section 49 of the Audit Commission Act 1998 has already been amended or repealed, and only for the purpose of making equivalent changes to the disclosure provisions contained in section 54. It cannot be used to impose any further restrictions on the disclosure of information under section 54. Section 58(2) of the Act also enables the Secretary of State in making an order under Part 2 of the Act (which relates to local government bodies in Wales, and includes section 54) to make any such incidental, consequential, transitional or supplementary provisions as he may consider appropriate.

The first tranche of legislative changes resulting from the DCA review have been implemented in the Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004 No.3363, referred to in section 2 above.

The circumstances in which section 49 of the Audit Commission Act and section 54 of the Act have effect differ somewhat between England and Wales, but the objective of this Order is to ensure that the substance and spirit of the amendment of disclosure provisions now approved in respect of the Audit Commission Act 1998 are replicated in the Act.

4. Legislative Background.

The Public Audit (Wales) Act 2004 received Royal Assent on 16 September 2004. The majority of its provisions are scheduled to commence on 1 April 2005. The National Assembly for Wales has the power of commencement under section 73 of the Act.

The Act extends the functions of the Auditor General for Wales, principally to include the majority of the functions currently undertaken by the Audit Commission in Wales. By virtue of the Act there will, from 1 April 2005, be a single public audit body for Wales which will, in legal terms, take the form of the office of the Auditor General for Wales, but which will be known as the Wales Audit Office or Y Swyddfa Archwilio Cymru.

As required by section 54(8) of the Act, a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament.

5. Extent

This Order extends to England and Wales.

6. European Convention on Human Rights.

The Secretary of State for Wales has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Public Audit (Wales) Act 2004 (Relaxation of Restriction on Disclosure) Order 2005 are compatible with the Convention rights.

7. Policy Background.

A key consideration of the Government during the passage of the Public Audit (Wales) Bill through Parliament was to ensure that its provision in respect of statutory public audit and inspection functions:

- were consistent in respect of the application of the criminal law between England and Wales; and,
- anticipated and facilitated any changes that the Government proposed to make to the existing disclosure of information provisions to achieve its wider objective of reducing statutory bars to such disclosure.

8. Impact.

A Regulatory Impact Assessment has not been prepared for this Order as it has no impact on business, charities or voluntary bodies.

9. Contact.

Cedric Longville at the Wales Office (02072700552) or e-mail cedric.longville@walesoffice.gsi.gov.uk can answer queries regarding this Order.

