



# Freedom of Information (Scotland) Act 2002

2002 asp 13

## PART 2

### EXEMPT INFORMATION

#### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information—
- (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if—
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.
- [<sup>F1</sup>(3) For the purposes of subsection (1), information is to be taken to be reasonably obtainable if—
- (a) it is available—
    - (i) on request from the Scottish public authority which holds it, and
    - (ii) in accordance with the authority's publication scheme, and
  - (b) any associated payment required by the authority is specified in or determined under the scheme.]

#### Textual Amendments

- F1** S. 25(3) substituted (31.5.2013) by [Freedom of Information \(Amendment\) \(Scotland\) Act 2013 \(asp 2\)](#), ss. 3, 7; S.S.I. 2013/136, art. 2

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## 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)—

- (a) is prohibited by or under an enactment;
- (b) is incompatible with <sup>F2</sup> an EU ] obligation; or
- (c) would constitute, or be punishable as, a contempt of court.

### Textual Amendments

**F2** Words in Act substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 2, 3, 6 (with art. 3(2)(3), 4(2), 6(4)(5))

### Modifications etc. (not altering text)

**C1** S. 26 excluded (1.12.2007) by [Statistics and Registration Service Act 2007 \(c. 18\)](#), ss. 40(3), 74; S.I. 2007/3388, art. 2(f)

## 27 Information intended for future publication

- (1) Information is exempt information if—
- (a) it is held with a view to its being published by—
    - (i) a Scottish public authority; or
    - (ii) any other person,
 at a date not later than twelve weeks after that on which the request for the information is made;
  - (b) when that request is made the information is already being held with that view; and
  - (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).
- (2) Information obtained in the course of, or derived from, a programme of research is exempt information if—
- (a) the programme is continuing with a view to a report of the research (whether or not including a statement of that information) being published by—
    - (i) a Scottish public authority; or
    - (ii) any other person; and
  - (b) disclosure of the information before the date of publication would, or would be likely to, prejudice substantially—
    - (i) the programme;
    - (ii) the interests of any individual participating in the programme;
    - (iii) the interests of the authority which holds the information; or
    - (iv) the interests of the authority mentioned in sub-paragraph (i) of paragraph (a) (if it is a different authority from that which holds the information).

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## **28 Relations within the United Kingdom**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), “administration in the United Kingdom” means—
  - (a) the Government of the United Kingdom;
  - (b) the Scottish Administration;
  - (c) the Executive Committee of the Northern Ireland Assembly; or
  - (d) the National Assembly for Wales.

## **29 Formulation of Scottish Administration policy etc.**

- (1) Information held by the Scottish Administration is exempt information if it relates to—
  - (a) the formulation or development of government policy;
  - (b) Ministerial communications;
  - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
  - (d) the operation of any Ministerial private office.
- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of—
  - (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
  - (b) paragraph (b) of that subsection, as relating to Ministerial communications.
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section—

“government policy” means—

  - (a) the policy of the Scottish Administration; and
  - (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

“the Law Officers” means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

“Ministerial communications” means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

“Ministerial private office” means any part of the Scottish Administration which provides personal administrative support to a Minister.
- (5) In the definitions of “Ministerial communications” and “Ministerial private office” in subsection (4), “Minister” means a member of the Scottish Executive or a junior Scottish Minister.

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### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act—

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially—
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation;
 or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

### **31 National security and defence**

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
- (2) A certificate signed by a member of the Scottish Executive certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security is conclusive of that fact.
- (3) Without prejudice to the generality of subsection (2), a certificate under that subsection may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- (4) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
  - (a) the defence of the British Islands or of any colony; or
  - (b) the capability, effectiveness or security of any relevant forces.
- (5) In subsection (4)—
  - (a) in paragraph (a), “British Islands” and “colony” are to be construed in accordance with Schedule 1 to the Interpretation Act 1978 (c.30); and
  - (b) in paragraph (b), “relevant forces” means—
    - (i) the armed forces of the Crown; and
    - (ii) any forces co-operating with those forces,
 or any part of the armed forces of the Crown or of any such co-operating forces.

