

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cyngor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

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Constitutional and Legislative Affairs Committee

Protection of Freedoms Bill

Legislative Consent Memorandum

Legal Advice Note

Background

1. On the 10th November 2011, the First Minister laid a Legislative Consent Memorandum (LCM) in relation to the Protection of Freedoms Bill. The Memorandum was considered by the Business Committee on the 15th November and referred to the Constitutional and Legislative Affairs Committee for scrutiny under Standing Order 29.4 prior to it being debated in Plenary, with a reporting deadline of 24 January 2012. This Note is intended to inform that consideration.

The Bill

2. The Bill in question was given a Second Reading in the House of Commons on 1st March 2011 and it completed its passage through the Commons on the 11th October. It has since been given a Second Reading in the House of Lords, and Committee Stage is scheduled to commence on 29 November 2011.

3. The Bill consists of seven Parts and includes:

- provision in respect of the retention and destruction of fingerprints, footwear impressions and DNA samples and profiles taken in the course of a criminal investigation;
- a requirement on schools and further education colleges to obtain the consent of each parent of a child under 18 years of age attending the school or college, before the school or college can process the child's biometric information;
- provision for the further regulation of Closed Circuit Television, Automatic Number Plate Recognition and other surveillance camera technology operated by the police and local authorities;

- amendment of the Regulation of Investigatory Powers Act 2000 to require local authorities to obtain judicial approval for the use of any one of the three covert investigatory techniques available to them under the Act, namely the acquisition and disclosure of communications data, and the use of directed surveillance and covert human intelligence sources;
- provision in respect of powers to enter land or other premises. The provisions enable a Minister of the Crown (or the Welsh Ministers), by order, to repeal unnecessary powers of entry, to add safeguards in respect of the exercise of such powers, or to replace such powers with new powers subject to additional safeguards. Each Cabinet Minister is placed under a duty to review existing powers of entry with a view to considering whether to exercise any of the aforementioned order-making powers. Provision is also made for the exercise of powers of entry to be subject to the provisions of a code of practice;
- provision in respect of parking enforcement;
- provision in respect of counter-terrorism powers;
- amends the Safeguarding of Vulnerable Groups Act 2006;
- amendment of the Police Act 1997 which sets out the framework for the disclosure of criminal convictions and other relevant information in certificates issued by the Criminal Records Bureau;
- establishes a new organisation, to be known as the Disclosure and Barring Service, which will replace and combine the functions of the ISA and the CRB;
- provides for a person to apply to the Secretary of State for a conviction or caution for an offence under section 12 or 13 of the Sexual Offences Act 1956, and associated offences, involving consensual gay sex with another person aged 16 or over, to become a disregarded conviction or caution;
- repeals section 43 of the Criminal Justice Act 2003, which makes provision for certain fraud trials to be conducted without a jury, and
- removes the restrictions on the times when a marriage or civil partnership can take place.

4. It is Part 6 that contains the subject matter of the current LCM and makes amendments to the Freedom of Information Act 2000 ("FOIA") and the Data Protection Act 1998 ("DPA"). The changes are fourfold. First, they amend the FOIA to make provision for the re-use of datasets by public authorities subject to that Act. Second, they amend the definition of a publicly owned company for the purposes of the FOIA so that it includes companies owned by two or more public authorities. Third, they extend to Northern Ireland amendments made to the FOIA by the Constitutional Reform and Governance Act 2010. Finally, they amend the FOIA and DPA to revise the arrangements in respect of the appointment and tenure of the office of the Information Commissioner and to make changes to the role of the Secretary of State in relation to the exercise of certain functions by the Information Commissioner.

The Legislative Consent Memorandum

5. An earlier Legislative Consent Motion in relation to this Bill was considered by the Assembly on 15th March 2011 (NDM4680) :”To propose that the National Assembly for Wales, in accordance with Standing Order 26.4, agrees that provisions of the Protection of Freedoms Bill in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.” Although that Motion was expressed in very general terms, the Assembly’s legislative competence at that time was very limited. It was substantially extended following the coming into force of Part 4 of the Government of Wales Act 2006, and a further LCM has been considered by the Government to be necessary.

6. The new motion read as follows : ““That the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that, in addition to the provisions referred to in motion NDM4680, those further provisions which have been brought forward in the Protection of Freedoms Bill relating to freedom of information and data protection, in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”

7. The motion arises from amendments proposed by the Home Secretary at Report Stage in the House of Commons, and they now appear as parts of clause 100 of the Bill. The text of that clause appears as Annex 1 to this paper, with the text inserted by the amendments underlined. A detailed explanation of Clause 100 taken from the Explanatory Memorandum prepared by the Home Office for the purpose of the Parliamentary proceedings appears as Annex 2.

