

*These notes refer to the Freedom of Information Act 2000 (c.36)  
which received Royal Assent on 30th November 2000*

# **FREEDOM OF INFORMATION ACT 2000**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Freedom of Information Act 2000 which received Royal Assent on 30 November 2000. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **BACKGROUND**

3. In December 1997, the Government issued a White Paper entitled "*Your Right to Know*" (Cm 3818) on its proposals for a Freedom of Information Act. It sought views by 28 February 1998. More than 550 responses to the White Paper were submitted. Copies were placed in the Library of both Houses of Parliament and published on the Internet.

4. A draft Bill was published as part of a consultation paper (Cm 4355) on 24 May 1999 followed by a process of pre-legislative scrutiny by committees in both Houses of Parliament and a further period of public consultation. 2248 responses were made as part of the public consultation on the draft Bill. Copies were placed in the library of both Houses of Parliament. A short report on the consultation and details of respondees and a breakdown of the responses on each provision of the draft Bill was published on the Internet.

5. The Act creates new rights of access to information. It is intended to supersede the Code of Practice on Access to Government Information. The Act amends the Data Protection Act 1998 and the Public Records Act 1958.

6. The Code of Practice on Access to Government Information is a non-statutory scheme which requires Government Departments and other public authorities under the jurisdiction of the Parliamentary Commissioner for Administration to make certain information available to the public and to release information in response to specific requests. The Act creates a statutory right of access, provides for a

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more extensive scheme for making information publicly available and covers a much wider range of public authorities including: local government, National Health Service bodies, schools and colleges, the police and other public bodies and offices. The provisions in the Act will be regulated by a Commissioner to whom the public will have direct access, rather than access only through the intervention of their Member of Parliament as under the Code. The Act will permit people to apply for access to documents, or copies of documents, as well as to the information itself.

7. The Public Records Act 1958 reorganised the arrangements for the preservation of public records. It places a duty on the Keeper of the Public Record Office to provide reasonable facilities for inspecting and obtaining copies of such records. The statutory rights under the Act and the Information Commissioner's regulatory powers will be extended to information contained in these records.

## **THE ACT**

8. The main purpose of the Act is to implement the principles set out in the White Paper in so far as it is appropriate to do so by primary legislation. Some matters will be dealt with in secondary legislation, codes of practice or by administrative action.

9. The Act:

- provides a right of access to recorded information held by public authorities;
- creates exemptions from the duty to disclose information; and
- establishes the arrangements for enforcement and appeal.

10. The Act is in eight parts.

### **Part I: Access to information held by public authorities**

11. This Part:

- provides for the general right of access to recorded information held by public authorities and specifies the conditions which need to be fulfilled before an authority is obliged to comply with a request;
- describes the effect of the exemptions in Part II on the obligations under section 1;
- provides for the Act to cover the bodies, persons or office holders specified in Schedule 1 and publicly-owned companies and includes a power to specify

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further public authorities for the purpose of the Act;

- allows public authorities to charge fees in accordance with regulations made by the Secretary of State;
- provides for time limits for complying with a request;
- makes special provision relating to public records transferred to the Public Record Office, etc.;
- requires public authorities to provide advice and assistance to applicants;
- requires public authorities to state the basis for refusal of a request;
- renames the Data Protection Commissioner and Data Protection Tribunal (with consequential amendments to other legislation being made in Schedule 2); and
- requires public authorities to adopt and maintain a publication scheme and to publish information in accordance with it.

#### **Part II: Exempt information**

12. This sets out the circumstances in which information is “exempt information” for the purposes of the Act. Some of the exemptions apply to a class of information; others rely on the application of a prejudice test or other consequences of disclosure.

#### **Part III: General functions of Secretary of State, Lord Chancellor and Information Commissioner**

13. This requires the Secretary of State to issue a code of practice providing guidance to public authorities on various administrative matters, including the practices which authorities should follow when dealing with requests for information. It also requires the Lord Chancellor to issue a code of practice providing guidance to public authorities on the keeping, management and destruction of their records.

14. Part III places a duty on the Commissioner to promote good practice and public authorities’ compliance with the Act, their publication schemes and codes of practice. The Commissioner is also obliged, where he considers it expedient, to disseminate information to the public about the Act. The Commissioner is permitted to charge fees with the consent of the Secretary of State for such services. Part III also enables the Commissioner to make practice recommendations specifying what a public authority should do to comply with the codes of practice and requires the Commissioner to lay annual reports before Parliament.

#### **Part IV: Enforcement**

15. This enables an applicant who is not satisfied with the response by a public authority to a request for information to apply to the Commissioner for a decision on

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whether the authority has acted in accordance with the provisions of the Act. Subject to certain conditions, for example, the exhaustion of other means of complaint, the Commissioner is under a duty to reach a decision.

16. This part of the Act also describes the investigative and enforcement powers of the Commissioner. The Commissioner's powers of entry and inspection are set out in Schedule 3. It confirms that the Act does not give rise to any right of action against public authorities for breach of statutory duty. This part also provides for the circumstances in which a certificate may be issued by an accountable person in respect of a decision notice or enforcement notice issued by the Commissioner in respect of the disclosure of exempt information. The effect of such a certificate is that a public authority need not comply with the Commissioner's notice.

**Part V: Appeals**

17. This states the circumstances in which an applicant or a public authority may appeal to the Tribunal when a decision notice, information notice, or enforcement notice has been served. It also states the circumstances in which a party to an appeal to the Tribunal can appeal to the courts on a point of law. It lays down the circumstances in which the Tribunal can hear appeals against the issue of a certificate in national security cases. It also provides for appeal procedures through amendments to the Data Protection Act 1998 as detailed in Schedule 4.

**Part VI: Historical records and records in Public Record Office or Public Record Office of Northern Ireland**

18. This effectively replaces the largely discretionary provision for access to public records under the Public Records Act 1958 with a new statutory regime; provides for the access to be enhanced in respect of information contained in records more than thirty years old by disapplying a number of the exemptions in Part II; regulates the relationship between the Lord Chancellor (or appropriate Minister in Northern Ireland) and public authorities in relation to certain information contained in historical records, and makes further provision in relation to decisions relating to certain transferred public records.

**Part VII: Amendments of Data Protection Act 1998**

19. With some exceptions and modifications this Part extends the Data Protection Act 1998 provisions about subject access and data accuracy to all personal information held by public authorities. Schedule 6 makes specific provision to extend the 1998 Act to include relevant personal information processed by or on behalf of both Houses of Parliament and makes other minor amendments to that Act.

**Part VIII: Miscellaneous and supplemental**

20. This Part:

- provides for a power to make provision relating to environmental information;

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- provides for a power to repeal or amend existing statutory bars to disclosure;
- provides for disclosure of information between the Commissioner and specified ombudsmen.
- creates an offence of altering etc. records with intent to frustrate a right of access;
- saves existing powers of public authorities to disclose information;
- makes provision in respect of defamation;
- prevents the extension of the Act to the Scottish Parliament and certain devolved bodies;
- deals with the application of the Act to government departments and to Parliament and the Northern Ireland Assembly;
- defines the way in which orders or regulations can be made under the Act;
- defines various terms used in the Act; and
- gives effect to repeals of existing legislation in Schedule 8.

21. Part VIII also sets out the commencement provisions for the Act. Those provisions in the Act which do not come into effect on, or at the end of the period of two months following, Royal Assent must be brought into force within the following five years unless brought into effect earlier by order of the Secretary of State; meanwhile, the Secretary of State must make annual reports to Parliament on progress towards full commencement.

## **COMMENTARY ON SECTIONS**

### **Part I: Access to information held by public authorities**

#### ***Right to information***

##### **Section 1: Right to information**

22. Section 1 confers a general right of access to information held by public authorities. An applicant has a right to be told whether the information requested is held by that authority (the duty to confirm or deny whether it holds information) and, if it is held, to have it communicated to him. Provisions limiting an authority's duty under section 1 appear in sections 1(3), 2, 9, 12 and 14 and in Part II. The grounds in

sections 9, 12 and 14 relate to the request itself and the circumstances in which an authority is not obliged to comply with it. The provisions of Part II relate to the nature of the information requested.

23. *Subsection (3)* provides that where an authority reasonably requires further information in order to identify and locate the requested information and it requests this from the applicant, it need not comply with section 1 until the further information is supplied. There are no formal requirements on applicants to describe the information in a particular way, but the description would have to be sufficient for a public authority to be able to identify and locate the information requested. The applicant is not required to describe a particular record.

24. *Subsection (4)* provides that, although the information communicated to an applicant must be the information held at the time the request was received, account may be taken of amendments or deletions that would have been made in the normal course of events. This is intended to help ensure that requests for information under the Act do not interfere with the other day-to-day work of an authority or with sound record management.

25. *Subsection (5)* provides that where a public authority has communicated information to an applicant, the authority shall be taken to have complied also with its duty to inform the applicant whether or not it holds that information.

## **Section 2: Effect of the exemptions in Part II**

26. This section deals with the effect of the exemptions in Part II. The effect of the provisions in Part II differs depending on whether they confer absolute exemption or not. Subsection (3) draws a distinction between provisions in Part II which confer an 'absolute exemption', where the need to balance the public interest in disclosure against the public interest in maintaining the exemption does not arise, and other exemptions whose application must be balanced against the public interest in disclosure.

27. *Subsection (1)* provides that public authorities are not under a duty to confirm or deny that they hold the requested information if either the provision of Part II which states that the duty does not arise in relation to that information confers absolute exemption or in all the circumstances of the case, the public interest in maintaining the exclusion of the duty outweighs the public interest in disclosing whether the authority holds the information.

28. *Subsection (2)* provides that public authorities are not under a duty to disclose information if either the information is exempt by virtue of a provision conferring an absolute exemption or, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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### **Section 3: Public authorities**

29. *Subsection (1)* defines the term “public authority” for the purposes of the Act.

30. The Act is intended to have wide application across the public sector at national, regional, and local level. In view of the large number of bodies and offices intended to fall within the scope of the Act it is not feasible to list each body individually. Public authorities are, therefore, designated in one of the following ways-

- a) on the face of the Act (in Schedule 1), using generic descriptions where appropriate, which specifies the principal authorities in national and local government, together with the principal public authorities relating to the armed forces, national health service, education, the police and other public bodies and offices;
- b) by order under section 4(1) adding to Schedule 1 any body or the holder of any office that satisfies certain specified conditions;
- c) by order under section 5 adding any person that satisfies certain conditions and that appears to the Secretary of State to exercise functions of a public nature or is providing under a contract with a public authority any service whose provision is a function of that authority; or
- d) by reference to the definition of a publicly-owned company in section 6.

31. *Subsection (2)* sets out the circumstances in which information is “held” by a public authority for the purposes of the Act. This does not extend to holding on behalf of another person or authority. It would not, for example, extend to a Minister’s constituency papers just because they were kept by the Minister in his Department. It includes information held elsewhere on behalf of an authority, for example in a private repository.

### **Section 4: Amendment of Schedule 1**

32. *Subsection (1)* provides a power for the Secretary of State to make an order, which will be subject to negative procedure, to add to Schedule 1 a reference to any body or the holder of any office which is not listed and which fulfils certain conditions.

