FREEDOM OF INFORMATION BILL 2014

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill.

INTRODUCTION

These explanatory notes relate to the Freedom of Information Bill 2014. They have been prepared by the Cabinet Office in order to assist readers in understanding the Bill. They do not form part of the Bill.

The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

BACKGROUND

The purpose of the Freedom of Information Bill 2014 is to give residents of the Isle of Man a legally enforceable 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.

The Bill sets certain parameters around the statutory right of access in order to achieve the balance set out above. These parameters include the intention that the Act will be phased in to allow for its impact to be properly assessed and managed.

Members of the public will still be able to request information outside of these parameters based on the Code of Practice on Access to Government Information which will be revised before the Act comes into force.

See Annex 1 for some key phrases and concepts used in the Bill.

Abbreviations

FOI	Freedom of Information

PART 1 – INTRODUCTORY

Clause 1: Short Title

The clause states the short title of Act.

Clause 2: Commencement

The clause allows the Council of Ministers by order to introduce different parts of the Act on different dates for different purposes.

Subsection (2) provides that such an order may make such consequential, incidental, supplemental, transitional and saving provisions as the Council of Ministers considers necessary or expedient.

Clause 3: Purpose
The clause states the purpose of the Bill, that is, to give Island residents 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
The clause states the Bill 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.

Subsection (4) allows the Council of Ministers to amend this date to an earlier date by order, subject to Tynwald approval.

Access to information outside the scope of the Act (e.g. requests from non-residents, requests to authorities not listed in Schedule 1) will be governed by the existing non-statutory Code of Practice on Access to Information, amended to take account of the Act. Subsection (2) states that the Act will operate in addition to, not as a substitute for, the existing Access Code.

The clause also provides that the Act will not amend the operation of the Public Records Act 1999 or the access rights created by it (subsection (3)).

Note: with the passage of time, information covered by the Act 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 future legislative change.

Access to information held by public authorities outside the scope of the Act will still be governed by the Code of Practice on Access to Information (suitably amended to align it to the Act). The Code will also remain in place for information requests from non-Island residents and for information created before October 2011.

Clause 5: Interpretation
This clause sets out the interpretation of terms used within the Bill.

Clause 6: Meaning of public authority
This clause defines public authority. As such it includes any of the following that are listed in Schedule 1:-

- a person;
- a body;
- a publicly-owned company; or
- the holder of any office.

Subsection (2) defines a publicly-owned company as:-

- 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 conferred on a public authority under an enactment.

The clause also states that the definition of public authority can be subject to any qualification set out in Schedule 1 (subsection (3)).

Note: a public authority has to be listed in Schedule 1 of the Bill to fall within the scope of the Act. Private companies will be covered only to the extent that they perform functions or exercise powers conferred to public authorities under an enactment. All other information which they hold will be outside the scope of the Act.

Clause 7: Meaning of public authority: supplementary
This clause provides further clarity on the meaning of a public authority. It states that Schedule 1 has effect of defining "public authority" and that the Schedule may specify that this Bill only applies to information of a specified description. In such cases nothing in the Bill applies to any other information held by the authority (subsections (2) and (3)).

The clause states that the Council of Ministers, with the exception of adding the Lieutenant Governor, may by order amend Schedule 1, and that the order may:-
- Modify any provision of this Act that the Council of Ministers considers necessary or expedient to modify the operation of this Act in relation to those whom the amendment to Schedule 1 relates; and
- Make such consequential, incidental, supplemental and saving provisions as the Council of Ministers considers necessary or expedient (subsection (5)).

Subsection (7) states that before making an order to amend Schedule 1, the Council of Ministers must consult every person to whom it relates and any other appropriate person.

PART 2 – ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Clause 8: Right of access to information held by public authorities
The clause provides that subject to this Act and in accordance with its provisions, every person who is resident in the Island has a legally enforceable right of access to information held by a public authority.

Subsection (2) states that information is so 'held' if it is held by a public authority, otherwise than on behalf of another person, or if it is held by another person on behalf of the public authority.

Under subsection (3) there is no requirement for a public authority to:-
- create or derive information;
- undertake research into, or analysis of, information; or
- undertake substantial research or collation.

The clause does not prevent public authorities from lawfully disclosing any information which they hold, so even if there are grounds to refuse a request under the Act, an authority can nonetheless release information to an applicant if it is lawful to do so (subsection (4)).

Clause 9: Requests for information
The clause states that an Island resident wishing to obtain access to information held by a public authority may request the information.

The clause further states that the request must be in the form prescribed by the Chief Secretary (who must specify the form but who may specify different forms for different public authorities) and be accompanied by a fee as prescribed by the regulations (if any such fee is prescribed). The form may be transmitted by electronic means (subsection (2), (3), (4) and (6)).

Subsection (5) provides that the form must require the applicant to provide:-

- their name;
- an address for correspondence; and
- an adequate description of the information requested in a legible manner which is capable of subsequent reference.

Clause 10: Requests taken to relate to information held at time of request
The clause states that a request for information is taken to relate to information held at the time when the request is received.

A public authority can take account of any amendment or deletion to that information *but only* if that amendment or deletion would have occurred regardless of the request (subsection (2)).