8. It will be seen that the amendments deal specifically with the charging of fees by public authorities in connection with the making available of copyright work for re-use. The Welsh Government, in its LCM at paragraph 7 explains the reason for the amendments as follows:
“The amendments were to the charging provisions which would have had the unintended effect of eliminating the possibility of charging for any datasets requested from a public authority. The amendments seek to preserve existing statutory powers to charge and to provide a power to make new regulations to enable charging. These amendments would ensure that (1) all public authorities which have existing statutory powers (other than under the Re-use of Public Sector Information Regulations 2005 (RPSI)) may continue to use those powers to charge and that (2) all public authorities which do not have their own statutory powers but who may use the RPSI regulations to charge, or who charge under a non-statutory power (e.g. common law or prerogative powers) may continue to charge under the new regulations.”

Conclusion

9. The matter is clearly within the legislative competence of the Assembly, as 'Access to information held by open access public authorities' is specifically included under Public Administration in Schedule 7 to the Government of Wales Act 2006. The Welsh Government has confirmed that the amendments are consistent with its own policy objective of protecting funding streams for public authorities. It is a very specific change to the Bill that was the subject of the previous Motion approved by the Assembly which covered legislating at Westminster on the subject of the release of datasets. There is no likelihood of an Assembly Bill in the near future that would provide a suitable vehicle for these provisions. For users of the legislation, and particularly local authorities, it is helpful for the question of charging to be dealt with at the same time and in the same legislation as the duties to which it relates. In these circumstances, a Legislative Consent Motion is considered an appropriate way to deal with the matter.

10. The Committee is recommended to consider whether it agrees with this view or whether it wishes to receive further evidence before coming to a conclusion and reporting to the Assembly.

Legal Services

November 2011

Part 6

Freedom of information and data protection

Publication of certain datasets

100 Release and publication of datasets held by public authorities .

- (1) The Freedom of Information Act 2000 is amended as follows. .
- (2) In section 11 (means by which communication to be made)— .
 - (a) after subsection (1) insert— .

“(1A) Where— .

 - (a) an applicant makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and .
 - (b) on making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form, .

the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use.”
 - (b) In subsection (4), for “subsection (1)” substitute “subsections (1) and 20(1A)”. .
 - (c) After subsection (4) insert— .

“(5) In this Act “dataset” means information comprising a collection of information held in electronic form where all or most of the information in the collection— .

 - (a) has been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority, .
 - (b) is factual information which— .
 - (i) is not the product of analysis or interpretation other than calculation, and
 - (ii) is not an official statistic (within the meaning given by section 6(1) of the Statistics and Registration Service Act 2007), and .
 - (c) remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded.” .
- (3) After section 11 (means by which communication to be made) insert— .

“11A Release of datasets for re-use

 - (1) This section applies where— .
 - (a) a person makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the authority, .
 - (b) any of the dataset or part of a dataset so requested is a relevant copyright work, .
 - (c) the public authority is the only owner of the relevant copyright work, and
 - (d) the public authority is communicating the relevant copyright work to the applicant in accordance with this Act. .
 - (2) When communicating the relevant copyright work to the applicant, the public authority must make the relevant copyright work available for re-use by the applicant in accordance with the terms of the specified licence. .
 - (3) The public authority may exercise any power that it has by virtue of regulations under section 11B to charge a fee in connection with making the relevant copyright work available for re-use in accordance with subsection (2). .

(4) Nothing in this section or section 11B prevents a public authority which is subject to a duty under subsection (2) from exercising any power that it has by or under an enactment other than this Act to charge a fee in connection with making the relevant copyright work available for re-use. .

(5) Where a public authority intends to charge a fee (whether in accordance with regulations under section 11B or as mentioned in subsection (4)) in connection with making a relevant copyright work available for re-use by an applicant, the authority must give the applicant a notice in writing (in this section referred to as a “re-use fee notice”) stating that a fee of an amount specified in, or determined in accordance with, the notice is to be charged by the authority in connection with complying with subsection (2). .

(6) Where a re-use fee notice has been given to the applicant, the public authority is not obliged to comply with subsection (2) while any part of the fee which is required to be paid is unpaid. .

(7) Where a public authority intends to charge a fee as mentioned in subsection (4), the re-use fee notice may be combined with any other notice which is to be given under the power which enables the fee to be charged. .

(8) In this section— .

“copyright owner” has the meaning given by Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act);

“copyright work” has the meaning given by Part 1 of the Act of 1988 (see section 1(2) of that Act);

“database” has the meaning given by section 3A of the Act of 1988;

“database right” has the same meaning as in Part 3 of the Copyright and Rights in Databases Regulations 1997 (S.I. 1997/3032);

“owner”, in relation to a relevant copyright work, means—

(a) the copyright owner, or

(b) the owner of the database right in the database;

“relevant copyright work” means—

(a) a copyright work, or

(b) a database subject to a database right,

but excludes a relevant Crown work or a relevant Parliamentary work;

“relevant Crown work” means—

(a) a copyright work in relation to which the Crown is the copyright owner, or

(b) a database in relation to which the Crown is the owner of the database right;

“relevant Parliamentary work” means—

(a) a copyright work in relation to which the House of Commons or the House of Lords is the copyright owner, or

(b) a database in relation to which the House of Commons or the House of Lords is the owner of the database right;

“the specified licence” is the licence specified by the Secretary of State in a code of practice issued under section 45, and the Secretary of State may specify different licences for different purposes.

11B Power to charge fees in relation to release of datasets for re-use .

(1) The Secretary of State may, with the consent of the Treasury, make provision by regulations about the charging of fees by public authorities in connection with making relevant copyright works available for re-use under section 11A(2) or by virtue of section 19(2A)(c). .

(2) Regulations under this section may, in particular— .

(a) prescribe cases in which fees may, or may not, be charged, .

(b) prescribe the amount of any fee payable or provide for any such amount to be determined in such manner as may be prescribed, .

(c) prescribe, or otherwise provide for, times at which fees, or parts of fees, are payable, .

(d) require the provision of information about the manner in which amounts of fees are determined, .

(e) make different provision for different purposes. .

(3) Regulations under this section may, in prescribing the amount of any fee payable or providing for any such amount to be determined in such manner as may be prescribed, provide for a reasonable return on investment. .

(4) In this section “relevant copyright work” has the meaning given by section 11A(8).” .

(4) In section 19 (publication schemes)— .

(a) after subsection (2) insert— .

“(2A) A publication scheme must, in particular, include a requirement for the public authority concerned— .

(a) to publish— .

(i) any dataset held by the authority in relation to which a person makes a request for information to the authority, and .

(ii) any up-dated version held by the authority of such a dataset, .
unless the authority is satisfied that it is not appropriate for the dataset to be published,

(b) where reasonably practicable, to publish any dataset the authority publishes by virtue of paragraph (a) in an electronic form which is capable of re-use, .

(c) where any information in a dataset published by virtue of paragraph (a) is a relevant copyright work in relation to which the authority is the only owner, to make the information available for re-use in accordance with the terms of the specified licence. .

(2B) The public authority may exercise any power that it has by virtue of regulations under section 11B to charge a fee in connection with making the relevant copyright work available for re-use in accordance with a requirement imposed by virtue of subsection (2A)(c). .

(2C) Nothing in this section or section 11B prevents a public authority which is subject to such a requirement from exercising any power that it has by or under an enactment other than this Act to charge a fee in connection with making the relevant copyright work available for re-use. .

(2D) Where a public authority intends to charge a fee (whether in accordance with regulations under section 11B or as mentioned in subsection (2C)) in connection with making a relevant copyright work available for re-use by an applicant, the authority must give the applicant a notice in writing (in this section referred to as a “re-use fee notice”) stating that a fee of an amount specified in, or determined in accordance with, the notice is to be charged by the authority in connection with complying with the requirement imposed by virtue of subsection (2A)(c). .

(2E) Where a re-use fee notice has been given to the applicant, the public authority is not obliged to comply with the requirement imposed by virtue of subsection (2A)(c) while any part of the fee which is required to be paid is unpaid. .

(2F) Where a public authority intends to charge a fee as mentioned in subsection (2C), the re-use fee notice may be combined with any other notice which is to be given under the power which enables the fee to be charged.” .

(b) after subsection (7) insert— .

“(8) In this section— .

“copyright owner” has the meaning given by Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act);

- “copyright work” has the meaning given by Part 1 of the Act of 1988 (see section 1(2) of that Act);
- “database” has the meaning given by section 3A of the Act of 1988;
- “database right” has the same meaning as in Part 3 of the Copyright and Rights in Databases Regulations 1997 (S.I. 1997/3032S.I. 1997/3032);
- “owner”, in relation to a relevant copyright work, means—
- (a) the copyright owner, or
 - (b) the owner of the database right in the database;
- “relevant copyright work” means—
- (a) a copyright work, or
 - (b) a database subject to a database right,
- but excludes a relevant Crown work or a relevant Parliamentary work;
- “relevant Crown work” means—
- (a) a copyright work in relation to which the Crown is the copyright owner, or
 - (b) a database in relation to which the Crown is the owner of the database right;
- “relevant Parliamentary work” means—
- (a) a copyright work in relation to which the House of Commons or the House of Lords is the copyright owner, or
 - (b) a database in relation to which the House of Commons or the House of Lords is the owner of the database right;
- “the specified licence” has the meaning given by section 11A(8).”
- (5) In section 45 (issue of code of practice)—
- (a) in subsection (2), after paragraph (d) (and before the word “and” at the end of the paragraph), insert—
 - “(da) the disclosure by public authorities of datasets held by them,”, .
 - (b) after subsection (2) insert—
 - “(2A) Provision of the kind mentioned in subsection (2)(da) may, in particular, include provision relating to—
 - (a) the giving of permission for datasets to be re-used, .
 - (b) the disclosure of datasets in an electronic form which is capable of re-use, .
 - (c) the making of datasets available for re-use in accordance with the terms of a licence, .
 - (d) other matters relating to the making of datasets available for re-use, .
 - (e) standards applicable to public authorities in connection with the disclosure of datasets.”, and .
 - (c) in subsection (3) for “The code” substitute “Any code under this section”. .
- (6) In section 84 (interpretation), after the definition of “the Commissioner”, insert—
- ““dataset” has the meaning given by section 11(5);”.

ANNEX 2

Extract from Explanatory Memorandum for the Protection of Freedoms Bill as transferred to the Lords.

“Part 6: Freedom of information and data protection

Clause 100: Release and publication of datasets held by public authorities

377. Clause 100 amends the Freedom of Information Act 2000 ("FOIA") which currently provides for access to information held by public authorities.

378. Subsection (2) amends section 11 of the FOIA (means by which communication to be made). Paragraph (a) inserts a new subsection (1A) which provides that where a request is made for information that is a dataset, or which forms part of a dataset, held by the public authority, and the applicant requests that information be communicated in an electronic form, then the public authority must, as far as is reasonably practicable, provide the information to the applicant in an electronic form that is capable of re-use, in other words a re-usable format.

379. There is no absolute duty for datasets to be provided in a re-useable format as it is recognised that, in some instances, there may be practical difficulties in relation to costs and IT to convert the format of the information. A re-usable format is one where the information is available in machine-readable form using open standards which enables its re-use and manipulation. If the applicant does not want to have the dataset communicated in electronic form, because for example, he or she wants the dataset in hard copy only, then the new duty in section 11(1A) will not arise. However, the public authority would still need to comply with the preference expressed, by virtue of the existing duty in section 11(1)(a) of the FOIA, and must provide the dataset in hard copy so far as it is reasonably practicable to do so.

380. Paragraph (b) amends section 11(4) by providing that the discretion which a public authority has in relation to the means by which communication of the information is to be made (which is already subject to the duty in section 11(1) of the FOIA) is now additionally subject to the new duty in section 11(1A).

381. Paragraph (c) of subsection (2) inserts new subsection (5) and provides for the definition of "dataset" for the purposes of the Act. The definition makes it clear that a dataset is a subset of information within the meaning of the FOIA. The definition provides that a dataset is a collection of information held in electronic form where all or most of the information meets the criteria set out in the following paragraphs of the new section 11(5).

382. The new subsection (5)(a) requires that the information in a dataset has to have been obtained or recorded by a public authority for the purpose of providing the authority with information in connection with the provision of a service by that authority or the carrying out of any other function of the authority.

383. New subsection (5)(b) requires that the information is factual in nature and (a) is not the product of interpretation or analysis other than calculation, in other words that it is the 'raw' or 'source' data; and (b) provides that it is not an official statistic within the meaning given by the Statistics and Registration Service Act

2007 ("SRSA 2007"). Official statistics have been excluded from the definition of datasets as the production and publication of official statistics is provided for separately in the SRSA 2007.

384. New subsection (5)(c) requires that the information within datasets has not been materially altered since it was obtained or recorded. Datasets which have had 'value' added to them or which have been materially altered, for example in the form of analysis, representation or application of other expertise, would not fall within the definition for the purposes of new subsection (5). Examples of the types of datasets which meet the definition, though not a comprehensive list, will include datasets comprising combinations of letters and numbers used to identify property or locations, such as postcodes and references; datasets comprising numbers and information related to numbers such as spend data; and datasets comprising text or words such as information about job roles in a public authority.

385. Subsection (3) inserts new sections 11A and 11B into the FOIA which provide for the new duty to make a dataset available for re-use and the charging of fees. New section 11A(1) provides for the four criteria which must be met for the new section to apply: (a) that a person must have made a request for a dataset; (b) that the dataset requested includes a 'relevant copyright work'; (c) that the public authority is the only owner of the 'relevant copyright work', in other words that it is not jointly owned with another party or that it is not owned in whole or in part by a third party; and (d) that the public authority is communicating the relevant copyright work to the requester under the FOIA, in other words that the dataset requested is not being withheld under one of the exemptions provided for in the FOIA.

386. New section 11A(2) provides that when communicating such a dataset to an applicant, the public authority must make the dataset available for re-use in accordance with the terms of a specified licence. New section 11A(3) to (7) makes provision for the charging of fees by public authorities for making datasets available for re-use. New subsection (3) provides that a public authority may charge a fee by virtue of regulations made under new section 11B and new subsection (4) preserves existing statutory powers for public authorities to charge a fee. New subsection (5) provides that where a public authority intends to charge a fee, it must give the applicant a "re-use fee notice", which states the amount of the fee which must be paid before the dataset is available for re-use. New subsection (6) provides that where the public authority has given the applicant a re-use notice, it is not required to make the dataset available for re-use until the fee is paid in accordance with the notice; and new subsection (7) provides that if a public authority is exercising any existing statutory power to charge, the authority may combine the re-use fee notice with any other notice in accordance with the relevant statutory power being exercised.

387. New section 11A(8) adds definitions of "copyright owner", "copyright work", "database", "database right", "owner", "relevant copyright work", and "the specified licence" to section 11A of the FOIA. The definition of a "relevant copyright work" excludes a "relevant Crown work" and a "relevant Parliamentary work" which are separately defined.

388. Crown owned works are excluded from the requirement on public authorities to make datasets available for re-use under the terms of a licence specified by the Secretary of State. This is because the Controller of Her Majesty's Stationery Office, who is appointed by letters patent from the Queen to manage Crown owned works,

already has the authority to require these works and databases to be made available for re-use under the terms of a licence.

389. Parliamentary owned works and databases are excluded from the requirement on public authorities to make such datasets available for re-use because it would not be appropriate to make Parliament subject to a direction of the Secretary of State as new section 11A of the FOIA would in effect do by way of the specified licence in the code of practice under section 45 of the FOIA.

390. New section 11B makes further provision about the charging of fees by public authorities for making datasets (containing relevant copyright works) available for re-use. Subsection (1) confers a power on the Secretary of State to make regulations (subject to the negative resolution procedure) about the charging of fees in connection with making the datasets available for re-use in response to requests under the FOIA and publication schemes. Subsections (2) and (3) set out what the regulations may prescribe, such as when a fee may or may not be charged and how much that fee might be.

391. Subsection (4) amends section 19 (publication schemes) of the FOIA. Paragraph (a) inserts new subsections (2A) to (2F) into section 19 of the FOIA. Under new section 19(2A), publication schemes must include a requirement for the public authority to publish any dataset it holds, which is requested by an applicant, and any updated version of a dataset, unless the authority is satisfied that it is not appropriate for the dataset to be so published (new subsection (2A)(a)). It requires public authorities, where reasonably practicable, to publish any dataset under new subsection (2A)(a) in an electronic form which is capable of re-use (new subsection (2A)(b)) Subject to new subsection(2B), it also requires public authorities to make any relevant copyright work (if the authority is the only owner) available for re-use in accordance with the terms of the specified licence. New subsections (2B) to (2F) mirror new section 11A(2A) to (2E) by making equivalent provision in respect of publication schemes for the charging of fees by public authorities for making datasets (where they contain relevant copyright works) available for re-use.

392. Paragraph (b) of subsection (4) inserts a new subsection (8) into section 19 of the FOIA which provides definitions of "copyright owner", "copyright work", "database", "database right", "owner", "relevant copyright work" and "the specified licence". The definition of a "relevant copyright work" excludes a "relevant Crown work" and a "relevant Parliamentary work" which are separately defined.

393. Subsection (5) amends section 45 of the FOIA (issue of code of practice). Paragraph (a) amends the list in section 45(2) of the FOIA, which sets out the matters that must be included in the code of practice made under that section, to insert a new requirement for the code of practice to include provision relating to the disclosure by public authorities of datasets held by them. Paragraph (b) sets out the different provisions relating to the re-use and disclosure of datasets that may, in particular, be included in the code of practice under section 45 of the FOIA. Paragraph (c) amends section 45(3) of the FOIA so as to provide for the possibility of making more than one code of practice under section 45, each of which makes different provision for different public authorities.

394. Subsection (6) inserts into section 84 of the FOIA, which defines the terms used in that Act, a definition of the new term "dataset". “