

Report to the Scottish Parliament on Progress on Implementation of the Freedom of Information (Scotland) Act 2002

**Laid before the Scottish Parliament by the Scottish Ministers (in pursuance of section
75(3) of the Freedom of Information (Scotland) Act 2002)**

28 May 2003

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Foreword by First Minister and Deputy First Minister

We are delighted to be able to lay before Parliament the first report on progress on implementing the Freedom of Information (Scotland) Act 2002.

The Act received its Royal Assent on 28 May 2002. Since that date one of the most important building blocks for an effective FOI regime has been put in place with the appointment of Mr Kevin Dunion as Scottish Information Commissioner in early 2003. The timetable for implementation of the Act, as set out in this report, has been devised in consultation with Mr Dunion. We are grateful to him for his assistance in this matter.

The timetable for implementation of the Act is challenging yet deliverable. The Act will be in force a full year before the date set out in the Act. This is a major achievement. The announcement of the timetable will help Scottish public authorities in their planning for FOI by removing any uncertainties about when the new rights will come into force. Public authorities will be assisted in their planning for FOI by guidance on the preparation of publication schemes which will be issued by the Scottish Information Commissioner and by two Codes of Practice which will be issued by Scottish Ministers.

Before the passage of the freedom of information legislation, Ministers established the Scottish Freedom of Information Implementation Group. Setting up this group early with a remit to prepare and oversee a strategy for the successful implementation of the FOI legislation has been helpful to the implementation process. This report summarises the work that group has undertaken in the past year.

Good progress has been made since the Act was passed by Parliament last year. Much remains to be done. By the time of next year's report to Parliament however we plan to have carried out most of the preparatory work that is necessary for the successful implementation of a statutory regime that will provide important rights to all.

Jack McConnell MSP

Jim Wallace QC MSP

Introduction

Under section 75 (3) of the Freedom of Information (Scotland) Act 2002 the Scottish Ministers have to lay before the Scottish Parliament an annual report on progress made towards bringing the provisions of the Act into force.

Chapters 1 and 3 of the report set out details of the work carried out in the year since Royal Assent necessary for the successful implementation of the Act. Much of the work detailed in Chapter 1 is of a technical nature while Chapter 3 sets out the work that the Scottish Freedom of Information Implementation Group has carried out to prepare Scottish public authorities for the new Act. The Scottish Ministers' proposals for bringing the provisions of the Act fully into force are detailed in Chapter 2. In addition to work on implementation of the Freedom of Information (Scotland) Act 2002 the report also provides (in Chapter 4) details of work carried out in other areas. This includes the first stage in identifying statutory bars to the disclosure of information which can be reviewed to see whether they can be removed, work on the preparation of Environmental Information Regulations and finally information on the current non – statutory arrangements for access to Scottish Executive information.

Progress on the work outlined in this report as it develops through the coming year can be monitored by visiting the FOI pages on the Scottish Executive's web-site at: <http://www.scotland.gov.uk/government/foi/>.

1. Developments since Royal Assent

Appointment of Scottish Information Commissioner

1.1 Section 42 (1) of the [Freedom of Information \(Scotland\) Act 2002](#) provides that the Commissioner will be appointed by Her Majesty on the nomination of the Parliament. Following a selection process conducted by a panel of MSPs under Parliament Standing Orders the nomination of Mr Kevin Dunion as Scottish Information Commissioner was agreed by the Scottish Parliament on 12 December 2002. Mr Dunion subsequently commenced his duties as Commissioner on 24 February 2003.

1.2 Since commencing his duties Mr Dunion has necessarily concentrated on establishing his office, which he has determined will be in St Andrew's, Fife. Arrangements for equipping and staffing that office are now well advanced, and in April a dedicated web-site for the Scottish Information Commissioner (www.itspublicknowledge.info) was launched. Mr Dunion has also met individuals across the public sector, and participated in key discussions with the Executive on the developing codes of practice and on the timescale for implementation set out in chapter two of this report.

