



Isle of Man
Government

Reiltys Ellan Vannin



Council of Ministers

Consultation on the Freedom of Information Bill 2014

February 2014

Freedom of Information Bill 2014

Public Consultation

Table of Contents

Introduction by the Chief Minister	4
Code of Practice on Access to Information	6
Financial implications of a Freedom of Information Act.....	9
Frequently Asked Questions.....	11
How the consultation will work.....	16
Overview of the Draft Freedom of Information Bill 2014.....	18
Part 1 – Introductory	18
Clause 2: Commencement	18
Clause 3: Purpose	18
Clause 4: Application	18
Clause 5: Interpretation.....	19
Clause 6: Meaning of public authority	19
Part 2 – Access to Information held by Public Authorities	20
Clause 7: Right of access to information held by public authorities	20
Clause 8: Requests for information	20
Clause 9: Requests taken to relate to information held at time of request	20
Clause 10: Grant of requests for information	20
Clause 11: Time for deciding request.....	21
Clause 12: Public authority may request additional information and fees.....	22
Clause 13: Duty to provide advice and assistance	22
Clause 14: Duty to advise applicant about progress of request.....	23
Clause 15: Manner of compliance	23
Clause 16: No civil proceedings arise for non-compliance.....	23
Clause 17: Refusal of requests	23
Clause 18: Content of refusal notice	24
Clause 19: Confirming or denying existence of particular information.....	24
Part 3 - Absolutely Exempt Information	25
Clause 20: Information accessible to applicant by other means	25
Clause 21: Court information.....	26
Clause 22: Parliamentary privilege.....	26
Clause 23: Conduct of parliamentary business	26
Clause 24: Absolutely exempt communications with the Crown	27

Clause 25: Absolutely exempt personal information.....	27
Clause 26: Information provided in confidence	28
Clause 27: Information the disclosure of which is restricted by law.....	29
Part 4 – Qualified Exempt Information.....	30
Overview.....	30
Clause 28: National security and defence	30
Clause 29: International relations	31
Clause 30: Economy and commercial interests.....	31
Clause 31: Investigations and legal proceedings	32
Clause 32: Law enforcement.....	32
Clause 33: Audit functions	32
Clause 34: Formulation of policy.....	32
Clause 35: Conduct of public business.....	33
Clause 36: Health and safety.....	33
Clause 37: Research and natural resources	34
Clause 38: Qualified exempt communications with the Crown	34
Clause 39: Qualified exempt personal information.....	34
Clause 40: Legal professional privilege.....	34
Clause 41: Information for future publication.....	34
Part 5 – Review and Enforcement	36
Overview.....	36
Clause 42: Review of decisions by the Information Commissioner	38
Clause 43: Review of decisions originally made by the Commissioner	38
Clause 44: Alternative dispute resolution.....	39
Clause 45: Information notices.....	39
Clause 46: Enforcement notices.....	39
Clause 47: Exception from the duty to comply with certain notices.....	40
Clause 48: Failure to comply with notices.....	40
Clause 49: Powers of entry and inspection	41
Clause 50: Right of appeal against notices.....	41
Part 6 – The Information Commissioner.....	42
Clause 51: The Isle of Man Information Commissioner	42
Clause 52: Independence	42
Clause 53: General functions of the Information Commissioner	42
Clause 54: Advice.....	42
Clause 55: Legal practitioners’ panel to provide legal advice and assistance	43
Clause 56: Recommendations as to good practice.....	43
Clause 57: Annual Report of the Information Commissioner.....	43

Part 7 – Publication Schemes and Code of Practice	44
Clause 58: Publication schemes	44
Clause 59: Code of practice.....	44
Clause 60: Compliance with code of practice	45
Part 8 – Supplemental Provisions	46
Clause 61: Record tampering	46
Clause 62: Confidentiality	46
Clause 63: Defamation	46
Clause 64: Notices	46
Clause 65: Subordinate legislation	46
Clause 66: Fees	47
Clause 67: Tynwald procedure	48
Clause 68: Amendment and repeal of enactments.....	49
Schedule 1 – Public Authorities	50
Schedule 2 – The Isle of Man Information Commissioner	50
Schedule 3 – Powers of Entry and Inspection	50
Schedule 4 – Amendment and Repeal of Enactments.....	50
Appendix 1 – List of Direct Consultees	51
Appendix 2 – Code of Practice on Consultations	51
Appendix 3 – Freedom of Information Bill 2014.....	52



Introduction by the Chief Minister

Open government is part of an effective democracy. People must have adequate access to the information on which Government business is based, and Ministers have a duty to explain their policies, decisions and actions to the public.

Good progress has been made in recent times to enhance the openness and transparency of the Government and to make more information available. The draft Freedom of Information Bill is the latest example of moves in that direction.

Meanwhile, of course, the Island already has a robust Code of Practice on Access to Information, in place since 1996, which has recently been strengthened and continues to function well.

When I was elected Chief Minister in 2011, my statement of policy priorities proposed the introduction of a Freedom of Information Bill to underpin trust between the public and Government. The proposal came with two important caveats, however, and these are still highly relevant.

Firstly, even with a Freedom of Information law there will still be areas where legitimate confidentiality has to be protected, a principle that is recognised in similar regimes around the world.

Secondly, this type of legislation cannot be properly implemented without significant cost to Government. When budgets across Departments are under serious pressure, this will inevitably bring an adverse impact on other areas of public spending.

The draft Bill now going out to public consultation therefore seeks to balance the competing demands of openness, confidentiality and affordability.

In addition to creating a statutory right of access to information, the Bill acknowledges the Government's need to respect confidentiality and its duty to protect the privacy of individuals and organisations with the inclusion of a number of well-defined exemptions. As is the case elsewhere there are two categories of exemptions, absolute and qualified, the latter being subject to consideration of the public interest.

Mitigation of some of the potential costs of the regime is proposed in a number of ways including a phased introduction, a statutory right of access which begins with the current Administration, a streamlined complaints procedure including a mechanism to resolve issues through informal means and using an existing regulator to enforce the Act.

The Council of Ministers remains committed to increasing openness and transparency but it has a responsibility to do so within the context of what is practical and realistic given the challenges facing the public finances of our Island.

A handwritten signature in black ink that reads "Allan Bell". The signature is written in a cursive style with a large initial 'A'.

Hon A R Bell MHK
Chief Minister

Code of Practice on Access to Information

The Code of Practice on Access to Information was published by the Council of Ministers in 1996¹.

The number of requests made under the Code is not recorded, but the Government publishes the number of refusals and the reasons why in a report laid before the October sitting of Tynwald each year².

A review of these reports from 2004-05 to 2012-13 shows that there were 40 refusals from Government agencies during this period (see Chart 1). In all other cases, information requested from the Government, either formally through the Code or as part of the routine business of Government, was provided to the person who requested it.

Chart 2 outlines the reasons for the refusal based on the categories contained within the Code. A quarter of refusals were for reasons of internal discussion and advice and the second most regularly used exemption (13%) was because of voluminous or vexatious requests.

At present, the Code allows for an independent review of an authority's decision to refuse by the High Bailiff, who is Commissioner under the Code. In order for the matter to be considered by the Commissioner, it has to be referred by a Member of Tynwald³.

Table 1 summaries the Commissioner's reports since the introduction of the Code. The table highlights the small number of complaints that have been referred to the Commissioner and the even smaller number of complaints that have been upheld.

The first complaint to be upheld was 2005-06, the next such complaint was in 2007-08 and two identical complaints were upheld in 2009-10. A complaint (from 2010-11) was partially upheld in 2011-12 when the Commissioner requested that the Department in question should reconsider the request for information and provide additional information which was originally withheld.

In all other years, there were either no complaints, the complaints were withdrawn or the Commissioner either dismissed or rejected them.

In recent months the Council of Ministers has bolstered the Code of Practice in response to a suggestion in the 2009 Commissioner's report that decisions by the Commissioner should, in effect, be binding on Government agencies.

It has been confirmed by the Chief Minister that should a case be referred to the Commissioner and should he decide that information which had been refused ought to be released, the Council of Ministers will consult with the appropriate Department

¹ The Code of Practice is available at:- <http://www.gov.im/categories/home-and-neighbourhood/code-of-practice-on-access-to-government-information/>

² For the latest report, see pages 3-6 of the Cross-Government Report 2013 available at:- <http://www.tynwald.org.im/business/opqp/sittings/20112014/2013-GD-0045.pdf>

³ The Commissioner's Report for 1 September 2012 to 31 August 2013 is available at:- <http://www.tynwald.org.im/business/opqp/sittings/20112014/2013-NN-0137.pdf>

or Board as required by the legislation. Then, if necessary, Council will use the powers provided within the Government Departments Act 1987, or the Statutory Boards Act 1987, as appropriate, to direct that the relevant Department or Board complies with the Commissioner's determination.

Chart 1: Number of Refusals under the Code of Practice on Access to Information 2004-05 to 2012-13

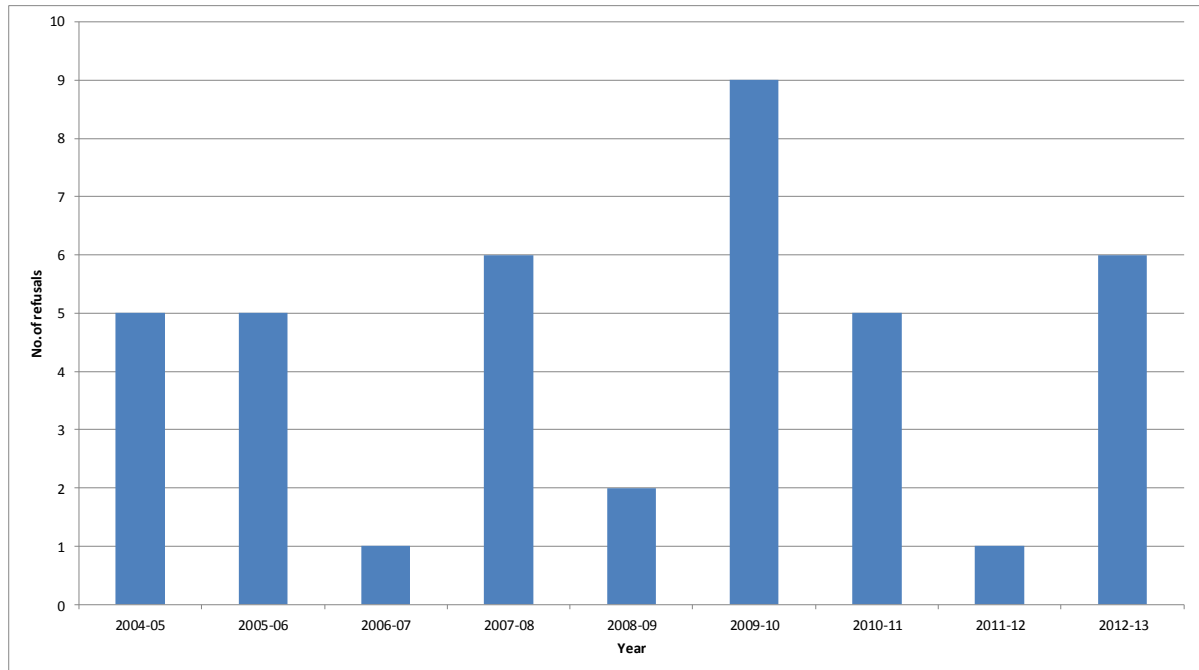


Chart 2: Reasons for refusals under the Code of Practice on Access to Information 2004-05 to 2012-13

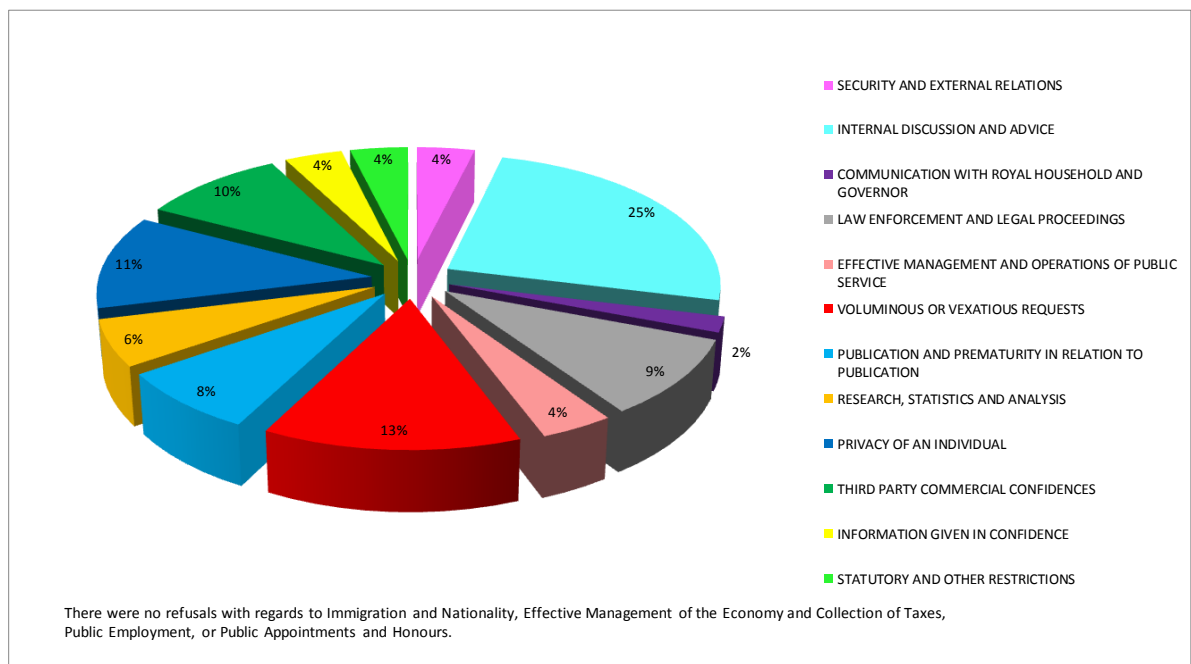


Table 1: Summary of Commissioner's Reports 1996 to 2013

Date range	Summary of Commissioner's Reports
1996-1998	No complaints
1998-1999	No complaints
1999-2000	One complaint, the substance of which was rejected
2000-2001	No complaints
2001-2002	One complaint, later withdrawn
2002-2003	One complaint, later withdrawn
2003-2004	No complaints
2004-2005	No report retrieved
2005-2006	One complaint, upheld
2006-2007	No complaints
2007-2008	Two complaints, one upheld, one rejected (in 2008-09)
2008-2009	No complaints
2009-2010	Two identical complaints, both upheld
2010-2011	One complaint, (partially upheld in 2011-12)
2011-2012	Two complaints, one withdrawn, one dismissed (in 2012-13)
2012-2013	One new complaint, dismissed

Notwithstanding that public awareness of the existence of the Code might have some limitations, it would be reasonable to conclude from these figures that the current system not only works, but it appears to work well.

The public is provided with the vast majority of information which it seeks from the Government and in the small number of instances where the Government refuses to provide information (in accordance with the Code of Practice) the High Bailiff in a majority of cases concludes that the Government has acted properly in withholding the information.

The current system does not, however, provide a statutory right of access to information which is the norm in most other developed jurisdictions across the globe.

It is this gap in the Manx statute book which the enclosed draft Bill seeks to fill.

Financial implications of a Freedom of Information Act

Closing the gap in the statute book comes at a cost; a Freedom of Information (FOI) Act will cost money. In the current economic climate the money spent on providing a statutory right of access to information held by public authorities will be money that cannot be spent on other services and obligations which public authorities have.

As the Chief Minister's introduction makes clear, the key challenge is to balance the competing demands of openness, confidentiality and affordability. This is particularly the case given the breadth of FOI's impact across the public service and its interaction with many other legal concepts.

This consultation exercise informs the impact assessment that will accompany the final version of the Bill. Public authorities and those companies falling within the Bill's scope are strongly encouraged to give careful consideration to the financial impact of complying with a statutory FOI regime.

A full impact assessment, drawing together information received during this consultation exercise, will be published before the Bill is introduced into the Branches of Tynwald.

In preparing this draft Bill, the Chief Secretary's Office has made certain cost projections for the central implementation of the Act.

In the House of Keys on 12 November 2013, the Chief Minister advised that the working estimate for implementation was up to £500,000 per year for the initial stages, depending upon the timescale over which preparation is undertaken. The Chief Minister also confirmed his expectation that the sum of £500,000 ought not to be exceeded within any financial year going forward.

This estimate does not include a detailed assessment of the compliance costs of individual public authorities.

However, the eventual cost of the regime could be lower than previous estimates because the Council of Ministers has sought to set the parameters of the statutory regime in such a way as to minimise its upfront costs through, for example, phasing its introduction, limiting its chronological scope, streamlining the review and appeals framework with a focus on informal resolution and providing a statutory right of access to ordinary residents of the Isle of Man.

The Government cannot afford to have FOI experts in every Department, Board and Office for what may turn out to be a large number of requests but fewer than 100 complex cases. It is therefore proposed to create a central advisory unit which supports the Departmental decision making process. The initial project of training and development of employee and public guidance will be centralised and in the longer term on-going administration and advice is likely to remain centralised, but decision making in relation to release of information will remain the responsibility of the legal entity involved.

Estimates currently show that the system proposed will require 3 additional staff; one legally qualified person who would eventually join the Attorney General's Chambers and two central administration and advisory staff.

There will be costs associated with publication of guidance (although this will be primarily electronic), rolling out training to front line staff and managers and building capacity to deal with more complex queries within more senior roles.

No costs have been taken into account for local authorities at this stage or for publicly-owned companies and other companies that will fall within the Act's scope. There will also be a resource requirement to reflect the new functions of the Data Protection Supervisor who will be the Information Commissioner under the Act (although these will be much lower than if a separate Commissioner and office were to be established).

Although the Code of Practice has been operating since 1996 with no dedicated budget allocation, it is not the case that complying with the Code has been cost free. However, the introduction of a statutory access regime with an appeal route that ends in the High Court, necessarily elevates the cost of compliance above the present level. All public authorities, once covered by the Act, will have to take their statutory responsibilities – and the costs associated with complying with them – seriously.

Frequently Asked Questions⁴

1. Which authorities will be covered by the Freedom of Information Act?

In order to properly assess and manage the impact of the Act, the Council of Ministers proposes to phase its introduction. It is anticipated that in the first instance, the Act will only apply to Government Departments and to the Cabinet Office.

When fully introduced, the Act will cover all public authorities in the Isle of Man; that is all Government agencies (Department, Boards, Offices and associated Bodies) and all local authorities.

The Act will also cover publicly-owned companies, defined as either:-

- a company in which one or more public authorities owns, whether directly or indirectly, shares or other interests which, when taken together, enable them to exercise more than half the number of votes in a general or other meeting of the company on any matter; or
- a company to the extent that it performs functions or exercises powers under an enactment.

The Act does not cover what might be termed 'semi-public' authorities such as political parties, trade unions or other associations.