33. *Subsections (2) and (3)* list the conditions to be fulfilled before an order under subsection (1) may be made in relation to a particular body or office holder. These are that:

- any body or office to be listed is established by the Crown or by an enactment or by subordinate legislation or by a Minister in his capacity as Minister or by

a government department or by the National Assembly for Wales; and

- in the case of a body, that it is wholly or partly constituted by appointment made by the Crown or a Minister or a government department or the National Assembly for Wales; or
- in the case of an office, that appointments are made by the Crown or a Minister or a government department or the National Assembly for Wales.

34. *Subsection (4)* provides for a body or office to cease to be a public authority by virtue of its inclusion in Part VI or VII of Schedule 1 if it ceases to satisfy the conditions in subsections (2) and (3).

35. *Subsection (5)* enables the Secretary of State to make an order to amend Parts VI and VII of Schedule 1 to remove an entry relating to a body or office which has ceased to exist (subsection (5)(a)) or which ceases to meet the conditions in subsections (2) and (3) (subsection (5)(b)). An order under subsection (5) must be laid before Parliament after being made (Section 82(4)).

36. *Subsection (7)* provides that, before making an order under subsection (1), the Secretary of State shall consult with the National Assembly for Wales if the order adds to Part II, III, IV or VI of Schedule 1 a reference to a body or office holder whose functions are exercisable only or mainly in or as regards Wales. It also provides that the Secretary of State shall consult with the First Minister and deputy First Minister in Northern Ireland if the order relates to a body which or office holder who, if the order were made, would be a Northern Ireland public authority.

#### **Section 5: Further power to designate public authorities**

37. *Subsection (1)* contains a power for the Secretary of State to make an order, subject to affirmative procedure, to include within the scope of the Act any person or office which is not described in Schedule 1 nor capable of being added to that Schedule by an order made under section 4(1) but which:

- appears to the Secretary of State to exercise functions of a public nature, or
- is providing contractual services to a public authority where the provision of that service is one of the functions of the authority.

38. *Subsection (3)* requires the Secretary of State to consult any person in respect of whom he proposes to make an order under subsection (1).

#### **Section 6: Publicly-owned companies**

39. *Subsection (1)* defines a publicly-owned company as one which:



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- is wholly owned by the Crown; or
- is wholly owned by any public authority listed in Schedule 1 other than a government department or an authority which is listed only in relation to particular information.

40. *Subsection (2)* defines a company wholly owned by the Crown as a company having no members except:

- Ministers, government departments or companies wholly owned by the Crown; or
- any person acting on behalf of the above,

and defines a company wholly owned by a public authority other than a government department as having no members except:

- that public authority or companies owned by that public authority; or
- any person acting on behalf of the above.

41. *Subsection (3)* defines company as including any body corporate.

#### **Section 7: Public authorities to which Act has limited application**

42. *Subsection (1)* provides that where a public authority is listed in Schedule 1 only in relation to specified information nothing in Parts I to V of the Act applies to any other information held by that authority.

43. *Subsection (2)* provides that an order under section 4(1) may specify that it is only to have effect with respect to particular information.

44. *Subsection (3)* enables the Secretary of State by order to amend Schedule 1 by limiting the information in relation to any public authority and by removing or amending that limitation. Such an order is subject to affirmative resolution procedure (section 82(2)(a)). *Subsection (4)* sets out with whom the Secretary of State must consult before making such an order.

45. *Subsection (5)* requires that an order made under section 5(1)(a) must specify the functions with respect to which it has effect. Nothing in Parts I to V of the Act applies to information held by an authority designated by order under section 5(1)(a) which does not relate to the specified functions.

46. *Subsection (6)* requires an order made under section 5(1)(b) to specify the services provided under contract to which the designation is to apply. Nothing in Parts I to V of the Act applies to information held by a contractor designated in such

an order which does not relate to the provision of the specified services.

47. *Subsection (7)* provides that nothing in Parts I to V of the Act applies to information held by a publicly-owned company which is excluded information.

48. *Subsection (8)* defines excluded information for the proposed subsection (7) as being information specified in relation to a publicly-owned company in an order by the Secretary of State. Such an order is subject to the affirmative resolution procedure (Section 82(2)(a)).

### **Section 8: Request for information**

49. This section lays down the conditions which must be fulfilled in order that a request for information is dealt with in accordance with the provisions of the Act. The conditions include a requirement that the applicant describes the information requested. A request for information can be made by any individual or body, regardless of the purpose of the application. An applicant will have to identify himself for the purposes of the application, but the identity of the applicant is otherwise of no concern to the authority except in the case of vexatious or repeated requests (section 14), and personal information (section 40(1) - if the applicant is the subject of the personal information, the provisions of the Data Protection Act 1998 will apply). In particular, the applicant need not be a United Kingdom national or resident.

### **Section 9: Fees**

50. This section makes provision for authorities to notify applicants that a fee is payable and exempts authorities from being obliged to disclose information until the fee has been paid. The applicant will have three months from the date of notification to pay the fee before his request lapses. This section also provides for the Secretary of State to make regulations governing the fees that authorities may charge. Such regulations will be able to prohibit a fee with regard to certain types of request, to set an upper limit on amounts that may be charged and to prescribe the manner in which any fees are to be calculated. The regulations will not apply where provision is made under another Act as to the fee that may be charged for the provision of particular information.

51. It is proposed that the regulations governing fees will specify that up to 10% of the reasonable marginal costs of complying with the request may be charged. This will be a maximum figure and there will be no requirement on an authority to charge the full 10%, or indeed to charge anything. The regulations will provide that the additional costs involved in providing the information in the manner or form requested (disbursements) may be charged in addition to any fee.

### **Section 10: Time for compliance with request**

52. This states that an authority must comply with its duty under section 1 promptly and in any event within 20 working days (or other period, not later than 60 working days, set under regulations) from receipt of a request. If a fees notice is

issued, time stops running from the issue of the notice until the fee is received. Working days do not include any Saturday or Sunday or Christmas Day, Good Friday or bank holidays under the Banking and Financial Dealings Act 1971 in any part of the UK. Where an authority is not able to reach a decision as to the balance of the public interest in disclosure within 20 working days, it must reach a decision within a reasonable period. In these circumstances, the authority is still required to issue a notice that an exemption applies under the provisions of section 17(1) within the 20 working day limit.

### **Section 11: Means by which communication to be made**

53. This section permits an applicant to express a preference as to the means of communication of information under section 1.

54. *Subsection (1)* provides that where the applicant expresses a preference for the communication of the information in one of 3 specified ways the public authority must provide the information in accordance with that preference so far as is reasonably practicable. The applicant is not restricted to one option but may, for example, inspect and take a copy. *Subsection (2)* provides that cost may be taken into account in considering whether it would be reasonable to comply with the applicant's wishes.

55. *Subsection (3)* requires an authority to give reasons for not complying with an applicant's expressed wishes.

56. *Subsection (4)* provides that, subject to the wishes of the applicant and cost, an authority may communicate information in any reasonable form taking the circumstances into account. Information may be provided on tape or other suitable means if considered appropriate.

### **Section 12: Exemption where cost of compliance exceeds appropriate limit**

57. This section exempts public authorities from the obligation to disclose the information requested, if the cost of doing so exceeds a threshold prescribed by the Secretary of State. It allows the Secretary of State to prescribe different amounts for different authorities. It enables the Secretary of State to make regulations to allow authorities to aggregate the costs of requests for information where two or more requests are made by one person, or by two or more persons acting together. It also enables the Secretary of State to make regulations governing the matters to be taken into account in calculating the costs, and the manner in which they are to be estimated.

### **Section 13: Fees for disclosure where cost of compliance exceeds appropriate limit**

58. This section provides that a public authority may charge for the communication of any information the communication of which is not required under section 1(1), because the cost of compliance exceeds the appropriate limit, and is not otherwise required by law. Such fees are to be determined by the public authority in

accordance with regulations made by the Secretary of State. It enables public authorities to charge for large amounts of information that might not be otherwise disclosed due to cost considerations. This does not affect existing statutory provisions as to fees to be charged for the disclosure of information.

#### **Section 14: Vexatious or repeated requests**

59. *Subsection (1)* states that an authority is not obliged to comply with vexatious requests. This is not intended to include otherwise valid requests in which the applicant happens to take an opportunity to vent his frustration.

60. *Subsection (2)* states that an authority does not have to comply with repeated or substantially similar requests from the same person other than at reasonable intervals.

#### **Section 15: Special provisions relating to public records transferred to Public Record Office, etc.**

61. This section addresses the situation where the appropriate records authority (for example, the Public Record Office) receives a request for information which is (or which, if it existed, would be) contained in a transferred public record and the duty to confirm or deny does not arise in relation to that information or the information is exempt only by virtue of a provision in Part II which is not specified as conferring absolute exemption in section 2(3). In such cases the appropriate records authority will send a copy of the request to the responsible authority (generally, that will be the public authority that transferred the information to the appropriate records authority) within the time period allowed for compliance with section 1(1).

62. *Subsection (3)* provides that the responsible authority shall reply to the appropriate records authority, within a reasonable time, giving their decision as to the balance of the public interest, in respect of either the duty to confirm or deny or to disclose the information (as relevant), as required by section 66(3) or (4).

63. *Subsection (4)* defines 'transferred public record' for the purposes of the Act as a public record that has been transferred to the Public Record Office, another place of deposit appointed by the Lord Chancellor under the Public Records Act 1958, or the Public Record Office of Northern Ireland.

64. *Subsection (5)* defines for the purposes of the Act 'appropriate records authority' and 'responsible authority' in relation to a transferred public record.

#### **Section 16: Duty to provide advice and assistance**

65. This section places a duty on authorities to provide advice and assistance to applicants or would-be applicants for information. An authority is deemed to have complied with this duty with respect to any request for information if it has conformed with the Secretary of State's code of practice issued under section 45 in relation to that case.

## ***Refusal of request***

### **Section 17: Refusal of request**

66. *Subsection (1)* requires that a public authority which is relying on a claim that the duty to confirm or deny does not arise, or on a claim that the information is exempt information, gives the applicant notice of that fact, specifying the exemption in question and stating (if that would not otherwise be apparent) why the exemption applies. Such a notice must be given within 20 working days.

67. *Subsection (2)* provides that where the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision on the application of section 2(1)(a) or (2)(b) (that is whether the public interest in maintaining the exclusion of the duty to confirm or deny, or in maintaining the exemption, outweighs the public interest in disclosing that the authority holds the information, or disclosing the information, as the case may be), the notice under subsection (1) must indicate this and must give an estimate of the date by which the public authority expects such a decision will be made.

68. *Subsection (3)* provides that where an authority has decided, under section 2, that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny, or in maintaining the exemption, outweighs the public interest in disclosing whether the authority holds the information or in disclosing the information itself, that authority must state the reasons for its decision. This must be done either in the notice given under subsection (1) or in a separate notice given within a reasonable time.

69. *Subsection (4)* provides that a public authority is not obliged to make a statement under this section if, or to the extent that, the statement would involve the disclosure of information that would itself be exempt.

70. *Subsection (5)* provides that where a public authority is relying on a claim that the cost of complying with the request would exceed the appropriate limit, or that the request is vexatious or repeated, then it must give the applicant notice of that fact within the time limit set down for complying with requests.

