

**SCOTTISH EXECUTIVE CONSULTATION**

**FREEDOM OF INFORMATION**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**MAY 2001**

The executive committee would like to acknowledge the assistance of David Short, Executive Committee Member, APIL for assisting with the preparation of this response.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Annette Morris  
Policy Research Officer  
APIL  
11 Castle Quay  
Nottingham  
NG7 1FW

Tel: 0115 958 0585

Fax: 0115 958 0885

E-mail: [Annette@apil.com](mailto:Annette@apil.com)

## FREEDOM OF INFORMATION

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. We have 110 members in Scotland. The aims of the association are:
  - To promote full and prompt compensation for all types of personal injury;
  - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
  - To promote health and safety;
  - To alert the public to dangers in society such as harmful products and dangerous drugs;
  - To provide a communication network exchanging views formally and informally.
  
2. APIL welcomes the opportunity to respond to this consultation regarding the freedom of information. We fully support the creation of an enforceable legal right to access information held by a wide range of Scottish public authorities. It is acknowledged that freedom of information laws should embrace a balance between the right of the public to information and the proper protection of sensitive information. We do not believe, however, that the Bill achieves such a balance. This is largely because of the inclusion of several class- and content-based exemptions, which in our view will keep information out of the public domain unnecessarily. We strongly believe that information should only be withheld from the Scottish public if its disclosure would cause substantial prejudice to the relevant interest.
  
3. Our response is limited to those issues towards which APIL feels it can make valid comment in the light of the experience of our members. Our concerns relate, therefore, to:

- Information concerning safety held by Scottish public authorities;
- Information relevant to a civil claim for compensation pursued by a victim of personal injury.

## **FUNDAMENTAL PROBLEMS IN THE BILL**

4. We are extremely concerned about the class- and content-based exemptions contained in the Bill. Whilst some are qualified, some are absolute in effect and we fear that they will lead to the unnecessary protection of large amounts of information. Essentially, the exemptions wrongly assume that disclosure of some types of information will always be harmful or will not be in the public interest. When the exemptions cover such large ranges of information, we do not believe that such assumptions can be made.
5. Some information falling within the exemptions may be disclosed if the public interest in disclosing the information outweighs the public interest in maintaining the exemption. It is assumed, therefore, that such information should not be disclosed unless the case for disclosure is established and proved. In addition, if the interest in disclosing information is equal to the interest in maintaining the exemption, under the public interest test as currently drafted, such information would not be disclosed, as it would be under the UK Act. The balance is, therefore, against, rather than in favour of, disclosure and for this reason we cannot support the public interest test.
6. Finally, we are extremely concerned about the First Minister's power to veto the decision to disclose some information. This veto is to be exercised by the First Minister after consultation with other Ministers. We do not believe that this provides a sufficient check on its use.
7. Information should only be protected if its disclosure would cause substantial prejudice. We do not believe that there should be a public interest test. The

freedom of information legislation should rest on the assumption that it would be in the public interest to disclose information, unless such disclosure would cause substantial harm. In addition, we agree with the Campaign for the Freedom of Information in Scotland that Ministers should have to appeal decisions to disclose certain information rather than have the power to veto disclosure. Alternatively, if the veto is maintained, it should be made much more difficult to exercise.

## **INDIVIDUAL EXEMPTIONS**

### **s.28 Formulation of Scottish Administration policy etc.**

8. Section 28 is a qualified class exemption that covers:

- Formulation or development of government policy
- Ministerial communications
- The provision of advice by any of the Law Officers
- The operation of any Ministerial private office.

9. This exemption will, therefore, cover the formulation of policy surrounding safety issues. Information in this class will only be released if the public interest in disclosure outweighs the public interest in maintaining the exemption. Jim Wallace, in a freedom of information debate on 15<sup>th</sup> March 2001, stated:

“Governments require an appropriate degree of privacy to conduct internal debates, to receive advice, to develop policy and to make decisions. Failure to provide adequate protection for those processes would undermine a Government’s ability to choose objectively between options and to maintain collective responsibility.”

10. We cannot, however, support that argument. We believe it is imperative that Scottish public authorities are held fully to account on issues of safety. Such

accountability can only be achieved if there is full and frank disclosure of relevant information where requested. If decision makers are confident that they have reached the right decisions on issues of safety in view of the information and advice available to them, then there should be no problem in defending and accounting for those decisions to the Scottish public. In stating this, however, we of course, support the non-disclosure of information that would cause substantial prejudice to the relevant interest.