2. What information could be released under the Freedom of Information Act?

Unless subject to an exemption (absolute or qualified), or if a practical refusal reason applies, all information held by a public authority covered by the Act is potentially subject to release if requested.

This means, for example, that businesses which provide goods or services to public authorities, or which receive money from them, should be aware that information which they provide to an authority (or which it holds about them) could be released. However, in such circumstances, it is likely that certain exemptions, such as information provided in confidence or the economy and commercial interests will be relevant.

Companies which fall within the second definition of publicly-owned companies in question 1 should consider the potential implications of the Act with the public authority on whose behalf they perform a statutory function or exercise powers.

A request for information needs to be considered on a case by case basis, and release will depend on a number of factors including the nature of the information requested and the timing of a request (for example, an exemption which applies at one point in time might not apply at a later stage).

⁴ The FAQs are written for guidance purposes only and should not be taken as official advice on how the Freedom of Information Act will operate. The Questions are written as if the Bill as currently drafted will be enacted; therefore references to the 'Act' are for presentational purposes only and do not pre-empt the outcome of the consultation process.

Applicants cannot use the Freedom of Information Act to request their own personal information; they will continue to have to submit a subject data access request under the Data Protection Act 2002. There are also exemptions for personal information of a third person as part of a complex interaction between the Freedom of Information Act and the Data Protection Act.

In summary, there are a number of circumstances under which information will not be released under the Act, including if:-

- It was created before 11 October 2011, the start of the current Administration (see question 8);
- It was requested by someone not ordinarily resident in the Isle of Man (see question 9);
- It relates to information held by a public authority not listed in Schedule 1 of the Act at the time of the request (linked to the Act's phased introduction, see question 1);
- An absolute or a qualified exemption applies;
- A practical refusal reason applies (e.g. if the request is vexatious);
- It is not a 'valid request' (e.g. if the request is not submitted in the correct manner).

In some of these circumstances, a public authority would consider a request with reference to the existing Code of Practice on Access to Information (see question 7).

3. Will Council of Ministers' papers be available?

Proceedings of the Council of Ministers are currently statutorily confidential under the Council of Ministers Act 1990. This position will not change for information created prior to the proposed start of the freedom of information regime, 11 October 2011.

However, for information created from this date it is proposed that the legal position will change to the extent that access to Council papers will be governed by the exemption regime and other parameters set out in the Freedom of Information Act.

As is the case in other jurisdictions, the introduction of a Freedom of Information Act in the Isle of Man does not mean that Council of Ministers' papers, or other internal advice and discussions, will be available to the public without restriction; a position which is central to the balance between openness and effective government.

4. Why introduce a Freedom of Information Act if the current Code of Practice works well?

At present, unlike in many other developed jurisdictions, the people of the Isle of Man do not have a statutory right of access to information held by public authorities.

Under a Freedom of Information Act, residents will be able to exercise their 'information rights' with the added weight and with the protection of the law, thus providing a firmer footing on which to do so.

The Act creates a number of statutory duties on public authorities which are not in place at present, such as a duty to provide advice and assistance to people making requests and a duty to advise an applicant about the progress of their request.

Furthermore, the experience in other jurisdictions has shown that the force of law is often required as a driver for cultural change within public authorities to reinforce a culture of openness and transparency.

The introduction of a Freedom of Information Act honours a commitment which the Chief Minister gave in his statement of policy priorities to Tynwald when it elected him to the position.

5. Why will a Freedom of Information Act cost more than the Code of Practice?

The Code of Practice is embedded across Government but in some parts of Government, especially those which receive very few requests under the Code, the working knowledge of the Code is directly proportionate to the number of requests that are received.

However, the introduction of a statutory freedom of information regime, placing as it does a legal duty on public authorities and their staff to provide information, necessarily increases the awareness raising and training obligations on authorities; obligations which will have to be rigorously applied and which are ongoing. These obligations will incur a cost, particularly in respect of potential legal proceedings and legal advice.

Moreover, experience from elsewhere has shown that a statutory right of access to information has increased the number of requests for information which are received by public authorities. This can mean that more officer time and more resources are required to meet this increased demand. It is the potential increase in the number of requests which in some authorities, particularly smaller ones, has led to very real concerns about their ability to effectively undertake other day-to-day duties.

6. How will the Freedom of Information Act differ from the Code of Practice?

The fundamental difference is that it creates a legally enforceable right to access information. It also imposes legal duties on public authorities.

As a consequence of creating a legal access right, the Act has to be more prescriptive than the Code in a number of areas ranging from the requirements necessary for an information request to be valid through to the review and enforcement provisions.

As already noted, the Act will alter the basis on which information can be requested and the circumstances under which it will be made available. The amendment to the statutory confidentiality of Council of Ministers proceedings is an example of this change.

The type and range of information available under the Act, however, is expected to be similar to what is already obtainable under the Code of Practice.

In accordance with all other freedom of information regimes, the Act (like the Code), contains exemptions from the right of access. In the Act, these exemptions are either absolute or qualified (the latter requiring an assessment of the public interest), a much clearer division than in the current Code.

Moreover, it is proposed that the Act will use different terminology than that used in the Code, examples being the consolidation of 'practical refusal reasons' and the 'decision period' for public authorities to decide whether or not to release information.

7. In what circumstances will the Code of Practice still apply once the Freedom of Information Act has been introduced?

Given the proposed phased implementation of the Act, together with the parameters which it will set around the scope of the statutory regime, the Code of Practice will still cover information requests in the following circumstances:-

- Requests for information created before 11 October 2011;
- Requests from non-residents of the Isle of Man;
- Requests for information held by public authorities not covered by the Act during its phased introduction which are currently subject to the Code; and
- Requests which are not valid requests for information under the Act (in certain circumstances).

8. Why limit the Freedom of Information Act to information created since the start of the current Administration?

The Council of Ministers has considered a number of parameters to help control the costs of implementing the Act. One of these parameters is the date from which the Act becomes effective in terms of the information which falls within its scope.

Opening up all information held by public authorities to a statutory freedom of information regime would significantly increase the cost for compliance for a number of reasons not least by increasing the potential number of requests and the obligations on public authorities to proactively manage and prepare older information for the statutory right of access.

As noted in question 7, requests for information created before 11 October 2011 will be considered with reference to the existing Code of Practice. There are also access rights to public records provided by the Public Records Act 1999 which are not affected by the Freedom of Information Act.

9. Why create a statutory right of access to information for Isle of Man residents only?

One of the consequences of freedom of information legislation elsewhere is the use of requests by private companies seeking information from public authorities which they then sell on.

These requests are often for detailed information and are submitted to many public authorities at the same time in a 'round robin' type format. As the Isle of Man

Government appears on many databases and can sometimes be mistaken by companies as part of the UK – or subject to the UK Freedom of Information Act – it is not uncommon for public authorities on the Island to be caught by these ‘round robin’ requests.

By restricting the scope of the Act to Isle of Man residents, public authorities can avoid a statutory obligation to respond to automated ‘round robin’ requests from other jurisdictions and instead focus limited resources on requests from residents who consume the Government’s services and who are directly affected by its decisions.

As noted in question 7, requests for information from non-Island residents will be considered with reference to the existing Code of Practice.

10. Why not just put the Code of Practice on Access to Information on a statutory footing?

This question has been asked in the past. The Freedom of Information Act is essentially what putting the existing Code of Practice on a statutory footing looks like.

By enacting the Code, provisions in an Act by their very nature have to be more prescriptive and precise than when on a non-statutory basis.

However, as the answers to some of previous questions have noted, the Council of Ministers has not sought to introduce an overcomplicated Act or to make its provisions in anyway disproportionate to the spirit and practice of the Code.

An Act is different from a Code, and these inherent differences are encapsulated in the Freedom of Information Act.

How the consultation will work

The purpose of this consultation exercise is to invite comments on the draft of the Freedom of Information Bill 2014, included in this document at Appendix 3.

The commentary within this document should be read with reference to the draft Bill.

An accompanying electronic feedback form, allowing both general comments and comments specific to each clause has been prepared. This feedback form can be completed, saved and returned to foiconsultation@cs.gov.im. There is a 'submit' function on the form to assist this process.

If you do not wish to complete the form, respondents can send their comments by email to the same email address, foiconsultation@cs.gov.im.

This consultation is not a referendum; rather, it seeks comments and views from which the Council of Ministers can take a more informed decision on the content of the draft Bill.

Responses to the consultation

The deadline for the submission of responses is: **Friday 21 March 2014.**

All electronic responses should be emailed to: foiconsultation@cs.gov.im

If you do not have access to the internet, responses can also be submitted to:

Dr Stuart Quayle
Head of Council of Ministers Administration
Chief Secretary's Office
Government Office
Bucks Road
Douglas
IM1 3PG

Additional copies of this document and further information

For hard copies of this document, please telephone 01624 685708. Copies can be collected from the Chief Secretary's Office at the above address.

An electronic version of this document and the accompanying feedback form can be found by following the links on the Government's current consultation page, available at: <http://tinyurl.com/ohle7dc>

If you have any queries about this consultation, please telephone 01624 685708 or email foiconsultation@cs.gov.im.

Important points to remember

- When submitting your views please indicate whether you are responding as an individual or on behalf of an organisation or a group of people.

- Where appropriate you should provide evidence to support your response.
- To ensure that the process is open, transparent, and in line with the Government's Code of Practice on Consultation, submissions will only be considered where the name of the individual(s) or organisation responding is provided.
- Unless you specifically request otherwise, any responses received may be published either in part or in their entirety, including your name.
- Please mark your response clearly if you wish your response and name to be kept confidential.
- Confidential responses will be included in any statistical summary and numbers of comments received.
- Any anonymous, abusive, or offensive responses will be discounted.
- The responses received do not guarantee changes to the draft Bill.

Summary of responses

The Chief Secretary's Office will aim to publish a summary of the responses six weeks after the closing date of the consultation.

Overview of the Draft Freedom of Information Bill 2014

Part 1 – Introductory

Clause 2: Commencement

The draft Bill allows the Council of Ministers by order to introduce different parts of the Freedom of Information (“FOI”) Act on different dates for different purposes and in so doing follows the established commencement procedures for many Manx statutes.

To fall within the scope of the Act, a public authority or a publicly-owned company (including a company to the extent that it performs functions or exercise powers under an enactment) has to be listed in Schedule 1 of the Act.

The Council of Ministers can amend Schedule 1 by order to add additional bodies to it and this will form the main mechanism for the Act’s phased implementation.

A full assessment of the impact on authorities’ day-to-day operations will help inform the exact nature and speed of the phased implementation so that the Act’s impact can be properly assessed and managed.

It is the Council of Ministers’ intention in the first instance to extend the Act to Departments and main Offices. However, in time, all government agencies and all local authorities in the Isle of Man, together with publicly-owned companies as defined in the Act, will fall within its scope.

Therefore, all government agencies, central and local, and companies within the scope of the Act, should be making preparations for their future obligations at an early stage and use this consultation exercise to help quantify the impact of those obligations.

Clause 3: Purpose

The purpose of the Bill is to give residents of the Isle of Man a statutory right of access to information held by public authorities in accordance with the principles that information should be available to the public to promote the public interest and that exceptions to the right of access are necessary to maintain a balance with the rights of privacy, effective government and value for the taxpayer.

Clause 4: Application

In order to balance the financial and operational impact of the Act with the rights which it gives to the public, the draft Bill proposes that the statutory FOI regime will apply to information created on or after 11 October 2011, the start of the current Administration as marked by the election of the Chief Minister. The Council of Ministers is able to amend this date to an earlier date by order.

Access to information created before this date will be governed by the existing non-statutory Code of Practice on Access to Information. The Code will also govern access to information by non-residents and access during the phased implementation to information held by a public authority which is not listed in Schedule 1 and to which the Code currently applies.

The Freedom of Information Act will not amend the operation of the Public Records Act 1999 or the access rights created by it. However, with the passage of time, information falling within the FOI regime will be covered by the access regime set out in the Public Records Act so the integration of the two (for example, the disapplication of certain FOI exemptions) will have to be addressed through primary legislative change in the future.

Clause 5: Interpretation

This clause sets out the interpretation of terms within the Act.

Clause 6: Meaning of public authority

In order to effectively manage the introduction of a statutory FOI regime, the draft Bill is set out to allow a phased implementation with regard to the number of public authorities which fall within the regime.

The FOI regime will apply to a person, body or the holder of any office, or to a publicly-owned company listed in Schedule 1 of the Act.

Schedule 1 may specify that the Act only applies to information of a specified description and in these cases nothing in the Act applies to any other information held by the authority. An entity listed in the Schedule is subject to any qualification set out therein.

The Schedule can be amended by order by the Council of Ministers, with the exception of adding the Lieutenant Governor.

The draft Bill defines a publicly-owned company:-

- as a company in which one or more public authorities owns, whether directly or indirectly, shares or other interests which, when taken together, enable them to exercise more than half the number of votes in a general or other meeting of the company on any matter; or
- a company to the extent that it performs functions or exercises powers under an enactment.

The latter provision will cover private companies only to the extent that they undertake a statutory function (prisoner transfers, certain social care services, for example), a so-called 'FOI following the public pound' provision. It is not intended that the Act will be extended in this regard in the first instance and this provision will form part of its phased implementation. Further work is needed by Government Departments and companies who will fall within the scope of the Act to properly assess the practical impact of this provision.

Part 2 – Access to Information held by Public Authorities

Clause 7: Right of access to information held by public authorities

The draft Bill proposes, subject to the Act and in accordance with its provisions, that every person who is ordinarily resident in the Isle of Man will have a legally enforceable right of access to information held by a public authority.

The Act does not prevent public authorities from lawfully disclosing any information which they hold, so even if there are grounds to refuse a request in the Act, an authority can nonetheless release information to an applicant (if it is lawful so to do).

Clause 8: Requests for information

A person wishing to make a request under the Act must do so in the form prescribed by regulations and the request must be accompanied by a fee (if any) for making a request (as prescribed by regulations).

Clause 66 sets out the proposed framework for fees in more detail, including that a fee for a request for information does not need to be set. Only if one is set will it have to accompany a request in order for it to be a valid request under the Act.

The form, which can be transmitted by electronic means, must require that an applicant provides their name, address for correspondence and an adequate description of the information requested. The form must also request the applicant to give consent to disclosure of their name by the authority. The latter provision will assist those authorities who may wish to publish their FOI responses in a disclosure log (or similar) and therefore benefit from the exemption in clause 20, information accessible by other means. It will also assist if an authority receives a request for information for the names of people who have made FOI requests to it.

Clause 9: Requests taken to relate to information held at time of request

Under the draft Bill, a public authority has to respond to a request on the basis of the information that it holds at the time that a request is made.

However, an authority can take account of any amendment or deletion to that information if that amendment or deletion would have occurred regardless of the request.

So, for example, if under the terms of an authority's established deletion policy the requested information would be deleted prior to a request being complied with, the Act allows that information to be deleted in the established manner and the requester would not receive the information (under clause 10(4)(a), the authority would not hold the information).

Clause 10: Grant of requests for information

A public authority must give an applicant the information which they request, if done so in accordance with the Act, other than when information is absolutely or qualified exempt information or a practical refusal reason applies.

When a practical refusal reason applies, an authority is able to provide the information on payment of a fee determined in accordance with the regulations.

Absolutely exempt information is information covered by a provision of Part 3 of the Act and it is considered in more detail below. Qualified exempt information is information covered by a provision of Part 4 of the Act and which the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Again, this is discussed in more detail below.

The draft Bill proposes the following practical refusal reasons:-

- if the public authority does not hold or cannot find the requested information (after taking reasonable steps to do so);
- if after an authority has fulfilled its duty to provide advice and assistance (clause 13), the applicant has submitted the request for information in a way that is illegible or not capable of being used for subsequent reference; the information requested cannot be provided without substantial collation or research; or the authority estimates that the cost of searching for and preparing the information would exceed the amount specified in relevant regulations;
- if the applicant has not complied with their duties under clause 12 (public authority may request additional details and fees);
- if the applicant refuses to consent to disclosure of their name;
- if the request is vexatious, malicious, frivolous, misconceived or lacking in substance; and
- if the request relates to information that is identical, or substantially similar, to information previously requested by, and supplied to, the applicant and a reasonable period of time has not passed between compliance with the previous request and the making of the current request.

The terms 'vexatious, malicious, frivolous, misconceived or lacking in substance' are not defined in the Bill. Guidance will be issued to public authorities under the code of practice proposed in clause 59 of the Bill (see below) in relation to the practical application of these terms in determining whether or not to refuse a request. It is anticipated that they will be given their ordinary meaning in any such guidance.

Clause 11: Time for deciding request

An authority has to make a decision on a request for information promptly, and in most cases, within 20 working days of receiving the request. Regulations, subject to Tynwald approval, can prescribe another period in which to make a decision.

When an authority is considering whether a qualified exemption under Part 4 applies to a request, it has to notify the applicant within 20 working days (or other prescribed period) and keep the applicant informed about progress of its consideration. Whilst still under a duty to decide promptly, there is no set timeframe in which to make a decision. However, in addition to having to decide promptly, an

authority also has to make a decision on the request as soon as is reasonable in all the circumstances. The period that is reasonable in the circumstances is to be determined having regard to a) the time required to consult with a person who may be affected by disclosure or about whether access to the information would be in the public interest or b) whether dealing with the request for information would substantially or unreasonably interfere with the day-to-day operations of the authority.

The code of practice under clause 59 of the Bill has to make provision in relation to the determination of the public interest when considering requests concerning qualified exempt information.

In the draft Bill, where an authority fails to comply with an information request (other than a request relating to qualified exempt information) within the period(s) set out in this clause, or within such further period as this applicant may allow (for example, as a result of an agreement reached through communication with the authority), the applicant can treat the failure as a refusal by the authority to supply the requested information.

Clause 12: Public authority may request additional information and fees

Under the draft Bill, an authority may, within the period allowed for making a decision (see previous clause) and in writing, request from an applicant information that it reasonably requires to identify the requested information. It can also request information to prove residency if it believes on reasonable grounds that the applicant is not resident on the Isle of Man.

On the same terms, an authority is able to require that the applicant pays fees, calculated in accordance with regulations, in order to comply with the request (see clause 66 for fuller consideration of the proposed fees structure).

The additional information and fees have to be provided within 28 days of the notice from the authority, otherwise it constitutes a practical refusal reason (under clause 10). This provision is intended to aid case management within authorities so that open requests are not, in effect, kept 'hanging' indefinitely.

The time between the date of the authority requesting the additional information or fees and them being provided is disregarded for the purposes of calculating the authority's decision period.

Clause 13: Duty to provide advice and assistance

It is proposed that all public authorities must give reasonable advice and assistance to a person wishing to make a request in accordance with the Act for information that it holds and to a person whose request is not in accordance with the Act or where the request is for information which the authority does not hold.