Note: under clause 63 (record tampering) destroying information, outside an authority's normal policies, is unlawful and may be a criminal offence if committed to prevent disclosure of the information sought.

Clause 11: Grant of requests for information
The clause states that a public authority must give an applicant the information which they request in accordance with the Act.

Subsection (2) states that a public authority may refuse to give the applicant the requested information if:-

- the information is absolutely or qualified exempt information;
- a practical refusal reason applies; or
- the applicant has not, upon request, provided additional information or fees.

The clause defines absolutely exempt information as information covered by a provision of Part 3 of the Bill (see below). It further defines qualified exempt information as information covered by a provision in Part 4 of the Bill and, crucially, where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The clause sets out 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);
- complying with the request would require the public authority to create or derive information; undertake research into, or analysis of, information; or undertake substantial research or collation;
- The request for information does not comply with the provisions of clause 9 (i.e. it is not a valid request);

- if the request is vexatious, malicious, frivolous, misconceived or lacking in substance;
- 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; and
- the authority estimates that the cost of searching for or preparing (or both) the information would exceed the amount specified in relevant regulations.

Note: 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 60 of the Bill (see below).

Clause 12: Standard processing period for responding to requests
The clause states that a public authority must respond to a request for information *promptly* and in any event within the 'standard processing period' defined as ending on the day that is 20 working days after the day on which the public authority receives the request. Another period can be prescribed by regulations, but only with Tynwald approval.

The clause defines 'respond to a request for information' as taking any step in relation to a request for information with a view to deciding whether to grant or refuse (to any extent) to give the information requested, and includes making that decision.

Clause 13: Extended processing period for responding to requests involving qualified exempt information
The clause only applies if, in responding to a request during the standard processing period, the public authority is considering whether it may refuse to give the applicant the information requested because the information is qualified exempt information.

If the extending processing period is applicable, the public authority must:-
- notify the applicant of the fact during the standard processing period (i.e. promptly and in any case within 20 working days);
- respond to the request as soon as is reasonable in all the circumstances; and
- give reasonable notice to the applicant about the progress of the request.

Subsection (3) sets some parameters for determining the period of time that is reasonable in all the circumstances; a period that has to have regard to the time taken to consult with a person who may be affected by disclosure or a person about whether access to the information would be in the public interest; or whether responding to the request for information would substantially or unreasonably interfere with the day-to-day operations of the public authority.

Clause 14: Public authority may request additional information and fees
The clause states that a public authority may 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 (in addition to any fees that may be payable with the initial request), calculated in accordance with regulations, in order to comply with the request.

The additional information and/or fees have to be provided within 28 days of the notice, otherwise it constitutes a reason for which a public authority may refuse to give the applicant the information requested (under clause 11).

Subsection (3) provides that 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 when the standard processing period ends.

Clause 15: Duty to provide advice and assistance
The clause states that a public authority must give reasonable advice and assistance to persons who wish to make, or who have made, a request for information.

Note: 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.

Clause 16: Manner of compliance
The clause states that an authority can comply with a request for information by any reasonable means.

However, the clause also allows the applicant to express a preference at the time of making a request 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.

Under subsection (5), 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 17: Refusal of requests
The clause states that a public authority must give the applicant a refusal notice if it decides for any of the reasons set out in clause 11 (see above) to refuse to give the requested information.

Under subsection (2), 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
The clause sets out the content of a refusal notice. Accordingly, such a notice must:-

- specify the reason why an authority 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;
- 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 (review of decisions by the Information Commissioner) and;
- the alternative dispute resolution processes available under clause 44 (alternative dispute resolution).

Subsection (2) states that 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.

Note: the procedure for dealing with complaints is one of the provisions that the code of practice under clause 60 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 (review of decisions by the Information Commissioner), it is also a step which the Information Commissioner has to be satisfied has occurred otherwise he need not make a decision.

Clause 19: Confirming or denying existence of particular information
The clause states 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 must give the applicant a refusal notice. In such circumstances, the refusal notice does not need to state the other means by which the information may be accessible or, if an authority's claim is in respect of a qualified exemption, state the reasons for claiming that such an exemption applies in respect of the balance of public interest (subsections (3) and (4)).

PART 3 - ABSOLUTELY EXEMPT INFORMATION

Clause 20: Information accessible to applicant by other means
The clause places an absolute exemption on information that is reasonably accessible (free of charge or on payment) other than by requesting the information under the Act.

Subsection (2) sets out the circumstances under which information is taken to be reasonably accessible; namely:-

- if it is available in public libraries or archives;
- if it is available on the internet or from any other reasonably accessible source:

- if it is available under a publication scheme (see clause 59); or
- if another piece of legislation provides access rights.

Subsection (3) states that information is not reasonably accessible merely because it is made available voluntarily by a public authority, otherwise than under a publication scheme (if any).

Note: The Bill does not replace existing access avenues for providing information, whether 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 Bill is designed to supplement, not duplicate, the usual flow of information to the public.

Clause 21: Court information
This clause places an absolute exemption on court information. This exemption contains three branches and covers information held by a public authority 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.

Subsection (4) contains interpretative provisions to explain the meaning of terms contained within it.

Clause 22: Parliamentary privilege and business
The clause places an absolute exemption on parliamentary privilege and business information.