### **32 International relations**

- (1) Information is exempt information if—
  - (a) its disclosure under this Act would, or would be likely to, prejudice substantially—
    - (i) relations between the United Kingdom and any other State;
    - (ii) relations between the United Kingdom and any international organisation or international court;
    - (iii) the interests of the United Kingdom abroad; or
    - (iv) the promotion or protection by the United Kingdom of its interests abroad; or
  - (b) it is confidential information obtained from—

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- (i) a State other than the United Kingdom; or
    - (ii) an international organisation or international court.
  - (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while—
    - (a) the terms on which that information was obtained require it to be held in confidence; or
    - (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
  - (3) In subsection (1)—
    - “international court” means an international court which—
      - (a) is not an international organisation; and
      - (b) is established—
        - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
        - (ii) by an international agreement to which the United Kingdom is a party;
    - “international organisation” means—
      - (a) an international organisation whose members include any two or more States; or
      - (b) an organ of such an international organisation;
    - “State” includes—
      - (a) the government of any State; and
      - (b) any organ of such a government,
- and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

### **33 Commercial interests and the economy**

- (1) Information is exempt information if—
  - (a) it constitutes a trade secret; or
  - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
  - (a) the economic interests of the whole or part of the United Kingdom; or
  - (b) the financial interests of an administration in the United Kingdom.
- (3) In subsection (2), “administration in the United Kingdom” has the same meaning as in section 28(2).

### **34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of—

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- (a) an investigation which the authority has a duty to conduct to ascertain whether a person—
    - (i) should be prosecuted for an offence; or
    - (ii) prosecuted for an offence is guilty of it;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
  - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if—
- (a) held by a Scottish public authority for the purposes of an inquiry instituted under the [<sup>F3</sup>Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016] but not for the time being concluded; or
  - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out—
    - (i) by virtue of a duty to ascertain; or
    - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- (3) Information held by a Scottish public authority is exempt information if—
- (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
  - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

#### Textual Amendments

**F3** Words in s. 34(2)(a) substituted (15.6.2017) by [Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016 \(asp 2\)](#), s. 42(2), **sch. 2 para. 10(2)**; S.S.I. 2017/155, reg. 2 (with regs. 4(2), 5)

## 35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially—
- (a) the prevention or detection of crime;
  - (b) the apprehension or prosecution of offenders;
  - (c) the administration of justice;
  - (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);
  - (e) the operation of the immigration controls;

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- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - (h) any civil proceedings—
    - (i) brought; and
    - (ii) arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
- (2) The purposes are—
- (a) to ascertain whether a person has failed to comply with the law;
  - (b) to ascertain whether a person is responsible for conduct which is improper;
  - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
  - (d) to ascertain a person's fitness or competence in relation to—
    - (i) the management of bodies corporate; or
    - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;
  - (e) to ascertain the cause of an accident;
  - (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
  - (g) to protect the property of a charity from loss or mismanagement;
  - (h) to recover the property of a charity;
  - (i) to secure the health, safety and welfare of persons at work; and
  - (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

## **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if—
  - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
  - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

## **37 Court records, etc.**

- (1) Information is exempt information if it is contained in—
  - (a) a document—
    - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;

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- (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
- (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
- (b) a document—
  - (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
  - (ii) created by such a person for such purposes, and a Scottish public authority holds the information solely because it is contained in such a document.
- (2) In this section—
  - “court” includes a tribunal or body exercising the judicial power of the State; and
  - “inquiry” means an inquiry or hearing held under a provision contained in, or made under, an enactment.
- (3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the [<sup>F4</sup>Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016].