The code of practice under clause 59 of the draft Bill must make provision in relation to transfer of requests by one public authority to another which holds or may hold the information requested (including how the time within which obligations under this Act must be fulfilled are modified for that purpose).

Clause 14: Duty to advise applicant about progress of request

It is important that public authorities maintain meaningful dialogue with applicants when considering their requests for information, particularly when they are considering whether or not a qualified exemption applies, a process which could be both complex and lengthy.

To help facilitate this dialogue, the Bill proposes a duty on authorities to ensure that they must give reasonable notice to an applicant about the progress of the applicant's request for information. The duty includes, but is not limited to, instances where an authority is considering a qualified exemption and where it is unable to make a decision within the decision period.

The duty is not confined to the above instances and other matters which might fall within it will be considered in the code of practice under clause 59 which has to make provision in relation to this clause.

Clause 15: Manner of compliance

The draft Bill allows an authority to comply with a request for information by any reasonable means.

However, the draft Bill also allows the applicant to express a preference for the manner in which they wish to receive the information and the authority must, where reasonably practicable and with regard to all the circumstances, including cost, provide it in this preferred manner.

The means by which an applicant can express a preference for receiving requested information are: the provision of a copy in permanent form or in another form acceptable to the applicant; the provision of a digest or summary; and the provision to the applicant of a reasonable opportunity to inspect a record containing it.

In circumstances where the authority determines that it is not reasonably practicable to give effect to a preference, it must notify the applicant of the reasons why.

Clause 16: No civil proceedings arise for non-compliance

Without affecting the powers of the Information Commissioner in respect of a failure to comply with notices (see clause 48), the draft Bill provides that no action arises in civil proceedings by reason only of the failure by an authority to comply with an information request.

Clause 17: Refusal of requests

If the requested information relates to information which is either absolutely exempt information, qualified exempt information, or if a practical refusal reason exists, an authority must, within the decision period, give the applicant a refusal notice.

An authority is not obliged to give a refusal notice in relation to a request for information if it has done so in relation to a previous identical or substantially similar request and it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

Clause 18: Content of refusal notice

A refusal notice issued by an authority must specify the reason why it is not required by the Act to provide the applicant with the requested information. If the information is absolutely exempt information or qualified exempt information it must state (if not otherwise apparent) why the exemption applies.

If the information is absolutely exempt information because of clause 20 (information accessible by other means) the notice must state the other means by which it is accessible.

A refusal notice must also contain details of the following:-

- steps the applicant might take to be given the information, despite the application of a practical refusal reason;
- the procedure provided by the authority for dealing with complaints about the handling by it of requests for information or about the right of application to the Commissioner conferred by clause 42 and;
- the alternative dispute resolution processes available under clause 44.

The procedure for dealing with complaints is one of the provisions that the code of practice under clause 59 must provide for and, in effect, represents an applicant's first appeal against the decision by an authority to withhold information; it effectively provides for an internal review of the authority's original decision. Under clause 42, it is also a step which has to occur before a matter can be referred to the Information Commissioner for a decision.

If an authority has refused a request on the grounds of a qualified exemption, the refusal notice must state the public authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Clause 19: Confirming or denying existence of particular information

The draft Bill proposes that nothing in the Act requires a public authority to confirm or deny whether it holds information of the description specified in the request if the confirmation or denial would itself be absolutely exempt information or qualified exempt information (other than if the only reason for refusing to confirm or deny whether it holds information is that the information is accessible by other means).

If an authority refuses to confirm or deny whether it holds information it is taken to have refused to give the applicant the information and it need not inform the applicant of the specific ground(s) upon which it is refusing to confirm or deny that it holds the information.

Part 3 - Absolutely Exempt Information

Overview

All FOI regimes contain exemptions to the right of access. As the Purpose clause of the Bill sets out, there are legitimate reasons why certain information is exempt from disclosure reflecting the need to maintain a balance with rights to privacy, effective government and value for the taxpayer.

Thus, exemptions are in place to provide protection to public authorities which hold information and to people and businesses who have supplied information to public authorities.

If an absolute exemption applies there is no obligation on the authority receiving the request to consider and weigh the benefits of disclosing the information because there is no entitlement on the part of the applicant to the information. Simply falling within the scope of the exemption is sufficient reason for the information to be exempt.

If information falls within an absolute exemption an authority can automatically withhold the information without any further consideration. However, in such cases the authority must explain, if not otherwise apparent, why an exemption applies (via a refusal notice, see clause 18).

The draft Bill sets out 8 absolute exemptions which are broadly in line with FOI regimes elsewhere and which cover situations where disclosure of information is not appropriate.

Clause 20: Information accessible to applicant by other means

The Act will not replace existing access avenues for providing information, whether that be by statute, established methods of publication or other means. Applicants cannot use an FOI request to oblige public authorities to provide information that is available to them elsewhere.

The clause establishes that information is not available to an applicant under FOI if it is reasonably accessible (free of charge or on payment) other than by requesting the information under the Act. This clause sets out the circumstances under which information is taken to be reasonably accessible, circumstances which include when another piece of legislation sets out access rights (for example, access to the health records of a deceased person through the Access to Health Records and Reports Act 1993).

A public authority will have to consider an applicant's circumstances and it is acknowledged that information which is reasonably accessible to one applicant might not be reasonably accessible to another. In this way there is a subjective element to relying on this exemption and an authority may have to seek additional details from the applicant to help ascertain whether or not information is reasonably accessible by other means.

Clause 21: Court information

This exemption contains three branches and covers information held only because it is contained in a document:-

- filed with – or otherwise placed in the custody of a court – or served upon or by a public authority for the purposes of legal proceedings;
- created by a court or a member of the administrative staff of a court for the purposes of legal proceedings; or
- placed in the custody of or created by a person conducting an inquiry or arbitration for the purpose of the inquiry or arbitration.

As the exemption relates to information held by a public authority 'only' by virtue of it being contained in a document for the purposes set out above, if an authority also holds information for another purpose (e.g. a contract which is the subject of legal proceedings) then the information could fall out with this exemption.

It is important to note that the FOI regime does not override existing procedures for disclosure (such as in sensitive family cases) which will continue to be controlled by the Court and therefore it does not provide an alternative access route to that governed by rules of court.

The exemption also contains interpretative provisions to explain the meaning of terms contained within.

Clause 22: Parliamentary privilege

See comments at clause 23 below.

Clause 23: Conduct of parliamentary business

Although the above exemptions are separate within the Bill, they can be considered together for present purposes.

These exemptions differ from others in that they allow the appropriate person (either the President of Tynwald or the Speaker of the House of Keys) to issue certificates which are conclusive evidence that the exemptions apply.

In such circumstances, there is no role for the Commissioner in reviewing whether or not the exemption has been correctly applied, although the Commissioner would be able to establish whether or not the certificate was authentic (see clause 42(4)). The Commissioner would also be able to investigate any complaints which arise under other parts of the Bill (e.g. fees, time limits, advice and assistance etc.).

These exemptions can be relied upon without issuing a certificate and in such circumstances the Commissioner would be able to consider whether or not the exemptions had been correctly applied.

Although the Bill covers Tynwald and its Branches (the House of Keys and the Legislative Council), individual Members of Tynwald do not fall within its scope. Constituency correspondence, for example, could not be subject to an FOI request.

As an aside, it is worth noting that there are no provisions in the corresponding Scottish Act in respect of parliamentary privilege as there is no concept of parliamentary privilege in relation to the Scottish Parliament or its members in the sense understood in Westminster. As the Parliament is a creature of statute, unlike Tynwald, the Scotland Act 1998 contains a number of provisions designed to give protection to Parliament so that it can conduct its business⁵.

Clause 24: Absolutely exempt communications with the Crown

There are two exemptions covering communications with the Crown (see also qualified exempt communications with the Crown in clause 38). Under this absolute exemption, information is exempt if it relates to communications with the Queen, the heir to, or the person who is for the time being second in line of succession to the Throne or a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne.

This exemption aligns the draft Bill with recent amendments to the UK FOI Act in this regard where it covers correspondence with the subject and information that relates to such correspondence, including correspondence made and received by persons acting on behalf of the subject.

The exemption also covers communications with the Lieutenant Governor, who is not a public authority under the Act.

Clause 25: Absolutely exempt personal information

In discussing this exemption, it is useful to underline the fact that applicants cannot use an FOI request to access information which a public authority holds about them (i.e. personal data). If an authority receives such a request, it must handle it as a Data Subject Access Request in accordance with the Data Protection Act 2002.

Given the separation of the two regimes, the personal information of the individual requesting the information is subject to an absolute exemption. Personal census information is covered by this exemption.

The second part of the exemption covers information which is personal data of which the applicant is not the data subject and where one of the following applies:-

- in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 2002, the disclosure of the information to a member of the public (otherwise than under this Act) would contravene any of the data protection principles;
- in a case where the information falls within paragraph (e) of that definition of "data", the disclosure of the information to a member of the public (otherwise than under this Act) would contravene any of the data protection principles if the exemptions in section 29A of the Data Protection Act 2002 (manual data held by public authorities) were disregarded; and

⁵ See for example Sections 40-43, of the Scotland Act 1998, including Section 41 on Defamation practices.

- by virtue of a provision of Part 4 of that Act, the information would be exempt from section 5(1)(c) of that Act (data subject's right of access to personal data in intelligible form) if the applicant were the data subject.

To be clear, the latter provision does not give information to a third party in lieu of a data subject. It is required because the provisions of the Data Protection Act 2002 are expressed in terms relating to the data subject. In order to get the provision to work in the FOI regime (where it does not relate to the data subject), it is necessary to deem the relevant party as standing in the data subject's shoes to assess whether or not the provision can apply.

In practice, what this exemption means is that to determine a request for information which relates to personal information, one must turn to consider the provisions of the Data Protection Act 2002, which are about ensuring adequate protection of privacy of personal information.

The consequential amendments to the Data Protection Act 2002 which fuses the FOI and the Data Protection regimes, including the new section 29A, have been developed in consultation with the Data Protection Supervisor, as have the relevant exemptions, and are set out in Part 1 of Schedule 4 of the draft Bill.

The amendment to the definition of data in the Data Protection Act 2002 to include a new paragraph (e), encompassing recorded information held by an authority but outside the original definition, is an example of the necessary amendments. This change allows, for example, personal information about third parties in an unrelated manual file to be protected under this exemption.

However, the extended definition of data only works in respect of manual information held by an authority for the purposes of FOI, the right of access under the Data Protection Act 2002 does not extend to this new category of data.

Clause 26: Information provided in confidence

Under this exemption, information is absolutely exempt if it was obtained by an authority from another person (including another authority) and, crucially, its disclosure would constitute a breach of confidence actionable by that or any other person.

Some statutes enable authorities to compulsorily require that certain information is provided to them, which may give rise to the necessary confidentiality. There are also numerous statutes which make provision for disclosure of certain types of information they hold only to certain limited classes of people through prescribed gateways (for example information received by the Financial Supervision Commission or the Insurance and Pensions Authority relating to clients of regulated entities) and then only in pursuance of certain objects.

It is worth noting that contracts between public authorities and third parties would not necessarily be covered by this exemption; whilst some information within contracts might be provided by third parties, contracts themselves would not normally fall within the class of information 'obtained from another person'.

Another important consideration in the applicability or otherwise of this exemption is whether disclosure would breach a duty of confidence to the extent that it is actionable (i.e. a breach in respect of which a claim would, on the balance of probabilities, succeed rather than simply being arguable). One of the factors making a breach actionable is that the information in question has the necessary quality of confidence and this, together with the other factors, means that authorities will have to carefully consider confidentiality clauses in contracts; simply marking information confidential may not be enough to engage this exemption.

The code of practice under clause 59 of the draft Bill has to make provision in relation to inclusion in contracts entered into by public authorities of terms relating to the disclosure of information.

Clause 30 below is designed to offer protection against the disclosure of information which may prejudice the commercial interests of a person (including the public authority holding it).

Clause 27: Information the disclosure of which is restricted by law

The Act is not an alternative route to bypass disclosure restrictions provided for by other statutes (for example, in relation to Income Tax or the Official Secrets Act) so this and related matters are covered by this exemption.

Information is absolutely exempt if its disclosure is prohibited by or under any other law, if its disclosure is incompatible with an EU obligation that applies to the Island (potentially, for example, in relation to mutual assistance in Customs and Excise matters) or if disclosure would constitute a contempt of court.

Part 4 – Qualified Exempt Information

Overview

The second set of exemptions in the draft Bill is the 14 qualified exemptions which are broadly in line with those in other FOI regimes, modified where necessary to meet the Island's circumstances.

A public authority is not required to provide information to an applicant if it is qualified exempt information and for information so to be, it must be covered by a provision in this Part *and* the public interest in maintaining the exemption (i.e. not disclosing) must outweigh the public interest in disclosing the information. In cases where the public interest in disclosure is *equal* to the public interest in withholding the information, the information should be released.

This latter consideration is the public interest test, the main factor setting qualified exempt information and absolute exempt information apart. The draft Bill does not define 'public interest' but the clause 59 code of practice must make provision in relation to the determination of the public interest when considering requests concerning qualified exempt information.

Given the Isle of Man's relative size and the nature of our small community with, for example, a limited number of options when providing goods and services to public authorities, consideration of the public interest will necessarily be different from a similar consideration in larger jurisdictions.

An additional element when considering whether or not certain qualified exemptions can be relied upon is the prejudice test. This test, already present in the existing Code of Practice on Access to Information, is relevant in those qualified exemptions which include the term 'would, or would be likely to, prejudice...'

In such instances, the prejudice test comes before the public interest test when considering the exemption as the basis for refusing a request. If seeking to rely on these exemptions, a public authority will have to identify the relevant interests which are impacted and establish both the nature of the prejudice and the likelihood of it arising. Only once these steps have been taken, can an authority apply the public interest test.

Guidance for applying the prejudice test will be issued and it is proposed that although prejudice does not have to be substantial or be certain to occur it must be more than trivial for the exemption(s) in question to be relied upon.

Clause 28: National security and defence

This exemption contains two limbs: the first prevents the disclosure of information which is required to safeguard national security; and the second protects information the disclosure of which would or would be likely to, prejudice the defence of the British Islands or the capability, effectiveness or security of any relevant forces.

The national security limb of this exemption differs from other qualified exemptions (including the defence limb) in that it allows the Chief Minister or the Minister for Home Affairs to certify that the exemption applies, and certification is conclusive

evidence of that fact (which means that there is no right of review by the Information Commissioner, see clause 42(4)). The certification, in common with other FOI regimes, can describe information in a general way and may be expressed to have prospective effect (i.e. can be prepared in the expectation of future requests).

Unlike the national security element which is class based (i.e. information just has to fall with the criteria of the exemption), the defence aspect of this exemption is prejudice based.

Clause 29: International relations

This exemption has three interlinked branches which seek to protect information whose disclosure may affect the Island's international relations.

The first two branches are prejudice based and cover information which would, or would be likely to, prejudice 1) relations between the Island and the United Kingdom, any other State or an international organisation or court, or 2) the interests of the Island abroad or the promotion or protection of any such interest.

The third branch covers confidential information if it is obtained from the same categories as in the first branch. The criteria for confidential information are set out in this exemption as are other interpretive provisions.

Clause 30: Economy and commercial interests

This exemption contains two limbs: the economy and commercial interests.

One of the Council of Ministers' over-riding objectives is growing the economy in the face of the challenges presented by the current financial situation. Fulfilling this objective requires Departments, particularly the Department of Economic Development, to explore prospects for future economic growth.

The Council of Ministers proposes that this exemption will protect the exploration of possible economic development opportunities from premature or inappropriate disclosure. It is not Council's intention for the FOI regime to undermine the Government's efforts to secure growth and jobs for the Isle of Man so it is anticipated that this exemption will be interpreted robustly to ensure that the Government's efforts in this regard are not inadvertently undermined.

Accordingly, information is qualified exempt if its disclosure would, or would be likely to, prejudice the economic interests of the Island, the financial interests of the Island or the ability of the Government to manage the national economy.

Under this exemption, information is also qualified exempt information if it constitutes a trade secret or its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the public authority holding it).

The final element of the exemption is likely to be of interest to businesses and other third parties as it is designed to offer protection to commercial interests and the ability to participate competitively in a commercial activity.

Clause 31: Investigations and legal proceedings

This exemption covers information in two related branches. Accordingly, in the first branch, information is qualified exempt if it has at any time been held by an authority for the purposes of: an investigation which it has a duty to conduct to ascertain whether a person should be charged with an offence or a person charged with an offence is guilty of it; an investigation conducted by the authority that in the circumstances may lead to criminal proceedings being instituted; or any criminal proceedings that the authority has the power to conduct.

In the second branch, the qualified exemption extends to information if it was obtained or recorded by the authority (from confidential sources) for the purposes of its functions: relating to the investigations set out above; criminal proceedings that it has the power to conduct; investigations other than those set out above that are conducted by the authority under other legal powers for the purposes set out in clause 32(3); or civil proceedings that are brought by or on behalf of an authority which arise out of investigations mentioned within the exemption.

Clause 32: Law enforcement

This exemption is closely linked to the previous one and exempts information if its disclosure would, or would be likely to, prejudice a number of listed matters including the prevention and detection of crime and the operation of immigration controls.

Under this exemption, information is also qualified exempt if its disclosure would, or would be likely to, prejudice the exercise by any authority of its functions for any of the listed purposes or any civil proceedings brought about as a result of the exercise of such functions. The listed purposes include to ascertain whether a person has failed to comply with the law and to ascertain whether regulatory action under any enactment is justified.

Clause 33: Audit functions

This exemption is relevant to authorities which have functions in relation to the audit of the accounts of other public authorities or which have functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

In such cases, information is qualified exempt if it is held by the authority and its disclosure would, or would be likely to, prejudice any of its functions in relation to the matters set out above.

Clause 34: Formulation of policy

This exemption, available to Government Departments and the Cabinet Office, covers information which relates to the formulation or development of Government policy, communications between Ministers (including the proceedings of the Council of Ministers and its committees), the provision of legal advice or the request for such and the operation of a Ministerial private office.

The exemption does not extend to statistical information used to provide an informed background to a policy decision once that decision has been made.

This is a class based exemption so information has to fall within the categories in the exemption rather than a public authority having to demonstrate that prejudice would be caused by releasing information.

The Purpose clause in the draft Bill recognises that exceptions to the right of access are necessary to maintain a balance with effective government. This exemption is designed to retain what has been referred to as a 'safe space' for the Government to formulate and develop policy and for Ministers to collectively engage in the policy-making process in the knowledge that these discussions are protected from unjustified disclosure.

It is worth noting that this exemption does not mean that all information relating to the Council of Ministers would be exempt; as a qualified exemption, the public interest in maintaining the exemption (i.e. not disclosing the requested information) would have to outweigh the interest in disclosing the information and individual requests would have to be considered in their merits. The exemption stipulates that consideration of the public interest must include consideration of the disclosure of factual information.