As a result, information is absolutely exempt if exemption from the obligation to disclose under the Act is required to avoid an infringement of the privileges of Tynwald, the House of Keys or the Legislative Council. Likewise, information is absolutely exempt if its disclosure would, or would be likely to, in the reasonable opinion of the appropriate person (for non-statistical information), prejudice the effective conduct of parliamentary business.

A certificate signed by the appropriate person (the President in relation to Tynwald and the Legislative Council and the Speaker in relation to the House of Keys) is conclusive evidence that the exemption is required to avoid an infringement of privilege or prejudice or likely prejudice to, the effective conduct of parliamentary business (subsections (2) and (3)).

Note: when a certificate has been issued, there is no role for the Information Commissioner in reviewing whether or not the exemption has been correctly applied, although the Commissioner would be able to investigate complaints which arise in respect of other parts of the Bill (e.g. fees, time limits, advice and assistance etc.). The exemption can be relied upon without issuing a certificate and in such circumstances the Commissioner would be able to consider whether or not it had been correctly applied.

Although the Bill covers Tynwald and its Branches, individual Members of Tynwald will not fall within its scope. Constituency correspondence, for example, could not be subject to an FOI request.

Clause 23: Absolutely exempt communications with the Crown
This clause is one of two exemptions covering communications with the Crown (see also qualified exempt communications with the Crown in clause 38).

This clause states that information is absolutely 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.

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

Clause 24: Absolutely exempt information under international agreements about exchange of information
This clause places an absolute exemption on information if it is, or relates to, confidential information obtained, provided or dealt with under an international agreement providing for the exchange of information for a purpose mentioned in clause 32(3) of the Bill. Those purposes are:-

- to ascertain whether a person has failed to comply with the law;
- to ascertain whether a person is responsible for conduct that is improper;
- to ascertain whether regulatory action under any enactment is justified;
- 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;
- to ascertain the cause of an accident;
- to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- to protect the property of a charity from loss or mismanagement;
- to recover the property of a charity;
- to secure the health, safety and welfare of persons at work; and
- 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;

with either the United Kingdom, a State other than the Island, an international organisation, or an international court (the definitions of which are found in clause 5).

Subsection (2) states that the above information is confidential while the terms on which it was obtained, provided or dealt with require the person who holds it to do so in confidence or the circumstances in which it was obtained, provided or dealt with make it reasonable for the State, organisation or court to expect that it will be held in confidence.

In the clause, 'internal agreement' includes, but is not limited to, an international arrangement for the purposes of Part 9 of the Income Tax Act 1970.

Clause 25: Absolutely exempt personal information
This clause places an absolute exemption on information if it constitutes:-

- the personal data of which the applicant is the data subject (so a person cannot use the Act to obtain information about themselves);
- personal census information; or
- a deceased person's health record.

Subsection (2) places an absolute exemption on 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
- by virtue of a provision of Part 4 of that Act, the information would be exempt from section 5 of that Act (right of access to personal data) if the applicant were the data subject.

Subsection (3) ties in words and phrases used above with their meaning in the Data Protection Act 2002 and subsection (4) provides further clarification of the terms used in the clause.

Note: the interaction between the Bill and the Data Protection Act 2002 is technically complex. The Bill creates a new definition of data for FOI purposes but limits the rights to that data under the Data Protection Act. Some of these restrictions are then disregarded in order to make parts of the exemption work. (See schedule 4 for the relevant amendments to that Act). In spite of the technical nature of the interaction, the policy intention behind the personal information exemptions (see also clause 39) is straightforward: the exemptions prevent the unreasonable disclosure of personal information through FOI, primarily by linking them to contravention of the data protection principles (fair and lawful processing etc).

Clause 26: Information provided in confidence
This clause places an absolute exemption on information if it was obtained by an authority from another person (including another public authority) and, crucially, its disclosure would constitute a breach of confidence actionable by that or any other person.

Clause 27: Information the disclosure of which is restricted by law
The clause places an absolute exemption on information if its disclosure by the public authority holding it is:-

- prohibited by or under any other statutory provision;
- if its disclosure is incompatible with an EU obligation that applies to the Island; or
- if disclosure would constitute a contempt of court.

Under subsection (2), the definition of "EU obligation" as it appears in the Act has the same meaning as it has in the European Communities (Isle of Man) Act 1973.

PART 4 – QUALIFIED EXEMPT INFORMATION

Clause 28: National security and defence
This clause contains two limbs: the first prevents the disclosure of information which is required to safeguard national security; and the second protects information where 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 automatic right of review by the Information Commissioner). Under subsection (3), the certification can describe information in a general way and may be expressed to have prospective effect (i.e. it can be prepared in the expectation of future requests).

Note: unlike the national security element of the exemption 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. As a result, in order for the defence qualified exemption to be engaged, a public authority has to demonstrate that release of the requested information will either cause prejudice or be likely to cause prejudice, the latter being set at a lower threshold than the former. Only once a public authority is satisfied in this regard can it begin the public interest test to assess whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The same process has to be followed for all 'prejudice causing' exemptions.

Clause 29: International relations
This clause places a qualified exemption in respect of international relations. It has three interlinked branches which seek to protect information the disclosure of which may detrimentally affect the Island's international relations.

