



Consultation on Proposals for a Freedom of Information (Amendment) (Scotland) Bill

**UNISON Scotland's Response to the Scottish Government Consultation
on Proposals for a Freedom of Information (Amendment) (Scotland)
Bill**

March 2012

Introduction

UNISON is Scotland's largest trade union representing more than 165,000 members delivering public services across Scotland.

UNISON Scotland welcomes the opportunity to respond to the Scottish Government Consultation on Proposals for a Freedom of Information (Amendment) (Scotland) Bill.

Overview

As a longstanding supporter of strong freedom of information legislation, UNISON Scotland is disappointed that the Scottish Government is making only minor changes via this Bill. It should use Section 5 of the Freedom of Information (Scotland) Act 2002 (FOISA) to extend FOISA to cover all public services.

The Scottish Government said that its aim with this proposed Bill is to “add strength and clarity to the existing legislation”. However, failing to ensure that freedom of information rights ‘follow the money’ means the existing legislation is weaker and less clear than it should be for the growing number of public services delivered by private companies and other bodies not currently covered by FOISA.

The public should be able to access information about the public services they use and about public and political decisions that affect them, whatever type of body holds the information or provides the service. The use of Section 5 to ensure this is long overdue.

UNISON broadly welcomes and supports most of the Consultation's proposed amendments, agreeing that the shift in culture towards greater openness and accountability means that long lifespans for some exemptions are increasingly out of step. We also support the Consultation Response submitted in February by Kevin Dunion, outgoing Scottish Information Commissioner.¹

Like Mr Dunion, we do not believe an absolute exemption is necessary for aspects of section 41 (a) (Communications with her Majesty, etc). We also support his proposals that, for relevant amendments, Ministers should introduce equivalent amendments to the Environmental Information (Scotland) Regulations 2004 (the EIRs) to ensure consistent rights of access to the information covered by these interrelated regimes.

Questions

Part 5 – Historical Records

1) Do you agree with the proposed amendment allowing greater flexibility to consider the lifespan of exemptions? 2) Please give reasons for your response.

We agree with this. We believe it is sensible, if there are concerns around reducing the lifespan of all of the exemptions from 30 years to 15 years, to introduce flexibility to ensure that section 59 (1) is actually used. The current 'all or none' approach means it is not being used to amend the definition of 'historical record'.

We support the Scottish Information Commissioner's proposals in his response (referred to earlier) that the amendment be made fully retrospective. This would mean that it applies to all records held by authorities, regardless of their creation date.

We note the point that Mr Dunion made - that most of the exemptions in question are subject to the public interest test, so relevant information could of course be released earlier where the public interest is in favour of release.

We would also like to see similar amendments to the EIRs, which would introduce a lifespan for the equivalent exceptions. This would ensure consistent FOI rights in the two interrelated regimes.

3) With a view to the intended Section 59(1) Order and the Scottish Government's preliminary views, please provide any comments you may have regarding specific exemptions, for example Section 33(1) (commercial interests), Section 36 (confidentiality) or Section 41(a) Communications with her Majesty, etc).

UNISON believes that the Government's preliminary intentions are, on balance, correct, except for the proposal re Section 41(a). We support reducing the lifespan to 15 years for **Section 33 (1) (a) and (b)**. We agree with the view of Scottish Ministers that commercial information – e.g. contractual information – loses its sensitivity over a relatively short period of time and that the 30 year period of protection is not justified.

In addition, Mr Dunion points out that he has not to date been presented with any evidence that information that constitutes a trade secret is held by Scottish public authorities.

On **Section 36**, we would generally be in favour of reducing the lifespan, but we note the comments of Mr Dunion, and of some responses in the 'Improving Openness' consultation, that there may be some circumstances where it might be appropriate to retain the exemption beyond 15 years.