However, in general, the public interest is served by the maintenance of collective responsibility and collective decision making as well as effective government and this will be reflected in the approach to the application of this exemption.

Clause 35: Conduct of public business

This is the exemption which public authorities in addition to Government Departments can use in relation to the similar types of information which are covered by the previous exemption. The exemption recognises that all authorities need a 'safe space' for internal discussion, thinking and policy development.

This exemption is not class based, so for it to be engaged and for information to be qualified exempt, an authority would have to demonstrate that disclosure would have to, or would be likely to: prejudice the work of the Council of Ministers; inhibit the free and frank provision of advice; inhibit the free and frank exchange of views for the purposes of deliberation; or otherwise prejudice the effective conduct of public business.

It is the latter elements of this exemption which would be particularly relevant to public authorities other than Government Departments and the Cabinet Office.

Clause 36: Health and safety

This exemption covers information if its disclosure would, or would be likely to, endanger the physical or mental health of an individual or the safety of an individual.

The use of the term 'endanger' is more relevant to the subject matter of this exemption than 'prejudice' although the use of the term does not represent a significant departure from the test of prejudice integral to the assessment of other exemptions.

The use of this exemption may be linked to other exemptions, such as those relating to personal information, and it provides an exemption from disclosing information if so doing would endanger any individual, not just the applicant.

It is worth noting that this exemption, in spite of its title, does not necessarily cover information in relation to what might commonly be thought of as health and safety matters such as establishing the cause of an accident (which could be covered by clause 32(3)(e)).

Clause 37: Research and natural resources

This exemption contains two limbs. The first covers information relating to ongoing research by an authority (or on behalf of an authority) when disclosure would, or would be likely to, prejudice the authority (or the person carrying out the research) or the subject matter of the research.

The second limb covers environmental information and reflects the fact that the Isle of Man is not subject to the Environmental Information Regulations which govern the access regime to this type of information in the UK (and the rest of the European Union).

Accordingly, information is exempt if disclosure would, or would be likely to, prejudice the well-being of a cultural, heritage or natural resource, a species of flora or fauna, or a habitat of a species of flora or fauna.

Clause 38: Qualified exempt communications with the Crown

This exemption is the partner to the absolute exemption communications with the Crown (see clause 24).

Under this exemption, information is qualified exempt if it relates to communications with a member of the Royal Family or the Royal Household, other than communications covered by the linked absolute exemption, and if it is made or received on behalf of the Sovereign, the heir to or the second in line to the throne.

The exemption also covers information relating to the conferring by the Crown of any honour or dignity.

Clause 39: Qualified exempt personal information

This exemption is the partner to the absolute exemption on personal information (see clause 25).

Accordingly, information is qualified exempt if it constitutes personal data of which the applicant is not the data subject and disclosure of the information if not requested under this Act would contravene section 8 of the Data Protection Act 2002, the right to prevent processing likely to cause damage or distress.

Clause 40: Legal professional privilege

This exemption covers information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

Clause 41: Information for future publication

It is not the intention of the FOI regime to undermine an authority's routine publication policy. So, this exemption covers information which will be published at a

future point by a public authority or someone else, whether or not a date for publication has been determined.

However, as well as being subject to the public interest test, for the exemption to be applicable, the requested information has to be held with a view to future publication at the time of the request and it has to be reasonable in all the circumstances that the information be withheld from disclosure until the future date of intended publication.

Part 5 – Review and Enforcement

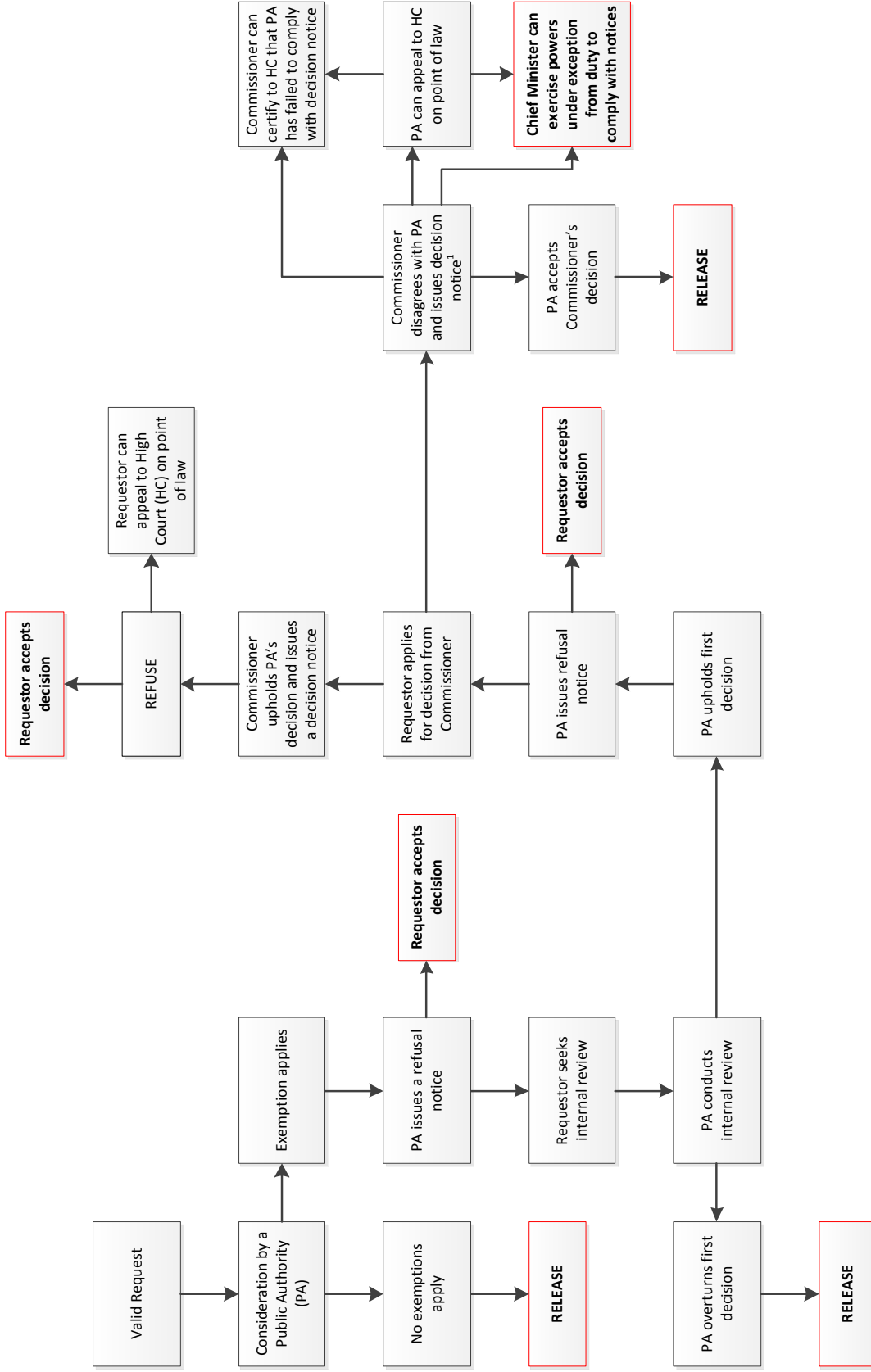
Overview

This Part of the Bill deals with the review of decisions made by public authorities under the Act and their enforcement. The mechanism for review and enforcement procedures proposed in the draft Bill can be summarised as follows:-

- in refusing a request for information, in addition to setting out the reasons for the refusal, an authority must provide the requester with particulars of its internal complaints procedure (allowing a review of the original decision and set out in the code of practice in clause 59), the right to apply to the Information Commissioner (clause 42) or the alternative dispute resolution process (clause 44);
- if the original refusal is maintained after the internal review, the requester can then apply to the Commissioner for a decision;
- if the Commissioner is satisfied that the appropriate criteria are met, they can consider whether the refusal was justified;
- the Commissioner can seek additional details from a public authority (via an 'information notice') and at any time seek to resolve the matter through an alternative dispute resolution process;
- subject to certain restrictions, the Commissioner can either uphold the refusal or overturn it and order the release of the information (via a 'decision notice');
- the Commissioner can also determine whether or not a public authority has complied with the Act (i.e. not just in relation to refusing a request) and can require the authority to take steps to enable it to so comply (via an 'enforcement notice');
- a public authority or a requester can appeal against a 'decision notice' and a public authority can appeal against 'information' or 'enforcement' notices to the High Court on a point of law;
- in most cases, if a public authority fails to comply with a decision, enforcement or information notice (once appeals have been exhausted), the Commissioner may certify that failure in writing to the High Court and the Court may deal with the authority as if it had committed a contempt of court;
- subject to certain restrictions, the Chief Minister can certify that a decision notice or enforcement notice ceases to have effect.

The review and enforcement provisions are illustrated in the flow diagram overleaf.

Summary of the Review and Enforcement provisions for information requests



1. The Information Commissioner can also issue 'information notices' (to receive information from a public authority) and 'enforcement notices' (to enforce a decision or compliance with the Act). A public authority can appeal to the High Court on a point of law in respect of all notices, a requestor can in respect of decision notices.

2. The boxes marked red highlight the end to a request for information, save for an appeal to the High Court on a point of law (where relevant).

Clause 42: Review of decisions by the Information Commissioner

It is proposed that those who request information under clause 8 of the Bill will have a right to apply to the Information Commissioner ('the Commissioner') for a decision on whether the request has been complied with in accordance with the Bill or whether an authority's refusal to comply with a request was justified.

When a matter is referred to him or her, the Commissioner must make a decision as soon as practicable. However, there are certain criteria that have to be satisfied before the Commissioner has to make a decision. Examples of these criteria include if the applicant has not exhausted any complaints procedure provided by an authority which makes a decision on an information request or if there has been undue delay in applying for a decision (see clause 42(3) for a full list the criteria).

In line with the provisions outlined in the relevant exemptions, the Commissioner cannot make a decision that would challenge the conclusiveness of certificates issued in relation to parliamentary privilege, parliamentary business or those issued in relation to the protection of national security.

In circumstances where the Commissioner cannot or need not make a decision they must notify the applicant and set out the reasons why. In any other circumstances, the Commissioner must give notice of their decision to the applicant and the authority in a 'decision notice' and publish said notice in the manner prescribed by regulations.

If the Commissioner decides that an authority has failed to comply with the Act or was not justified in refusing to comply with a request, they must specify in the notice the reasons for the decision, any steps that the authority must take to comply, the period in which the steps must be taken and the right of appeal to the High Court on a point of law.

In respect of the last point, the period in which a public authority is given to comply must not expire before the end of the period within which an appeal to the High Court may be brought. If an appeal is brought, no compliance step that might be affected by the appeal need be taken by the authority pending its determination or withdrawal.

Clause 43: Review of decisions originally made by the Commissioner

Where an applicant wishes to apply for a decision on whether a request for information has been complied with or whether a refusal was justified in circumstances where the authority in question is the Information Commissioner, the Tynwald Commissioner for Administration would undertake the role of the Information Commissioner as set out in clause 42.

The Council of Ministers notes that the Tynwald Commissioner for Administration Act has not yet received an Appointed Day Order and accepts that an interim review mechanism may need to be utilised if this remains the case when the FOI regime is introduced.

Clause 44: Alternative dispute resolution

In many FOI regimes, formal enforcement proceedings can often be both lengthy and costly. In order to help control the costs of the regime in the Isle of Man and to help speed up the resolution of reviews and decisions, the Council of Ministers proposes to introduce a mechanism of alternative dispute resolution.

Accordingly, the Commissioner can at any time attempt to resolve a matter which has been referred to him/her for a decision by negotiation, conciliation, mediation or another form of alternative dispute resolution (termed in the draft Bill an "ADR process"). If, after an ADR process has been conducted the Commissioner makes a decision under the formal processes in the Bill they must have regard to the outcome of the ADR process.

The ADR process must be conducted in accordance with the code of practice under clause 59.

Clause 45: Information notices

In circumstances where the Commissioner has received an application for a decision or reasonably requires information for the purpose of determining whether an authority has complied with, or is complying with the Act or conforming to the code of practice, the Commissioner may serve an 'information notice' on an authority.

This notice requires provision of such information relating to the application, to compliance with the Act or to conformity with the code as specified therein and must state why the information is required and contain particulars of the right of appeal.

After receipt of an information notice, the authority must provide information in the form specified in the notice and within the time specified in the notice (although this time must not expire before the end of the time limit for an appeal and in the event of such an appeal, the information need not be provided pending its determination or withdrawal).

Authorities are obliged to comply with the notice irrespective of whether an obligation to maintain secrecy or restrict disclosure, however arising or imposed, except in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

The Commissioner may cancel a notice by informing the public authority.

Clause 46: Enforcement notices

In circumstances where the Commissioner is satisfied that an authority has failed to comply with the Act, they may serve an 'enforcement notice' on the authority requiring it to take the steps specified therein.

The notice must set out the provision with which the Commissioner is satisfied that the authority has failed to comply with and the reasons why. In addition, it must set out the right to appeal.

The time specified in the notice for the authority to take the steps required to comply with the Act must not expire before the end of the time limit for an appeal and in the

event of such an appeal, the notice need not be complied with pending its determination or withdrawal.

The Commissioner may cancel a notice by informing the public authority.

Clause 47: Exception from the duty to comply with certain notices

A decision or enforcement notice served on a Government Department or the Cabinet Office which relates to a failure of a request(s) for information to comply with clause 7 ceases to have effect if the Chief Minister, after consulting the Council of Ministers and the Attorney General, signs a certificate that he or she has, on reasonable grounds, formed the view that there was no failure.

In such circumstances, the Chief Minister must give the certificate to the Commissioner not later than the 30th working day following the effective date; lay a copy of it before Tynwald at the next available sitting; and notify the applicant of the reasons for his opinion as soon as reasonably practicable after signing the certificate.

The Chief Minister is not obliged to provide information in the certificate if it would involve the disclosure of absolutely exempt information or qualified exempt information.

The "effective date" above means the day on which the notice was given to the public authority or, if an appeal under clause 50 is brought, the day on which that appeal is determined or withdrawn.

The Council of Ministers acknowledges that similar provisions to those proposed in this clause have been closely scrutinised in other jurisdictions. A policy on the use of certificates under this clause will be published and it is anticipated that they will only be issued in exceptional circumstances rather than on a routine basis. Nevertheless, the inclusion of this clause as a backstop provision is an important component of the balance of rights and responsibilities in the proposed FOI regime.

Clause 48: Failure to comply with notices

In most circumstances, the Commissioner is able to certify in writing to the High Court that a public authority has failed to comply with a decision notice (by not taking any steps it is required to take under the notice); an information notice or an enforcement notice.

The Commissioner is not able to certify to the High Court before the expiry of the period specified in the notice under clause 42 (review of decisions by Information Commissioner), clause 45 (information notices) or clause 46 (enforcement notices); or the period mentioned in clause 47(2)(a) (exception from duty to comply with certain notices).

The Court must inquire into the matter and may deal with the public authority as if it had committed a contempt of court after hearing any witness and any statement that may be offered in defence.

No right of action in civil proceedings in respect of a failure to comply with a duty imposed by or under this Act is conferred by this clause.

A public authority is taken to have failed to comply with an information notice if it makes a statement which it knows to be false in a material respect or it recklessly makes a statement which is false in a material respect.

The Commissioner is not able to certify to the High Court in respect of decision or enforcement notices that cease to have effect because of the exception from the duty to comply with certain notices.

Clause 49: Powers of entry and inspection

In order to fulfil their functions under the Act, the Commissioner has powers of entry and inspection in relation to public authorities which are set out in Schedule 3 of the draft Bill.

Clause 50: Right of appeal against notices

The draft Bill provides for the applicant or the public authority to appeal to the High Court on a point of law against a decision notice. A public authority can also appeal on the same basis against information or enforcement notices.

All appeals must be made in accordance with rules of court.

Part 6 – The Information Commissioner

Clause 51: The Isle of Man Information Commissioner

See comments at clause 52 below.

Clause 52: Independence

Under the draft Bill, the Data Protection Supervisor appointed under the Data Protection Act 2002 is appointed, and is to be known as, the Isle of Man Information Commissioner (“the Commissioner”).

Schedule 2 has effect in relation to the appointment of the Commissioner which will be by the Council of Ministers, subject to Tynwald approval. The Commissioner has a statutory guarantee of independence in the exercise of their powers and can only be removed from office following a motion in Tynwald (which itself is subject to certain criteria).

The Commissioner is appointed for a term of up to five years and is automatically eligible for re-appointment for a second term of up to five years on expiry of the term and is eligible for re-appointment for a third term if the Council of Ministers is satisfied that it is in the public interest to do so.

In changing the current method of appointment of the Data Protection Supervisor from Governor in Council to Council of Ministers with Tynwald approval, the draft Bill implements a recommendation of the Report on the Functions of the Lieutenant Governor approved by Tynwald in July 2011.

Clause 53: General functions of the Information Commissioner

It is proposed that the Commissioner will have a number of functions under the Act. In the performance of their functions and the exercise of their powers, the Commissioner must comply with the code of practice issued under clause 59.

The Commissioner must encourage public authorities to follow good practice in their compliance with the Act and observance of the code of practice.

The Commissioner must also provide the public with such information they consider appropriate about the Act, good practice under it, their functions and the functions of public authorities. They may give advice to any person in respect of these matters.

Clause 54: Advice

The next two clauses are designed to provide a framework for the Commissioner to secure appropriate legal support to assist with their functions under the Act.

In addition to providing the Commissioner with appropriate legal advice on what could often be important legal principles and case law, the provisions have been included to try to reduce the potential for an appeal against a notice by the Commissioner on a point of law (and therefore seek to reduce any court time and cost that might arise out of appeals under the Act).

Accordingly, without limiting the Commissioner's powers to appoint persons to provide services, they may seek legal advice and assistance from a legal practitioner on the panel kept for the purpose of the next clause.

The person has the duties which the Commissioner directs and their terms and conditions of appointment, including arrangements for the payment of allowances, must be determined by the Commissioner in accordance with the overall annual financial limits determined by Treasury.

Clause 55: Legal practitioners' panel to provide legal advice and assistance

Linked to the provision above, the Cabinet Office must prepare and maintain a panel of legal practitioners (advocates, barristers or solicitors) willing to give advice and assistance.

Any legal practitioner is entitled to serve on the panel unless there is good reason for exclusion arising out of their conduct when giving or selected to give advice or assistance or their professional conduct generally.

Clause 56: Recommendations as to good practice

The Commissioner may make recommendations to a public authority (in writing, specifying the provisions of the Act or code of practice which they believe the authority is not conforming to, together with the steps required to confirm) if it appears to the Commissioner that an authority's practice does not comply with the Act (or code of practice).

Clause 57: Annual Report of the Information Commissioner

It is proposed that the Commissioner must lay an annual report (more often if appropriate) before Tynwald on the exercise of their functions under the Act.