71. *Subsection (6)* provides that if the request is vexatious or it repeats an earlier request and the authority has already given the applicant a notice in relation to a previous request for information stating that it is relying on such a claim, the authority is not obliged to give the applicant notice of the reason for its refusal if, in all the circumstances, it would be unreasonable to expect it to serve a further notice.

72. *Subsection (7)* provides that a notice under subsection (1), (3) or (5) must contain particulars of any procedure the authority has for dealing with complaints, or a statement that the authority does not have such a procedure, and must contain particulars of the right conferred by section 50 (application for a decision by the

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Commissioner).

### ***The Information Commissioner and the Information Tribunal***

#### **Section 18: The Information Commissioner and the Information Tribunal**

73. *Subsections (1) to (3)* rename the Data Protection Commissioner as the Information Commissioner and the Data Protection Tribunal as the Information Tribunal. The Commissioner and the Tribunal are to have functions both under the Data Protection Act and under this Act. Consequential amendments to the Data Protection Act 1998 and other legislation are included in Schedule 2.

74. *Subsection (5)* provides that if the Data Protection Commissioner who was in post immediately before Royal Assent remains in office for the two years after that time, she will leave office at the end of that period. *Subsection (6)* allows the re-appointment of a person whose appointment is terminated by subsection (5).

75. *Subsection (7)* provides that, if a previous Data Protection Commissioner is re-appointed as Information Commissioner, any previous terms of office served by virtue of an appointment made before the passing of this Act are disregarded in determining the length of time for which he can serve in the new post.

### ***Publication schemes***

#### **Section 19: Publication schemes**

76. This section places a duty on every public authority covered by the Act to adopt and maintain a scheme which relates to the publication of information by the authority, to publish information in accordance with it and to review it from time to time. The scheme has to be approved by the Commissioner. Subject to the need to obtain this approval, and to the requirements discussed below and set out in this section, each authority is free to draw up its own scheme and so can tailor its proposals to its particular circumstances.

77. The section requires public authorities to adopt a scheme specifying the classes of information which it publishes or intends to publish, the manner of publication and whether the information is available to the public free of charge or on payment. This section is a step beyond the core access rights created by section 1.

78. A publication scheme is intended to be a guide to the authority's publications and policy. It can be either general or specific, for example, an authority might propose that minutes of a particular committee would be published within a specified interval of time. As required in *subsection (2)* a scheme must describe the types of information the authority intends to publish, the manner in which it will be published, and whether there will be a charge.

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79. *Subsection (3)* requires a public authority, when adopting or reviewing a scheme, to have particular regard to the public interest (a) in allowing the public to have access to information held by the authority and (b) in the publication of reasons for decisions made by the authority.

80. *Subsection (4)* requires an authority to publish its publication scheme but allows it to do so in whatever way it thinks fit.

81. *Subsections (5) to (7)* concern the approval of publication schemes. The Commissioner may refuse to approve a scheme, approve it only for a specified period, or revoke his approval. The Commissioner must give reasons for refusing to approve or for revoking approval to a scheme.

82. Material made generally available in accordance with a publication scheme would be exempt under section 21 from the right of access. As such, the authority would not be obliged to respond to requests for it on an individual basis.

#### **Section 20: Model publication schemes**

83. This section gives authorities the option of adopting an 'off-the-shelf' scheme, which may have been prepared by the Commissioner, or others, rather than preparing their own. For example, a scheme could be prepared for all schools, which each individual school could adopt, or all district authorities in a county might work together to prepare a model scheme, which would then be jointly adopted. This would enable better use to be made of resources in that the Commissioner would not have to approve a large number of draft schemes and authorities could work together in preparing model schemes. A model scheme could be adopted by an authority with or without modifications. (If modifications are proposed, the further approval of the Commissioner is required in relation to those modifications.)

84. The section contains provisions for approval, refusal to approve and revocation of approval of schemes which are comparable to those for individual schemes, except that when revoking his approval of a model publication scheme the Commissioner must publish a notice to this effect which must include a statement of his reasons.

#### **Part II: Exempt information**

85. Part II of the Act sets out the cases in which information is "exempt information". Some provisions are class based; that is if the information is of the type described, an exemption can be claimed. Others refer to the harmful consequences of disclosure.

#### **Section 21: Information accessible to public by other means**

86. Section 21 exempts information if it is reasonably accessible to the applicant by other means. This provision confers absolute exemption for the purposes of

section 2. Information may be exempt by virtue of this provision even though it is available only on payment. Information available by virtue of other legislation (other than information which is required to be available for inspection) is deemed to be reasonably accessible to the applicant and therefore exempt. Information which is available for inspection, whether voluntarily or under another enactment, will only be exempt by virtue of this section if it is in fact reasonably accessible to the applicant. Examples of the type of information covered by this exemption include: books and pamphlets published by an authority, or birth, marriage and death certificates available under other legislation.

87. The section does not apply simply because the information is available from the public authority itself on request (other than information which the authority is obliged by or under any enactment to make available), unless it is made available in accordance with the authority's publication scheme and any payment required is specified in or determined in accordance with that scheme.

**Section 22: Information intended for future publication**

88. This section exempts information which is intended to be published, where it is reasonable that the information should not be disclosed until the intended date of publication. Examples of the type of information covered by this exemption include information relating to research projects which it would be inappropriate to publish until the project had been completed, or statistical information which is usually published to a specific timetable (annually, quarterly etc). This exemption is related to the duty to adopt a publication scheme (section 19). Where a publication scheme states that an authority will publish information on specified dates or at specified intervals the authority would normally be able to rely on this exemption in relation to particular requests for such information.

89. *Subsection (2)* provides that the duty under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) if to comply would, itself, disclose information which it is reasonable to withhold until the publication date. This might apply where, for example, to be told that information relating to amendments to taxation is held would reveal that tax rates are to be amended, and therefore it would be reasonable for an authority neither to confirm nor deny that such information is held pending publication of the relevant policy proposals or decisions.

**Section 23: Information supplied by, or relating to, bodies dealing with security matters**

90. Section 23(1) exempts, as a class, all information directly or indirectly supplied by, or relating to certain bodies dealing with security matters. This provision confers absolute exemption for the purposes of section 2.

91. *Subsection (2)* provides that a certificate signed by a Minister of the Crown is conclusive proof that the information is of the type in question, subject to a right of



appeal to the Information Tribunal under section 60.

92. *Subsections (3) and (4)* set out the bodies concerned.

93. *Subsection (5)* provides that the obligation under section 1(1)(a) to confirm or deny whether or not the authority holds the information does not arise if to comply would itself disclose information which is exempt by virtue of subsection (1).

#### **Section 24: National security**

94. Section 24 exempts information not covered by section 23, where an exemption is required to safeguard national security. A certification process is provided which is similar to that in section 23.

95. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny whether the requested information is held does not arise where such an exemption is required in order to safeguard national security.

96. *Subsection (4)* allows a certificate to describe information by means of a general description. A certificate may apply to information existing at the time the certificate is issued or it may also cover information acquired or recorded at a later date.

#### **Section 25: Certificates under ss 23 and 24: supplementary provisions**

97. Section 25 makes supplementary provision to the certification process under sections 23 and 24, for evidential purposes. It restricts the power to sign a certificate to a Cabinet Minister, the Attorney General, the Attorney General for Northern Ireland or the Advocate General for Scotland.

#### **Section 26: Defence**

98. Section 26 exempts information the disclosure of which would, or would be likely to, prejudice the defence of the British Islands or any colony or the capability, effectiveness or security of the armed forces.

99. The expression "the British Islands" is defined in Schedule 1 to the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands and the Isle of Man. The expression "colony" is also defined in that Schedule.

100. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) where to comply would, or would be likely to, result in the harm set out in relation to defence.

#### **Section 27: International relations**

101. *Subsection (1)* exempts information the disclosure of which would, or would be likely to, prejudice relations between the United Kingdom and any other State or international organisation, or international court, the interests of the United Kingdom

abroad, or the promotion or protection by the United Kingdom of those interests. The definition of “State” includes the Government of any State and any organ of such government.

102. *Subsection (2)* exempts confidential information obtained from a State or international organisation or international court. *Subsection (3)* sets out what is meant by “confidential” for this purpose.

103. *Subsection (4)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if the information is exempt by virtue of subsection (1) or (2) if to comply:

- would, or would be likely to, result in the harm set out in relation to international relations; or
- would itself involve the disclosure of confidential information (whether recorded or not) obtained from another State or international organisation.

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

104. This section exempts information which would, or would be likely to, prejudice relations between any two administrations in the United Kingdom (as defined in *subsection (2)*).

105. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) if to comply would, or would be likely to, result in harm of the kind described.

#### **Section 29: The economy**

106. This section exempts information the disclosure of which would, or would be likely to, prejudice the economic interests of the United Kingdom or the financial interests of any administration in the United Kingdom, (which would include, for example, budgetary interests).

107. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) if to comply would, or would be likely to, prejudice the interests mentioned in subsection (1).

#### **Section 30: Investigations and proceedings conducted by public authorities**

108. *Subsection (1)* exempts, as a class, any information held at any time by a public authority for the purposes of a criminal investigation or criminal proceedings conducted by it.

109. *Subsection (2)* additionally exempts, as a class, information relating to the obtaining of information from confidential sources (informers) if it was obtained or

recorded for the purposes of the authority's functions relating to:

- criminal investigations;
- criminal proceedings;
- the investigations referred to in section 31;
- civil proceedings which arise from such investigations.

110. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if the information is exempt by virtue of subsections (1) or (2).

111. *Subsection (4)* treats proceedings instituted or conducted by certain connected persons as being instituted or conducted by the public authority.

112. *Subsection (5)* provides that 'criminal proceedings' includes certain court-martial and disciplinary proceedings, and proceedings before a Courts-Martial Appeal Court and summary appeal courts and a Standing Civilian Court; corresponding provision is made in relation to 'offence'.

113. *Subsection (6)* modifies this section in its application to Scotland, so as to take account of the different criminal procedure in Scotland.

### **Section 31: Law enforcement**

114. *Subsection (1)(a) to (f)* exempts information the disclosure of which would, or would be likely to, prejudice certain specified law enforcement matters. *Subsection (1)(g)* exempts information which would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in *subsection (2)*. This subsection essentially protects the conduct of investigations and proceedings which may lead to prosecutions. *Subsection (1)(h)* exempts information which would, or would be likely to, prejudice civil proceedings brought by an authority arising out of investigations conducted for the purposes set out in *subsection (2)*. *Subsection (1)(i)* exempts information which would, or would be likely to, prejudice any inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 arising out of an investigation conducted for the purpose set out in *subsection (2)*.

115. *Subsection (2)* sets out the purposes referred to in *subsections (1)(g), (h) and (i)*. These include:

- investigations into whether circumstances exist or may arise justifying regulatory action under any enactment;
- regulatory investigations relating to unfitness or incompetence of company

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directors;

- investigation of persons in regulated professions or who carry out activities which require a licence;
- investigations into accidents;
- action relating to charity management;
- action relating to health and safety.

116. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if the information is exempt by virtue of subsection (1) and to comply would, or would be likely to, prejudice any of the law enforcement matters referred to in this section.