The first two branches (subsections (1) and (2)) are prejudice based and cover information which would, or would be likely to, prejudice:-

- relations between the Island and the United Kingdom, any other State or an international organisation or court; or
- the interests of the Island abroad or the promotion or protection of any such interest.

The third branch, in subsection (3) covers confidential information if it is obtained from the same categories as in the first branch.

Subsection (4) states that information obtained from a State, organisation or court is confidential while:-

- the terms on which it was obtained require it to be held in confidence; or
- the circumstances on which it was obtained make it reasonable for the State etc. to expect that it will be so held.

Clause 30: Economy and commercial interests
This clause contains two limbs: the economy and commercial interests. Accordingly, under subsection (1), 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 subsection (2), 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).

Clause 31: Investigations and legal proceedings

This exemption covers information in two related branches. Under subsection (1), information is qualified exempt if it has at any time been held by the 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.

Under subsection (2), 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) (see below); 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 clause also has two branches. Under subsection (1) information is qualified exempt information if its disclosure would, or would be likely to, prejudice:-

- the prevention or detection of crime;
- the apprehension or prosecution of offenders
- the administration of justice;
- assessment or collection of tax or of an imposition of a similar nature;
- the operation of immigration controls; or
- the maintenance of security and good order in institutions where persons are lawfully detained.

Under subsection (2), 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 purposes listed below or any civil proceedings brought about as a result of the exercise of such a function.

Subsection (3) lists the purposes referred to above, namely:-

- to ascertain whether a person has failed to comply with the law;
- to ascertain whether a person is responsible for conduct that is improper;
- to ascertain whether regulatory action under any enactment is justified;
- 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;
- to ascertain the cause of an accident;
- to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- to protect the property of a charity from loss or mismanagement;
- to recover the property of a charity;
- to secure the health, safety and welfare of persons at work; and
- 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.

Clause 33: Audit functions
This clause provides for information to be qualified exempt if it is held by a public authority which has functions:-
- in relation to the audit of the accounts of other public authorities; or
- in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions

and its disclosure would prejudice, or be likely to prejudice, any of the matters mentioned above.

Clause 34: Formulation of policy
This clause provides that information is qualified exempt information if it is held by a Government Department or the Cabinet Office and it 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.

Under subsection (2), the exemption does not extend to statistical information used to provide an informed background to a policy decision once that decision has been made.

Under subsection (3), in determining whether or not to engage this exemption, regard must be had to the public interest in disclosing factual information used to provide an informed background to decision-taking.

Note: 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. However, to be sure, a public interest test has to be undertaken.

Clause 35: Conduct of public business
This clause is open to all public authorities and it creates a qualified exemption on information if its disclosure would, 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.

Clause 36: Health and safety
This clause creates a qualified exemption if the disclosure of information would, or would be likely to, endanger the physical or mental health of an individual or the safety of an individual.

Note: 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.

In spite of its title, the exemption 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 clause exemption contains two limbs. Subsection (1) 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.

Subsection (2) provides for a qualified exemption 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 clause is the partner to clause 24, the absolute exemption communications with the Crown.

Under this clause, 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 or the person who has subsequently acceded to the Throne or become heir to, or second in line of succession 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 clause is the partner to clause 25, the absolute exemption on personal information.

Under this clause, 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.

Under section 8 of the Data Protection Act a data subject has the right to prevent the processing of certain types of their personal data if it is likely to cause unwarranted and substantial damage and distress. Thus, if a third party has previously objected, the authority must consider whether this exemption will apply. Being a qualified exemption, a decision on whether or not the exemption is engaged is subject to the public interest test.

The terminology defined in the Data Protection Act 2002 has the same meaning in this clause as they have in that Act.

Clause 40: Legal professional privilege
This clause creates a qualified exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

Clause 41: Information for future publication
This clause provides for a qualified exemption if:-

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

Note: it is not the intention of the FOI regime to undermine an authority's routine publication policy.

PART 5 – REVIEW AND ENFORCEMENT

Clause 42: Review of decisions by the Information Commissioner

Under this clause a person, for these purposes called 'a review applicant', has the right to apply to the Information Commissioner ('the Commissioner') for a decision on:-

- whether a public authority has responded to a request for information in accordance with the requirements of Part 2 of the Bill (access to information held by public authorities); or
- whether a public authority was justified in refusing to give the information requested.

Under subsection (2), the Commissioner must make a decision as soon as practicable, however, under subsection (3) he/she need not make a decision if satisfied that:-

- the review applicant submitted a request for information that does not comply with clause 9 (requests for information). This includes, for example, cases where the review applicant is not resident in the Island;
- the review applicant has not exhausted the complaints procedure provided by a public authority who is responding to requests for information;
- the matter could be resolved by conducting an Alternative Dispute Resolution (ADR) process;
- there has been undue delay in applying to the Commissioner;
- the application is vexatious, malicious, frivolous, misconceived or lacking in substance; or
- the application has been withdrawn or abandoned.

Under subsection (4) the 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 clause 22(2) (parliamentary privilege and business) or clause 28(2) (national security and defence).

In cases where subsections (3) or (4) apply, the Commissioner must notify the review applicant that no decision will be made and the grounds for not doing so.

