PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

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Background to Submission

I was the first Scottish Information Commissioner from 2003 to 2012, author of Freedom of Information in Scotland in Practice (Edinburgh University Press 2011) and currently Honorary Professor at the Centre for Freedom of Information, University of Dundee. I have provided expert input to the drafting, implementation and evaluation of the freedom of information laws in several countries including Brazil, Chile, Croatia, Georgia, Albania, and Tunisia. I am a member of the World Bank's Access to Information Appeals Board.

Q1. ***What effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had?***

The Freedom of Information (Scotland) Act 2002 (FOISA) has had a positive effect. There is a high public awareness of the right to information[1]; that right is easy to use, not requiring the law to be formally cited; almost 80,000 requests per annum are logged by public authorities which, by and large, are complying with their obligations; the right to appeal is free and the decisions of the Commissioner are complied with and rarely challenged. As a result, information which would previously have been withheld is now much more commonly in the public domain. For example, information on the salaries, bonuses, and expenses of those in prominent positions of public life is now routinely published. Information on the tendering and awarding of contracts which might previously have been refused on grounds of 'commercial confidentiality' has been required to be disclosed. Over time this has brought about a change in public authority practice. For instance, the revised code of practice issued by Scottish Ministers in 2010 contained extensive guidance on the disclosure of information relating to contracts or procurement processes, indicating not only that the contractor should be informed that information about the contract may be disclosed but also that authorities should consider inserting into contracts a requirement upon the contractor to disclose certain information[2]. Blanket claims to exemption are no longer acceptable. It is notable that some of the most significant disclosures of information in terms of consequence have come from individuals making requests which have a personal significance. It was relatives of patients who had died in the Vale of Leven hospital making FoI requests (with the assistance of their MSP) which uncovered the scale of the patient mortality from hospital-acquired infections and led to a public enquiry. It was a trade union shop steward's request for the PFI contract for the Royal Infirmary of Edinburgh, which saw it and other similar contracts being published.

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[1] The most recent in a series of IPSOS MORI polls, carried out in 2017 for the SIC, showed 85% of respondents had heard of the Freedom of Information Scotland Act 2002

[2] Scottish Ministers' Code of Practice 2010, paragraph 4.1.2.

Q2. ***Have the policy intentions of FOISA been met and are they being delivered?***

By and large the policy objectives have been realised.

a) The legal right of access to information has been established by FOISA and strengthened by Freedom of Information (Amendment) (Scotland) Act 2013, However the legal right is not just delivered by FOISA but also through the Environmental Information (Scotland) Regulations 2004 (EIRs). Requests for environmental information must be dealt with under the EIRs, not FOISA alone. The legal superiority of the environmental regulations, as derived from European Directive 2003/4 EC, and the broad interpretation of what constitutes environmental information was perhaps not appreciated when FOISA was being implemented. The consequence is that applicants may be unaware of the differential rights and public authorities unsure as to which regime to apply to a request. As there are some significant distinctions between the two this has consequences e.g. as to which exemptions/ exceptions can apply, the nature of the harm and public interest tests to be satisfied, and indeed the calculation and application of any fees.

b) Sensitive information is protected by FOISA and the EIRs. However, the degree to which information is sensitive has been demonstrated to be less than those in authority often claim. The decisions of the Information Commissioners to order disclosure have not led to any evidence of the claimed harm (although claims continue to be made of a chilling effect on the creation of politically sensitive information in central government.) There is a degree of over-protection in the legislation[3] with the catch-all provisions of s30 'Prejudice to the effective conduct of public affairs' being most commonly used.[4] More generally, FOISA does not meet international principles which requires that all exemptions are subject to a substantial harm and public interest test.[5]

c) The role of the Scottish Information Commissioner is well-established, is fully independent, and the functions of the office are carried out without political pressure or financial straitjacket (as has happened in some other countries).

d) Publication schemes are often regarded as onerous by authorities. Yet, proactive publication is fundamental to the concept of open government.

e) Legislation has provided greater and more timely access to historic records ,with the Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 201

[3] A comparative legal review of the exemptions in UK FoI law, which FOISA broadly mirrors, described them as a "formidable list of broad, repetitive and in many cases simply unnecessary exceptions". Mendel, T, *Freedom of Information- A Comparative Legal Survey*, UNESCO: Paris 2008, p.125

[4]Other than exemptions for personal information, the most commonly cited exemption in Decisions made by the SIC is that at s30(c)'.

