

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002

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Background to this Submission

1. The authors of this submission to the Public Audit and Post-Legislative Scrutiny Committee are academics engaged in the project “Uncovering the Environment: The Use of Public Access to Environmental Information”, funded by the ESRC. The project seeks to identify how the right of access to environmental information is actually being used in Scotland under the Environmental Information (Scotland) Regulations 2004 (EISR) and whether the right is meeting its intended aims. The project concludes in June 2020, but we are willing to provide further information on our initial findings if the Committee would find that useful.

Question 1 - In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?

2. One set of initial findings emerging from the project is that the public has a higher awareness of FOISA than EISR, and that generally FOISA has overshadowed the EISR as the instrument for accessing environmental information. The practical significance of this initial finding is that it leads to the public overlooking the EISR and incorrectly submitting requests for environmental information under FOISA. This finding may be partially explained by the key aims of FOISA (transparency and accountability of public authorities) being a self-encapsulated end-goal, rather than the open-ended goal of promoting participation in environmental decision-making found in the EISR.
3. This overshadowing of the EISR by FOISA has various negative impacts. First, while the overarching design of both regimes is similar, the specific obligations imposed on Scottish public authorities by the two regimes differ in significant ways.¹ This divergence is problematic as it can lead users of the right to become uncertain and confused as to what their substantive rights actually are, dissuading them from submitting requests and from using their right to access information. Further, the confusion between the two regimes may lead to individuals misunderstanding their procedural rights, leading to (potentially) unnecessary internal reviews.
4. Second, under FOISA there is significantly less emphasis on the duty to proactively disclose information than there is under EISR. Indeed, under the EISR public authorities are obliged to proactively disclose environmental information in an active and systemic manner. This contrasts with the more general duty to adopt and maintain a publication scheme

¹ Examples of this include the power to levy fees for disclosing information on request, the exemptions used to withhold information from disclosure and the scope of the public authorities subject to each regime.

under FOISA, which imposes less of an obligation on Scottish public authorities. While the link between proactively disclosing information and reduced numbers of requests has not been definitively proven, the Scottish Information Commissioner has noted that the use of publication schemes has led to fewer requests on the disclosed subject. Consequently, FOISA's focus on requests for information may detract from efforts to increase proactive disclosure.

Question 2 - Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.

5. In responding to this question, it is critical to note that the EISR and FOISA prioritise their respective objectives differently. A fundamental component of the EISR is that it aims to promote public participation through informing the general public. This aim is not as pronounced in FOISA, where the promotion of transparency and accountability is the primary objective. However, these aims are not exclusive to their respective information regimes: the two information regimes share similar aims despite their different prioritisation of those aims. This allows the project's findings on whether the EISR are effective at meeting its aims to be applied to FOISA as well.

6. The initial responses to surveys and interviews conducted so far for the project suggest that Scottish public authorities are perceived by users of the right as secretive, obstructive and not acting in the spirit of the legislation.² This perception is particularly interesting because Scottish public authorities generally tend to fully or partially disclose information that is subject to a request for disclosure. What this suggests is that FOISA, despite its efforts to promote the disclosure of information, may not have led to the general public perceiving Scottish public authorities as transparent and accountable.

7. Further, the responses to the project's surveys and interviews also show a perception that Scottish public authorities do not engage with individuals using information accessed under the EISR regime. Generally, this results in a perception of "surface-level" participation: where the authority hears the concerns of the public but does not engage with or act on these concerns. This lack of engagement undermines how FOISA meets its policy objectives because it weakens the connections between access to information and being granted the power to engage with the authority on matters of importance. Consequently, our initial findings do not evidence that either of the main policy intentions of FOISA has been fully met in practice.

Question 3 - Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?

8. The initial findings of the project indicate two specific issues which hinder the implementation of FOISA. The first of these is the timescale for Scottish public authorities responding to requests for information. While FOISA obliges public authorities to respond

² A caveat to this finding is that data collection for the project is not yet complete and the sample number is still small.

“promptly”, the statistics indicate that authorities often respond only near the end of or past the 20-day time limit. Users of the right are often unhappy about this, contributing to the negative perception of Scottish public authorities.³ While the project has not yet formally interviewed Scottish public authorities on how they guarantee the right, a lack of resources is highlighted as a common issue in FOI policy meetings. As extending the time limit to respond would create a further divergence with EISR, one potential way to remedy this failing is to increase funding to FOI departments in Scotland.

9. The second issue is that how information is created and stored does not reflect how the public requests information. Public authorities create and store information in a sectoral manner, with information on issues such as waste, water and air being created and stored separately. One reason for this sectoral approach is because it reflects the structure of the legal obligations imposed on Scottish public authorities. However, this approach does not match how users of the right request access to information, which tends to focus on specific locations rather than on sectoral areas.

10. Such a mismatch is significant as it can lead to lengthy delays, further contributing to the delays in responding to requests. Critically, the issue strikes at the heart of general data management and the use of GIS. Consequently, what is required is either an overhaul of how information is stored or a redesign of the information regime to account for this mismatch.

Question 4 - Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

11. In discussing potential reforms to the parallel FOISA and EISR regimes in Scotland, it is important to highlight the role of the Convention of Access to Information, Public Participation in Decision-Making Procedures and Access to Justice in Environmental Matters (Aarhus Convention). Ratified by the UK in February 2005, the Convention contains a series of procedural obligations which Scottish public authorities are obliged to follow in guaranteeing the right of access to environmental information. However, post-Brexit Scotland will not be legally bound to transpose the stricter obligations on the right of access to environmental information introduced by EU Directive 2003/4/EC which was enacted to give effect to the Aarhus Convention within EU law. This point is significant, as it creates an opportunity for Scotland to implement reforms that would have been difficult to implement while the UK was a member of the EU.

12. One potential reform to FOISA which might be considered is to merge it and the EISR into a single information regime. By merging the two information laws into a unified regime, the issues that arise from the different procedural rights enshrined in FOISA and EISR would be eliminated. Further, Scottish public authorities would not have to determine whether a request falls under FOISA or EISR. This is significant, as the project has

³ As discussed in Question 2.

identified this need to distinguish between the two regimes as a source of confusion for both users and public authorities.

13. While such a reform would likely be of benefit to the information disclosure system in Scotland, it is not without difficulties. As the international obligations enshrined in the Aarhus Convention are stricter than those in FOISA, any merger of the two regimes would necessitate any request for non-environmental information also to meet the stricter requirements enshrined in the Aarhus Convention.⁴ This may generate resistance to the proposed reform, as the stricter obligations would likely result in Scottish public authorities having to disclose more non-environmental information than they currently do under the current FOISA regime. Users of the right to information may also resist this reform, as the restrictive FOISA charging provisions may be discarded for the more costly charging provisions of the EISR.

Question 5 - Are there any other issues you would like to raise in connection with the operation of FOISA?

14. A final issue that we would like to raise is the evolution of technology and its role in the provision of information, both environmental and non-environmental. The project's initial findings suggest that the internet, email and other online methods have become very significant means by which individuals seek proactively disclosed information and submit requests for information. Not only has technology influenced how users engage with the right, but it has also driven the expectation that users will be able to access the sought-after information immediately.

15. However, neither FOISA nor guidance from the Scottish Information Commissioner engages with how technology changes the way in which individuals interact with the right to information.⁵ A more ambitious provision in any new FOI legislation would provide the legal impetus for public authorities and the Scottish Information Commissioner to better engage with new technologies and how they interact with their information systems. By doing this the right would more accurately reflect how society actually engages with and accesses information, enabling individuals to more effectively use their right to access information.

⁴ An example of this is the application of the public interest test in withholding information from disclosure. Under FOISA the authority needs to apply the public interest test only when applying certain exemptions, whereas under EISR the authority needs to apply the test whenever it exempts information from disclosure.

⁵ While also insufficient, the EISR recognise this and highlight the need to make environmental information available "by electronic means".