Executive Note

Draft SSI: The Freedom of Information (Relaxation of Statutory Prohibitions on Disclosure of Information) (Scotland) Order 2008
SSI/2008/

1. The above Order was made in exercise of the powers conferred by section 64(1) and (3) of the Freedom of Information (Scotland) Act 2002 ("the 2002 Act"). That power provides that the Scottish Ministers may, by order, repeal or amend an enactment which is capable of preventing the disclosure of information under section 1 of the 2002 Act. Section 1 sets out the general entitlement that a person who requests information from a Scottish public authority which holds it is entitled to be given it, subject to certain exemptions and reasons information may not be provided as set out in the 2002 Act. The Order is subject to affirmative parliamentary procedure under section 72(2)(b) of the 2002 Act.

Background and Policy Objectives

2. One exemption in the 2002 Act, allowing requested information to be withheld, is that the disclosure is prohibited by or under an enactment (otherwise than under the 2002 Act) so a statutory bar on disclosure exists. This exemption is set out in section 26(a) of the 2002 Act.

3. This order amends five enactments which contain prohibitions on the disclosure of information. Such prohibitions could frustrate a request for information as the exemption in section 26(a) in the 2002 Act would be engaged. The amendments to the five enactments mean that the prohibitions in those five will no longer have to be considered when Scottish public authorities are dealing with requests for information. Other exemptions in terms of the 2002 Act may still apply to the information requested.

4. The power in the 2002 Act to remove statutory bars provides an opportunity for a discriminating, flexible and staged approach to be taken to the removal of the relatively common statutory bars to the disclosure of information which existed prior to the freedom of information legislation. The power can only deal with enactments which are Acts of the UK Parliament, or Acts on the Scottish Parliament, which received Royal Assent before the end of 2002 (the calendar year in which the 2002 Act received Royal Assent) or subordinate legislation made before 28 May 2002 (date Royal Assent received for the Act).

5. The five statutory bars being removed have been identified as creating barriers to the provision of information, and their removal ensures the provision of information in Scotland is no longer subject to the statutory restriction they provided. This Order is the first to be made under section 64 of the 2002 Act.

6. Further detail on the five enactments effected by this Order are:-

Factories Act 1961("the 1961 Act")
Section 154 of the 1961 Act makes it an offence for a person to disclose certain information that he has obtained in pursuance of powers conferred by the 1961 Act unless disclosure is made in performance of his duty. The amendment made by this Order provides that the offence provisions in section 154 do not apply if the person making the disclosure is a Scottish public authority for the purposes of the 2002 Act.

Office, Shops and Railway Premises Act 1963 ("the 1963 Act")
Section 59 of the 1963 Act makes it an offence for a person to disclose any information that he has obtained in premises entered by him in pursuance of powers conferred by the 1963 Act unless disclosure is made in performance of his duty or for the purposes of any legal proceedings or of a report of any such proceedings. The amendment made by this Order provides that the offence provisions in section 59 do not apply if the person making the disclosure is a Scottish public authority for the purposes of the 2002 Act.

Medicines Act 1968 ("the 1968 Act")
Section 118 of the 1968 Act makes it an offence for a person to disclose certain information that he has obtained in pursuance of powers conferred by the 1968 Act unless disclosure is made in performance of his duty. The amendment made by this Order provides that the offence provisions in section 118(1) do not apply if the person making the disclosure is a Scottish public authority for the purposes of the 2002 Act.

Health and Safety at Work etc. Act 1974 ("the 1974 Act")
Section 28(2) of the 1974 Act contains a general prohibition on the disclosure of certain information as defined by the 1974 Act, subject to certain exceptions. This Order makes various amendments to section 28 to remove these statutory bars.

Diseases of Fish Act 1983 ("the 1983 Act")
Section 7 of the 1983 Act empowers Scottish Ministers to make orders which may require persons to supply him with certain information (e.g. persons occupying inland fish farms may need to report the business and provide information in relation to the fish). Section 9 of the 1983 Act makes it an offence to disclose information which has been supplied in this way, unless the disclosure is made with the consent of the supplier; in an anonymous form; for the purposes of bringing criminal proceedings or to enable the Environment Agency to carry out its functions. The amendment made by this Order provides that the offence provisions in section 9 do not apply if the person making the disclosure is a Scottish public authority for the purposes of the 2002 Act.

Consultation

7. In 2006 a consultation was carried out into the operation of the 2002 Act during its first year of operation. Views were sought about any statutory bars to the release of information, though only a few consultees provided specific examples of where the provision had in practice prohibited the release of information in response to a FOI request.

8. We have more recently sought the views of the Scottish Information Commissioner for specific examples of prohibitions he was aware of that have created problems. This has resulted in the inclusion of the removal of the statutory bar in the Diseases of Fish Act 1983.

Financial Effects

9. The instrument has no financial effects on the Scottish Executive, local government or business. It removes, in five specific instances, statutory prohibition against the provision of information.

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