[5] See for example Article 19 *The Public's Right to Know - Principles on Freedom of Information Legislation* (1999) https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf

Q.3 ***Are there any issues in relation to the implementation of and practice?***

There are a number of issues relating to implementation and practice. The bodies which are subject to FOISA are listed under Schedule 1, or are publicly owned companies, or those which have been designated under section 5, where bodies a) appear to Scottish Ministers to exercise functions of a public nature; or b) are providing, under a contract made by a Scottish public authority, any service whose provision is a function of that authority." There was a clear expectation that this power of designation would be used regularly so that the right to information kept pace with changes in the delivery of public services. When section 5 was being debated in the Scottish Parliament, the then Justice Minister said, "Provisions allow providers of services to the public to be added to the Bill case-by-case and I reassure the parliament that that power will be exercised." [6] However there has been marked reluctance to make such designations and where consultation has taken place there has been considerable delay before a designation has been made. For example, a consistent call has been to designate registered social landlords (RSLs). The Scottish government issued a formal consultation in 2010 which would have designated the Glasgow Housing Association, as well as PFI / PPP contractors and local authority sport, leisure and cultural trusts but decided in 2011 that none would be designated. In 2016 a consultation to designate RSLs was carried out, with an expected implementation date of 1 April 2018 which has now been pushed back to November 2019. The situation is somewhat improved by the requirement, under s7A of the amended FOISA, for the Scottish Ministers to make a report to Parliament at least every 2 years on the exercise of their powers under s5.

Whereas FOISA allows Ministers to designate bodies which are exercising public functions directly or under contract, in many other countries the FoI law applies directly in such circumstances. [7] Some go even further by applying the requirement to provide information to bodies in receipt of public funding. Consideration should be given to amending the law to have a gateway clause which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA.

The right to information is only effective of course if information pertinent to a request has been created and retained. Yet authorities' performance in this respect can be highly variable. A major element of the time taken, and cost of responding to FoI requests is the difficulty of establishing whether the information is held. Furthermore, information which should be expected to be held is not, either because it has not been created or has been disposed of (perhaps in anticipation of an FoI request). Greater emphasis needs to be given to adequately creating and maintaining an information trail (drafts, memos, emails, correspondence etc) which shows how decisions have been arrived at.

Related to this, information within the scope of FOISA may be exchanged other than through records management systems and official email accounts, e.g. by text, personal

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[6] *Scottish Parliament Official Report 24 April 2002, col 111*

[7] In Scotland, the Environmental Information Regulations do have direct application to bodies which have public responsibilities or provide public services relating to the environment, but only if they are under the control of a public body which is subject to FOISA

email accounts, and social media apps. Such a practice makes it difficult for officials to conduct adequate searches for relevant information. If this is being done deliberately to avoid freedom of information, and in particular information is not disclosed when a request is received, greater consideration should be given to using the provisions of section 65 which makes it an offence to block, destroy or conceal a record held by the authority.

Finally, Scotland as with most countries is not immune to authorities failing to respond to requests timeously. The law requires that they "must comply promptly" with a request and "in any event by not later than the twentieth working day" after it has been received. Yet many in authority treat the 20 days as the time available to respond even if the information could have been found and provided earlier.