**Section 32: Court records, etc**

117. This exempts, as a class, information contained in specified records. The obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to such information. This provision confers absolute exemption for the purposes of section 2.

118. This section exempts information which is held by a public authority solely by virtue of the fact that it is contained in documents:

- filed with, or placed in the custody of, a court, or
- served upon, or by, the public authority for the purposes of such proceedings, or
- which a court has created for the purpose of such proceedings (for example, bench memoranda).

119. *Subsection (2)* of this section extends the exemption to information recorded or obtained by a public authority for the purposes of its functions relating to statutory inquiries (including those to which the Tribunals of Inquiry (Evidence) Act 1921 applies) and to arbitrations. In either case, evidence could be given to the inquiry or arbitration by third parties and the inquiry could create documents of its own. A public authority could find itself holding this information either because it was a party or because inquiry papers were held by it.

120. *Subsection (4)* contains a definition of “court” which is the same as that in section 19 of the Contempt of Court Act 1981, thereby bringing in tribunals and other bodies exercising the judicial powers of the State. This section also applies to the judicial functions of coroners and documents relating to any particular inquest or post-

mortem examination.

121. This section does not apply to information which a public authority holds otherwise than in the documents specified, even though the information may relate to, and be deployed in connection with, particular proceedings.

**Section 33: Audit functions**

122. *Subsections (1) and (2)* of this section exempt the disclosure of information which would, or would be likely to, prejudice the exercise by any public authority of its auditing functions. The section relates to the audit of the accounts of other public authorities, or examinations into the efficiency, economy and effectiveness with which they use their resources to discharge their public functions. The section would not extend to the internal auditing functions of authorities.

123. *Subsection (3)* provides that the duty to confirm or deny does not arise if compliance with section 1(1)(a) would prejudice the authority's auditing functions.

**Section 34: Parliamentary privilege**

124. This section exempts information if this is required for the purpose of avoiding an infringement of the privileges of either House of Parliament. *Subsection (2)* provides that the duty to confirm or deny does not apply insofar as that exemption is required for the purpose of avoiding an infringement of the privileges of either House.

125. *Subsections (3) and (4)* make provision for the Speaker of the House of Commons, in relation to that House, and the Clerk of the Parliaments, in relation to the House of Lords, to sign certificates as conclusive evidence that the exemption applies.

**Section 35: Formulation of Government policy etc.**

126. *Subsection (1)* provides that information held by a government department or by the National Assembly for Wales is exempt, as a class, if it relates to the formulation or development of government policy, ministerial communications, Law Officers' advice or the operation of a Ministerial private office.

127. *Subsection (2)* provides that once a decision as to government policy has been taken, any statistical information used to provide an informed background to that decision cannot be exempt information by virtue of subsection (1)(a) or (1)(b). Such statistical information could be exempt under section 36.

128. *Subsection (3)* provides that the duty to confirm or deny does not arise in relation to information which is exempt by virtue of subsection (1).

129. *Subsection (4)* requires that a public authority must have regard to the particular public interest, when making any determination under section 2 in relation to information exempt by virtue of subsection (1)(a), in the disclosure of factual information which has, or is intended to be used, to provide an informed background

to decision taking.

130. *Subsection (5)* clarifies that "government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales and defines "the Law Officers", "Ministerial communications" and "Ministerial private office" for the purposes of this section.

**Section 36: Prejudice to effective conduct of public affairs**

131. This section relates to information held by government departments which is not exempt by virtue of section 35 and information held by other public authorities. *Subsection (2)* provides that information is exempt if, in the reasonable opinion of a qualified person, its disclosure:

- would, or would be likely to, prejudice the maintenance of the convention of collective ministerial responsibility,
- would, or would be likely to, prejudice the work of the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales,
- would, or would be likely to, inhibit the free and frank provision of advice or exchange of views, or
- would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

132. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (2) if, in the reasonable opinion of a qualified person, compliance would, or would be likely to, have any of the adverse effects referred to.

133. *Subsection (4)* provides that in the case of statistical information, the test is the same as in subsections (2) and (3) but is a simple prejudice test (that is, the reasonable opinion of a qualified person does not apply to statistical information).

134. *Subsection (5)* defines a "qualified person".

135. *Subsection (7)* provides that a certificate signed by the Speaker of the House of Commons, in relation to that House, or the Clerk of the Parliaments, in relation to the House of Lords, and stating that in his reasonable opinion, disclosure of information held by either House, or compliance with section 1(1)(a), would have the effects mentioned in subsection (2), is to be conclusive evidence that the exemption applies.

**Section 37: Communications with Her Majesty, etc. and honours**

136. *Subsection (1)* exempts as a class, all information relating to the award of any

honour or dignity by the Crown or to any communications with the Royal Family or Household.

137. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if the information is exempt by virtue of subsection (1) or would be if the information existed.

### **Section 38: Health and safety**

138. *Subsection (1)* exempts information the disclosure of which would, or would be likely to, endanger the physical or mental health or safety of any individual.

139. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) if to comply would, or would be likely to, result in the harm described.

### **Section 39: Environmental information**

140. This section exempts environmental information, which is to be made available under the regulations made under section 74 of the Act.

141. *Subsection (1)* provides that such information is exempt if the public authority is obliged to release the information requested in accordance with the regulations or would be so obliged but for an exemption under the regulations.

142. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if the information is exempt by virtue of subsection (1).

143. *Subsection (3)* makes it clear that the inclusion of a specific exemption for environmental information available under the regulations does not limit the width of the general exemption contained in section 21(1) (information available by other means).

### **Section 40: Personal information**

144. *Subsection (1)* exempts, as a class, personal information relating to the applicant for the information. The right to know whether this information is held, and if so to have access to it, is covered instead by the provisions of the Data Protection Act 1998 (as amended by Part VII of the Act). This provision, in relation to such information, confers absolute exemption for the purposes of section 2.

145. Where the information is personal information relating to a third party (that is, someone other than the applicant), it is exempt under *subsection (2)* if its disclosure would contravene the Data Protection Act 1998 or if the person to whom it relates would not have a right to know about it or a right of access to it under that Act (because of its exemption provisions). Personal information to which the relevant provisions of that Act do not apply is treated for these purposes as if they did. The

1998 Act prohibits the disclosure of personal information where, for example, it would be unfair, or incompatible with the purpose for which it was obtained, or where the individual who was the subject of the information had properly served notice that disclosure would cause unwarranted substantial damage or distress. This provision confers absolute exemption for the purposes of section 2 where disclosure would contravene any of the data protection principles, disregarding section 33A(1) of the DPA 1998 (which contains exemptions from the principles for manual data held by public authorities).

**Section 41: Information provided in confidence**

146. Section 41 exempts, as a class, information obtained from any other person if its disclosure would constitute a breach of confidence actionable by that or any other person. This provision confers absolute exemption for the purposes of section 2. A duty of confidence may be created by contract, or may arise from the circumstances. The common law of confidence itself provides that in certain circumstances a duty of confidence does not arise having regard to the public interest.

147. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

**Section 42: Legal professional privilege**

148. Section 42 exempts, as a class, information to which legal professional privilege applies.

149. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) if to comply would involve the disclosure of any information in respect of which such a claim could be maintained in legal proceedings.

**Section 43: Commercial interests**

150. *Subsection (1)* exempts information if it constitutes a trade secret.

151. *Subsection (2)* exempts information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person – including those of the public authority holding the information.

152. *Subsection (3)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise if, or to the extent that, compliance would, or would be likely to, prejudice commercial interests.

**Section 44: Prohibitions on disclosure**

153. Section 44 exempts all information where disclosure:



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- is prohibited by or under any enactment;
- is incompatible with any European Community obligation; or
- would constitute or be punishable as a contempt of court.

(Section 75, enabling statutory prohibitions to be modified by order, is intended to complement this provision.) This provision confers absolute exemption for the purposes of section 2.

154. *Subsection (2)* provides that the obligation under section 1(1)(a) to confirm or deny that the requested information is held does not arise in relation to information which is exempt by virtue of subsection (1) where compliance would itself (apart from the Act) be prohibited by or under any enactment or is incompatible with any European Community obligation or would constitute or be punishable as a contempt of court.

### **Part III: General functions of Secretary of State, Lord Chancellor and Information Commissioner**

#### **Section 45: Issue of code of practice by Secretary of State**

155. This requires the Secretary of State to issue, and from time to time revise, a code of practice setting out practices which he considers public authorities should follow in discharge of their duties in relation to Part I of the Act (access to information). It specifies particular matters which must be included in the code such as the advice and assistance that should be given to applicants and procedures for dealing with complaints. It also allows the code to make different provision for different authorities. *Subsection (4)* requires the Secretary of State to consult the Commissioner before making or revising a code; and *subsection (5)* provides for it to be laid before Parliament.

156. The matters to be included in the code are administrative ones that are an important part of good practice. They form an important part of the overall scheme for dealing with requests for information. For example, the code will include provision relating to the provision by authorities of arrangements for dealing with complaints from applicants. It is envisaged that an effective complaints system will enable the more straightforward complaints to be dealt with by the authorities themselves and help ensure the best use of the resources of the Commissioner who would be able to concentrate on more complex or difficult cases.

#### **Section 46: Issue of code of practice by Lord Chancellor**

157. This requires the Lord Chancellor to issue a code of practice setting out practices which he considers public authorities (and other authorities whose records are subject to the Public Records Act 1958) should follow in relation to the keeping, management and destruction of their records. In doing so, he is to have regard to the

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public interest in public access to such records. Different provision may be made in relation to different authorities. The Lord Chancellor must consult the Secretary of State and the Commissioner before making or revising the code, and it must be laid before Parliament. Corresponding provision for Northern Ireland is included.

158. For records which are also public records for the purposes of the Public Records Act 1958, the code may also include guidance as to the transfer of records to the Public Record Office and their review before transfer. Corresponding provision for Northern Ireland is included.

159. The requirement to have regard to the public interest in access to records reflects the intention that the code will establish standards of good practice in relation to record-keeping. Good practice would increase the efficiency with which information can be located and retrieved by authorities in response to requests for information, and therefore increase the amount of information which will be available under Part I of the Act consistent with the imposition of cost limits.

#### **Section 47: General functions of Commissioner**

160. This section places a duty on the Commissioner to promote good practice by public authorities and promote the observance of the requirements of the Act and the Secretary of State's and Lord Chancellor's codes of practice. The duty to promote good practice includes, but goes wider than, the enforcement of the right of access under the Act; it enables the Commissioner to promote access to information held by public authorities in general. It could include the issue of advice on such matters as how to handle requests for information and the management of recorded information.

161. *Subsection (2)* places a duty on the Commissioner in relation to the dissemination to the public of information in relation to the operation of the Act, good practice, and other matters within the scope of his functions under the Act. He can also give advice to any person on any of these matters.

162. *Subsection (3)* enables the Commissioner to assess whether a public authority is following good practice, but only with the consent of the public authority.

163. *Subsection (4)* enables the Commissioner to charge for services provided under this section, subject to the consent of the Secretary of State. This allows him to charge for matters such as information, literature, or speaking engagements, but not, for example, for performing his statutory duties to enforce Part I of the Act.