### **s.33 Investigations by Scottish public authorities and s.36 Court records**

11. We feel very strongly that a personal injury victim's claim for compensation should not be defeated or diminished unnecessarily due to difficulties in obtaining relevant information from public authorities, disclosure of which would cause no prejudice. However two exemptions in the current Bill would lead to such a situation. The first such exemption relates to court records and the second to investigations by Scottish public authorities and proceedings arising out of such investigations.
12. Section 36 creates an absolute exemption to disclosure for court records. This means that even if disclosure of certain information contained within court records is in the public interest and would cause no harm, it would not be disclosed. Documents such as police reports and witness statements from criminal proceedings can often be vital in proving liability in civil proceedings in the context of a claim for compensation. We are not suggesting that evidence that could prejudice investigations, prosecutions or a fair criminal trial should be released immediately. We do believe, however, that once a criminal case is concluded, it should be possible to access information that would not cause substantial prejudice, if relevant to civil proceedings. If the Bill remains as currently drafted, pursuers may not be able to successfully claim the compensation they deserve because of the current exemption.
13. Section 33 exempts the disclosure of investigations by Scottish public authorities and proceedings arising out of such investigations. This may relate

to investigations concerning safety as carried out by, for example, local authority or environmental health inspectors. Such information again may be relevant to liability in a civil claim for compensation for personal injury. Its non-disclosure may, therefore, defeat or diminish such a claim, especially as under this exemption a public authority would not even have to admit whether it held the information requested if it did not “wish” to do so under section s.18(1).

14. Information exempt under s.33 may be disclosed if the public interest in disclosing the information outweighs the public interest in maintaining the exemption. Our view on the public interest test has been expressed above. If the Bill remains as currently drafted, we can only hope that it will more often than not be considered to be in the public interest to disclose information relating to safety investigations.

**s.35(2) Disclosure of information which would be an actionable breach of confidence**

15. Section 35(2) exempts absolutely the disclosure of information where such disclosure would amount to an actionable breach of confidence. This means that even if disclosure of the relevant information is in the public interest, it will not be disclosed. The obligation of confidentiality can arise extremely easily, which is why this exemption is extremely worrying. This exemption could, therefore lead to the exclusion of large amounts of important information. An obligation of confidentiality could arise in relation to a wide range of safety information, which the public would have an interest in knowing. This exemption would, however, prevent the disclosure of such information.

## **s.32(1)(b) Commercial interests and the economy**

16. s.32(1)(b) prevents the disclosure of information that would “prejudice substantially the commercial interests of any person (including...a Scottish public authority)”. We are pleased to see that this is not an absolute exemption so that information will be disclosed if the interest in disclosing the information will outweigh the interest in maintaining the exemption. We are of course concerned, however, about the operation of the public interest test generally, as noted above. In this context it would mean that the balance would be in favour of maintaining the exemption in favour of commercial interests, as it would be for the applicant to prove the case for disclosing the relevant safety information. If the public interest test remains in the Bill we sincerely hope that the interests of the public in gaining access to information relating to safety will have great weight against the maintenance of commercial interests, especially if it is believed those very commercial interests have prejudiced the safety of the Scottish public.

## **FEES**

17. We are extremely concerned that the charging regime under s.9 of the draft Bill as it is likely to affect access to justice. Charges levied to gain access to information will be much higher under the Scottish legislation than under the Freedom of Information Act 2000. It is intended that applicants should pay the location and retrieval costs associated with accessing information where this exceeds £100. If the cost exceeds £500, an authority will not be obliged to give access at all. An applicant could have to pay up to £400, therefore, to access information.

18. Under the UK Act it is believed that the regulations will charge no more than 10% of the cost of locating the information. If the request cost £500, the applicant would pay only £50. Access to information will essentially depend upon financial means. The poorer members of our society could be excluded



from accessing information purely on the basis of money. This cannot be fair and should not be maintained.

## **VEXATIOUS REQUESTS**

19. Under s. 14 a Scottish public authority will not be obliged to comply with a request for information if the request is vexatious. No definition of “vexatious”, however, appears in the draft Bill. This means that its definition would be left to the public authority receiving the application for information who may have a vested interest in whether disclosure is made or not. We believe that the wording used in the Bill to describe situations in which information will not be disclosed should be carefully defined to prevent any potential abuse.

## **REVEALING WHETHER INFORMATION EXISTS**

20. Under s.18, in certain circumstances, a public authority is not even required to reveal whether requested information exists if it does not “wish” to. This leaves public authorities a large discretion on this issue. We believe that the situations in which a public authority can refuse to reveal the existence of requested material should be much more restrictive and carefully defined in the legislation.

## **SCOTTISH INFORMATION COMMISSIONER**

21. We are generally impressed by the office and powers of the Scottish Information Commissioner, which are more extensive than the UK Commissioner’s. We are particularly concerned, however, about the fact that the Scottish Information Commissioner will not have the power to review refusals to disclose information by the Lord Advocate or procurators fiscal. We can see no particular reason why these two positions should be exempt.

## **TIME LIMITS**

22. We are pleased to see that strict time limits for responding to requests for information exist within the legislation, though we do note that no sanction exists for a public authority's non-compliance. We are extremely concerned, however, about the fact that members of the public will have only 20 working days to ask for an authority to review a refusal to provide information. We believe that this is too short a time for a member of public to digest and analyse a refusal and possibly seek advice on whether a review would be advisable.

## **CONCLUSION**

23. In conclusion we believe that the proposed Scottish freedom of information legislation is an improvement on the equivalent UK statute. Much power remains with the Scottish public authorities, however, in deciding if information should be released, because unless issues of interpretation are challenged in court, such issues will be decided by the authorities themselves. For this reason, we believe that it will be advantageous to include a "purpose clause" in the legislation, to assist with the necessary change of culture in the freedom of information.