In many instances, the information is supplied late or not at all. Since FOISA and EIRs have come into effect the Commissioner has issued 3080 decisions, of which 900 concern the failure of authorities to respond to requests in time, and 640 of these decisions are wholly in favour of the applicant. [8] Consistently, failure to respond accounts for a quarter of all appeals to the SIC. In 2014 the SIC issued a Special Report to the Scottish Parliament which found that just five authorities accounted for 50% of failures to respond in the previous year.[9] Even if information is finally disclosed it may have lost its value to the applicant as a result of delay. Journalists have expressed particular grievance in this regard. In some countries (e.g. India), the Commissioner has the power to fine authorities for failing to respond.

Q.4 Could ***the legislation be strengthened or otherwise improved in any way?***

Based upon the points touched upon in this submission, the following amendments to laws are desirable so that the right to information in Scotland meets the standard now apparent in more modern FoI laws internationally.

a) combine FOISA and the EIRs into a single statute – this would remove the confusion over which bodies are covered and which regime applies, or

b) amend FOISA to align it more closely with the more progressive provisions of EIRS e.g. all exemptions to be subject to the public interest test (EIR reg 10 91)(b)), are to be read in a restrictive way (EIR reg 10(2)(a)) and with a presumption in favour of disclosure (EIR reg 10(2)(b))

c) amend FOISA and EIRS so that they have direct application to bodies which have public responsibilities or provide public services (not just those under the control of public

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[9] http://www.itspublicknowledge.info/home/SICReports/OtherReports/20140807SpecialReport.aspx

authorities) or are in receipt of significant public contracts and/or funds, to reflect the changes in the delivery of public services , infrastructure development and operation.

d) Many FoI laws require the authority to formally designate a senior official with responsibility for FoI compliance and also include a statutory requirement to make an annual report on performance to the Commissioner/ Ombudsman. Although in practice something similar happens in Scotland (e,g. quarterly statistical reporting by authorities on requests has been established by the Commissioner) an explicit provision in the law would be beneficial.

Q5 ***Are there any other issues you would like to raise?***

An aspect of implementation which attracts little attention is the power of the Commissioner to 'effect settlement' when an appeal is received. This is a provision, which in comparable terms appears in many, but by no means all, FoI laws elsewhere. It is often described as 'mediation', 'conciliation', or 'early resolution'. The benefit to the applicant is that information sought may be provided more quickly than waiting for a formal determination by the Commissioner. Furthermore, the terms of settlement may provide information by agreement which might not be forthcoming if determination was insisted upon. The benefit to the authority is that the terms of settlement may satisfy its concerns relating to the scope of the request; settlement which results in disclosure is not recorded as a decision against the authority, and in the absence of a decision no precedent is set if a similar request is received. Settlement can also occur where the applicant accepts that information is not held or that an exemption does apply. The benefit to the Commissioner is that experienced staff can make an early evaluation which allows cases to be closed more quickly and uses resources of the Commissioner more efficiently

Research which I carried out on settlement in Europe and Latin America found that only a small number of Commissioners had explicit procedures to guide staff, authorities and applicants as to when settlement may be conducted[10]. The Investigations handbook[11] of the Scottish Information Commissioner is by far the most detailed as to how cases are selected and how settlement will be pursued, giving confidence that it is attempted appropriately and not simply as a tool of case management to reduce workload.

The significance of settlement is evident in 2017/18 statistics which show that the SIC issued 205 formal Decisions but closed a further 98 cases by resolution. So, even if settlement does not result in a formal Decision for or against an authority, it would be useful to know, statistically, whether settlement has resulted in all, some or none of the information, sought in an appeal, being disclosed.

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[10] See Kevin Dunion and Hugo Rojas 'Alternative Systems of Dispute Resolution and the Right to Freedom of Information', TRANSPARENCIA & SOCIEDAD, No. 3, 2015, pp. 69-91.
Available at https://www.dundee.ac.uk/centrefoi/research/

[11] Investigations Handbook, Scottish Information Commissioner, (last updated 14/03/2019)
http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx