

FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM ALISTAIR P SLOAN

1. I am responding to this call for evidence as an individual who has made use of the Freedom of Information (Scotland) Act 2002 (FOISA) on a number of occasions when conducting research. I am a supporter of the principles behind FOISA and the general “Open Government” movement. I believe that FOISA plays a vital and essential role in our democracy.

2. FOISA has provided an unprecedented level of access to information held by a wide range of bodies that carry out public functions. It has undoubtedly contributed to creating a much more open society and enabled the Scottish people to better hold public servants to account over how they conduct their public functions and how they spend public money.

3. It is important that Freedom of Information is protected in Scotland and that changes made to the legislation are for the purpose of strengthening the Act rather than wakening it.

4. Freedom of Information benefits everyone in society. It gives members of the public, elected representatives¹ and even other public authorities² the ability to formally request information from bodies covered by the Act.

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

5. I welcome any move to strengthen the information access rights provided to the people of Scotland by FOISA and this Bill broadly does that. However, there are a number of concerns with the Bill. Firstly, the wording of Section 2 of the Bill is of concern and I will expand upon this in more detail in answer to question 4. Secondly, the Bill, as currently drafted, is a missed opportunity. There are additional things which could be included which would further strengthen the Act. I have provided further information on the missed opportunity of this Bill towards the end of this document.

Did you take part in the Scottish Government’s consultation on the Bill and how have your views been reflected?

6. Unfortunately, I was unable to provide a response to the Government’s consultation in time due to other pressures.

¹ For example: <http://www.itspublicknowledge.info/UploadedFiles/Decision048-2011.pdf> (Shirly-Anne Somerville MSP), <http://www.itspublicknowledge.info/UploadedFiles/Decision134-2010.pdf> (Hugh Henry MSP), <http://www.itspublicknowledge.info/UploadedFiles/Decision082-2009.pdf> (Jamie Hepburn MSP), <http://www.itspublicknowledge.info/UploadedFiles/Decision128-2006.pdf> (Christine Grahame MSP) and <http://www.itspublicknowledge.info/uploadedFiles/Decision111-2012.pdf> (Catherine Stihler MEP)

² For example <http://www.itspublicknowledge.info/uploadedFiles/Decision086-2012.pdf> (Motherwell, Cumbernauld and South Lanarkshire Colleges)

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

7. There are aspects of the Bill that will strengthen the provisions within FOISA and it broadly seeks to protect the right of access to information held by public authorities in Scotland. However, I am concerned that the amendment proposed in Section 2 of the Bill will adversely affect the right to access information from public authorities in Scotland. I am also concerned that the Bill represents a missed opportunity.

In response to the Scottish Government's consultation on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the position of the Scottish Government to these concerns?

8. I am concerned about this aspect of the Bill as it will have an adverse effect on the rights of people to access information under FOISA.

9. Her Majesty as Head of State is in a position where information of a sensitive nature comes into Her Majesty's possession. It is, in my view, legitimate to protect correspondence with Her Majesty. This proposed exemption goes much further than that. Information would be caught by the exemption if it were to relate to correspondence. For example, a request to the First Minister's office for information as to the number of piece of correspondence he had sent to Her Majesty would be caught by that exemption because the information *relates* to correspondence with Her Majesty. To reveal the number of pieces of correspondence a particular Minister has had with Her Majesty would do nothing to prejudice the privacy of correspondence between public authorities and Her Majesty. It would be hard to argue that the public interest in releasing such information would be outweighed by the public interest in maintaining the exemption.

10. The principal idea behind the exemption is not significant; the removal of the public interest test is highly significant, especially with current wording of the amendment. The Committee would be advised to consider this carefully to ensure that unintended consequences do not occur. In other exemptions where information need only relate to a particular subject the relationship need only be a very tenuous one before the exemption can apply. It is possible for a large amount of information to be covered by this exemption when it was not intended to be covered, and because of the absolute nature of the exemption it cannot be rectified by considering the public interest.

11. Presently, under FOISA absolute exemptions are narrow in scope. It is normally absolutely clear from the exemption what is and what is not covered by the exemption. Having an absolute exemption as wide as this one appears to be would undermine the fundamental principles of FOISA.

12. The current s.41 provision appears to provide adequate protection. It is clear from the decisions of the Scottish Information Commissioner's Office that great weight is given to protecting confidentiality and constitutional conventions. Indeed, as recently as this year, the Scottish Information Commissioner's Office issued a decision notice upholding the Scottish Minister's decision where the Ministers had refused to confirm or deny whether information was held on the grounds that if it were held s.41 would apply.

13. There are other exemptions which could also apply in the case of correspondence between Her Majesty and public authorities depending on the situation in which the correspondence arises. Exemptions such as the ones found at ss.28-30 would be examples of exemptions already in FOISA which can be applied to communications with Her Majesty, other members of the Royal Family and the Royal Household.

14. It could be argued that by implementing an absolute exemption where currently a qualified exemption applies is removing information from the public where the public interest is in that information being released. Such a move would be unfortunate and, I would argue, not be in the wider public interest.

15. Even if the exemption to be “tightened up” so as not to cover information not intended on being covered, I would not be in favour of this amendment to the Bill. However, if the amendment is to be included then it would be necessary to ensure, as I have already stated, that information not intended on being covered by this exemption is not in fact covered.

16. I recognise that this amendment would bring the legislation into line with the Freedom of Information Act 2000. However, I do not accept that this alone is a sufficient reason to introduce the amendment as it is currently written. The Scottish Government regularly mentions the distinct nature of Scots law, yet seems content to simply introduce an amendment to the Scottish FOI law because Westminster has. I do not believe that this amendment is needed and the current provisions in FOISA are quite sufficient.

In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the position of the Scottish Government to these concerns?

17. This amendment can only be a good thing for FOI in Scotland. By reducing the period that some information is held for before it becomes a historical record will allow for greater openness. The approach of being able to vary the period for different exemptions (and indeed different specified types of information) means that information which does not need to be held for as long before being classed as a historical record can be considered as historical earlier. This will mean that accessing information will become easier.

18. The Government’s proposal to open up such orders to consultation before they are made is entirely sensible and will permit proper consideration of the effects of a particular order before it is made.

The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

19. There may be financial implications as a result of the amendments to s.65 of FOISA. The additional costs would primarily be those of the public authorities accused of offences rather than for the Scottish Court Service and the Crown Office and Procurator Fiscal Service. Court buildings and staff would already be in place as would prosecutors. In terms of costs to the Scottish Information Commissioner it is unlikely that there would be any additional costs to them as investigations would already be occurring in such cases.

20. Costs associated with s.65 are avoidable if public authorities subject to the Act are careful in how they manage their records and ensure that they are fully compliant with all aspects of FOISA and any other relevant legislation.

Section 65

21. The Committee has not asked any questions directly pertaining to the proposed amendment to s.65 of FOISA. I would like to express my support for this amendment. Freedom of Information is an important element of our modern democracy and should a public authority decide to wilfully destroy or otherwise prevent the disclosure of evidence in such a way that constitutes an offence under s.65 it is absolutely necessary that the Scottish Information Commissioner is able to take action.

22. The current six month time scale permitted for prosecutions for this offence is wholly inadequate and means that a public authority could, if it wished, commit an offence under s.65 in the knowledge that it is unlikely that any prosecution can be mounted.

23. I note the recent report by the Justice Committee of the United Kingdom Parliament in relation to the equivalent legislation. That report suggests raising the maximum fine available under the legislation from £5,000 as a way of sending a clear message to public authorities that such an offence will not be tolerated. The maximum fine available in Scotland is £5,000 and that is partly due to the limits on sentencing powers of a Sheriff sitting in summary cases.

24. The Committee might be minded to consider proposing an amendment similar to that proposed by the Justice Committee of the United Kingdom Parliament (in relation to s.77 of the Freedom of Information Act 2000) so that the matter can be dealt with on indictment as well as by summary complaint. This would allow more severe penalties in the, hopefully unlikely event, that a serious example of the offence came to the attention of the Commissioner and the Crown Office.

Missed Opportunity

25. I noted at the outset of my response to this call for evidence that I considered FOI to be vital and essential in our democracy. I believe that this Bill is a missed opportunity for the Scottish Government to truly show how committed to transparency they are.

26. There are a great number of organisations currently not covered by FOISA which provide significant public services, spending significant amount of public money on those services that a sizable majority in Scotland appear to believe should be covered by FOISA. A Government truly committed to the principles of FOI would, I submit, be keen to include these bodies within FOISA and this Bill presents an opportune moment to consider who else should be covered by FOISA and to include them within Schedule 1 to FOISA.

27. There are other organisations which the public would benefit from being covered by FOISA. The Law Society of Scotland and Faculty of Advocates both provide important public services through their regulation of the legal profession in Scotland. Both organisations do have a dual function which involves the representation of its members. However, both organisations could be given a

derogation for information held for the purposes of representing its members.

28. COSLA is another organisation not covered by FOISA which can play an important role in the delivery of public services at a local level. It should also be covered by the Act to ensure transparency in the decision making and delivery of services at local government level.

29. I have long been of the opinion that ACPOS should also be covered by FOISA. However, given that at the end of this financial year the eight Scottish forces currently policing Scotland are due to be merged into one it is likely that ACPOS will cease to exist. Whether the Chief Constable of the new Scottish Police Service seeks membership of ACPO is not something that can be speculated on. However, there seems to be no good reason not to cover ACPOS at this stage. It is likely that ACPOS will play a significant role in the months leading up to the merging of Scotland's eight police forces into one single police force and as such it should be directly accountable to the people of Scotland. While ACPOS voluntarily seeks to be open it cannot be compelled to disclose information as it is not presently covered by the Act. Information held by members of ACPO within their individual forces would not presently be covered by FOISA.

30. The Government's present position on extending to coverage of the Act is unsustainable. There is no reasonable argument against extending FOISA to other bodies as part of this Bill given that the purpose of the Bill is to address weaknesses in the Act. It is important that the Scottish Government's words in relation to its commitment to FOI are matched by its actions in this area. Sadly, to date its actions have been contradicting its words on the Government's commitment to FOI and openness in general.

31. There is also a great deal of sections within Acts which place blanket prohibitions on disclosure by public authorities. Many of these are decades old and pre-date FOISA. The Government could use this Bill to look at some of those statutory prohibitions on disclosure and include amendments to those within this Bill. These statutory prohibitions upon disclosure do not permit the public interest in disclosure of the information to be considered. The fact that they pre-date FOISA means they also largely pre-date the "Open Government" agenda which has taken hold over the last decade and could be considered as being outdated.

Conclusion

32. Freedom of Information is important in any modern democracy. It allows the public to properly consider the decisions of public officials and to better understand how decisions are made, particularly controversial decisions. I am pleased to note that the Scottish Government are committed to Freedom of Information and I hope that in due course the Scottish Parliament will demonstrate their commitment to Freedom of Information in Scotland as they consider this Bill.

33. The Committee should propose amendments to be considered at stage 2 which would extend the coverage of FOISA to bodies such as COSLA, the Law Society of Scotland and the Faculty of Advocates.

34. I welcome this Bill to amend provisions of FOISA which will largely strengthen the Act. However, I have concerns regarding s.2 of the Bill and would strongly suggest a thorough consideration of the amendment at s.2 by the Committee. I also

have concerns about the opportunities that will be missed to further strengthen FOISA and to further demonstrate the Government's commitment to FOI should the Bill be passed in its present form.