In any other case, the Commissioner must give notice of his or her decision via a "decision notice" to the review applicant and to the public authority. Under subsection (6), the decision notice must specify:-

- the reasons for the decision;
- any steps to be taken by the public authority to comply with the requirement or to comply with the request for the information;
- the period of time within which those steps must be taken (which must not expire before the end of the period within which an appeal to the High Court may be brought (subsection (7)); and
- the right of appeal to the High Court conferred by clause 50.

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 (subsection (8)).

Clause 43: Review of decisions originally made by the Information Commissioner

This clause provides for a situation 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. In such circumstances, the Tynwald Commissioner for Administration would undertake the role of the Information Commissioner as set out in clause 42.

Note: The Tynwald Commissioner for Administration Act 2011 is not yet in force so an interim review mechanism will be established whilst this remains the case.

Clause 44: Alternative dispute resolution

This clause provides for the Commissioner at any time to 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 Bill an "ADR process"). If, after an ADR process has been conducted, the Commissioner makes a decision under the formal processes in the Bill it must have regard to the outcome of the ADR process.

Note: in many Freedom of Information 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 Bill proposes this mechanism of alternative dispute resolution.

Clause 45: Information notices

This clause sets out powers for the Commissioner in circumstances where he or she 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, Part 2 of the Act; or for determining whether the practice of the authority conforms with the code of practice. In such circumstances, the Commissioner may serve an 'information notice' on an authority.

Under subsection (2) the notice can require such information as specified relating to:-

- the application;
- compliance with the requirements of Part 2 of the Act; or

- conformity with the code of practice.

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 (subsection (3)), 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 (subsection (5)).

Under subsection (4) the notice must state why the information is required and contain particulars of the right of appeal.

Under subsection (6), an authority is not required to provide information:-

- that is a 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
- which is a 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 proceedings.

The Commissioner may cancel a notice by informing the public authority (subsection (7)). In the clause, information includes unrecorded information (subsection (8)).

Clause 46: Enforcement notices

This clause provides that in circumstances where the Commissioner is satisfied that an authority has failed to comply with a requirement under Part 2 of the Act, they may serve an 'enforcement notice' on the authority requiring it to take the steps specified therein in order to so comply.

The notice must set out the provision with which the Commissioner is satisfied that the authority has failed to comply and the reasons why. In addition, it must set out the right of a public authority to appeal the notice (subsection (3)).

The public authority must take the steps within the period of time specified in the notice (subsection (2)). However, the time specified in the notice for the authority to take the steps required to comply 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 (subsection (4)).

The Commissioner may cancel a notice by informing the public authority (subsection (5)).

Note: An enforcement notice is a legal order the Information Commissioner can make to require a public authority to address its failure to comply with Part 2 of the Act. In practice, this is most likely to be used where there is systemic or repeated non-compliance. An enforcement notice cannot be issued purely in relation to a breach of the code of practice which is unrelated to a breach of the Act.

The distinction in practice between enforcement and decision notices is that the latter arise in the context of specific complaints, whereas the former are more likely to be issued where there have been systematic failures or repeated non-compliance

with the Act (e.g. in relation to meeting timescales for responding to requests, incorrect issuing of refusal notices (e.g. not specifying the relevant exemptions etc.).

Clause 47: Exception from the duty to comply with certain notices
The clause allows for 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 8 in respect of absolutely exempt information or qualified exempt information to cease 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, under subsection (2), 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 (subsection (3)).

The "effective date" 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 (subsection (4)).

Clause 48: Failure to comply with notices
The clause provides the power for the Commissioner, in most circumstances, 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 in respect of decision or enforcement notices that cease to have effect because of the exception from the duty to comply with certain notices.

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) (subsection (2)).

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 (subsection (3)).

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 (subsection (4)).

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 (subsection (5)).

Clause 49: Powers of entry and inspection
The clause provides that Schedule 3 has effect in relation to the Commissioner's powers of entry and inspection.

Clause 50: Right of appeal against notices
The clause 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.

Clause 51: Public authority may claim late exemption
The clause applies in proceedings under:-

- clause 42 (review of decisions by the Information Commissioner);
- clause 43 (review of decisions originally made by the Information Commissioner); and
- clause 50 (right of appeal against notices).

In such proceedings, a public authority is entitled to claim that information requested in the request for information that is the subject of the proceedings is absolutely exempt information or qualified exempt information at any time. This can be claimed whether or not the public authority has made that claim in a refusal notice issued in relation to the information or in the case of proceedings under the three clauses set out above (subsection (2)).

However, this power is subject to subsection (3) insofar as the Information Commissioner or the High Court may refuse the public authority's claim if either (as the case may be) is satisfied on reasonable grounds that:-

- the public authority has not responded to the request for information in accordance with the requirements of Part 2 (access to information held by public authorities); or
- the public authority would not have been justified in refusing to give the information requested in reliance on the claim had the claim been made in the refusal notice issued in relation to the information; or
- there has been undue delay by the public authority in making the claim.

This clause does not prevent the Information Commissioner from considering a public authority's late reliance on a practical refusal reason.

PART 6 – THE INFORMATION COMMISSIONER

Clause 52: The Isle of Man Information Commissioner
The clause provides that the Isle of Man Data Protection Supervisor appointed under section 4 of 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 and sets out further details of the appointment. The Commissioner is appointed by the Council of Ministers with the approval of Tynwald 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. He or she 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. The Commissioner can only be removed from office following a Tynwald resolution (which itself is subject to certain criteria).

