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### **Freedom of Information (Amendment) (Scotland) Bill**

I am writing to you following my appearance before the Finance Committee on 12 September in order to provide additional clarification of certain points raised during the committee session.

### **Extending coverage of the Freedom of Information (Scotland) Act 2002 ('the Act')**

A significant part of the committee session focussed on the issue of extension of coverage of the Act. The Scottish Information Commissioner's annual report, published on 17 September, has continued to keep this issue firmly in the public eye.

As the committee is aware, following consultation in 2009, Scottish Ministers agreed to defer any decision on extension until Parliament had completed consideration of the Amendment Bill. This is primarily an issue of expediency - I am very conscious of the time and resource implications for both the Scottish Parliament and the Scottish Government of returning to the complex issue of extension while the Bill progresses through Parliament.

However, extension is clearly very much on the agenda and I am actively considering the options available to me. As an ongoing part of this process I am open to engaging in the debate and will listen carefully to the views that this committee and stakeholders express.

I believe the key objective that we want to achieve is improving and extending the public's access to information. Extension of coverage is clearly one option. However, we should also seek to explore other ways of improving access, for example by other legislative routes, Codes of Practice etc.

I would though wish to note that, while it is correct that section 5 of the Act has yet to be used, it is a misconception that Schedule 1 of the Act is unchanged from commencement on 30 September 2002. Coverage has constantly evolved by means of other primary and

secondary legislation as new bodies have been created – or been abolished. This evolutionary process will undoubtedly continue given the changing public sector landscape

Finally, while discussing extension, I think it worth reiterating that the power to extend coverage is already contained within the legislation. As such, there would not appear to be any advantage in using primary legislation to extend coverage rather than in doing so by order. The issue of consultation has been raised in this context. However, I do not consider that the consultation that has already taken place specifically on the question of extension is in any way less valuable – or in-depth – than consultation would be were extension included as a further amendment on the face of the Bill.

### **Historical Records – lifespan of exemptions**

The second issue on which I am happy to provide further comment to the committee is around the intention to increase the flexibility of the order-making power in respect of revising the lifespans of certain exemptions.

Specifically, the committee noted the submission of the Commission for Ethical Standards in Public Life and their concerns around increased flexibility leading to a more complex and less successful freedom of information system.

However, I consider that the concerns of the Commission are possibly misplaced. Clearly, we would wish the provision, if enacted, to be introduced and explained in a way that the public understand. To this end I would note that what we are proposing is amending the lifespans of exemptions which are already time limited, that is to say officials handling FoI requests will already be aware that certain exemptions lapse after a specified number of years. The exemptions in this category are not being changed.

Our published plans for the intended order are straightforward and, for the vast majority of '30-year' exemptions, simply reduce the lifespan to 15 years. Perhaps not surprisingly, freedom of information requests are almost invariably for information of current interest – and rarely for information that would be classed as an 'historical record'. In addition, few organisations hold significant amounts of information potentially falling within the category of 'historical record'. The prospect therefore of information classed as an 'historical record' being subject to an FoI request is considered to be small.

Moreover, we should not forget that we are committed to further consultation on a draft order – to include a business regulatory impact assessment (BRIA) – and that the order will be subject to affirmative Parliamentary process. A combination of consultation and the BRIA will allow any concerns of increased complexity and significant increase in resource requirement to be identified.

While not wishing to deny that at the margins there may be rare instances of slightly increased complexity with an increased range of lifespans to consider, I believe that this will be in a few isolated cases and that any disadvantage is greatly outweighed by the potential for more information to be made publicly available significantly earlier.

### **Contractual arrangements with public authorities**

The final issue I would like to return to is that of contractual provisions – while this was specifically referred to in the context of NHS Boards and local authorities the generality applies to any contracting public authority.



The Scottish Government fully supports clear and enforceable contract provisions in terms of making information relating to contracts and procurement processes available. I would draw the committee's attention to the Code of Practice required to be issued by Scottish Ministers under section 60 of the Act which provides guidance to public authorities on the discharge of their functions under the Act.

A significant part of this Code is dedicated to good practice in respect of contractual and procurement-related information. While not wishing to undermine a public authority's commercial relationships with the private sector, the relevant section of the Code emphasises the importance of transparency in the use of public funds – in particular around the full financial implications of long term and high value contracts, as well as in regard to information demonstrating diligence on the part of authorities in managing contractors to ensure best value for money. Compliance with the Code is enforceable by the Scottish Information Commissioner. In addition, contractual clauses will routinely set out a public authority's obligations under freedom of information legislation.

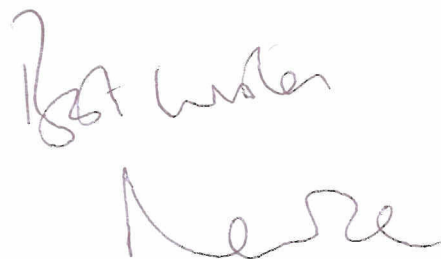
Two other legislative initiatives are also of particular relevance. Firstly, the Public Records (Scotland) Act 2011. While not fully coming into force until 1 January 2013, the Act imposes duties on public authorities to produce, implement and review records management plans. Such plans must set out the arrangements for the management of records created or held by the authority and records created or held by contractors who carry out any functions of the authority.

In addition, the Procurement Reform Bill, on which consultation is underway, aims to establish a national legislative framework for sustainable public procurement that supports Scotland's economic growth. As the consultation notes, in order to realise the full potential of procurement, we need to ensure that the legal and policy frameworks for public procurement in Scotland are transparent, responsive and fit for purpose. Transparency will be a critical element of this developing policy area.

Clearly, the issue of transparency in terms of contractual relations with public authorities is not unrelated to the question of formal designation of, for example, contractors, by means of the Freedom of Information (Scotland) Act. However, in considering the issue of accessing information relating to contracts, I think it important to note that designation is not the only route by which information can be acquired. There are many alternative ways of seeking information and I would suggest that the focus in this discussion should be on ensuring that information can be accessed rather the mechanism by which it is accessible.

## Conclusion

I would like to conclude by reiterating my willingness to fully engage with the Committee on all matters in relation to freedom of information – including extension of coverage – and look forward to a productive discussion in due course.



**NICOLA STURGEON**