The consultation document notes that there was little hard evidence from specific cases and that in many scenarios other exemptions could apply. We are inclined to respond in that case, that, unless the responses to this consultation can demonstrate evidenced specific

scenarios of a need to maintain the 30 year lifespan, then Ministers should reduce it to 15 years for this exemption too. Or consider separate treatment for the two parts of Section 36.

However, given that information could still be released before the 30 years if the necessary tests are met, including public interest considerations in Section 36 (1), or where a breach of confidence is no longer actionable, 36 (2), we are willing to agree that this could be maintained at 30 years.

On **Section 41 (a)**, we are opposed to making communications with Her Majesty, the heir, the second in line, or the relevant member of the Royal Family subject to 'absolute' exemption, therefore not requiring the application of a public interest test. As Mr Dunion pointed out, the effect of this proposal, combined with the proposed lifespan for the 41(a) exemption, would result in "an absolute exemption for information relating to communications, which would in some cases last for more than the current 30 years. There would be no prospect of a release before that time on public interest grounds, regardless of either the distance of the information from the actual content of communications, the nature and content of the information, or the weight of public interest which may exist in relation to its disclosure."

Without referring to all of Mr Dunion's comments on why he opposes the proposal on absolute exemption, we note in particular:

- a) His view that absolute exemption should be rare in FOI laws, citing the Commonwealth Principles and Guidelines on the Right to Know.
- b) His point that the exemption will be far more wide-ranging than suggested as it will not just be the communications themselves which would be subject to an absolute exemption, but "any information held by Scottish public authorities which **relates** to those communications". In our view, it would be entirely wrong to exempt, with no public interest test, such basic information as the number of times such communications have occurred, details of the departments or individuals involved in communications, or the cost of the communications.
- c) The examples (including cases) that he gives of where disclosure could conceivably be appropriate, including e.g. information relating to the public cost of the Royal Family, or, "hypothetically, circumstances where a member of the Royal Family or staff on their behalf acts significantly outside their constitutional role in such communications, to the clear detriment of the public interest".

The Scottish Government is aiming with this proposal to broadly mirror recent amendments to the United Kingdom Freedom of Information Act 2000 (FOIA). We agree with Mr Dunion that the constitutional conventions set out by the Ministry of Justice in relation to those amendments are in fact properly protected by the current Section 41 (a) qualified exemption.

If it is retained as a qualified exemption, we would support the proposal to amend the lifespan as proposed to 5 years after the relevant death (that being of Her majesty, the heir, the second in line or the relevant member of the Royal Family), or 20 years after the information has been created – whichever occurs latest.

Section 65

4) Do you agree with the proposed amendment increasing the relevant time period to 12 months? 5) Please give reasons for your response.

The time period should certainly be increased, but this should be in line with the recommendation made by the Scottish Information Commissioner in his response. This would be that summary proceedings for an offence under Section 65 should be commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the prosecutor to justify proceedings, comes to his/her knowledge, with no proceedings being commenced more than 18 months after the commission of the offence.

It is entirely sensible that the Scottish Government should act on this based on the experience of Mr Dunion in office. He also notes that this time limit is consistent with the approach taken for increasing similar time limits beyond six months in a range of other legislation.

We would be concerned that if the Scottish Government does not take up Mr Dunion's recommendation, there is a risk that offences under Section 65 might only come to light too late for prosecution. If the Scottish Government is serious about ensuring the Commissioner should have the power to seek prosecution for those who deliberately destroy requested information to which the applicant is entitled, then it should adopt Mr Dunion's recommended amendment.

We would also support the introduction of an equivalent amendment to the EIRs.

For further information please contact:

Mike Kirby, Scottish Secretary

UNISON Scotland

UNISON House

14, West Campbell Street,

Glasgow G2 6RX

Tel 0845 355 0845 Fax 0141 331 1203

m.kirby@unison.co.uk

ⁱ <http://www.itpublicknowledge.info/nmsruntime/saveasdialog.asp?IID=5357&sID=377>