Clause 53: Independence
The clause states that the Commissioner is to perform his or her functions and exercise his or her powers independently and, in so doing, is not subject to the direction of Tynwald, its Branches or the Council of Ministers.

Clause 54: General functions of the Information Commissioner
The clause sets out the general functions of the Information Commissioner.

It is the duty of the Commissioner to perform their functions under the Act and to promote good practice (subsection (1)). The Commissioner must conform with the code of practice, in addition to the requirements under the Act, in the performance of their functions and the exercise of their powers (subsection (2)).

Under subsection (3), the Commissioner must provide the public with such information as he or she considers appropriate about, and may give advice to any person in respect of:-

- the operation of the Act;
- good practice;
- the functions of public authorities under the Act; and
- the functions of the Information Commissioner.

Under subsection (4) the Information Commissioner may, with the consent of a public authority, assess whether it is following good practice. Good practice is defined as such practice in the performance of the functions of a public authority under this Act as appears to the Commissioner to be desirable, and includes, but is not limited to, compliance with the requirements of the Act and conformity with the code of practice.

Clause 55: Recommendations as to good practice
Under the clause, the Commissioner may make recommendations to a public authority (in writing, specifying the provisions of the code of practice which they believe the authority is not conforming to, together with the steps required to conform) if it appears to the Commissioner that an authority's practice in relation to its functions under the Act does not conform to the code of practice.

Clause 56: Advice
The clause provides for the Commissioner to secure appropriate legal support to assist with their functions under the Act.

Subsection (1) allows for the Commissioner to seek legal advice and assistance from a legal practitioner on the advice panel set up for the purpose without limiting the powers of the Commissioner under paragraph 12 of Schedule 2.

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 (subsections (2) and (3)).

Clause 57: Advice panel
Linked to the clause above, the clause states that the Chief Secretary 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 general professional conduct.

Clause 58: Annual report of Information Commissioner
This clause requires the Commissioner to 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 59: Publication schemes
The clause gives the power for public authorities to:-

- adopt and maintain a publication scheme relating to the publication of information which it holds; and
- publish information in accordance with the scheme, and review it from time to time.

Under subsection (4), if an authority publishes such a 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 (subsection (6)).

Subsection (5) 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) (subsections (2) and (3)).

Note: publication schemes are compulsory in some Freedom of Information 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.

Clause 60: Code of practice
Under the clause, 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, which must be laid before Tynwald (subsection (5)), 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 13(2)(c);
- 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.

Subsection (3) states that before issuing or revising the code, the Council of Ministers must consult the Information Commissioner.

The code 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 (subsection (4)).

Clause 61: Compliance with code of practice
This clause states that if a public authority complies with its obligations under the code of practice, it is taken to have complied with its requirements (if any) under the Act.

PART 8 – SUPPLEMENTAL PROVISIONS

Clause 62: No civil proceedings arise from non-compliance
This clause states that 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.

Under subsection (2) this does not affect the powers of the Information Commissioner under clause 48 (failure to comply with notices)

Clause 63: Record tampering
The clause states that a person commits an offence if:-

- a request for information has been made to a public authority;
- the applicant is entitled to be supplied with the information under this Act or the Data Protection Act 2002;
- the person alters, defaces, erases, destroys or conceals information held by the authority with the intention of preventing the authority from supplying the information to the applicant; and the person is:-
    - 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

- is an officer or employee of the public authority, or of a committee, body or person referred to in the above point, including an employee of the Public Services Commission acting under the direction of the public authority, committee, body or person, in the course of his or her duties or employment.

Subsection (2) states that a person guilty of an offence is liable on summary conviction to a fine not exceeding £5,000.

Under subsection (3), proceedings under this clause may not be instituted except:-

- in a case where the public authority is the Information Commissioner, with the consent of the Attorney General; and
- in any other case, by the Information Commissioner or by or with consent of the Attorney General.

Note: there is no criminal activity involved in deleting information in anticipation of a future FOI request as the Bill is predicated largely on what happens or must happen if a request for information is made (FOI is not, primarily, a records management Act).

Clause 64: Confidentiality

The clause states that a person commits an offence if the person performing the functions of the Commissioner (their staff or an agent) and, 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.

Subsection (2) states that disclosure is made with lawful authority only if:-

- the disclosure is made with the consent of the individual or of the person for the time being carrying on the business;
- the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act or the Data Protection Act 2002;
- 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;
- the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act, the Data Protection Act 2002 or otherwise; or
- having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

A person guilty of an offence under this clause is liable on summary conviction to a fine not exceeding £5,000 and proceedings under this clause may not be instituted except by or with the consent of the Attorney General (subsections (3) and (4).

Note: The clause mirrors a similar provision in section 54 of the Data Protection Act 2002, a section which is repealed by the Freedom of Information Act.

Clause 65: Defamation

The clause states that 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 66: Notices
The clause stipulates 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 67: Subordinate legislation
The clause allows the Council of Ministers to make orders and regulations in accordance with this Act or otherwise as are necessary or expedient to give effect to this Act.