#### Textual Amendments

- F4** Words in s. 37(3) substituted (15.6.2017) by [Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016 \(asp 2\)](#), s. 42(2), **sch. 2 para. 10(3)**; S.S.I. 2017/155, reg. 2 (with regs. 4(2), 5)

#### Modifications etc. (not altering text)

- C2** S. 37(1)(b) excluded (7.6.2005) by [Inquiries Act 2005 \(c. 12\)](#), **ss. 18(4), 51** (with ss. 44, 50); S.I. 2005/1432, **art. 2**

## 38 Personal information

- (1) Information is exempt information if it constitutes—
  - (a) personal data of which the applicant is the data subject;
  - [<sup>F5</sup>(b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A));]
  - (c) personal census information; or
  - (d) a deceased person’s health record.
- [<sup>F6</sup>(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
  - (a) would contravene any of the data protection principles, or
  - (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
- (2B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).]
- [<sup>F7</sup>(3A) The third condition is that—



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- (a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or
- (b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.]

<sup>F8</sup>(4) . . . . .

(5) In this section—

[<sup>F9</sup>“the data protection principles” means the principles set out in—

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

“data subject” has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

“the GDPR”, “personal data”, “processing” and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act);]

“health record” has the meaning assigned to that term by section 1(1) of the Access to Health Records Act 1990 (c.23); and

“personal census information” means any census information—

- (a) as defined in section 8(7) of the Census Act 1920 (c.41); or
- (b) acquired or derived by virtue of sections 1 to 9 of the Census (Great Britain) Act 1910 (c.27),

which relates to an identifiable person or household.

[<sup>F10</sup>(5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.]

(6) In section 8(7) of the Census Act 1920 (penalties), in the definition of “personal census information”, at the end there is added “ but does not include information which, by virtue of section 58(2)(b) of the Freedom of Information (Scotland) Act 2002 (asp 13) (falling away of exemptions with time), is not exempt information within the meaning of that Act ”.

#### Textual Amendments

- F5** S. 38(1)(b) substituted (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(2\)](#) (with [ss. 117, 209, 210](#), [Sch. 20 para. 36](#)); S.I. 2018/625, reg. 2(1)(g)
- F6** S. 38(2A)(2B) substituted for s. 38(2) (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(3\)](#) (with [ss. 117, 209, 210](#), [Sch. 20 para. 36](#)); S.I. 2018/625, reg. 2(1)(g)
- F7** S. 38(3A) substituted for s. 38(3) (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(4\)](#) (with [ss. 117, 209, 210](#), [Sch. 20 para. 36](#)); S.I. 2018/625, reg. 2(1)(g)
- F8** S. 38(4) omitted (25.5.2018) by virtue of [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(5\)](#) (with [ss. 117, 209, 210](#), [Sch. 20 para. 36](#)); S.I. 2018/625, reg. 2(1)(g)
- F9** Words in s. 38(5) substituted (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(6\)](#) (with [ss. 117, 209, 210](#), [Sch. 20 para. 36](#)); S.I. 2018/625, reg. 2(1)(g)

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**F10** S. 38(5A) inserted (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 90\(7\)](#) (with ss. 117, 209, 210, [Sch. 20 para. 36](#)); S.I. 2018/625, [reg. 2\(1\)\(g\)](#)

### **39 Health, safety and the environment**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.
- (2) Information is exempt information if a Scottish public authority—
  - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- (3) Subsection (2)(a) is without prejudice to the generality of section 25(1).

#### **Modifications etc. (not altering text)**

**C3** [S. 39\(2\)\(3\)](#) applied (1.1.2005) by [The Environmental Information \(Scotland\) Regulations 2004 \(S.S.I. 2004/520\)](#), [reg. 20](#) (with [reg. 3](#))

### **40 Audit functions**

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions in relation to—

- (a) the audit of the accounts of other Scottish public authorities; or
- (b) the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

### **41 Communications with Her Majesty etc. and honours**

Information is exempt information if it relates to—

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
- (b) the exercise by Her Majesty of Her prerogative of honour.

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