Commencement of Provisions of Act

1.3 Sections 72 (Orders and Regulations), 75 (Commencement) and 76 (Short title) of the Act came into force on Royal Assent. To date, one commencement order, the [Freedom of Information \(Scotland\) Act 2002 \(Commencement No. 1\) Order 2002 \(SSI 2002/437\)](#) has been made. The order came into force on 30 September 2002 and gave effect to the following provisions of the Act: -

Provisions Commenced	Purpose of Provisions
Sections 3(1), 4, 5, 6 and 7 and schedule 1 :	These provisions specify bodies to be subject to the Act, the machinery for removing or adding bodies to the list, and enable the Act to have limited application in certain circumstances.
Sections 42, 43, 45 and schedule 2 :	These provisions establish the office of the Scottish Information Commissioner and set out the functions (and conditions attached) of the Commissioner.
Section 24 :	This provision enables the Scottish Information Commissioner to make model publication schemes.

Sections 60 and 61:	These provisions enable the Scottish Ministers to issue codes of practice.
Section 62	This provision enables the Scottish Ministers to make regulations for the purpose of implementing the information provisions of the Aarhus Convention
Section 64	This provision confers a power on the Scottish Ministers to amend or repeal, by order, enactments which prevent the disclosure of information.
Sections 70(1) and (2) and Section 71:	These provisions amend the Public Records (Scotland) Act 1937 and the Scottish Public Services Ombudsman Act 2002.
Section 73:	Commences the provisions on interpretation in the Act.

2. Timetable for Implementation of the Act

2.1 Scottish Ministers are committed to timely and effective implementation in advance of the backstop of 31 December 2005 provided in the Act.

2.2 The key factors behind the implementation timetable announced in this report include:

- the need to allow sufficient time for the Scottish Information Commissioner to establish and staff his office; to prepare guidance; to approve publication schemes for over 9,000 public authorities; and to prepare for the role as the appellate authority for forthcoming Aarhus-compliant, Scottish Environmental Information Regulations;
- the need to include sufficient time to produce, and consult on, Codes of Practice and Regulations;
- the design and delivery of an effective training programme for the staff of Scottish public authorities; and finally
- the need to allow time for Scottish public authorities to prepare themselves for implementation, including reviewing their records management and other administrative arrangements to ensure they can meet their responsibilities under the Act.

2.3 After discussion with the Scottish Information Commissioner the following timetable for implementation of the Act has been agreed: -

Date	
By 28 February 2004	The Scottish Ministers, the Scottish Parliament, The Scottish Parliamentary Corporate Body, Non Ministerial Office Holders in the Scottish Administration, Local Government and the Police (public authorities as listed in Parts 1, 2, 3 and 6 of Schedule 1 of the Freedom of Information (Scotland) Act 2002) to submit publication schemes for approval to the Scottish Information Commissioner
By 1 June 2004	The publication schemes submitted by the public authorities above to be approved by the Scottish Information Commissioner
By 31 May 2004	Public Authorities listed in Parts 4 (The National Health Service) and 5 (Educational Institutions) of Schedule 1 of the Freedom of Information (Scotland) Act 2002 to submit publication schemes for approval by the Scottish Information Commissioner
By 1 September 2004	The publication schemes submitted by the above public authorities to be approved by the Scottish Information Commissioner
By 31 August 2004	All public authorities listed in Part 7 of Schedule 1 of the Freedom of Information Act 2002 to submit publication schemes for approval by the Scottish Information Commissioner
By 30 November 2004	The publication schemes submitted by the above public authorities to be approved by the Scottish Information Commissioner
1 January 2005	The right of access to information held by all public authorities listed in Schedule 1 to the Freedom of Information (Scotland) Act 2002 to be brought into force

3. Work of the Scottish Freedom of Information Implementation Working Group

3.1 The Scottish Freedom of Information Implementation Group was established in January 2001 with the following terms of reference:

- ◆ To prepare and oversee a strategy for the successful implementation of the Scottish freedom of information legislation;
- ◆ To prepare and oversee a strategy to foster a culture of openness across the Scottish public sector;
- ◆ To develop and oversee a strategy for training staff in the Scottish public sector; and
- ◆ To report to and advise the Deputy First Minister on the above.