Under subsection (2) orders and regulations may contain any consequential, incidental, supplemental, transitional and saving provisions that the Council of Ministers considers appropriate.

Subsection (3) states that orders and regulations, other than those covered by subsection (4) 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 be annulled, they cease to have effect.

Subsection (4) sets out the exceptions to this general provision, Accordingly, the following must not come into operation without the approval of Tynwald:-

- orders under clause 4(4), providing for an earlier application date;
- orders under clause 7(4) (amendment of Schedule 1) and 59(2) (order to adopt publication scheme);
- regulations prescribing fees for the purpose of clause 68 (fees); and
- regulations prescribing another period for the purposes of defining the 'standard processing period' in clause 12(2) (time for deciding request).

Clause 68: Fees
This clause sets out the framework for fees chargeable under the Act. Without limiting clause 67 (subordinate legislation) the clause states 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 Information Commissioner

Subsections (2), (3) and (4) state that regulations may provide for:-

- fees by fixing a fee, or a rate, process or formula by which a fee may be calculated;
- different fees for different cases and circumstances; and
- the process for making reasonable estimates of fees and notifying the applicant of the estimates.

In respect of the latter point, subsection (5) states that in setting fees, public 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.

Subsection (6) states that regulations may also provide:-

- that no fee is payable in cases prescribed by regulations; and
- that a fee must not exceed the maximum specified in, or determined in accordance with, regulations.

Under subsection (7) a public authority may, if it considers it appropriate, waive the whole or any part of a fee or refund the whole or any part of the fee.

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 (subsection (8)).

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 (subsections (9) and (10)).

Clause 69: Amendment and repeal of enactments etc.
Schedule 4 of the Bill has effect.

SCHEDULE 1 – PUBLIC AUTHORITIES

The schedule lists the public authorities which fall within the scope of the Act. Public authorities will be added to the Schedule as the scope of the Act is extended during its phased implementation. The first phase of the implementation is to include the following public authorities in the Schedule:-

- The Cabinet Office; and
- The Department of Environment, Food and Agriculture.

SCHEDULE 2 – THE ISLE OF MAN INFORMATION COMMISSIONER

This schedule, made under clause 52(2), sets out in further detail the terms of appointment and other issues in relation to the Information Commissioner. The schedule includes:-

- Selection of a candidate
- Qualifications
- Tenure of office
- Terms and conditions
- Restrictions
- Resignation and removal
- Procedure for removal
- When the office of the Information Commissioner becomes vacant
- Exercise of functions during absence, inability or vacancy and delegation
- General powers
- Staff
- Appointment of persons to provide services
- Delegation of functions
- Validity of acts
- Financial provision
- Accounts and Audit

SCHEDULE 3 – POWERS OF ENTRY AND INSPECTION

This schedule, made under clause 49, sets out the Information Commissioner's powers of entry and inspection and the issuing of warrants in three parts.

Part 1: the issue of warrants, sets out the power to grant warrants, the matters that must be satisfied and the requirement to issue certified copies thereof.

Part 2: the execution of warrants, sets out the powers in relation to the use of reasonable force, the requirement for a warrant to be executed at a reasonable hour, requirements in relation to occupied premises and receipts for items seized.

Part 3: the matters exempt from inspection and seizure, sets out the information that is excluded from the schedule and details the position in respect of communications between advocate and client and information consisting partly of matters in respect of which powers under the schedule are not exercisable.

Part 4: supplementary, in respect of the return of warrants, offences and interpretation of the schedule.

SCHEDULE 4 – AMENDMENT AND REPEAL OF ENACTMENTS ETC.

This schedule sets out the consequential amendments to existing legislation, viz.:-

- Data Protection Act 2002
- Council of Ministers Act 1990
- Lloyds TSB Act 1997
- Halifax International Act 2001
- Online Gambling Regulations Act 2001
- Public Sector Pensions Act 2011
- Tynwald Commissioner for Administration Act 2011

The most significant amendment of existing enactments is in respect of the Data Protection Act 2002.

Paragraph 1 broadens the definition of data within the Data Protection Act to include unstructured, manual personal data held by public authorities.

Paragraph 6 removes a public authority's obligation to comply with a data subject's right of access in respect of unstructured personal data unless a subject access request contains a description of the data (and then only if the cost of compliance is below the prescribed limit).
Paragraph 7 removes from the extension of the new definition of data all the substantive effects of the Data Protection Act except those relating to subject access and accuracy as the general application of that Act to all personal information held by public authorities is not an intended by-product of the Bill.

The schedule also contains a transitional provision so that, without limiting the provisions of the Schedule, a reference in any enactment or document in force or created before the date on which this schedule commences to the 'Data Protection Supervisor' is to be taken as a reference to the 'Information Commissioner'.

Annex 1: Some key phrases and concepts in the Bill

Public Authority
In order to fall within the scope of the Act, a public authority has to be listed in Schedule 1. A public authority so listed can be a person, body, a publicly-owned company or the holder of any office.

A publicly-owned company is 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 conferred on a public authority under an enactment.