Part 7 – Publication Schemes and Code of Practice

Clause 58: Publication schemes

Publication schemes are compulsory in some FOI regimes. However, the establishment of these regimes often predates sophisticated internet search engines and increasing moves towards Government transparency.

Experience elsewhere shows that whilst publication schemes bring certain advantages, they can be expensive to maintain, do not always provide the information which is the subject of many requests (hence the growing number of requests) and they do not tend to be well used by the public.

Moreover, the Bill incentivises publication of information through the absolute exemption created by information accessible by other means (see clause 20).

Noting these factors, the draft Bill proposes that an authority may adopt such a scheme, publish information in accordance with it and keep the scheme under review. If an authority adopts a publication scheme, the scheme must specify classes of information it publishes (or intends to publish), the manner in which it is, or will be, published and whether the information will be available free of charge or for a fee. The authority has to publish its publication scheme, but it is able to do so in a manner which it feels is most appropriate.

The draft Bill also stipulates that a publication scheme cannot derogate from the right of access under the Act, include more onerous access provisions than those under the Act or specify fees which are higher than those prescribed by regulations.

The Council of Ministers is able, by order, to require a public authority to adopt and implement a publication scheme and such an order may specify provisions that are both compulsory and non-compulsory in a scheme and these can differ between public authorities (depending, for example on their size and range of functions).

Clause 59: Code of practice

The code of practice has been referred to at various points of the consultation document and it will be an important part of the FOI landscape.

This code of practice is not to be confused with the Code of Practice on Access to Information issued by the Council of Ministers in 1996 which currently guides access to government information (and which will continue to do so under the Act for information created before 11 October 2011 and in other instances).

Under the draft Bill it is proposed that the Council of Ministers must issue a code of practice that gives guidance to public authorities as to the practice to be followed in the exercise of their functions under this Act.

In particular, the code must make provision in relation to the following matters:-

- determination of when information is held by an authority for the purposes of the definition of "held" in clause 5;

- determination of matters to which a public authority may have regard in determining whether a request for information is vexatious, malicious, frivolous, misconceived or lacking in substance;
- determination of the public interest when considering requests concerning qualified exempt information;
- provision of advice and assistance by authorities to persons who propose to make, or have made, requests for information;
- provision of notice about the progress of an applicant's request for information for the purposes of clause 14;
- transfer of requests by one authority to another that holds or may hold the information requested (including how the time within which obligations under this Act must be fulfilled are modified for that purpose);
- consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
- inclusion in contracts entered into by authorities of terms relating to the disclosure of information;
- provision by authorities of procedures for dealing with complaints about the handling of requests for information; and
- information that authorities are expected to make publicly available routinely.

It is also proposed that before issuing or revising the code, the Council of Ministers must consult the Information Commissioner and it must be laid before Tynwald.

The code of practice may authorise or require provision to be made by, or confer discretionary powers on, the Commissioner or the delegation by a person of functions conferred on that person by or under the code of practice.

Clause 60: Compliance with code of practice

If a public authority complies with its obligations under the code of practice, it is taken to have complied with its obligations under the Act.

This provision is relevant to those circumstances when the Commissioner may need to consider the role of an authority (for example when considering an enforcement notice or recommendations as to good practice).

Part 8 – Supplemental Provisions

Clause 61: Record tampering

The draft Bill creates an offence liable on summary conviction to a fine not exceeding £5,000 if, following a valid information request under the Act, a member, officer or employee of an authority tampers or conceals information with the intention of preventing the authority from supplying the information to the applicant.

Clause 62: Confidentiality

In the draft Bill a person performing the functions of the Commissioner (their staff or an agent) creates an offence if, without lawful authority, they knowingly or recklessly disclose information that:-

- is obtained in the course of performing their functions;
- relates to an identified or identifiable individual or business; and
- is not, before or at the time of the disclosure, otherwise publicly available.

The criteria for lawful authority, including being made with the consent of the individual, mirrors a similar provision in section 54(2) of the Data Protection Act 2002.

A person guilty of an offence under this clause is liable on summary conviction to a fine not exceeding £5,000⁶.

Clause 63: Defamation

If information supplied by a public authority to an applicant under this Act was supplied by a third person, the publication to the applicant of defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice.

Clause 64: Notices

The draft Bill provides that notices under this Act have to be in writing, which is taken as being so if it is transmitted by electronic means; is received in legible form; and is capable of being used for subsequent reference.

Clause 65: Subordinate legislation

The Council of Ministers may make orders and regulations in accordance with this Act or otherwise as are necessary or expedient to give effect to this Act.

Orders and regulations may contain any consequential, incidental, supplemental, transitional and saving provisions that the Council of Ministers considers appropriate.

⁶ The offences created by clauses 61 and 62 are subject to the limitation of time provisions in section 75 of the Summary Jurisdiction Act 1989. As such, a court of summary jurisdiction shall not hear a complaint unless the complaint was made within 6 months from the time when the offence was committed or the matter of complaint arose.

Clause 66: Fees

This clause sets out the framework for fees chargeable under the Act. The power to charge fees is a recognition that the financial and administrative burden placed on public authorities by information requests is not the sole responsibility of the taxpayer and that this burden should be shared – to some degree – by the person(s) making the request.

Although there will be interest at this stage in Council providing a monetary indication of the proposed level of fees, further consideration is required before decisions in this regard can be taken. For example, the development of an appropriate online payment method could reduce the level of fees that need to be charged given the lower administrative costs involved as could improvements to information and records management in public authorities.

Consequently, this clause sets out the parameters within which the fees structure will be established and Council's direction of travel in this regard.

Although clause 8(2)(b) proposes that for a request for information to be valid it has to be accompanied by a fee, the regulations also provide for no fee being payable in prescribed cases. It is Council's expectation that public authorities would not ordinarily charge for straightforward requests. However, flexibility exists in the regulations so that if, for example, an authority is inundated with requests it can impose a charge to help offset the burden on the taxpayer involved in responding to them.

As all fees under the draft Bill will be set out in regulations, subject to Tynwald approval, an opportunity exists for appropriate consideration and scrutiny of the regulations at that point.

Regulations may provide for different fees for different cases and circumstances and for the processes for estimating fees and notifying the applicant of the estimate. This is intended to ensure transparency in processes and to make sure that there are no surprises for applicants in terms of the fees that can be charged under the Act.

The draft Bill proposes that the Council of Ministers may make regulations prescribing the fees payable to public authorities in respect of requests for information and giving access to information in accordance with this Act or in respect of applications to the Commissioner under clause 42.

With regard to the latter point, the Council of Ministers does not intend to introduce a fee immediately, but will keep the number of decisions referred to the Commissioner, and their cumulative cost, under review. It is also anticipated that the fee could be refundable if the Commissioner finds in the applicant's favour.

It is proposed that regulations may provide for fees by fixing a fee, or a rate, process or formula by which a fee may be calculated. This would allow, for example:-

- authorities to charge fees to cover the reasonable costs of reproduction and communication of the requested information;

- authorities to follow an 'escalator' principle and charge a higher fee for repetitive requests from a particular person or persons appearing to act in together;
- the setting of the permitted activities which authorities can take into account when calculating the cost complying with a request. It is anticipated that such activities would include the preparation of information for release (including any redaction and time taken to consider whether or not a qualified exemption applies) in addition to ascertaining whether or not the information is held and providing it; and
- the setting of the amount above which a practical refusal reason under clause 10(4)(b) (iii) can apply.

In setting fees, authorities can take the costs of complying with any of the requests to be the estimated costs of complying with them all where two or more requests are made by one person or by different persons appearing to act together.

Regulations may also specify the maximum level of fee that can be charged by an authority in any circumstances.

Under the draft Bill, it is proposed that public authorities may waive the whole or any part of a fee if they consider it appropriate to do so.

Fees prescribed under this Act cannot override a provision by or under another enactment as to the way to determine a fee. In these cases, the fee must be determined in that way rather than in accordance with regulations.

Finally, regulations may specify the destination of the fees paid and if no destination is specified, fees received are to be paid into and form part of the General Revenue of the Island.

Clause 67: Tynwald procedure

This clause sets out the Tynwald procedure for the secondary legislation sitting under the Act.

Accordingly, it is proposed that orders under clauses 6(6) and 58(2); regulations prescribing fees for the purposes of clause 66; and regulations prescribing another period for the purposes of clause 11(1)(b) must not come into operation unless approved by Tynwald.

The draft Bill also proposes that regulations (other than regulations noted above) must be laid before Tynwald as soon as practicable after they are made, and if Tynwald at the sitting at which they are laid or at the next following sitting resolves that they are to be annulled, they cease to have effect.

Finally, it is proposed that the code of practice under clause 59 must be laid before Tynwald.

Clause 68: Amendment and repeal of enactments

Schedule 4 of the draft Bill details the amendments to existing enactments, principally to the Data Protection Act 2002, which will be necessary to align the statute book with the FOI Act.

Section (6)(2) of the Council of Ministers Act 1990 will also be amended.

The process of aligning secondary legislation is ongoing and cannot be completed until the final version of the Bill has been agreed.

Schedule 1 – Public Authorities

See comments under clauses 2 and 6.

The public authorities in Schedule 1 of the draft Bill are listed as illustrative examples for consultation purposes only and should not be taken as a definitive list of the authorities which will fall within the Act's scope in the first phase of its implementation.

Schedule 2 – The Isle of Man Information Commissioner

This schedule sets out in further detail the terms of appointment and other issues in relation to the Information Commissioner.

Schedule 3 – Powers of Entry and Inspection

This schedule sets out the details of the Information Commissioner's powers of entry and inspection and the issuing of warrants.

Schedule 4 – Amendment and Repeal of Enactments

This schedule sets out the consequential amendments to existing legislation as a result of the proposals in the draft Bill.

The schedule has been developed in consultation with the Data Protection Supervisor insofar as the Bill amends the Data Protection Act 2002.

Appendix 1 – List of Direct Consultees

Tynwald Members

Clerk of Tynwald

Attorney General

Local Authorities

Chief Officers of Government Departments, Boards and Offices

Chamber of Commerce

Isle of Man Trade Union Council

Isle of Man Law Society

Positive Action Group

Appendix 2 – Code of Practice on Consultations

It is the intention of CSO to carry out this consultation in accordance with the Government's Code of Practice on Consultation.

The Code sets out the following six criteria:

- (1) Consult widely throughout the process, allowing a minimum of six weeks for a minimum of one written consultation at least once during the development of the legislation or policy;
- (2) Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses;
- (3) Ensure your consultation is clear, concise and widely accessible;
- (4) Give feedback regarding the responses received and how the consultation process influenced the policy;
- (5) Monitor your Department's effectiveness at consultation; and
- (6) Ensure your consultation follows best practice, including carrying out an Impact Assessment if appropriate.

Appendix 3 – Freedom of Information Bill 2014

The consultation draft of the Freedom of Information Bill 2014 is reproduced in full overleaf.

The contents of this document are the property of the Chief Secretary's Office and should not be copied or reproduced without permission.

The commentary in this document is not intended as, and should not be taken as, definitive official advice on how the Freedom of Information Act will operate.



FREEDOM OF INFORMATION BILL 2014

Index

Section	Page
PART 1 – INTRODUCTORY	57
1 Short title	57
2 Commencement	57
3 Purpose.....	57
4 Application	58
5 Interpretation.....	58
6 Meaning of public authority	59
PART 2 – ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES	60
7 Right of access to information held by public authorities	60
8 Requests for information	60
9 Requests taken to relate to information held at time of request	60
10 Grant of requests for information.....	61
11 Time for deciding request.....	62
12 Public authority may request additional information and fees	63
13 Duty to provide advice and assistance	63
14 Duty to advise applicant about progress of request	63
15 Manner of compliance.....	64
16 No civil proceedings arise for non-compliance.....	64
17 Refusal of requests.....	64
18 Content of refusal notice.....	65
19 Confirming or denying existence of particular information	66
PART 3 – ABSOLUTELY EXEMPT INFORMATION	66
20 Information accessible to applicant by other means.....	66
21 Court information.....	66
22 Parliamentary privilege	67
23 Conduct of parliamentary business	68
24 Absolutely exempt communications with the Crown.....	68
25 Absolutely exempt personal information.....	69
26 Information provided in confidence	70
27 Information the disclosure of which is restricted by law.....	70

PART 4 – QUALIFIED EXEMPT INFORMATION	70
28 National security and defence	70
29 International relations.....	71
30 Economy and commercial interests	72
31 Investigations and legal proceedings	72
32 Law enforcement.....	73
33 Audit functions.....	74
34 Formulation of policy	74
35 Conduct of public business.....	75
36 Health and safety.....	75
37 Research and natural resources.....	75
38 Qualified exempt communications with the Crown.....	76
39 Qualified exempt personal information.....	76
40 Legal professional privilege.....	76
41 Information for future publication	77
PART 5 – REVIEW AND ENFORCEMENT	77
42 Review of decisions by the Information Commissioner	77
43 Review of decisions originally made by the Information Commissioner	78
44 Alternative dispute resolution.....	78
45 Information notices	79
46 Enforcement notices.....	80
47 Exception from duty to comply with certain notices	80
48 Failure to comply with notices	81
49 Powers on entry and inspection.....	82
50 Right of appeal against notices.....	82
PART 6 – THE INFORMATION COMMISSIONER	82
51 The Isle of Man Information Commissioner	82
52 Independence.....	82
53 General functions of the Information Commissioner	82
54 Advice	83
55 Legal practitioners’ panel to provide legal advice and assistance	83
56 Recommendations as to good practice.....	83
57 Annual report of Information Commissioner	84
PART 7 – PUBLICATION SCHEMES AND CODE OF PRACTICE	84
58 Publication schemes.....	84
59 Code of practice	85
60 Compliance with code of practice.....	86
PART 8 – SUPPLEMENTAL PROVISIONS	86
61 Record tampering.....	86
62 Confidentiality	86
63 Defamation.....	87

64	Notices.....	87
65	Subordinate legislation	88
66	Fees	88
67	Tynwald procedure	89
68	Amendment and repeal of enactments.....	89
SCHEDULE 1		91
PUBLIC AUTHORITIES		91
SCHEDULE 2		92
THE ISLE OF MAN INFORMATION COMMISSIONER		92
SCHEDULE 3		97
POWERS OF ENTRY AND INSPECTION		97
PART 2 - EXECUTION OF WARRANTS		98
SCHEDULE 4		101
AMENDMENT AND REPEAL OF ENACTMENTS		101
PART 2 – OTHER AMENDMENTS		104

This page is intentionally blank



FREEDOM OF INFORMATION BILL 2014

A **BILL** to make provision for the disclosure of information held by public authorities; and for connected purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

PART 1 – INTRODUCTORY

1 Short title

The short title of this Act is the Freedom of Information Act 2014.

2 Commencement

- (1) This Act (other than this section and section 1) comes into operation on such day as the Council of Ministers by order appoints and different days may be appointed for different provisions and for different purposes.
- (2) An order under subsection (1) may make such consequential, incidental, supplemental, transitional and saving provisions as the Council of Ministers considers necessary or expedient.

3 Purpose

The purpose of this Act is to enable persons who are ordinarily resident in the Island to obtain access to information held by public authorities in accordance with the principles that —

- (a) the information should be available to the public to promote the public interest; and
- (b) exceptions to the right of access are necessary to maintain a balance with rights to privacy, effective government, and value for the taxpayer.

4 Application

- (1) This Act applies in relation to information created on or after 11 October 2011.
- (2) This Act operates in addition to, and not in substitution for, the Code of Practice on Access to Government Information approved and issued by the Council of Ministers.
- (3) This Act does not affect the operation of the *Public Records Act 1999* and does not provide a right of access to information covered by that Act other than in accordance with that Act.
- (4) The Council of Ministers may by order amend subsection (1) to provide for an earlier date.

5 Interpretation

In this Act —

“**absolutely exempt information**” has the meaning given by section 10(4);

“**ADR process**” has the meaning given by section 44;

“**applicant**”, in relation to a request for information, means the person making the request;

“**code of practice**” means the code of practice referred to in section 59;

“**company**” includes any body corporate;

“**decision notice**” means a notice given under section 42(5)(b);

“**decision period**” has the meaning given by section 11(5);

“**enforcement notice**” has the meaning given by section 46(1);

“**held**”: information is **held** by a public authority if it is held —

- (a) by the public authority, otherwise than on behalf of another person; or
- (b) by another person for or on behalf of the public authority;

“**information**” includes information recorded in any form;

“**Information Commissioner**” means the Isle of Man Information Commissioner appointed in accordance with section 51;

“**information notice**” means a notice given by section 45(2);

“**practical refusal reason**” has the meaning given by section 10(4);

“**public authority**” has the meaning given by section 6;

“**public records**” has the same meaning as in the *Public Records Act 1999*;

“**publication scheme**” has the meaning given by section 58;

“**publicly-owned company**” has the meaning given by section 6(8);

- “**qualified exempt information**” has the meaning given by section 10(4);
- “**records**” includes not only written documents but also records conveying information by any other means;
- “**refusal notice**” means a notice given under section 18;
- “**request for information**” means a request under section 8; and
- “**working day**” means any day except —
- (a) a Saturday, a Sunday, Christmas Day or Good Friday;
 - (b) a bank holiday under the *Bank Holidays Act 1989*; or
 - (c) in the case of an educational establishment, any day not falling during term at that establishment as determined in accordance with the establishment’s articles of government or management.

6 Meaning of public authority

- (1) A “**public authority**” means —
 - (a) a person, body or the holder of any office that is listed in Schedule 1; or
 - (b) a publicly-owned company that is listed in Schedule 1.
- (2) Schedule 1 has effect for the purposes of defining a “public authority”.
- (3) Schedule 1 may specify that this Act applies only to information of a specified description held by a public authority.
- (4) If it does so, nothing in this Act applies to any other information held by the public authority.
- (5) Subsection (1) is subject to any qualification set out in Schedule 1.
- (6) The Council of Ministers may by order amend Schedule 1.
- (7) However, an order under subsection (6) may not add the Lieutenant Governor to the list of public authorities.
- (8) In this Act, “**publicly-owned company**” means —
 - (a) a company in which one or more public authorities owns, whether directly or indirectly, shares or other interests which, when taken together, enable them to exercise more than half the number of votes in a general or other meeting of the company on any matter; or
 - (b) a company to the extent that it performs functions or exercises powers under an enactment.

PART 2 – ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

7 Right of access to information held by public authorities

- (1) Subject to this Act, every person who is ordinarily resident in the Island has a legally enforceable right to obtain access, in accordance with this Act, to information held by a public authority.
- (2) Nothing in this Act limits the powers of a public authority to lawfully disclose information held by it.

8 Requests for information

- (1) A person who wishes to obtain access to information held by a public authority may request the information.
- (2) The request must –
 - (a) be in the form prescribed by regulations; and
 - (b) be accompanied by the fee for making a request (if any) prescribed by regulations.
- (3) The form must –
 - (a) require the applicant to provide the following information –
 - (i) the applicant's name;
 - (ii) an address for correspondence; and
 - (iii) an adequate description of the information requested; and
 - (b) request the applicant to give consent to disclosure of the applicant's name.
- (4) The form may be transmitted by electronic means.

9 Requests taken to relate to information held at time of request

- (1) A request for information is taken to relate to information held at the time when the request is received.
- (2) However, account may be taken of any amendment or deletion made between the time when the request for the information is received and the time when it is to be communicated, but only if the amendment or deletion would have been made regardless of the receipt of the request.

10 Grant of requests for information

- (1) A public authority must give the applicant the information requested in the request for information in accordance with this Act subject to subsection (2).
- (2) A public authority is not required by this Act to give the applicant the information if –
 - (a) the information is absolutely exempt information or qualified exempt information; or
 - (b) a practical refusal reason applies.
- (3) If subsection (2)(b) applies, the public authority may nevertheless give the applicant the information on payment of a fee determined in accordance with regulations.
- (4) In this Act –

“**absolutely exempt information**” is information covered by a provision of Part 3;

“**practical refusal reason**” means one or more of the following –

- (a) the public authority does not hold or cannot, after taking reasonable steps to do so, find the information that the applicant has requested;
- (b) subject to the public authority fulfilling the duty imposed by section 13 (duty to provide advice and assistance) –
 - (i) the applicant has submitted the request for information in a way that is illegible or not capable of being used for subsequent reference;
 - (ii) the information requested cannot be given to the applicant without substantial collation or research; or
 - (iii) the public authority estimates that the cost of searching for and preparing the information to give to the applicant would exceed the amount specified in regulations made for the purposes of this paragraph;
- (c) the applicant has not complied with section 12 (public authority may request additional details and fees);
- (d) the applicant refuses to consent to disclosure of the applicant’s name;
- (e) the request is vexatious, malicious, frivolous, misconceived or lacking in substance;
- (f) both of the following apply –

- (i) the request relates to information that is identical, or substantially similar, to information previously requested by, and supplied to, the applicant; and
- (ii) a reasonable period of time has not passed between compliance with the previous request and the making of the current request; and

“**qualified exempt information**” is information to which both of the following apply –

- (a) the information is covered by a provision of Part 4; and
- (b) the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

11 Time for deciding request

- (1) A public authority must make a decision on a request for information promptly and, in any event –
 - (a) the end of the period of 20 working days starting on the day on which the public authority received the request; or
 - (b) if another period is prescribed by regulations, not later than the end of that period.
- (2) Subsection (1) does not apply if, in making a decision on a request, the public authority is considering whether the information requested is qualified exempt information, in which case the authority must –
 - (a) notify the applicant within the period mentioned in subsection (1) that the public authority is doing so; and
 - (b) make a decision on the request for information as soon as is reasonable in the circumstances.
- (3) Subsection (2) is subject to subsection (6) and the public authority’s duty under section 14 (duty to advise applicant about progress of request).
- (4) If a public authority fails to comply with a request for information (other than a request to which subsection (2) applies) –
 - (a) within the period mentioned in subsection (1); or
 - (b) within such further period as the applicant may allow,the applicant may, for the purpose of section 42(1)(b) (review of decisions by the Information Commissioner), treat the failure as a refusal by the public authority to supply the information requested.
- (5) In this Act, “**decision period**” means the period mentioned in subsection (1) or (2) that applies to the request for information.
- (6) For the purposes of subsection (2), the period that is reasonable in the circumstances is to be determined having regard to –

- (a) the time required to consult with —
 - (i) a person who may be affected by disclosure of the information; or
 - (ii) a person about whether access to the information would be in the public interest; or
- (b) whether dealing with the request for information would substantially or unreasonably interfere with the day-to-day operations of the public authority.

12 Public authority may request additional information and fees

- (1) During the decision period, the public authority may, by notice —
 - (a) request from an applicant information that —
 - (i) the public authority reasonably requires to identify the information requested; or
 - (ii) if the public authority believes on reasonable grounds that the application is not ordinarily resident in the Island, proves that the applicant is so resident; or
 - (b) require the applicant to pay fees, calculated in accordance with regulations, in order to comply with the request for information.
- (2) The applicant must comply with the notice within 28 days of the date of the notice.
- (3) Any time between the date of the notice given under subsection (1) and the applicant complying with the notice is disregarded for the purposes of determining when the decision period ends.

13 Duty to provide advice and assistance

A public authority must give reasonable advice and assistance to a person who —

- (a) wishes to make a request under section 8 for information that the public authority holds; and
- (b) in making a request under section 8, has not made the request —
 - (i) in accordance with that section; or
 - (ii) to the appropriate public authority.

14 Duty to advise applicant about progress of request

A public authority must, during the decision period, give reasonable notice to an applicant about the progress of the applicant's request for information, including (but not limited to) —

- (a) whether the public authority is considering whether the request relates to qualified exempt information; and
- (b) if the public authority is unable to make a decision on the request within the decision period, information about the time required for the public authority to do so.

15 Manner of compliance

- (1) A public authority may comply with a request for information by any reasonable means.
- (2) However, if the applicant expresses a preference for receiving the information by any one or more of the means mentioned in subsection (3), the public authority must, where reasonably practicable, give effect to that preference.
- (3) The means are —
 - (a) the provision of a copy of the information in permanent form or in another form acceptable to the applicant;
 - (b) the provision of a digest or summary of the information; and
 - (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.
- (4) In determining what is reasonably practicable, the public authority may have regard to all the circumstances, including cost.
- (5) If the public authority determines that it is not reasonably practicable to give effect to a preference, it must notify the applicant of the reasons for the determination.

16 No civil proceedings arise for non-compliance

- (1) No right of action arises in civil proceedings by reason only of the failure by a public authority to comply with a request for information.
- (2) Subsection (1) does not affect the powers of the Information Commissioner under section 48 (failure to comply with notices).

17 Refusal of requests

- (1) A public authority must, within the decision period, give an applicant a refusal notice if the public authority claims that the public authority is not required to give the applicant the information because —

- (a) the information is absolutely exempt information or qualified exempt information; or
 - (b) a practical refusal reason exists.
- (2) The public authority is not obliged to give a refusal notice in relation to a request for information if —
- (a) the public authority has, in relation to a previous identical or substantially similar request for information, given the applicant a refusal notice; and
 - (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

18 Content of refusal notice

- (1) A refusal notice must —
- (a) specify the reason why the public authority is not required by this Act to give the applicant the information;
 - (b) if the information is absolutely exempt information or qualified exempt information, state (if not otherwise apparent) why the exemption applies;
 - (c) if the information is absolutely exempt information because of section 20 (information accessible by other means), state the other means by which it is accessible; and
 - (d) contain particulars —
 - (i) of any steps the applicant might take to be given the information despite the application of a practical refusal reason;
 - (ii) of the procedure for complaining to the public authority about the handling of the request for information or applying to the Information Commissioner under section 42; and
 - (iii) of the alternative dispute resolution processes available under section 44.
- (2) If the public authority's claim is made in respect of qualified exempt information, the refusal notice must state the public authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

19 Confirming or denying existence of particular information

- (1) Nothing in this Act requires a public authority to confirm or deny whether it holds information of the description specified in the request if the confirmation or denial would itself be absolutely exempt information or qualified exempt information.
- (2) Subsection (1) does not apply if the only reason for refusing to confirm or deny whether it holds information is that the information is accessible by other means.
- (3) If a public authority refuses to confirm or deny whether it holds information –
 - (a) the public authority is taken to have refused to give the applicant the information; and
 - (b) it need not inform the applicant of the specific ground upon which it is refusing to confirm or deny that it holds the information.

PART 3 – ABSOLUTELY EXEMPT INFORMATION

20 Information accessible to applicant by other means

- (1) Information is absolutely exempt information if it is reasonably accessible to the applicant, whether free of charge or on payment, other than by requesting it under section 8(1) (requests for information).
- (2) Without limiting subsection (1), information is taken to be reasonably accessible if –
 - (a) it is available in public libraries or archives;
 - (b) it is available on the internet or from any other reasonably accessible source;
 - (c) it is made available under a publication scheme; or
 - (d) the public authority that holds it, or any other person, is obliged by law to supply it to members of the public on request.
- (3) Information is not reasonably accessible merely because it is made available voluntarily by a public authority, otherwise than under a publication scheme.

21 Court information

- (1) Information is absolutely exempt information if it is held by a public authority only by virtue of being contained in a document of the following kind for the purposes of legal proceedings –

- (a) filed with, or otherwise placed in the custody of, a court;
 - (b) served upon, or by, a public authority.
- (2) Information is absolutely exempt information if it is held by a public authority only by virtue of being contained in a document created by a person of the following kind for the purposes of legal proceedings —
- (a) a court;
 - (b) a member of the administrative staff of a court.
- (3) Information is absolutely exempt information if it is held by a public authority only by virtue of being contained in a document —
- (a) placed in the custody of; or
 - (b) created by,
a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
- (4) In this section —
- “arbitration” means any arbitration to which Part I of the *Arbitration Act 1976* applies;
- “court” includes a tribunal or other body exercising judicial power;
- “inquiry” means an inquiry or a hearing held under a provision contained in, or made under, an enactment; and
- “legal proceedings” includes —
- (a) a cause or matter within the meaning of the *High Court Act 1991*; and
 - (b) an inquest or *post-mortem* examination.

22 Parliamentary privilege

- (1) Information is absolutely exempt information if exemption from the obligation to disclose it under this Act is required to avoid an infringement of the privileges of —
- (a) Tynwald;
 - (b) the Legislative Council; or
 - (c) the House of Keys.
- (2) A certificate signed by the appropriate person specified in subsection (3) certifying that exemption is required to avoid an infringement of privileges is conclusive evidence of that fact.
- (3) The appropriate person is —

- (a) the President of Tynwald, in the case of the privileges of Tynwald or the Legislative Council; and
 - (b) the Speaker of the House of Keys, in the case of the privileges of the House of Keys.
- (4) In any proceedings under this Act, a document purporting to be a certificate under subsection (2), or a document purporting to be a certified copy of the certificate, is to be treated as the certificate or copy unless the contrary is proved.

23 Conduct of parliamentary business

- (1) Information is absolutely exempt information if its disclosure under this Act would, or would be likely, in the reasonable opinion of the appropriate person specified in subsection (3), to prejudice the effective conduct of parliamentary business.
- (2) In relation to statistical information, subsection (1) has effect with the omission of the words “in the reasonable opinion of the appropriate person specified in subsection (3)”.
- (3) The appropriate person is —
- (a) the President of Tynwald, in relation to information held by Tynwald or the Legislative Council; and
 - (b) the Speaker of the House of Keys, in relation to information held by the House of Keys.
- (4) A certificate signed by the appropriate person certifying that exemption is required to avoid the prejudice referred to in subsection (1) is conclusive evidence of that fact.
- (5) In any proceedings under this Act, a document purporting to be a certificate under subsection (4), or a document purporting to be a certified copy of the certificate, is to be treated as the certificate or copy unless the contrary is proved.

24 Absolutely exempt communications with the Crown

Information is absolutely exempt information if it relates to communications with —

- (a) the Queen;
- (b) the heir to, or the person who is for the time being second in line of succession to the Throne;

- (c) a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne; or
- (d) the Lieutenant Governor.

25 Absolutely exempt personal information

- (1) Information is absolutely exempt information if it constitutes —
 - (a) personal data of which the applicant is the data subject; or
 - (b) personal census information.
- (2) Information is also absolutely exempt information if —
 - (a) it constitutes personal data of which the applicant is not the data subject; and
 - (b) one of the following applies —
 - (i) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the *Data Protection Act 2002*, the disclosure of the information to a member of the public (otherwise than under this Act) would contravene any of the data protection principles;
 - (ii) in a case where the information falls within paragraph (e) of that definition of “data”, the disclosure of the information to a member of the public (otherwise than under this Act) would contravene any of the data protection principles if the exemptions in section 29A of the *Data Protection Act 2002* (manual data held by public authorities) were disregarded;
 - (iii) by virtue of a provision of Part 4 of that Act, the information would be exempt from section 5(1)(c) of that Act (data subject’s right of access to personal data in intelligible form) if the applicant were the data subject.
- (3) Words and phrases defined in the *Data Protection Act 2002* have the same meaning in this section as they have in that Act.
- (4) In this section —
 - “census information” means any information —
 - (a) acquired by a person employed in taking a census under the *Census Act 1929* in the course of the person’s employment; or
 - (b) derived from information covered by paragraph (a); and
 - “personal census information” means census information that relates to an identifiable person or household.

26 Information provided in confidence

Information is absolutely exempt information if —

- (a) it was obtained by the public authority from another person (including another public authority); and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

27 Information the disclosure of which is restricted by law

- (1) Information is absolutely exempt information if its disclosure by the public authority holding it —
 - (a) is prohibited by or under any statutory provision;
 - (b) is incompatible with an EU obligation that applies to the Island; or
 - (c) would constitute or be punishable as a contempt of court.
- (2) In subsection (1), “EU obligation” has the same meaning as it has in the *European Communities (Isle of Man) Act 1973*.

PART 4 – QUALIFIED EXEMPT INFORMATION

28 National security and defence

- (1) Information is qualified exempt information if exemption from the obligation to disclose it under this Act is required to safeguard national security.
- (2) A certificate signed by the Chief Minister (or, in the absence of the Chief Minister, by the Minister for Home Affairs) certifying that refusal to supply the information (or information of a specified description that includes that information) is necessary to safeguard national security is conclusive evidence of that fact.
- (3) Without limiting the generality of subsection (2), the certificate may —
 - (a) identify the information to which it applies by means of a general description; and
 - (b) may be expressed to have prospective effect.
- (4) In any proceedings under this Act, a document purporting to be a certificate under subsection (2), or document purporting to be a certified copy of the certificate, is to be treated as the certificate or copy unless the contrary is proved.

- (5) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice —
 - (a) the defence of the British Islands or any of them; or
 - (b) the capability, effectiveness or security of any relevant forces.
- (6) In this section, “relevant forces” means —
 - (a) the armed forces of the Crown; and
 - (b) any forces co-operating with those forces, or any part of any of those forces.

29 International relations

- (1) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice relations between the Island and —
 - (a) the United Kingdom;
 - (b) any other State;
 - (c) an international organisation; or
 - (d) an international court.
- (2) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice —
 - (a) any interests of the Island abroad; or
 - (b) the promotion or protection by the Island of any such interest.
- (3) Information is also qualified exempt information if it is confidential information obtained from —
 - (a) the United Kingdom;
 - (b) a State other than the Island;
 - (c) an international organisation; or
 - (d) an international court.
- (4) In this section, information obtained from a State, organisation or court is confidential while —
 - (a) the terms on which it was obtained require it to be held in confidence; or
 - (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (5) In this section —

“international court” means an international court that is not an international organisation and that is established —

- (a) by a resolution of an international organisation of which the United Kingdom is a member; or
- (b) by an international agreement to which the United Kingdom is a party;

“international organisation” means an international organisation whose members include any 2 or more States, or any organ of such an organisation;

“State” includes the government of a State and any organ of its government or administration; and

“State other than the Island” includes references to a territory of the United Kingdom outside the United Kingdom and the Crown Dependencies.

30 Economy and commercial interests

- (1) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice —
 - (a) the economic interests of the Island;
 - (b) the financial interests of the Island; or
 - (c) the ability of the government to manage the national economy.
- (2) Information is qualified exempt information if —
 - (a) it constitutes a trade secret; or
 - (b) its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the public authority holding it).

31 Investigations and legal proceedings

- (1) Information is qualified exempt information if it has at any time been held by a public authority for the purposes of —
 - (a) an investigation that the public authority has a duty to conduct to ascertain whether —
 - (i) a person should be charged with an offence; or
 - (ii) a person charged with an offence is guilty of it;
 - (b) an investigation, conducted by the public authority, that in the circumstances may lead to criminal proceedings being instituted; or
 - (c) any criminal proceedings that the public authority has the power to conduct.
- (2) Information is qualified exempt information if —

- (a) it was obtained or recorded by the public authority for the purposes of its functions relating to –
 - (i) investigations covered by subsection (1);
 - (ii) criminal proceedings that the public authority has power to conduct;
 - (iii) investigations other than investigations covered by subsection (1) that are conducted by the public authority, by virtue of powers conferred by or under any enactment, for a purpose specified in section 32(3) (purposes for which law enforcement exemption available); or
 - (iv) civil proceedings that are brought by or on behalf of the public authority, which arise out of investigations mentioned in this subsection or subsection (1); and
- (b) it relates to the obtaining of information from confidential sources.

32 Law enforcement

- (1) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice –
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (c) the administration of justice;
 - (d) the assessment or collection of a tax or duty or of an imposition of a similar nature;
 - (e) the operation of immigration controls; or
 - (f) the maintenance of security and good order in institutions (within the meaning of the *Custody Act 1995*) where persons are lawfully detained.
- (2) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes mentioned in subsection (3) or any civil proceedings brought as a result of the exercise of such a function.
- (3) The purposes are –
 - (a) to ascertain whether a person has failed to comply with the law;
 - (b) to ascertain whether a person is responsible for conduct that is improper;
 - (c) to ascertain whether regulatory action under any enactment is justified;

- (d) to ascertain a person's fitness or competence in relation to —
 - (i) the management of bodies corporate; or
 - (ii) any profession or other activity that the person is, or seeks to become, authorised to carry on;
- (e) to ascertain the cause of an accident;
- (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- (g) to protect the property of a charity from loss or mismanagement;
- (h) to recover the property of a charity;
- (i) to secure the health, safety and welfare of persons at work; and
- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

33 Audit functions

- (1) Information is qualified exempt information if —
 - (a) it is held by a public authority to which this section applies; and
 - (b) its disclosure would, or would be likely to, prejudice the exercise of any of the public authority's functions in relation to any of the matters referred to in subsection (2).
- (2) This section applies to a public authority that has functions in relation to —
 - (a) the audit of the accounts of other public authorities; or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

34 Formulation of policy

- (1) Information is qualified exempt information if —
 - (a) the information is held by a public authority that is —
 - (i) a Department; or
 - (ii) the Cabinet Office; and
 - (b) the information relates to —
 - (i) the formulation or development of government policy;
 - (ii) communications between Ministers (including, in particular, the proceedings of the Council of Ministers or of any committee of the Council of Ministers);

- (iii) the provision of legal advice or any request for such advice; and
 - (iv) the operation of a Ministerial private office.
- (2) Once a decision as to policy has been made, statistical information used to provide an informed background to the taking of the decision is not qualified exempt information by virtue of this section.
- (3) In determining whether the public interest in maintaining this exemption outweighs the public interest in disclosing the information, regard must be had to the public interest in disclosing factual information used to provide an informed background to decision-taking.
- (4) In this section, “Ministerial private office” means any part of the Isle of Man government that provides personal administrative support to a Minister.

35 Conduct of public business

Information is qualified exempt information if its disclosure would, or would be likely –

- (a) to prejudice the work of the Council of Ministers;
- (b) to inhibit –
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) otherwise to prejudice the effective conduct of public business.

36 Health and safety

Information is qualified exempt information if its disclosure would, or would be likely to –

- (a) endanger the physical or mental health of an individual; or
- (b) endanger the safety of an individual.

37 Research and natural resources

- (1) Information is qualified exempt information if –
 - (a) the information relates to research being, or to be, carried out by, or on behalf of, a public authority; and
 - (b) disclosure before the completion of the research would, or would be likely to prejudice –
 - (i) the public authority or a person who is, or will be, carrying out the research on behalf of the public authority; or

- (ii) the subject matter of the research.
- (2) Information is qualified exempt information if the disclosure of the information would, or would be likely to prejudice the well-being of —
- (a) a cultural, heritage, or natural resource;
 - (b) a species of flora or fauna; or
 - (c) a habitat of a species of flora or fauna.

38 Qualified exempt communications with the Crown

- (1) Information is qualified exempt information if it relates to communications —
- (a) with a member of the Royal Family or the Royal Household (other than a communication covered by section 24 (absolutely exempt communications with the Crown)); and
 - (b) made or received on behalf of —
 - (i) the Sovereign for the time being of the United Kingdom;
 - (ii) the heir to, or the person who is for the time being second in line of succession to the Throne; or
 - (iii) a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne.
- (2) Information is qualified exempt information if it relates to the conferring by the Crown of an honour or dignity.
- (3) The definition of “His Majesty”, “Her Majesty”, “the King”, “the Queen” and “the Crown” in section 3 of the *Interpretation Act 1976* does not apply to this section.

39 Qualified exempt personal information

- (1) Information is qualified exempt information if —
- (a) it constitutes personal data of which the applicant is not the data subject; and
 - (b) disclosure of the information to a member of the public otherwise than under this Act would contravene section 8 of the *Data Protection Act 2002* (processing likely to cause damage or distress).
- (2) Words and phrases defined in the *Data Protection Act 2002* have the same meaning in this section as they have in that Act.

40 Legal professional privilege

Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

41 Information for future publication

Information is qualified exempt information if —

- (a) it is held with a view to its being published, by a public authority or any other person, at some future date (whether determined or not);
- (b) when the request for information is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until that future date.

PART 5 – REVIEW AND ENFORCEMENT**42 Review of decisions by the Information Commissioner**

- (1) A person may apply to the Information Commissioner for a decision on —
 - (a) whether a request for information has been complied with in accordance with this Act; or
 - (b) whether a refusal to comply with a request for information was justified.
- (2) The Information Commissioner must make the decision as soon as practicable.
- (3) However, the Information Commissioner need not make a decision if he or she is satisfied that —
 - (a) the applicant has not exhausted any complaints procedure provided by a public authority that makes a decision on a request for information;
 - (b) the matter could be resolved by conducting an ADR process;
 - (c) there has been undue delay in applying;
 - (d) the application is vexatious, malicious, frivolous, misconceived or lacking in substance; or
 - (e) the application has been withdrawn or abandoned.
- (4) The Information Commissioner must not make a decision if satisfied that the application would require him or her to challenge the conclusiveness of a certificate mentioned in section 22(2) (parliamentary privilege), 23(4) (parliamentary business) or 27(2) (national security and defence).
- (5) The Information Commissioner must —

- (a) if subsection (3) or (4) applies, notify the applicant that no decision will be made and the grounds for not doing so; and
 - (b) in any other case —
 - (i) give notice of the Information Commissioner’s decision (a “**decision notice**”) to the applicant and the public authority; and
 - (ii) publish the decision notice in the manner prescribed by regulations.
- (6) Subsection (7) applies if the Information Commissioner decides that a public authority —
- (a) has failed to comply with this Act; or
 - (b) was not justified in refusing to comply with the request for information.
- (7) The Information Commissioner must specify in the decision notice —
- (a) the Information Commissioner’s reasons for the decision;
 - (b) any steps to be taken by the public authority to comply with the requirement or to comply with the request for the information;
 - (c) the period of time within which those steps must be taken; and
 - (d) the right of appeal to the High Court conferred by section 50.
- (8) The period mentioned in subsection (7)(c) must not expire before the end of the period within which an appeal to the High Court may be brought.
- (9) If an appeal to the High Court is brought, no step that is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

43 Review of decisions originally made by the Information Commissioner

If the public authority that makes a decision in relation to which a person could apply to the Information Commissioner under section 42(1) (review of decisions by the Information Commissioner) is the Information Commissioner, section 42 applies as if the references to the Information Commissioner were references to the Tynwald Commissioner for Administration (within the meaning of the *Tynwald Commissioner for Administration Act 2011*).

44 Alternative dispute resolution

- (1) The Information Commissioner may, at any time, attempt to resolve a matter that is the subject of an application under section 42 (review of decisions by the Information Commissioner) by negotiation, conciliation, mediation or another form of alternative dispute resolution (an “**ADR process**”).

- (2) If, after an ADR process has been conducted, the Information Commissioner makes a decision under section 42, the Information Commissioner must have regard to the outcome of the ADR process.
- (3) An ADR process must be conducted in accordance with the code of practice.

45 Information notices

- (1) Subsection (2) applies where the Information Commissioner —
 - (a) has received an application under section 42(1) (review of decisions by the Information Commissioner); or
 - (b) reasonably requires information —
 - (i) for the purpose of determining whether a public authority has complied, or is complying, with this Act; or
 - (ii) for the purpose of determining whether the practice of a public authority conforms with the code of practice.
- (2) The Information Commissioner may give the public authority notice (“an **information notice**”) requiring it to give the Information Commissioner such information relating to the application, to compliance with this Act or to conformity with the code of practice as is specified in the notice.
- (3) The information must be given —
 - (a) in the form specified in the notice; and
 - (b) within the period of time specified in the notice.
- (4) An information notice must —
 - (a) state why the information is required by the Information Commissioner; and
 - (b) contain particulars of the right of appeal conferred by section 50 (right of appeal against notices).
- (5) The period specified under subsection (3)(b) must —
 - (a) not expire before the end of the period within which an appeal may be brought under section 50 against the notice; and
 - (b) if an appeal is brought, the information need not be given pending the determination or withdrawal of the appeal.
- (6) The obligation to comply with an information notice applies despite an obligation to maintain secrecy or restrict disclosure (however arising or imposed), other than information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- (7) The Information Commissioner may cancel an information notice by notice to the public authority.
- (8) In this section, “information” includes unrecorded information.

46 Enforcement notices

- (1) If the Information Commissioner is satisfied that a public authority has failed to comply with this Act, the Information Commissioner may give the public authority notice (“an **enforcement notice**”) requiring it to take the steps specified in the notice to comply with the Act.
- (2) The public authority must take the steps within the period of time specified in the notice.
- (3) An enforcement notice must —
 - (a) state —
 - (i) the provision with which the Information Commissioner is satisfied the public authority has failed to comply; and
 - (ii) why the Information Commissioner is so satisfied; and
 - (b) contain particulars of the right of appeal conferred by section 50.
- (4) The period specified in subsection (2) must —
 - (a) not expire before the end of the period within which an appeal may be brought under section 50 against the notice; and
 - (b) if an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.
- (5) The Information Commissioner may cancel an enforcement notice by notice to the public authority.

47 Exception from duty to comply with certain notices

- (1) A decision notice or enforcement notice ceases to have effect if —
 - (a) the notice —
 - (i) is served on a public authority that is a Department or the Cabinet Office; and
 - (ii) relates to a failure, in respect of one or more requests for information, to comply with section 7 (right of access to information) in respect of absolutely exempt information or qualified exempt information; and
 - (b) the Chief Minister, after consulting the Council of Ministers and the Attorney General, signs a certificate that he or she has, on reasonable grounds formed the view that there was no failure.
- (2) The Chief Minister must —
 - (a) give the certificate to the Information Commissioner not later than the 30th working day following the effective date;
 - (b) lay a copy of it before Tynwald at the next available sitting day after signing the certificate; and
 - (c) notify the applicant of the reasons for the Chief Minister’s opinion as soon as reasonably practicable after signing the certificate.

- (3) The Chief Minister is not obliged to provide information under subsection (2)(c) if it would involve the disclosure of absolutely exempt information or qualified exempt information.
- (4) In this section, “effective date” means —
 - (a) the day on which the notice was given to the public authority; or
 - (b) if an appeal under section 50 (right of appeal against notices) is brought, the day on which that appeal is determined or withdrawn.

48 Failure to comply with notices

- (1) The Information Commissioner may certify in writing to the High Court that a public authority has failed to comply with —
 - (a) a decision notice (other than a decision notice that ceases to have effect because section 47 (exception from duty to comply with certain notices) applies) by not taking any steps it is required to take under the notice;
 - (b) an information notice; or
 - (c) an enforcement notice (other than an enforcement notice that ceases to have effect because section 47 applies).
- (2) The Information Commissioner must not exercise the power under subsection (1) before the expiry of —
 - (a) the period specified in the notice under section 42 (review of decisions by Information Commissioner), 45 (information notices) or 46 (enforcement notices); or
 - (b) if the failure relates to a decision notice or an enforcement notice, the period mentioned in section 47(2)(a) (exception from duty to comply with certain notices).
- (3) The Court must inquire into the matter and may deal with the public authority as if it had committed a contempt of court after hearing —
 - (a) any witness who may be produced against or on behalf of the public authority; and
 - (b) any statement that may be offered in defence.
- (4) This section does not confer any right of action in civil proceedings in respect of a failure to comply with a duty imposed by or under this Act.
- (5) For the purposes of this section, reasons why a public authority fails to comply with an information notice include, but are not limited to —
 - (a) making a statement that it knows to be false in a material respect; or
 - (b) recklessly making a statement that is false in a material respect.

49 Powers on entry and inspection

Schedule 3 (powers of entry and inspection) has effect.

50 Right of appeal against notices

- (1) The applicant or public authority may appeal on a point of law to the High Court against a decision notice.
- (2) The public authority may appeal on a point of law to the High Court against an information notice or an enforcement notice.
- (3) An appeal under this section must be made in accordance with rules of court.

PART 6 – THE INFORMATION COMMISSIONER**51 The Isle of Man Information Commissioner**

- (1) The Data Protection Supervisor appointed under section 4 of the *Data Protection Act 2002* is appointed, and is to be known instead, as the Isle of Man Information Commissioner.
- (2) Schedule 2 has effect.

52 Independence

The Information Commissioner is to perform his or her functions and exercise his or her powers independently and, in doing so, is not to be subject to the direction of Tynwald, its Branches or the Council of Ministers.

53 General functions of the Information Commissioner

- (1) The Information Commissioner must encourage public authorities to follow good practice in their compliance with this Act and observance of the code of practice.
- (2) The Information Commissioner must comply with the code of practice in the performance of his or her functions and the exercise of his or her powers.
- (3) The Information Commissioner must provide the public with such information as he or she considers appropriate about –
 - (a) this Act;
 - (b) good practice under this Act;

- (c) the functions of public authorities under this Act; and
 - (d) the functions of the Information Commissioner.
- (4) The Information Commissioner may give advice to any person in respect of a matter referred to in subsection (3).

54 Advice

- (1) Without limiting paragraph 13 of Schedule 2 (appointment of persons to provide services), the Information Commissioner may seek legal advice and assistance from a legal practitioner on the panel kept for the purposes of section 55 (legal practitioners' panel to provide legal advice and assistance) for the purposes of the performance of the Information Commissioner's functions under this Act.
- (2) The person has the duties that the Information Commissioner directs.
- (3) The terms and conditions of appointment of such a person, including arrangements for the payment of allowances must be determined by the Information Commissioner in accordance with overall annual financial limits determined by the Treasury.

55 Legal practitioners' panel to provide legal advice and assistance

- (1) The Cabinet Office must prepare and maintain a panel of legal practitioners willing to give advice or assistance for the purposes of section 54 (advice).
- (2) Any legal practitioner is entitled to have his or her name on the panel, unless there is good reason for excluding him or her arising out of his or her —
 - (a) conduct when giving or selected to give advice or assistance; or
 - (b) professional conduct generally.
- (3) In this section, "legal practitioner" means an advocate, or a barrister or solicitor.

56 Recommendations as to good practice

- (1) The Information Commissioner may make recommendations to a public authority if it appears to the Information Commissioner that its practice in relation to its functions under this Act does not comply with this Act or a code of practice made under section 59.
- (2) A recommendation under subsection (1) must —
 - (a) be in writing and specify the provisions of this Act or code of practice with which, in the opinion of the Information

Commissioner, the public authority's practice does not conform;
and

- (b) specify the steps that the Information Commissioner considers the public authority should take in order to conform.

57 Annual report of Information Commissioner

- (1) The Information Commissioner must, each year, lay before Tynwald a general report on the exercise of his or her functions under this Act.
- (2) The Information Commissioner may also lay before Tynwald any other reports concerning those functions, as he or she considers appropriate.

PART 7 – PUBLICATION SCHEMES AND CODE OF PRACTICE

58 Publication schemes

- (1) A public authority may –
 - (a) adopt and maintain a publication scheme relating to the publication of information by the public authority;
 - (b) publish information in accordance with the scheme; and
 - (c) from time to time review the scheme.
- (2) The Council of Ministers may by order require a public authority to adopt and implement a publication scheme.
- (3) An order under subsection (2) may specify provisions that a public authority must or may include in the publication scheme.
- (4) If a public authority adopts a publication scheme, the publication scheme must specify –
 - (a) classes of information that the public authority publishes or intends to publish;
 - (b) the manner in which information of each class is, or intended to be, published; and
 - (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.
- (5) A publication scheme must not –
 - (a) derogate from a right of access under section 7(1);
 - (b) include provisions that are more onerous for the applicant than those under this Act; or
 - (c) specify fees that are higher than those prescribed by regulations.

- (6) The public authority must publish its publication scheme but may do so in such manner as it thinks fit.

59 Code of practice

- (1) The Council of Ministers must issue a code of practice that gives guidance to public authorities as to the practice to be followed in the exercise of their functions under this Act.
- (2) The code must, in particular, make provision in relation to —
 - (a) determination of when information is held by a public authority for the purposes of the definition of “held” in section 5 (interpretation);
 - (b) determination of matters to which a public authority may have regard in determining whether a request for information is vexatious, malicious, frivolous, misconceived or lacking in substance;
 - (c) determination of the public interest when considering requests concerning qualified exempt information;
 - (d) provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information;
 - (e) provision of notice about the progress of an applicant’s request for information for the purposes of section 14;
 - (f) transfer of requests by one public authority to another that holds or may hold the information requested (including how the periods of time within which obligations under this Act must be fulfilled are modified for that purpose);
 - (g) consultation with persons to whom information requested relates or with persons whose interests are likely to be affected by the disclosure of such information;
 - (h) inclusion in contracts entered into by public authorities of terms relating to the disclosure of information;
 - (i) provision by public authorities of procedures for dealing with complaints about the handling of requests for information; and
 - (j) information that public authorities are expected to make publicly available routinely.
- (3) Before issuing or revising the code, the Council of Ministers must consult the Information Commissioner.
- (4) The code of practice may authorise or require —
 - (a) provision to be made by, or confer discretionary powers on, the Information Commissioner; or

- (b) the delegation by a person of functions conferred on that person by or under the code of practice.

60 Compliance with code of practice

A public authority is taken to comply with an obligation imposed by this Act if the public authority complies with the provisions of the code of practice in relation to the obligation (if any).

PART 8 – SUPPLEMENTAL PROVISIONS

61 Record tampering

- (1) A person commits an offence if —
 - (a) a request for information has been made to a public authority;
 - (b) the applicant in relation to the request for information is entitled to be supplied with the information under this Act;
 - (c) the person alters, defaces, erases, destroys or conceals information held by the public authority with the intention of preventing the public authority from supplying the information to the applicant; and
 - (d) the person is —
 - (i) a member of the public authority, or of a committee, body or person authorised or required to exercise a function of the public authority in the course of performance of that function; or
 - (ii) an officer or employee of the public authority, or of a committee, body or person referred to in subparagraph (i), including a civil servant acting under the direction of the public authority, committee, body or person, in the course of his or her duties or employment.
- (2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding £5,000.

62 Confidentiality

- (1) A person commits an offence if —
 - (a) the person performs functions as —
 - (i) the Information Commissioner;
 - (ii) a member of staff of the Information Commissioner; or
 - (iii) an agent of the Information Commissioner; and
 - (b) the person knowingly or recklessly discloses information that —

- (i) the person obtains in the course of performing the functions;
 - (ii) relates to an identified or identifiable individual or business; and
 - (iii) is not, before or at the time of the disclosure, otherwise publicly available; and
- (c) the disclosure is not made with lawful authority.
- (2) A disclosure of information is made with lawful authority only if –
- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business;
 - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act;
 - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of any functions under this Act or the *Data Protection Act 2002*;
 - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise; or
 - (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.
- (3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding £5,000.

63 Defamation

If information supplied by a public authority to an applicant under this Act was supplied to the public authority by a third person, the publication to the applicant of defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice.

64 Notices

- (1) Notices under this Act must be in writing.
- (2) A notice is to be taken as given in writing if it –
 - (a) is transmitted by electronic means;
 - (b) is received in legible form; and
 - (c) is capable of being used for subsequent reference.

65 Subordinate legislation

- (1) The Council of Ministers may make orders and regulations —
 - (a) in accordance with this Act; or
 - (b) otherwise as are necessary or expedient to give effect to this Act.
- (2) Orders and regulations may contain any consequential, incidental, supplemental, transitional and saving provisions that the Council of Ministers considers appropriate.

66 Fees

- (1) Without limiting section 65 (subordinate legislation), the Council of Ministers may make regulations prescribing the fees payable —
 - (a) to public authorities in respect of —
 - (i) requests for information; and
 - (ii) giving access to information in accordance with this Act; or
 - (b) in respect of applications to the Information Commissioner under section 42 (review of decisions by the Information Commissioner).
- (2) Regulations may provide for fees by fixing a fee, or a rate, process or formula by which a fee may be calculated.
- (3) Regulations may also provide for different fees for different cases and circumstances.
- (4) Regulations may also provide for the processes for estimating fees and notifying the applicant of the estimate.
- (5) For the purposes of subsection (4), the regulations may provide that, in circumstances prescribed in the regulations, if 2 or more requests for information are made to a public authority by —
 - (a) one person; or
 - (b) different persons who appear to the public authority to be acting together or with a common aim,the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.
- (6) Regulations may also provide —
 - (a) that no fee is payable in cases prescribed by regulations; and
 - (b) that a fee must not exceed the maximum specified in, or determined in accordance with, regulations.
- (7) A public authority may waive the whole or any part of a fee if it considers it appropriate to do so.