164. *Subsection (5)* places a duty on the Commissioner from time to time as he considers appropriate to consult with the Keeper of Public Records or, in Northern Ireland, the Deputy Keeper of the Records of Northern Ireland about the promotion of observance of the Lord Chancellor's code of practice in respect of public records.

#### **Section 48: Recommendations as to good practice**

165. This section enables the Commissioner to take action where an authority's

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practices do not conform to the Secretary of State's or the Lord Chancellor's code of practice. He may issue a practice recommendation specifying the steps the authority should take to conform, but must consult first with the Keeper of Public Records when the practice recommendation relates to a failure to conform with the Lord Chancellor's code of practice and is issued in respect of records which are public records for the purposes of the Public Records Act 1958 or with the Deputy Keeper of the Records of Northern Ireland for public records for the purposes of the Public Records Act (Northern Ireland) 1923.

#### **Section 49: Reports to be laid before Parliament**

166. This section requires the Commissioner to lay before Parliament an annual report on the exercise of his functions under this Act, and enables him to lay before Parliament such other reports as he considers fit.

#### **Part IV: Enforcement**

#### **Section 50: Application for decision by Commissioner**

167. This section permits any person to complain to the Commissioner about an authority's compliance with the requirements of the Act in respect of a request for information by that person.

168. The Commissioner is required to make a decision on the authority's compliance unless:

- the complaint has not exhausted the authority's own complaints system;
- the complainant has delayed too long before complaining;
- the complaint is vexatious or frivolous; or
- the complaint is withdrawn or abandoned.

The Commissioner can in his discretion decide to reach a decision in a case where he is not obliged to do so under the Act.

169. *Subsection (3)* requires the Commissioner either to notify the complainant that he has not made a decision and his grounds for not doing so, or to serve notice of his decision on both the complainant and public authority.

170. *Subsection (4)* states that where the decision is that a public authority has failed in its duty to confirm or deny whether it holds information or its duty to communicate information, or has otherwise failed to comply with the Act as it relates to the means by which information may be communicated or refusal of requests, a decision notice must specify steps the public authority must take to comply with the

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Act and the time period for doing so. (In respect of a failure to comply with any requirement of Part I of the Act, the Commissioner would have discretion to issue an enforcement notice under section 52 whether or not any application had been made by a complainant.)

171. *Subsection (5)* states that a decision notice must contain information about the right of appeal to the Tribunal against that decision.

172. *Subsection (6)* provides that the time specified in a decision notice for complying with any steps required should not be shorter than the time available for an appeal to the Tribunal to be lodged. It also provides that an appeal shall be suspensory in effect as regards the matters affected by the appeal, and the steps specified in the decision notice would not have to be taken pending the outcome of the appeal.

173. *Subsection (7)* provides that any decision notice has effect subject to the 'accountable person' override provisions set out in section 53 (Exception from duty to comply with decision notice or enforcement notice).

**Section 51: Information notices**

174. This section enables the Commissioner to obtain from a public authority, by issuing an information notice, information (including unrecorded information) he requires to deal with an application under section 50 or to reach a determination on whether an authority has complied or is complying with Part I of the Act or with the Secretary of State's or Lord Chancellor's code of practice. He can specify the time for the authority to comply with the request and the form in which the information should be provided. This corresponds to the powers of the Commissioner under section 43 of the Data Protection Act 1998.

175. *Subsections (2) and (3)* require the Commissioner to specify in the information notice the basis for asking for the information and details of the rights of appeal against the notice.

176. *Subsections (5) and (6)* state that an authority is not required to supply the Commissioner with certain information relating to communications between a legal adviser and client (or a person representing a client) about the client's compliance with the Act or any proceedings arising from it.

177. *Subsection (7)* allows the Commissioner to cancel an information notice.

**Section 52: Enforcement notices**

178. This section enables the Commissioner to issue an enforcement notice if he is satisfied that a public authority has failed to comply with any of the requirements of Part I of the Act. The notice would require the authority to take, within a specified time, such steps as may be specified for complying with the requirements of Part I of the Act. The section contains provisions relating to appeals (comparable to those for

decision notices and information notices). Again, any enforcement notice has effect subject to section 53 (Exception from duty to comply with decision notice or enforcement notice).

179. Provisions in section 52 correspond to the powers of the Commissioner under section 40 of the Data Protection Act 1998. Experience of enforcing data protection legislation suggests that the powers may be rarely needed and used only when informal procedures have failed.

**Section 53: Exception from duty to comply with decision notice or enforcement notice**

180. Section 53 enables 'the accountable person' (as defined in subsection (8)) to give a certificate to the Commissioner in certain cases where a decision notice or enforcement notice has been issued. The effect of the certificate is that the public authority need not comply with the notice to which the certificate relates. A certificate may be issued only where the information concerned is exempt information (and thus, under section 2, a public interest test is relevant). A certificate must be given to the Commissioner no later than the twentieth working day following the effective date (subsection (2)). The accountable person may only issue such a certificate if he has on reasonable grounds formed the opinion that, in respect of the request to which the certificate relates, the authority has not failed to comply with its obligations. In practice this will mean that the accountable person has formed a view different from that of the Commissioner on the question of the public interest.

181. *Subsection (1)(a)* provides that this section applies in relation to decision or enforcement notices served on Government departments, the National Assembly for Wales and any other public authority designated for this purpose by the Secretary of State. Any order to designate any such body is subject to the affirmative resolution procedure under section 82(2). *Subsection (5)* sets out the bodies or person the Secretary of State must consult before making such an order. *Subsection (1)(b)* provides that the section only applies to decision notices or enforcement notices relating to a failure to comply with the duty to confirm or deny that the authority holds the information requested, or the duty to disclose the information, where the only relevant exemptions are confirmed by any provision of Part II which does not confer absolute exemption.

182. *Subsection (3)* provides that the accountable person must lay a copy of the certificate before each House of Parliament, or the appropriate devolved Assembly, as soon as is practicable after issuing the certificate.

183. *Subsection (4)* defines the "effective date" in relation to a decision notice or enforcement notice, and it is the date from which the 20 working day period is counted.

184. *Subsection (6)* provides that where the certificate relates to a decision notice the accountable person must also inform the applicant (who was the complainant for

the purposes of section 50) of his reasons for the decision, at the same time as giving the certificate to the Commissioner, or as soon after that time as is reasonably practicable.

185. *Subsection (7)* qualifies the previous subsection in that the accountable person is not obliged to provide information to the applicant, if, or to the extent that, it would involve the disclosure of exempt information.

186. *Subsection (8)* defines “accountable person”.

#### **Section 54: Failure to comply with notice**

187. This section provides sanctions for an authority’s failure to comply with a decision notice, information notice, or enforcement notice. Failure, in respect of information notices, includes knowingly or recklessly making false statements. The Commissioner may certify failure to the court. The court may inquire into the matter and, after hearing witnesses or any statement on behalf of the public authority, deal with the authority as if it had committed a contempt of court. In this section, the court means the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland.

#### **Section 55: Powers of entry and inspection**

188. This section introduces Schedule 3 which makes provision for the Commissioner’s powers of entry and inspection. The powers are similar to those available to the Commissioner under the Data Protection Act 1998.

#### **Section 56: No action against public authority**

189. This section ensures that the Act does not create any right to an injunction or to sue for damages for breach of statutory duty. It does not affect the Commissioner’s powers to issue enforcement notices. The section does not oust the courts’ judicial review jurisdiction.

### **Part V: Appeals**

#### **Section 57: Appeal against notices served under Part IV**

190. *Subsections (1) and (2)* of this section enable a complainant or a public authority to appeal to the Tribunal against a decision notice and a public authority to appeal to the Tribunal against an information notice or enforcement notice served on it.

191. *Subsection (3)* relates to decision notices or enforcement notices about information which falls under section 66 (*Decisions relating to certain transferred public records*) and in respect of which, under subsections (3) and (4) of that section, the “responsible authority” (that is, generally, the originating authority) has determined that the public interest in maintaining the exemption outweighs the public

interest in disclosing the information. This subsection provides that either the public authority holding the information or the responsible authority can appeal against a decision notice or enforcement notice requiring such a disclosure.

**Section 58: Determination of appeals**

192. This section provides that appeals are to be allowed on only two grounds:

- that the notice against which the appeal was brought was not in accordance with the law; or
- where the notice involved the exercise of discretion by the Commissioner, that he should have acted differently.

193. The Tribunal may review any facts on which the notice was based and if it allows the appeal it may substitute the notice with another one.

**Section 59: Appeals from the decision of Tribunal**

194. This section enables any party to an appeal to appeal from a decision of the Tribunal to the courts on a point of law.

**Section 60: Appeals against national security certificate**

195. Section 60 provides that the Commissioner or any person whose request for information is affected by the issue of a certificate under section 23 or 24 may appeal to the Tribunal against the certificate.

196. Sections 23(2) and 24(3) provide that any question of whether exemption under section 23 (information supplied by, or relating to, bodies dealing with security matters) or section 24 (national security) applies falls to be resolved by reference to a decision of a Minister of the Crown who may issue a certificate to the effect that the information is exempt information.

197. *Subsections (2) and (3)* provide that the Tribunal (which, under Schedule 6 to the Data Protection Act 1998 as amended by Schedule 4 to the Act, will be specially constituted for these appeals) may allow the appeal and quash the certificate if it finds, in the case of section 23(2) appeals, that the information was not exempt information or, in the case of section 24(3) appeals, that, applying the principles of judicial review, the Minister did not act reasonably in issuing the certificate.

198. *Subsections (4) and (5)* relate to certificates issued by a public authority which identify information by means of a general description as allowed under section 24(3). Subsection (4) provides that, if a public authority claims that particular information is covered by the certificate, any other party to the proceedings may appeal to the Tribunal on the grounds that the certificate does not apply to that information. The Tribunal may determine that the certificate does not apply. If it does not so determine, the certificate applies.

**Section 61: Appeal proceedings**

199. This section introduces Schedule 4 which amends Schedule 6 to the Data Protection Act 1998 relating to appeal proceedings. The effect of the amendments is that appeals under this Part are dealt with in accordance with the procedures in the amended Schedule 6 to the Data Protection Act 1998.

**Part VI: Historical records and records in Public Record Office or Public Record Office of Northern Ireland**

**Section 62: Interpretation of Part VI**

200. This section defines the expression “historical record” for the purpose of this Part of the Act. A historical record is a record which is thirty years old, counting from the calendar year following that in which it was created. Where records are kept in a file, the thirty years (and the other periods of years mentioned in section 63) are reckoned from the calendar year following that in which the most recent was created.

**Section 63: Removal of exemptions: historical records generally**

201. The effect of this section is to disapply some of the exemptions in Part II of the Act in the case of information contained in a historical record, and therefore to extend the scope of the right of access in section 1 in these cases. The exemptions which are disapplied are those relating to:

- relations within the United Kingdom (section 28);
- criminal investigations and proceedings (section 30(1));
- court records, etc (section 32);
- audit functions (section 33);
- formulation of government policy etc (section 35);
- prejudice to effective conduct of public affairs (section 36);
- communications with Her Majesty etc (section 37(1)(a));
- legal professional privilege (section 42); and
- commercial interests (section 43).

202. In addition, the exemption relating to honours (section 37(1)(b)) is disapplied in respect of information contained in a record which is 60 years old, and the law enforcement exemption (section 31) is disapplied in respect of information contained



in a record which is one hundred years old.