Annual reports of the Group's work in its first two years of operation can be found on the Scottish Executive's web-site at <http://www.scotland.gov.uk/government/foi/workgroup.asp>.

3.2 The work of the Group has centred on two main areas, namely the development of a strategy for the training of public sector staff and producing draft Codes of Practice which will underpin the operation of the Act by public authorities.

Training Strategy

3.3 During its first year the Group prepared a strategy for providing training and awareness materials on FOI to Scottish public authorities. The Group in conjunction with Corporate Learning Services in the Scottish Executive has during the past year taken forward the development of the strategy. In November 2002 an Invitation to Tender for training services to support FOI implementation (based upon the Group's strategy) was issued by the Scottish Executive. Following the tendering process a contract was awarded to Masons Solicitors to design, develop and deliver a range of training services for all Scottish public authorities. The costs of this core training package (which amount to just over £50,000) are being met by the Scottish Executive. It is intended that the training and awareness materials to be developed will be provided in good time to Scottish public authorities to assist in their preparations for the implementation of FOI.

Development of Codes of Practice

3.4 Sections 60 and 61 of the Act specify that two Codes of Practice are to be issued by Scottish Ministers (after consultation with the Scottish Information Commissioner). The section 60 Code will provide guidance on how public authorities should discharge their duties in compliance with the Act. The section 61 Code must provide Scottish public authorities with guidance on the keeping, management and destruction of their records.

Section 60 Code of Practice

3.5 Section 60(2) of the Act sets out the guidance which the Code must provide. This includes the following: -

- provision of advice and assistance by public authorities
- transfer of requests for information
- consultation with third parties likely to be affected by disclosure of information
- the inclusion of disclosure of information terms in contracts
- procedures for dealing with complaints
- the maintenance of statistics by public authorities regarding the operation of the Act

3.6 The purpose of the section 60 Code is to provide public authorities with best practice guidance on the discharge of their functions under the Act. The Code will be non – statutory but its observance will be promoted by the Scottish Information Commissioner and the failure of a public authority to comply with its provisions may lead to it failing to comply with its statutory duties under the Act.

3.7 A sub-group of the Implementation Group has been formed to take forward work on the development of the section 60 Code. The sub-group consists of a range of interests and includes representation from the Scottish Consumer Council and Citizens Advice Scotland. The Freedom of Information Unit has also consulted a variety of equality groups, including the Disability Rights Commission, and the views of these groups have been taken into account.

3.8 Drafts of the Code of Practice prepared by the sub-group have been placed on the Scottish Executive's web-site together with the minutes of meetings of the sub-group (at www.scotland.gov.uk/government/foi/sections.asp). The draft Code covers the provisions set out in section 60(2) of the Act. As currently drafted the Code is in three sections. The first of these describes the main features of the Act and the duties that it places on public authorities. Detailed advice on specific functions is provided in the second section and the remaining section concentrates on refusals and appeals. It is also intended that the Code will summarise the existing duties of public authorities under legislation such as the Disability Discrimination Act 1995 that may have to be taken into account when dealing with some requests for information. The sub-group is currently finalising its work on the development of the Code and the main group at its meeting in June will consider its conclusions. Following this, the Code will be issued for public consultation. It is expected that the Code will be ready for consultation with the Scottish Information Commissioner by late autumn this year.

Section 61 Code of Practice

3.9 Work on the development of the section 61 Code of Practice on records management is well advanced. The Records Management sub-group of the Implementation Group provided comments on the section 61 draft Code, which informed further revisions. Presenting their report to the Implementation Group on 14 February 2003, the sub-group endorsed the revised draft Code which in their opinion also provided, “for the first time in Scotland, an over-arching guide to good records management practice which was equally appropriate to a public authority’s functions and duties under other legislation such as Data Protection.”