- (8) If provision is made by or under another enactment as to the way to determine a fee, the fee must be determined in that way rather than in accordance with regulations.
- (9) Regulations may specify the destination of the fees paid.
- (10) If no destination is specified, fees received are to be paid into and form part of the General Revenue of the Island.

67 Tynwald procedure

- (1) The following must not come into operation unless they are approved by Tynwald –
 - (a) orders under sections 6(6) (amendment of Schedule 1) and 58(2) (order to adopt publication scheme);
 - (b) regulations prescribing fees for the purposes of section 66 (secondary legislation); and
 - (c) regulations prescribing another period for the purposes of section 11(1)(b) (time for deciding request).
- (2) Regulations (other than regulations to which subsection (1) applies) must be laid before Tynwald as soon as practicable after they are made, and if Tynwald at the sitting at which they are laid or at the next following sitting resolves that they are to be annulled, they cease to have effect.
- (3) The code of practice under section 59 must be laid before Tynwald.

68 Amendment and repeal of enactments

Schedule 4 has effect.

SCHEDULE 1

[Section 6]

PUBLIC AUTHORITIES

[Note for public consultation: This Act will be gradually applied to public authorities and this Schedule is indicative of the public authorities to which the Act will first apply.]

PART 1 – EXECUTIVE GOVERNMENT

- 1 The Council of Ministers.
- 2 A Department.
- 3 The Cabinet Office.

PART 2 - LEGISLATURE

- 1 Tynwald.
- 2 The Legislative Council.
- 3 The House of Keys.

PART 3 – PUBLICLY-OWNED COMPANIES

- 1 [To be determined.]

SCHEDULE 2

[Section 46(3)]

THE ISLE OF MAN INFORMATION COMMISSIONER**1 Selection of a candidate**

The Information Commissioner must be appointed by the Council of Ministers, subject to the approval of Tynwald.

2 Qualifications

A candidate for appointment as the Information Commissioner must be a person whom the Council of Ministers believes has the appropriate qualifications, skills and competence.

3 Tenure of office

- (1) Once the Council of Minister's selection has been approved by Tynwald, the Information Commissioner's appointment starts on the date agreed by the Council of Ministers and the Information Commissioner.
- (2) The Information Commissioner holds office for a term of up to 5 years, but is —
 - (a) automatically eligible for re-appointment for a second term of up to 5 years on expiry of the term; and
 - (b) eligible for re-appointment for a third term of up to 5 years on expiry of the term if the Council of Ministers is satisfied that it is in the public interest to do so.

4 Terms and conditions

The terms and conditions of employment of the Information Commissioner are to be determined by Tynwald after a recommendation by the Council of Ministers.

5 Restrictions

- (1) The Information Commissioner must not, except with the approval of the Council of Ministers —
 - (a) enter into any other contract of employment;
 - (b) hold any other office; or
 - (c) carry on any profession, trade or vocation.
- (2) The Council of Ministers may attach conditions to such approval.

6 Resignation and removal

The person holding the office of Information Commissioner —

- (a) may resign by written notice to the Chief Minister; and
- (b) may be removed from office by resolution of Tynwald in accordance with paragraph 7.

7 Procedure for removal

- (1) Tynwald may revoke the appointment of a person to the office of Information Commissioner on a motion tabled in accordance with this paragraph.
- (2) A motion under this paragraph may only be tabled in the name of the Council of Ministers.
- (3) The motion must allege one of the following grounds for revocation, namely that the person holding the office of Information Commissioner —
 - (a) has not carried out the duties of the office in a competent manner;
 - (b) is incapacitated either mentally or physically from carrying out the duties of the office;
 - (c) has neglected to carry out all or any of the duties of the office;
 - (d) has failed to comply with the requirements of paragraph 5(1) (restrictions on other employment and professional activity);
 - (e) has failed to comply with any term or condition of the appointment;
 - (f) has engaged in conduct incompatible with the office of Information Commissioner;
 - (g) has taken leave of absence not provided for by the terms and conditions of the appointment; or
 - (h) has been convicted of an offence (in the Island or elsewhere) and by reason of that conviction shown himself or herself not to be a fit and proper person to continue to hold the office.
- (4) The motion must not be moved unless the person holding the office of Information Commissioner —
 - (a) has been given a copy of a statement in support of the motion setting out details of the evidence relied upon in support of the alleged grounds for revocation; and
 - (b) has been given such reasonable opportunity as the circumstances permit to prepare a written statement in respect of that evidence.
- (5) The Clerk of Tynwald must forward a copy of the statements to each member of Tynwald with the Order Paper for the sitting at which the motion is to be considered.

- (6) Once the motion has been tabled, the Council of Ministers may, by notice, suspend the Information Commissioner from office.
- (7) If the motion —
- (a) is withdrawn;
 - (b) is lost after debate;
 - (c) is not debated within 3 months of being tabled; or
 - (d) is debated but not voted upon within that time,
- the Information Commissioner must be restored to office without loss of remuneration or any other benefits.
- (8) In reckoning the period of 3 months referred to in sub-paragraph (7)(c) disregard August and September.

8 When office of Information Commissioner becomes vacant

- (1) The office of Information Commissioner becomes vacant if the term of appointment of the person holding the office expires and is not renewed.
- (2) It also becomes vacant if the person holding the office —
- (a) dies;
 - (b) gives the Chief Minister written notice of resignation;
 - (c) accepts nomination to become a member of Tynwald;
 - (d) is compulsorily detained as a patient in a hospital (but otherwise than by virtue of Schedule 2A to the *Summary Jurisdiction Act 1989*, Schedule 1A to the *Criminal Jurisdiction Act 1993*, or section 2, 4, 5 or 132 of the *Mental Health Act 1998* (short term detentions));
 - (e) has a receiver appointed in respect of his or her property;
 - (f) becomes bankrupt or makes a composition or arrangement with his or her creditors;
 - (g) is convicted, in the Island or elsewhere, of an offence involving corruption; or
 - (h) is convicted, in the Island or elsewhere, of an offence and sentenced to custody.
- (3) It also becomes vacant if Tynwald acting in accordance with this paragraph revokes the appointment.

9 Exercise of functions during absence, inability or vacancy and delegation

Section 20 of the *Interpretation Act 1976* applies to the office of the Information Commissioner, but section 21 of that Act (power to delegate functions to deputy) does not.

10 General powers

- (1) The Information Commissioner may, with the approval of the Treasury –
 - (a) enter into contracts; and
 - (b) acquire and dispose of land and other property.
- (2) This paragraph does not limit the operation of section 26(3) of the *Interpretation Act 1976*.

11 Staff

- (1) The Information Commissioner may, with the approval of the Treasury as to numbers, appoint staff to assist in carrying out the Information Commissioner's functions.
- (2) The terms and conditions of appointment of such staff, including arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff of the Information Commissioner must be determined by the Information Commissioner in accordance with overall annual financial limits determined by the Treasury.

12 Appointment of persons to provide services

- (1) The Information Commissioner may, with the approval of the Treasury, appoint any person to provide services by assisting or advising the Information Commissioner in carrying out his or her functions.
- (2) The fees and allowances to be paid to that person must be determined by the Information Commissioner in accordance with overall annual financial limits determined by the Treasury.

13 Delegation of functions

- (1) Any function of the Information Commissioner may be exercised by –
 - (a) a member of the Information Commissioner's staff; or
 - (b) a person providing services to the Information Commissioner under paragraph 12,
authorised by the Information Commissioner for that purpose.
- (2) The Council of Ministers may by resolution impose limitations and conditions on the exercise of the Information Commissioner's power to authorise others to discharge functions under sub-paragraph (1).
- (3) Any authorisation given under sub-paragraph (1) does not affect the responsibility of the Information Commissioner for the exercise of the function.

14 Validity of acts

The validity of any act of the Information Commissioner is not affected by any defect in the appointment of the holder of that office, including a disqualification (if any) for holding that appointment.

15 Financial provision

The following is a charge on the General Revenue —

- (a) the salary, pension and allowances of the Information Commissioner; and
- (b) any expenses incurred by the Information Commissioner in the exercise of the Information Commissioner's functions.

16 Accounts and audit

- (1) The Information Commissioner must —
 - (a) keep accounts; and
 - (b) prepare annual accounts in respect of each financial year.
- (2) The accounts of the Information Commissioner are to be audited in accordance with the *Audit Act 2006*.
- (3) The financial year of the Commissioner is —
 - (a) the period beginning with the date on which the first Commissioner is appointed and ending with 31 March next following that date; and
 - (b) each successive period of 12 months ending with 31 March.

SCHEDULE 3

[Section 53]

POWERS OF ENTRY AND INSPECTION**PART 1 - ISSUE OF WARRANTS****1 Power to grant warrants**

- (1) If a judge is satisfied by information on oath supplied by the Information Commissioner that there are reasonable grounds for suspecting —
- (a) that a public authority has failed or is failing to comply with —
 - (i) a requirement of this Act;
 - (ii) so much of a decision notice as requires steps to be taken; or
 - (iii) an information notice or an enforcement notice; or
 - (b) that an offence under section 61 (record tampering) has been or is being committed,

and that evidence of such a failure to comply or of the commission of the offence is to be found on any premises specified in the information, the judge may, subject to paragraph 2, grant a warrant to the Information Commissioner.

- (2) A warrant issued under sub-paragraph (1) authorises the Information Commissioner or any of his or her officers or staff at any time within 7 days of the date of the warrant —
- (a) to enter and search the premises;
 - (b) to inspect and seize any documents or other material found there that may be evidence mentioned in that sub-paragraph; and
 - (c) to inspect, examine, operate and test any equipment found there in which information held by the public authority may be recorded.

2 Matters that must be satisfied

- (1) A judge must not issue a warrant under this Schedule unless he or she is satisfied —
- (a) that the Information Commissioner has given 7 days' notice to the occupier of the premises in question demanding access to the premises; and
 - (b) that either —
 - (i) access was demanded at a reasonable hour and was unreasonably refused; or

- (ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Information Commissioner or any of the Information Commissioner's officers or staff to permit the Information Commissioner or the officer or member of staff to do any of the things referred to in paragraph 1(2); and
 - (c) that the occupier, has, after the refusal, been notified by the Information Commissioner of the application for the warrant and has had an opportunity of being heard by the judge on the question of whether or not it should be issued.
- (2) Sub-paragraph (1) does not apply if the judge is satisfied that the case is one of urgency or that compliance with those provisions would defeat the object of the entry.

3 Copies

A judge who issues a warrant under this Schedule must also issue 2 copies of it and certify them clearly as copies.

PART 2 - EXECUTION OF WARRANTS

4 Power to use reasonable force

A person executing a warrant issued under this Schedule may use such reasonable force as is necessary.

5 Warrant to be executed at reasonable hour

A warrant issued under this Schedule must be executed at a reasonable hour unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed.

6 Occupied premises

- (1) If the premises in respect of which a warrant is issued under this Schedule are occupied by a public authority and any officer or employee of the public authority is present when the warrant is executed, he or she must be shown the warrant and supplied with a copy of it; and if no such officer or employee is present a copy of the warrant must be left in a prominent place on the premises.
- (2) If the premises in respect of which a warrant is issued under this Schedule are occupied by a person other than a public authority and the occupier is present when the warrant is executed, the occupier must be shown the warrant and supplied with a copy of it; and if that person is not present a copy of the warrant must be left in a prominent place on the premises.

7 Receipts for items seized

- (1) A person seizing anything in pursuance of a warrant under this Schedule must give a receipt for it if asked to do so.
- (2) Anything so seized may be retained for so long as is necessary in the circumstances but the person in occupation of the premises in question must be given a copy of anything that is seized if he or she so requests and the person executing the warrant considers that it can be done without undue delay.

PART 3 - MATTERS EXEMPT FROM INSPECTION AND SEIZURE**8 Certain exempt information excluded**

The powers of inspection and seizure conferred by a warrant issued under this Schedule are not exercisable in respect of information in relation to which a certificate mentioned in section 22(2) (parliamentary privilege), 23(4) (parliamentary business) or 28(2) (national security and defence) in circumstances where a request for the information has been refused.

9 Communications between advocate and client

- (1) Subject to this paragraph, the powers of inspection and seizure conferred by a warrant issued under this Schedule are not exercisable in respect of —
 - (a) any communication between an advocate and his or her client in connection with the giving of legal advice to the client with respect to his or her obligations, liabilities or rights under this Act; or
 - (b) any communication between an advocate and his or her client, or between an advocate or his or her client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purposes of such proceedings.
- (2) Sub-paragraph (1) also applies to —
 - (a) any copy or other record of any such communication as is there mentioned; and
 - (b) any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings as are there mentioned.

- (3) This paragraph does not apply to anything in the possession of any person other than the advocate or his or her client or to anything held with the intention of furthering a criminal purpose.
- (4) In this paragraph references to the advocate of client include references to any person representing the client.

10 Information consisting partly of matters in respect of which powers not exercisable

If the person in occupation of any premises in respect of which a warrant is issued under this Schedule objects to the inspection or seizure under the warrant of any material on the grounds that it consists partly of matters in respect of which those powers are not exercisable, the person in occupation must, if the person executing the warrant so requests, furnish the person executing the warrant with a copy of so much of the material in relation to which the powers are exercisable.

11 Return of warrants

A warrant issued under this Schedule must be returned to the Chief Registrar —

- (a) after being executed; or
- (b) if not executed within the time authorised for its execution,

and the person by whom the warrant is executed must make an endorsement on it stating what powers have been exercised by the person under the warrant.

12 Offences

- (1) A person commits an offence if that person —
 - (a) intentionally obstructs a person in the execution of a warrant issued under this Schedule; or
 - (b) fails without reasonable excuse to give any person executing the warrant such assistance as he or she reasonably requires for the execution of the warrant.
- (2) A person guilty of an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding £5,000.

13 Interpretation of Schedule

In this Schedule —

“**premises**” includes any vessel, vehicle, aircraft or hovercraft, and references to the occupier of any premises include references to the person in charge of any vessel, vehicle, aircraft or hovercraft.

SCHEDULE 4

AMENDMENT AND REPEAL OF ENACTMENTS

[Section 68]

PART 1 – AMENDMENTS TO THE DATA PROTECTION ACT
2002**1 Amendment of the Data Protection Act 2002**

The *Data Protection Act 2002* is amended in accordance with paragraphs 2 to 12.

2 Amendment of section 1

In section 1(1) (basic interpretative provisions) —

- (a) in the definition of “data”, omit “or” (second occurring);
- (b) at the end of the definition of “data” add —
 - or (e) does not fall within paragraph (a) to (d) but is recorded information held by a public authority; and
- (c) after the definition of “data subject”, insert —
 - “held” by a public authority, in relation to information covered by paragraph (e) of the definition of “data”, is to be interpreted in accordance with the *Freedom of Information Act 2014*; and
- (d) after the definition of “processing”, insert —
 - “public authority” has the same meaning as in the *Freedom of Information Act 2014*; and

3 Amendment of section 4

- (1) Sections 4(1) and (2) (the Supervisor and the Tribunal) are repealed.
- (2) In section 4(6), omit “the Supervisor and”.
- (3) Consequently, for the marginal note substitute “The Tribunal”.

4 Amendment of section 5

In section 5(1) (right of access to personal data) omit “6 and 7”, substitute “6, 7 and 7A”.

5 Insertion of new section 7A

After section 7 (application of section 5: credit reference agencies), insert —

7A Unstructured personal data held by public authorities

- (1) A public authority is not obliged to comply with section 5(1) in relation to unstructured personal data unless the request under that section contains a description of the data.
- (2) Even if the data are described by the data subject in the request, a public authority is not obliged to comply with section 5(1) in relation to unstructured personal data if the public authority estimates that the cost of complying with the request so far as relating to those data would exceed the appropriate limit.
- (3) Subsection (2) does not exempt the public authority from its obligation to comply with section 5(1)(a) in relation to the unstructured personal data unless the estimated cost of complying with that paragraph alone in relation to those data would exceed the appropriate limit.
- (4) In subsections (3) and (4) “the appropriate limit” means such amount as may be prescribed by regulations.
- (5) Any estimate for the purposes of this section must be made in accordance with regulations under section 66 of the *Freedom of Information Act 2014* (fees).
- (6) In this section “unstructured personal data” means any personal data falling within paragraph (e) of the definition of “data” in section 1(1), other than information that is recorded as part of, or with the intention that it should form part of, any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals. ²²

6 Amendment of section 13

- (1) In section 13(1)(e) (registrable particulars) omit “and”.
- (2) At the end of section 13(1) (registrable particulars) add —
 - ²³, and (g) if the data controller is a public authority, a statement of that fact. ²⁴

7 Insertion of new section 29A

After section 29 (research, history and statistics) insert —

29A Manual data held by public authorities

- (1) Personal data falling within paragraph (e) of the definition of “data” in section 1(1) are exempt from —
 - (a) the first, second, third, fifth, seventh and eighth data protection principles;

- (b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 5 and 12;
 - (c) sections 8 to 10;
 - (d) section 11, except so far as it relates to damage caused by a contravention of section 5 or of the fourth data protection principle and to any distress that is also suffered by reason of that contravention;
 - (e) Part III; and
 - (f) section 50.
- (2) Personal data that fall within paragraph (e) of the definition of “data” in section 1(1) and relate to appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to —
- (a) service in any office or employment under the Crown or under any public authority; or
 - (b) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action taken, in such matters is vested in the Lieutenant Governor, any Minister or any public authority, are also exempt from the remaining data protection principles and the remaining provisions of Part II,
- are also exempt from the remaining data protection principles and the remaining provisions of Part II. **22**

8 Amendment of section 30

In section 30 (information available to the public by or under statutory provision) after “under any statutory provision” insert “(other than the *Freedom of Information Act 2014* or an enactment under that Act)”.

9 Amendment of section 50

In section 50(8) (unlawful obtaining etc. of personal data) after “section 24” insert “or 29A”.

10 Amendment of section 51

In section 51 (prohibition of requirement as to production of certain records), after subsection (6), insert —

- (6A) A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within paragraph (e) of the definition of “data” in section 1(1).

11 Amendment of section 63

- (1) In the table in section 63 (index of defined expressions) after the entry relating to “health professional”, insert –

held	section 1(1)
------	--------------

- (2) In the table in section 63 (index of defined expressions) after the entry relating to “processing (of information or data)”, insert –

public authority	section 1(1)
------------------	--------------

12 Amendment of Schedule 5

- (1) Part 1 is repealed.
 (2) In the heading to Schedule 5 “The Supervisor and” is omitted.

PART 2 – OTHER AMENDMENTS**13 Council of Ministers Act 1990**

After section 6(2) of the *Council of Ministers Act 1990* insert –

- (2A) Subsection (2) does not affect the operation of the *Freedom of Information Act 2014* in respect of information created on or after 11 October 2011.



This document can be provided in large print or audio tape on request

Chief Secretary's Office
Government Office, Bucks Road
Douglas, IM1 3PN

www.gov.im/cso