**Section 64: Removal of exemptions: historical records in public record offices**

203. This section makes further disapplication of exemptions in Part II of the Act in the case of information contained in a historical record, but only where the record is held by the Public Record Office. (The Public Record Office is a government department and so, by virtue of paragraph 1 of Schedule 1, a public authority for the purposes of the Act.) Corresponding provision for Northern Ireland is included.

204. Under *subsection (1)*, the exemption for information accessible to the public by other means does not apply in these cases. This is despite the fact that the Keeper of Public Records will continue to be under an obligation under section 5(3) of the Public Records Act 1958 to arrange reasonable facilities for public inspection and copies *as well* as complying with the duties under the Act. Nor does the exemption for information intended for future publication apply.

205. *Subsection (2)* provides that, where information is held in a historical record in the Public Record Office, although the exemption relating to information supplied by, or relating to the work of, bodies dealing with national security matters will continue to apply, it will not be considered to be an absolute exemption for the purposes of section 2.

**Section 65: Decisions as to refusal of discretionary disclosure of historical records**

206. This section applies where a public authority holds information contained in a historical record which is *also* a “public record” as defined by the Public Records Act 1958, and where that information is exempt information by virtue of a provision in Part II not specified as conferring absolute exemption in section 2(3). Section 65 provides that where the authority is minded to refuse a request for that information, it must consult the Lord Chancellor before doing so. Corresponding provision for Northern Ireland is included. *Subsection (2)* disapplies this section to information to which clause 66 applies.

**Section 66: Decisions relating to certain transferred public records**

207. This section applies to information in a transferred public record which has not been designated by the responsible authority as open information for the purposes of this section. Section 66 provides that, before deciding whether any exemption applies in respect of the duty to confirm or deny, or the duty to disclose, the appropriate records authority (for example, the Public Record Office) must consult the responsible authority (which will generally be the authority who transferred the record to it).

208. *Subsections (3) and (4)* provide that if the duty to confirm or deny, or the duty to disclose, does not arise, as a result of an exemption not specified in section 2 as conferring absolute exemption, then it will be for the responsible authority, not the public records authority, to make the public interest decisions regarding the duty to confirm or deny and disclosure. This is because it is the responsible authority which

has the knowledge and expertise to enable them to make such decisions.

209. *Subsection (5)* provides that the responsible authority must consult with the Lord Chancellor before determining that the public interest does not require disclosure. In the case of public records to which the Public Records Act (Northern Ireland) 1923 applies, consultation must be with the appropriate Northern Ireland Minister.

210. *Subsection (6)* provides that if the responsible authority is not a public authority within the scope of the Act, then it will be treated as a public authority for the purposes of Parts III, IV and V of the Act, so far as relating to the duty in section 15(3) and the imposition of any requirement to provide information to which this section applies.

#### **Section 67: Amendments of public records legislation**

211. This section introduces Schedule 5 which amends the Public Records Act 1958 to make provision consequential on the application of the Act to the Public Record Office and to create a power to extend the meaning of public records for the purposes of the 1958 Act.

#### **Part VII: Amendments of Data Protection Act 1998**

##### **Sections 68 to 73**

212. Part VII of the Act has the effect that the Data Protection Act 1998 rights of subject access and data accuracy are extended to all personal information held by public authorities, with some modifications and exemptions.

213. This is achieved by the device of providing that all personal information held by public authorities counts as personal data for the purposes of the 1998 Act, then cancelling all of the effects of that redefinition except those relating to subject access and accuracy (other than as regards personal information and non-designated functions of public authorities). Some modifications are made to the right of subject access as it relates to certain unstructured records.

214. The Data Protection Act 1998 creates two important rights for individuals in respect of information which is personal to them. Individuals are entitled to be told whether personal information relating to them is being held (or otherwise processed) and, if so, to have both it and certain other details about it communicated to them. This is known as subject access. The 1998 Act also makes provision placing a duty of accuracy on all data controllers. In both cases, the 1998 Act makes the rights enforceable both in the courts and, as a regulatory matter, by the Commissioner. These rights are, however, limited by the terms of application of the Data Protection Act 1998 itself. In particular, the scope of that Act is limited by the key definitions set out in section 1(1), most importantly the definition of "data", which is restricted to information which is automated, or intended for automated processing, or part of a

structured “relevant filing system” (as defined), or part of an “accessible record” (defined by section 68 of the 1998 Act to mean certain health, education, housing and social work records).

215. Section 68 has the effect that, for public authorities within the terms of the Act, the limitations on the definition of “data” in s.1(1) of the 1998 Act disappear (except to the extent that the information relates to functions in respect of which, under section 7, the Act does not apply). Subject to that limitation, the 1998 Act therefore applies to *any* personal information held by a public authority. That means, specifically, that the Data Protection Act applies to public authorities’ non-automated records even though they are not part of a “relevant filing system” and not part of an “accessible record” as defined in the Act. An example of that might be incidental personal information on a policy file, or in loose papers. The chief effect of this section for present purposes is that it achieves the extension of all the Data Protection Act provisions about subject access and accuracy to this new range of information. Section 1 of the 1998 Act, as amended by the Act, is set out as an Annex to these Notes.

216. But subject access will work in a slightly modified way in this new area, and Section 69 introduces two important qualifications to the subject access right which are not found in the 1998 Act as it stands. Section 69 itself applies to only *some* of the personal information added to the scope of subject access by section 68. It does not apply to information recorded on paper which, although it is not part of a “relevant filing system” or part of an “accessible record”, is nevertheless structured to a certain extent by reference to individuals. An example of such relatively structured information might be a case file about an individual which contains correspondence about a number of matters relating to that individual and is indexed by reference only to the dates of the correspondence. This relatively structured information will be treated for subject access purposes in exactly the same way as other personal information within the scope of the Data Protection Act. But two special rules will apply in respect of subject access to the residue, that is, the relatively unstructured information.

- Firstly, subject access will not be given to this information unless the information is expressly described in the request. A request from a data subject for access to his own personal data has to be met in general by giving access to *all* of that subject’s data, without his having to specify any of it. No part of the residue of relatively unstructured personal information, however, will be included in response to a subject access request unless the data subject has expressly described it.
- Secondly, even where residual relatively unstructured personal information has been described, the authority will be able to rely on provisions equivalent to those set out in section 12 of the Act to refuse a request *in so far as it relates to that information* where to do so would cost more than is provided

for by a prescribed cost ceiling.

217. Section 68 also provides that the extension of subject access is to have no effect on the criminal offence created by section 56 of the 1998 Act, which prohibits in some circumstances the act of requiring the production of information obtained in the exercise of the right of subject access.

218. However, as well as achieving the expansion (and partial modification) of data subject rights, the amendment to the definition of “data” produced by section 68 would of course bring all the rest of the 1998 Act to bear on the totality of public authorities’ personal information. Given that the new rights exist and are operated wholly within the context of the 1998 Act, the extension of the definition of “data” is a streamlined way of extending the key subject access and accuracy provisions. But the general application of the 1998 Act to all personal information held by public authorities is not an intended by-product, and the Act therefore needed to ensure that the excess application of the 1998 Act was cancelled out. That is what section 70 achieves. It strips out of the extension of the new definition of “data” *all* the substantive effects of the Data Protection Act 1998 *except* those relating to subject access and accuracy.

219. Section 70 has one further effect. It provides that the extension of the rights of subject access and accuracy achieved in Part VII of the Act does *not* apply to personnel information held by public authorities.

220. Section 71 amends section 16(1) of the Data Protection Act 1998 so as to require data controllers who are public authorities for the purposes of the Act to state that fact when making any notification under Part III of the 1998 Act. This information will then appear on the public register maintained under Part III of the 1998 Act.

221. Section 72 amends section 34 of the Data Protection Act 1998. Section 34 provides that personal data are exempt from the Act’s provisions relating to subject access and accuracy, and from certain other restrictions on disclosure, if they consist of information which is subject to a statutory duty to make it available to the public. That is because such statutory access provisions – such as those governing the Register of births, marriages and deaths or the Land Registry – make their own detailed arrangements for access, accuracy, and disclosure, which are accordingly made to prevail over the more general provisions of the 1998 Act. But the reference in section 34 to statutory obligations would be capable of including those in this Act, thus making this Act’s regime predominate over that of the 1998 Act. This would not be consistent with this Act’s express provision that, in the case of personal data, its own provisions are subject to the limits of the 1998 Act. Section 72 removes the inconsistency by providing that the reference to statutory obligations in section 34 of the 1998 Act is not to include those in this Act.

222. Section 73 introduces Schedule 6 which contains further amendments to the 1998 Act.

## **Part VIII: Miscellaneous and supplemental**

### **Section 74: Power to make provision relating to environmental information.**

223. This section provides that the Secretary of State may make regulations to implement 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, which the UK signed at Aarhus in 1998 (the Aarhus Convention), insofar as the Convention relates to the provision of access to environmental information.

224. The regulations will form a free-standing regime, giving access to environmental information. Section 39 exempts environmental information which is available under the regulations from the main provisions of the Act.

225. The regulations made under the power contained in this section will replace the current Environmental Information Regulations 1992 (SI 1992/3240), as amended by the Environmental Information (Amendment) Regulations 1998 (SI 1998/1447). These regulations implement Directive 90/313/EEC on the Freedom of Access to Information in the Environment.

226. *Subsection (3)* gives the Secretary of State power to make regulations to implement those articles of the Aarhus Convention which relate to the provision of access to environmental information, or for the purpose of dealing with matters arising from them, or amendments to them.

227. *Subsection (4)* permits the regulations to include provisions enabling charges to be made in connection with the disclosure of environmental information, and to give effect to any obligations the regulations may impose.

228. *Subsection (4)* also permits certain provisions of the Act to be applied to the regulations, with modifications. The regulations may make provision for a code of practice to apply to bodies subject to the regulations and for the application of the Information Commissioner's powers under sections 47 and 48, as modified if necessary, to it. The regulations may also apply, with modifications, to Parts IV and V of the Act (dealing with enforcement and appeals), so that the Information Commissioner enforces the regulations and, as set out in Part V, with the Tribunal, considers any appeals relating to applications for environmental information under the regulations. The regulations may also make provision for any transitional or consequential provisions that are appropriate.

229. *Subsection (5)* ensures that the regulations made under the section to implement the Aarhus Convention do not apply to the Scottish bodies referred to in

section 80.

**Section 75: Power to amend or repeal enactments prohibiting disclosure of information**

230. This section empowers the Secretary of State to make orders repealing or amending primary or secondary legislation which has the effect of prohibiting disclosure of information under the Act. These orders may remove or relax the prohibitions and they may also make consequential, incidental or transitional provision. Orders may make different provision for different cases and can only be made with the approval of both Houses of Parliament (section 82(2)).

**Section 76: Disclosure of information between Commissioner and ombudsmen**

231. *Subsection (1)* allows the Commissioner to disclose to specified ombudsmen any information he has obtained or which has been given to him under or for the purposes of this Act or the Data Protection Act 1998, if it appears to him that the information in question relates to a matter which could be the subject of an investigation by one of the specified ombudsmen under the enactment relating to that ombudsman. The ombudsmen specified are: the Parliamentary Commissioner for Administration; the Health Service Commissioners for England, Wales and Scotland; Local Commissioners (as defined by section 23(2) of the Local Government Act 1974); the Commissioner for Local Administration in Scotland; the Scottish Parliamentary Commissioner for Complaints; the Welsh Administration Ombudsman; the Northern Ireland Commissioner for Complaints and the Assembly Ombudsman for Northern Ireland.

232. In effect, the ability of the Commissioner to disclose information to the three Scottish ombudsmen will be limited to information about matters obtained by or given to him under the Data Protection Act 1998. This is because the Commissioner will not have information under this Act relating to bodies within the jurisdiction of the Scottish ombudsmen.

233. *Subsection (2)* introduces Schedule 7, which provides for amendments to the relevant legislation to provide that the specified ombudsmen are empowered to disclose information to the Commissioner.

**Section 77: Offence of altering etc. records with intent to prevent disclosure**

234. This section makes it an offence to alter, deface, block, erase, destroy or conceal records held by a public authority with the intention of preventing its disclosure to an applicant who has made a request for the information and is entitled to receive it. The offence applies to the public authority and anyone who is employed by, is an officer of, or is subject to the direction of, the public authority. A person found guilty of the offence is liable to a fine not exceeding level 5 on the standard scale (currently £5000). The offence cannot be committed by a government department but can be committed by civil servants.

**Section 78: Saving for existing powers**

235. This section ensures that nothing in the Act limits existing powers of public authorities to disclose information held by them.

**Section 79: Defamation**

236. This section provides that for the purposes of the law of defamation a disclosure under the Act is covered by qualified privilege, in cases where the information had been supplied to the public authority by a third person.

**Section 80: Scotland**

237. This section provides that no order may be made under section 4(1) or 5 in respect of the Scottish Parliament, any part of the Scottish Administration, the Scottish Parliamentary Corporate Body or any Scottish public authority with mixed functions or no reserved functions within the meaning of the Scotland Act 1998. The power conferred by section 74(3) does not include power to make provision in relation to information held by these bodies. The Scottish Parliament has legislative competence in relation to freedom of information for these bodies.

**Section 81: Application to government departments, etc**

238. This section ensures that each government department is a separate public authority for the purposes of the Act. However, that does not mean that a duty of confidence can be treated as arising between one government department and another.

**Section 82: Orders and regulations**

239. This provides that any power of the Secretary of State to make an order or regulations under this Act shall be exercisable by statutory instrument. An order under each of the following provisions requires affirmative resolution procedure:-

- section 5 (designation of further public authorities);
- section 7(3) (amending Schedule 1) or (8) (excluded information);
- section 53(1)(a)(iii)(to designate a public authority as an authority excepted from the duty to comply with a decision or enforcement notice in accordance with section 53); or
- section 75 (power to amend or repeal enactments prohibiting disclosure of information); or
- regulations under section 10(4) (time for compliance); or
- section 74(3)(power to make provision relating to environmental information).

240. An order under section 4(1) (amendments to Schedule 1 adding an entry) and regulations made under any other provision of the Act are subject to annulment in

pursuance of a resolution of either House.

241. An order under section 4(5) (amendments to Schedule 1 removing an entry) has to be laid before Parliament after being made.

242. By virtue of *subsection (5)*, a draft order under section 5 or 7(8) which would otherwise attract the procedure applicable to hybrid instruments will not do so.

### **Section 83: Meaning of a "Welsh public authority"**

243. This section defines a "Welsh public authority" as any public authority listed in Parts II, III, IV or VI of Schedule 1, and whose functions are exercisable only or mainly in or as regards Wales, other than an excluded authority, or any public authority which is an Assembly subsidiary as defined by section 99(4) of the Government of Wales Act 1998. *Subsections (2) and (3)* provide that an "excluded authority" means one which has been designated for the purpose of this section by order of the Secretary of State, after consultation with the National Assembly for Wales.

### **Section 85: Expenses**

244. This authorises any increase attributable to the Act in expenditure which is payable out of money provided by Parliament.

### **Section 87: Commencement**

245. *Subsection (1)* provides for the immediate commencement on Royal Assent of:

- sections 3 to 8 (the definition of 'public authority', power to add bodies to Schedule 1, power to designate further public authorities, defining publicly-owned companies and public authorities to which the Act has limited application, definition of request for information) and Schedule 1;
- sections 19 and 20 (allowing the approval of publication schemes by the Commissioner and the drafting of model publication schemes);
- section 47(2) to (6) (empowering the Commissioner to carry out his general functions under the Act);
- section 49 (requiring the Commissioner to lay reports before Parliament);
- section 74 (power to make provision relating to environmental information);
- section 75 (power to amend or repeal enactments prohibiting disclosure of information);
- sections 78 to 85 (saving for existing powers, defamation, application to



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Scotland and to government departments, orders and regulations made under the Act, meaning of a "Welsh public authority", interpretation and expenses);

- section 87 (commencement);
- paragraph 4 of Schedule 5 (enabling bodies to be added to the Table in paragraph 3 of Schedule 1 of the Public Records Act 1958) and section 67 so far as it relates to that paragraph;
- those parts of Schedule 6 relating to Schedule 14 of the Data Protection Act 1998 and section 73 so far as it relates to those parts and Part 1 of Schedule 8 (which repeals part of Schedule 14 to the Data Protection Act 1998) and section 86 so far as it relates to that Part.

246. The subsection also provides for the immediate commencement of certain paragraphs of Schedule 2 (with section 18(4) so far as relating to those paragraphs) and so much of any other provisions of the Act as confers power to make any order, regulation or code of practice.

247. *Subsection (2)* provides for the coming into force two months after Royal Assent (ie on 30<sup>th</sup> January 2001) of the provisions providing that the Data Protection Commissioner is to be known as the Information Commissioner and those that make consequential changes in related legislation.

248. *Subsections (3) and (4)* provide that all other provisions must come into force within five years after Royal Assent unless they have already been brought into force, provide flexibility to have different commencement dates for different purposes within the five year period, and allow for savings and transitional provision to be made, including provision capable of having effect after the five year period.

249. *Subsection (5)* requires the Secretary of State to lay before Parliament annual reports on his proposals for commencement of those parts of the Act not yet fully in force, until such time as the Act is fully commenced in accordance with subsection (3).

## **Schedules**

### **Schedule 1: Public authorities**

250. This Schedule lists "public authorities" for the purposes of the Act. Government departments, the Houses of Parliament, the Northern Ireland Assembly, the National Assembly for Wales, the armed forces, local government bodies, National Health Service bodies, schools, colleges and universities, police authorities and Chief Officers of Police and other public bodies and offices are all specified

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as public authorities. Further persons, bodies or office holders may be designated by order under sections 4 and 5.

## **Schedule 2: The Commissioner and the Tribunal**

### ***Part I: Provision consequential on section 18(1) and (2)***

251. Part I makes provision required as a consequence of the renaming of the Data Protection Commissioner and Data Protection Tribunal. *Paragraphs 1 and 2* make general provision in connection with the changing of the names of the Commissioner and the Tribunal. Specific amendments are made to:

- Public Records Act 1958
- Parliamentary Commissioner Act 1967
- Superannuation Act 1972
- Consumer Credit Act 1974
- House of Commons Disqualification Act 1975
- Northern Ireland Assembly Disqualification Act 1975
- Tribunals and Inquiries Act 1992
- Judicial Pensions and Retirement Act 1993
- Data Protection Act 1998

### ***Part II: Amendments relating to extension of functions of Commissioner and Tribunal***

252. This Part makes minor substantive amendments to the institutional provisions of the Data Protection Act 1998.

253. *Paragraph 16* amends section 6 of the 1998 Act to require lay members of the Tribunal to include persons representing applicants for information under this Act and persons to represent the interests of public authorities.

254. *Paragraph 17* amends section 26(2) of the 1998 Act to ensure that in prescribing notification fees the Secretary of State is to have regard to the expenses of the Commissioner and Tribunal under the 1998 Act only, and not their expenses under

this Act.

255. *Paragraph 18* amends section 58 of the 1998 Act to provide that information may be passed to the Commissioner or Tribunal to allow them to discharge their freedom of information functions.

256. *Paragraph 19* amends section 59 of the 1998 Act to provide that the duty of confidentiality on the Commissioner, his staff and agents and the related offence under the 1998 Act apply also in respect of information obtained by or furnished to the Commissioner under this Act.

257. *Paragraph 20* amends Schedule 5 to the 1998 Act to allow the Commissioner to appoint a second deputy commissioner and states that, if two are appointed, the Commissioner should specify the functions of each.

258. *Paragraph 21* amends Schedule 5 to the 1998 Act to enable both deputy commissioners to perform the functions of the Commissioner in relation to freedom of information as well as data protection in the event of a vacancy in the Commissioner post or when the Commissioner is unable to act.

259. *Paragraph 22* amends paragraph 9(1) of Schedule 5 to the 1998 Act to provide that the Commissioner's funding regime, set up in respect of his functions under the Data Protection Act 1998 and consumer credit legislation, applies also in respect of his freedom of information functions.

### **Schedule 3: Powers of entry and inspection**

260. This Schedule sets out the circumstances in which, where he suspects a contravention of the Act, the Commissioner may seek a warrant enabling him to enter and search premises and seize material. The powers are comparable to the ones available to him under Schedule 9 to the Data Protection Act 1998.

#### ***Issue of Warrants***

261. *Paragraph 1(1)* allows a circuit judge to issue a warrant to the Commissioner where the judge is satisfied by information from the Commissioner on oath that there are reasonable grounds for suspecting either that the public authority has failed or is failing to comply with any of the requirements of Part I of the Act, so much of a decision notice as requires steps to be taken, or an information notice or enforcement notice, or that an offence under section 77 has been or is being committed. The judge must also be satisfied that evidence of the failure or of the offence is to be found on the premises specified.

262. *Paragraph 1(2)* sets out the action that may be taken under the warrant. The Commissioner or his officers or staff may, within seven days, enter and search the premises in question and inspect, examine, operate and test any relevant equipment.

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They may inspect and seize any documents or other material which may be evidence of the alleged contravention or offence.

263. *Paragraph 2(1)* sets out further conditions for the issue of a warrant. The judge must be satisfied that:

- a) the Commissioner has given seven days' notice in writing to the occupier of the premises demanding access;
- b) access was demanded at a reasonable hour and was unreasonably refused; or, if entry was granted, the occupier refused unreasonably to comply with a request; and
- c) the occupier has been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the judge.

264. *Paragraph 2(2)* says that the above conditions do not apply if the judge is satisfied that the case is one of urgency, or that meeting the conditions would defeat the purpose for which the warrant is being sought.

265. *Paragraph 3* requires the judge to issue not only the warrant but also two certified copies of it.

#### ***Execution of warrants***

266. *Paragraph 4* allows necessary, reasonable force to be used in executing a warrant.

267. *Paragraph 5* requires the warrant to be executed at a reasonable hour unless there are grounds for suspecting that doing so would mean that the evidence would not be found.

268. *Paragraph 6* requires the person occupying the premises to be shown and given a copy of the warrant if he is present when it is executed. If the occupier is not present, a copy of the warrant must be left prominently on the premises.

269. *Paragraph 7* requires a receipt to be given, if sought, for anything seized. It also provides for anything seized to be retained as long as is necessary. The person occupying the premises must be given a copy of anything that is seized if he asks for it and if this can be done without undue delay.

#### ***Matters exempt from inspection and seizure***

270. *Paragraph 8* exempts from the powers conferred by a warrant information which is exempt from any of the Act's provisions by virtue of sections 23(1) or 24(1)

(the exemptions relating to national security).

271. *Paragraph 9(1)* prohibits the exercise of the power authorised by a warrant in respect of any communication between a professional legal adviser and his client in connection with the client's obligations, liabilities or rights under the Act, or other specified communications relating to proceedings or possible proceedings under the Act. These include proceedings before the Tribunal.

272. *Paragraph 9(2)* makes clear that the prohibition in paragraph 9(1) also applies to copies or other records of such communications, and anything enclosed with or referred to in any such communication, if the communication is made in connection with the giving of such advice or in relation to such proceedings as are mentioned.

273. *Paragraph 9(3)* provides that paragraph 9 does not apply to anything in the possession of any person other than the professional legal adviser or his client, or to anything held with the intention of furthering a criminal purpose.

274. *Paragraph 9(4)* provides that references in paragraph 9 to the client of a professional legal adviser include references to any person who may be representing the client.

275. *Paragraph 10* deals with the situation in which material consists partly of matters covered by the warrant and partly of matters not covered by the warrant. In such a case, if the person executing the warrant requests him to do so, the occupier of the premises must provide a copy of so much of the material as is covered by the warrant.

### ***Return of warrants***

276. *Paragraph 11* requires warrants to be returned to the issuing court whether or not they have been executed. The warrant must contain an endorsement by the relevant person of the powers which have been exercised under it.

### ***Offences***

277. *Paragraph 12* makes it an offence for a person intentionally to obstruct another in the execution of a warrant, or to fail without reasonable excuse to give the person executing a warrant such assistance as he may reasonably require.

### ***Vessels, vehicles etc***

278. *Paragraph 13* defines "premises" for the purpose of the Schedule as including vessels, vehicles, aircraft or hovercraft. References to occupiers of premises

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include references to the people in charge of the vessels etc.

### ***Scotland and Northern Ireland***

279. *Paragraph 14* provides for the interpretation of the Schedule in Scotland according to the procedures and terminology which apply there.

280. *Paragraph 15* makes similar provision for Northern Ireland.

### **Schedule 4: Appeal Proceedings – Amendments of Schedule 6 to Data Protection Act 1998**

#### ***Constitution of Tribunal in national security cases***

281. *Paragraph 1* amends paragraph 2(1) of Schedule 6 to the Data Protection Act 1998 to enable the Lord Chancellor to designate, from the chairmen and deputy chairmen of the Tribunal, those who can hear appeals in national security cases under section 60(1) or (4) of this Act.

282. *Paragraph 2* amends paragraph 3 of Schedule 6 to the Data Protection Act 1998 to provide that in appeals in national security cases the Tribunal shall consist of three members designated under paragraph 2(1), of whom the Lord Chancellor is to designate one to preside.

#### ***Constitution of Tribunal in other cases***

283. *Paragraph 3* amends paragraph 4 of Schedule 6 to the Data Protection Act 1998 to provide for the constitution of the Tribunal in other than national security cases to be similar to that for data protection, that is, it shall consist of a chairman or deputy chairman (who shall preside) and an equal number of members appointed respectively to represent the interests of applicants for information and public authorities under the Act (see section 6(6) of the 1998 Act, as amended by paragraph 16 of Schedule 2 to the Freedom of Information Act).

#### ***Rules of procedure***

284. *Paragraph 4* amends the provision conferring power to make rules of procedure for the Tribunal so that the rules may extend to appeals under sections 57(1) and (2) and 60(1) and (4) of the Freedom of Information Act.

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## **Schedule 5: Amendments of public records legislation**

### ***Functions of the Advisory Council on Public Records***

285. *Paragraph 1* inserts a new provision into the Public Records Act 1958 which extends the role of the Lord Chancellor's Advisory Council on Public Records to include the giving of advice on matters relating to the application of the Freedom of Information Act to information contained in public records which are also historical records under Part VI of the Act.

### ***Access to Public Records***

286. *Paragraphs 2 and 3* amend the Public Records Act 1958 with the effect of preserving the duty of the Keeper of Public Records to arrange reasonable facilities for the inspection of records which are held in the Public Record Office (and other appointed places of deposit) and which are subject to disclosure under the provisions of the Act, but otherwise to repeal the provisions of the 1958 Act relating to access to such records. The provision which had been made by section 5 of that Act had established a regime for access to and closure of records largely based on the discretion of the Lord Chancellor. That discretionary provision is superseded by the statutory regime for access which is established by sections 1 and 2 of the Act and which is subject to the exemptions in Part II of the Act. The provision made by sections 65 and 66 retains some of the 1958 Act's elements of consultation and consent as between the Public Record Office or Lord Chancellor on the one hand, and public authorities on the other, in the case of such disclosure of information as continues under the Act's regime to be discretionary. *Paragraph 5* makes provision for Northern Ireland corresponding to that made by paragraph 2(3).

### ***Power to extend the meaning of 'public records'***

287. *Paragraph 4* inserts a new paragraph 3A in Schedule 1 of the Public Records Act 1958. This enables further bodies to be added to the Table in paragraph 3 of that Schedule by Order in Council. Any new entry must relate to a body which is specified in Schedule 2 to the Parliamentary Commissioner Act 1967 or could be added to that Schedule. An Order in Council under this new power is subject to negative resolution procedure (unlike orders under the wider power in the existing paragraph 7, which are subject to affirmative resolution).

## **Schedule 6: Further amendments of Data Protection Act 1998**

288. *Paragraph 1* makes a drafting amendment of subsection (3) of section 7 of the

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1998 Act, so that the wording of that subsection is consistent with that of the equivalent provision in section 1(3) of this Act.

289. *Paragraph 2* inserts a new section 35A into the 1998 Act conferring exemptions from certain provisions of the 1998 Act where required to avoid infringing parliamentary privilege.

290. *Paragraph 3* inserts a new section 63A into the 1998 Act providing that the provisions of the 1998 Act shall apply to personal data processed by or on behalf of either House of Parliament, designating the data controllers for each House and providing an exemption from prosecution under the Act to the designated data controllers. Similar provision is unnecessary for the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly as the Data Protection Act 1998 already applies to them.

291. *Paragraphs 4 and 5* amend Schedules 2 and 3 to the 1998 Act. Those Schedules set out conditions which apply to the processing of personal data and sensitive personal data respectively, and one of which must be met in order to comply with the first data protection principle. The amendments have the effect that processing necessary for the exercise of any functions of Parliament will satisfy the requirements of Schedule 2 and 3 to the 1998 Act.

292. *Paragraph 6* amends the exemption relating to honours in paragraph 3(b) of Schedule 7 to the 1998 Act so as to add a reference to a dignity. The award of peerage may be regarded as a dignity rather than an honour.

293. *Paragraph 7* amends the reference in paragraph 10 of Schedule 7 to the 1998 Act to the Scottish equivalent of legal professional privilege.

294. *Paragraph 8* amends paragraph 2(1) of Schedule 14 to the 1998 Act to provide that the transitional exemption from notification for those data controllers already registered under the Data Protection Act 1984 at the time when Part III of the 1998 Act is brought into force is to extend until the normal date of expiry of their registered entry.

**Schedule 7: Disclosure of information by ombudsmen**

295. This Schedule provides for amendments to the relevant legislation which relate to information disclosed to specified ombudsmen and provides that they are empowered to disclose on a similar basis to that provided for by section 76 to the Information Commissioner. There is no provision for the three Scottish ombudsmen to disclose to the Commissioner, as any such amendments to the legislation relating to the Scottish ombudsmen would be a matter for the Scottish Parliament.



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**Schedule 8: Repeals**

296. This Schedule contains details of repeals.

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### **Hansard References**

The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

<b>Stage</b>	<b>Date</b>	<b>Hansard reference</b>
<b>House of Commons</b>		
Introduction	18 November 1999	Vol 339 Col 124
Second Reading	7 December 1999	Vol 340 Cols 714-798

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Committee	<p>1<sup>st</sup> Sitting, 21 December 1999</p> <p>2<sup>nd</sup> Sitting, 11 January 2000</p> <p>3<sup>rd</sup> Sitting, 11 January 2000</p> <p>4<sup>th</sup> Sitting, 18 January 2000</p> <p>5<sup>th</sup> Sitting, 18 January 2000</p> <p>6<sup>th</sup> Sitting, 20 January 2000 [Part I]</p> <p>6<sup>th</sup> Sitting, 20 January 2000 [Part II]</p> <p>7<sup>th</sup> Sitting, 25 January 2000</p> <p>8<sup>th</sup> Sitting, 25 January 2000</p> <p>9<sup>th</sup> Sitting, 27 January 2000</p> <p>10<sup>th</sup> Sitting, 1 February 2000</p> <p>11<sup>th</sup> Sitting, 1 February 2000</p> <p>12<sup>th</sup> Sitting, 8 February 2000</p> <p>13<sup>th</sup> Sitting, 8 February 2000</p> <p>14<sup>th</sup> Sitting, 10 February 2000</p>	Standing Committee B
Report and Third Reading	<p>4 April 2000</p> <p>5 April 2000</p>	<p>Vol 1857 Cols 830-935</p> <p>Vol 1857 Cols 981-1123</p>
<b>House of Lords</b>		
Introduction	6 April 2000	Vol 1802 Col 1490

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which received Royal Assent on 30th November 2000*

Second Reading	20 April 2000	Vol 612 Cols 823-893
Committee	17 October 2000	Vol 617 Cols 883-954 and Cols 971-1020
	19 October 2000	Vol 617 Col 1208 –1300
	24 October 2000	Vol 618 Cols 273 – 314
	25 October 2000	Vol 618 Cols 407 – 476
Report	14 November 2000	Vol 1824 Cols 134-158 and Cols 173-266
Third Reading	22 November 2000	Vol 1825 Cols 817 – 852

**Royal Assent** - 30 November 2000 House of Lords Hansard Vol 1826 Col 1491

House of Commons Hansard Vol 1877 Col 1231

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## ANNEX

***Section 1 of the Data Protection Act 1998 showing the amendments effected by section 68 of the Freedom of Information Act (printed in bold). This extract has no authoritative status.***

### **Basic interpretative provisions.**

1. - (1) In this Act, unless the context otherwise requires-

“data” means information which-

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or

**(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);**

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including-

(a) organisation, adaptation or alteration of the information or data,

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- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data;

**“public authority” has the same meaning as in the Freedom of Information Act 2000;**

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires-

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention-

- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
- (b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

**(5) In paragraph (e) of the definition of “data” in subsection (1), the reference to information “held” by a public authority shall be construed in accordance with section 3(2) of the Freedom of Information Act 2000.**

**(6) Where section 7 of the Freedom of Information Act 2000 prevents Part I to V of that Act from applying to certain information held by a public authority, that information is not to be treated for the purposes of paragraph (e) of the definition of “data” in subsection (1) as held by a public authority.**