3.10 On 19 March, the Scottish Executive held a seminar which was attended by key representatives from across the range of public authorities and interested campaign groups, aimed at helping inform further revision of the draft Code. A number of issues were discussed and a further revision of the Code, based on the discussion, was completed in April and circulated to attendees for information. The revision is also available on the Scottish Executive Internet site at <http://www.scotland.gov.uk/government/foi/s61revised.pdf>

3.11 In addition to supporting the section 61 draft Code, the Implementation Group supported the recommendations made by the sub-group for the use of detailed operational guidance in the form of a generic Model Action Plan (MAP).

3.12 The MAP sets out detailed steps and an action plan which constitutes good records management practices compliant with the section 61 Code of Practice. The MAP recognises the variation in size of sectors, types of records created and held, and records management methods used. Accordingly it was developed as a *generic* plan which identified common practice for use by all public authorities, but which could be used as the basis for sector-specific MAPs.

3.13 To ensure that MAPs have the authority to aid compliance with FOI obligations and drive up records management standards across public authorities, the Implementation Group also supported a recommendation that the generic version be approved and made available by the Scottish Information Commissioner (SIC), and that sector-specific MAPs be subject to approval by the Commissioner.

Future Work

3.14 The Group will finalise its work on the development of the two Codes of Practice and also monitor progress on the development and roll out of the training programme discussed earlier in this chapter. With the Scottish Information Commissioner and an implementation timetable in place the coming year will see the Group putting in place the basis on which individual public authorities will be able to plan for the commencement of Freedom of Information.

4. Other Developments

Review of statutory bars

4.1 Section 64 of the Freedom of Information (Scotland) Act 2002 provides Scottish Ministers with the power to amend or repeal by order enactments which are capable of preventing the disclosure of information, otherwise obtainable under section 1 of the Act. Work has started on identifying Scottish legislation containing provisions which may prevent the disclosure of information by Scottish public authorities. Once identified, each provision will be reviewed to see whether the bar remains appropriate or whether it can be removed. This work will be carried out alongside a similar review being undertaken by the Lord Chancellor's Department in connection with the removal of unnecessary statutory bars contained in Westminster legislation. The Executive will also scrutinise pre-devolution Westminster legislation identified by LCD, to identify those provisions which may require to be considered for repeal by the Scottish Parliament.

Environmental Information Regulations

4.2 Section 62 of the Act enables the Scottish Ministers to make regulations to provide for a regime to access environmental information. These Environmental Information Regulations will implement the Aarhus Convention – the United Nations Economic Commission for Europe (UNECE) 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'. This is a measure to which the United Kingdom and all other European Union Member States are signatories.

4.3 Once operational, these new regulations will be the principal means of gaining access to environmental information and will be enforced by the Scottish Information Commissioner. A consultation paper was issued in May 2002 on the principles that should underlie the new regime on access to environmental information. In due course draft Regulations will be drawn up and these will also be the subject of a further consultation exercise.

Code of Practice on Access to Scottish Executive Information

4.4 The Code of Practice on Access to Scottish Executive Information (which is non-statutory) was introduced on 30 June 1999 and replaced the similar Code of Practice on Access to Government Information. The Code sets out how the Scottish Executive and other Scottish public bodies should respond to requests for information. There is a presumption under the Code that information will be released except where disclosure would not be in the public interest, as specified in Part II of the Code. The Code will remain in place until the access rights contained in the Freedom of Information (Scotland) Act 2002 are implemented from January 2005.

4.5 A report on the operation of the Code during the calendar year 2002 will shortly be published on the Scottish Executive's web-site and copies placed in the Parliament's Reference Centre.

5. Conclusions

5.1 This report has set out the implementation work that has been carried out since the Freedom of Information (Scotland) Act 2002 received its Royal Assent in May 2002. This work has focussed on preparing for implementation of the Act. Significant progress has been made in developing the codes that will underpin the operation of the Act, and in taking forward delivery of the training strategy. Key sections of the Act have now been commenced including those enabling the appointment of an independent Scottish Information Commissioner to be made.

5.2 Following Mr Dunion's appointment as Commissioner and consultation with him, the Executive has determined that the implementation timetable should be as set out in Chapter two. This timetable is challenging. The Executive will continue to work with its partners in the Implementation Group, with the Scottish Information Commissioner, with equality and other interests to deliver commitments on open government in Scotland.