Information Commissioner
This is the Act's regulator and champion. The Data Protection Supervisor will become the Information Commissioner (appointed by the Council of Ministers with the approval of Tynwald). The Commissioner has a range of powers and duties to ensure that public authorities fulfil their obligations under the Act. In certain cases, s/he can certify in writing to the High Court that an authority has failed to comply with a notice that s/he has issued and if the Court finds in his favour, the authority could be held in contempt of court.

Standard Processing Period for responding to a request
A public authority must respond to a request promptly, and in any case within 20 working days (which can be extended by order). Where a public authority is considering whether or not information is qualified exempt information (see below) an **'extended processing period'** applies. This period is unspecified in length but has to be reasonable in all the circumstances (whether or not responding to the request interferes with the day to day running of the authority is a legitimate consideration in determining what it reasonable).

Exemptions
There are two types of exemption under which an authority can refuse to disclose requested information:-

a) Absolutely exempt information
There is no single policy reason justifying absolute exemptions, however, a common theme amongst them is that disclosure is provided for, or governed by, a more specialised set of rules.

All absolute exemptions are 'class' exemptions and in assessing whether one applies the only question is whether the information falls within one of the categories covered by the exemptions. If it does, then the exemption is engaged and the information is exempt. There is no test of public interest or prejudice (see below).

b) Qualified exempt information
This is a particularly important concept to the Bill and embodies a key principle underlying access to information regimes, namely that where the conditions for exemption are satisfied, the public authority is entitled to refuse to provide the information requested if in all the circumstances the public interest in maintaining the

exemption outweighs the public interest in disclosing the information – authorities have to perform the so called 'public interest test'.

There are also some qualified exemptions which are subject to a 'prejudice test'. Under these exemptions, a public authority has to first establish whether the release of information would, or would be likely to prejudice the subject matter of the exemption, and only if it concludes that it will does it then go on to conduct a public interest test.

It is likely that the more complex requests will involve consideration of the prejudice or public interest tests to determine whether or not a qualified exemption is engaged.

Practical refusal reason

Practical refusal reasons constitute another basis on which an authority can refuse to disclose information. The reasons are:-

- the public authority does not hold or cannot, after taking reasonable steps to do so, find the information that the applicant has requested;
- complying with the request for information would require the public authority to do one or more of the following:-
    - create or derive information from information that it holds;
    - undertake research into, or analysis of, information that it holds; or
    - undertake substantial compilation or collation of information that it holds.
- the applicant has submitted a request for information that does not comply with section 9 (including being an Island resident);
- the request for information is vexatious, malicious, frivolous, misconceived or lacking in substance;
- both of the following apply:-
    - the request for information 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 public authority estimates that the cost of searching for or preparing (or both) the information to give to the applicant would exceed the amount specified in regulations.

A public authority can also refuse a request if an applicant fails to provide additional information and/or fees within 28 days of the request. Additional information might be sought if an authority is unclear about what information is being sought by the applicant from the initial request. Additional fees might be sought if a) the authority knows that the cost of complying would exceed the maximum limit but could nonetheless provide the information if the applicant is willing to pay for it; or b) if the cost associated with releasing the information is greater than the initial fee but below the maximum limit.

Code of Practice

This is not to be mistaken for the existing Code of Practice on Access to Government Information; this code is required by the Act. The Council of Ministers has to issue the code which gives guidance to authorities as to the practice to be followed in the exercise of their functions under the Act. If it abides by the code, an authority is

taken to have fulfilled its obligations. The Act sets out a number of provisions which must be included in the code although this is non-exhaustive.

Refusal notice
Issued by a public authority to set out the reasons why it has refused a request for information (in all or part). The Bill sets out certain aspects which have to be contained within a refusal notice. The next step for an applicant who is unhappy with the decision is to ask for an internal review. This step is not set out in the Act but needs to be fulfilled before the Commissioner can become involved.

Decision notice
Issued by the Information Commissioner when s/he makes a decision on a complaint referred to him by a 'review applicant' (a person who is not satisfied by the way an authority has dealt with a request or thinks that information has been wrongly refused). The Bill sets out certain aspects which have to be contained within a decision notice.

Information notice
Issued by the Information Commissioner after s/he has received a request from a review applicant and when he is seeking further information from an authority in respect of why it reached the decision that it did/acted in the way that it did. Note: in practice it is likely that an information approach from the Commissioner will be sufficient rather than needing to issue a formal information notice.

Enforcement notice
Also issued by the Information Commissioner and are more likely to be issued where there have been systematic failures or repeated non-compliance with the Act (e.g. in relation to meeting timescales for responding to requests, incorrect issuing of refusal notices, not specifying the relevant exemptions or in relation to a specific complaint etc.).

Note: a public authority can appeal all notices issued by the Information Commissioner to the High Court on a point of law. An applicant can appeal a decision notice on the same basis.

Alternative Dispute Resolution process
The Bill allows the Information Commissioner at any time to try to resolve complaints through informal means rather than through the formal mechanisms in the Bill.

Fees
The Bill creates a flexible power to make fees by regulations. There are different layers of fees: to accompany the initial request and then additional fees that can be charged if, for example, the request involves the retrieval and release of lots of information. There is also a cost limit (yet to be set) above which an authority can refuse the request. There is also a power for fees to be charged if a review applicant wishes to complain to the Information Commissioner.

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. The regulations may also 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 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 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. They also allow authorities to waive or refund the whole or any part of a fee.