

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : THE SCOTTISH GOVERNMENT

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

The policy memorandum for the Bill stated that the legislation was underpinned by “a belief that better government is born of better scrutiny”, and we agree with that. It is reflected in the First Minister’s aspiration that the Scottish Government should be the most open and accessible that Scotland has ever had.

We consider that FOISA has significantly contributed to openness and transparency throughout Scotland by giving people a simple and effective statutory right to access information from a wide range of public bodies.

We are mindful that few Scottish public authorities routinely charge for responding to requests and we believe consideration should be given to reform of the fee regime.

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

To establish a legal right of access to information held by a broad range of Scottish public authorities

We consider that this policy intention has been delivered. Scottish public authorities continue to receive a growing number of requests for information year on year, with the Scottish Government alone receiving over 3,400 requests in 2018, a rise of nearly 12% from the 3,050 received in 2017, which was itself 42% more than the previous record of 2,155 in 2015.

The Scottish Information Commissioner, in his evidence to the Committee on 10 January, acknowledged that there has been a general increase in the use of the provisions across the board in relation to a number of authorities and his annual report for 2017/18 indicates that their research has “consistently shown high levels of public awareness of FOI law in Scotland (85% of respondents to [the Commissioner’s] research in March 2017).”

To balance this right with provisions protecting sensitive information

We consider that FOISA strikes broadly the right balance between the right of access to information and provisions that protect sensitive information. FOISA contains a limited

number of tightly-drawn exemptions which protect a range of sensitive information – from the personal information of third parties to law enforcement and international relations.

The exemptions in FOISA are also nuanced and tailored to their individual circumstances. Where the harm test applies, public authorities must consider whether disclosure of the information would cause substantial prejudice – a higher test than that found in the UK Freedom of Information Act 2000 (where the test is whether disclosure would cause prejudice). Even if substantial prejudice would result from disclosure, authorities must go on to consider the public interest test before withholding the information. Indeed, the public interest test needs to be considered in all cases except for the small number of absolute exemptions. Additionally, many of the exemptions are time limited and fall away after an appropriate period (now generally 15 years).

In our view, the exemptions in FOISA remain fit for purpose and achieve the effect of protecting genuinely sensitive information without impeding access to information. We recognise that there may be arguments in favour of technical adjustments to some of the exemptions, but overall consider that they work well.

To establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime

In our view, FOISA provides a robust framework which protects the independence of the Commissioner. Successive holders of that office have worked diligently to promote and enforce the FOI regime, and we consider that overall this policy objective has been delivered.

To encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme

We consider that the proactive publication of information is an essential aspect of the FOI regime. It is particularly important in promoting openness and transparency, and we think it is positive that authorities have increasingly published information proactively, rather than reacting to requests for information.

However, we question whether the requirement to maintain a publication scheme has stood the test of time. The Bill began its Parliamentary passage in September 2001, nearly 18 years ago. In the intervening period, the amount of information that is available online has increased almost beyond recognition, and many individuals can readily search for the information that they wish to obtain. We think the Committee may wish to consider whether requiring authorities to maintain a publication scheme is an effective way of encouraging the proactive publication of information.

To make provision for the application of the Freedom of Information regime to historical records.

As noted above, many of the exemptions in FOISA cease to apply once information reaches a certain age. This is achieved by defining records as historical records once a certain period of time has elapsed.

When FOISA was enacted, the majority of exemptions fell away after 30 years, with some falling away after 60 or 100 years (and the remainder continuing in perpetuity). However, FOISA was amended in 2013 to confer greater flexibility on the Scottish Ministers to vary these periods, and we brought forward an Order at the end of 2013 to reduce most of the 30 year periods to 15 years.

In our view, FOISA delivers the policy intention in relation to historical records, meaning that more information becomes available through the passage of time – and it now becomes available sooner than ever before. This part of the legislation has already been amended to ensure that it remains fit for purpose, in line with the Scottish Government's policy of adjusting the FOI regime where it is necessary and sensible to do so.

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

We do not consider that there are any significant issues in relation to the implementation of FOISA, some 14 years after it came fully into force on 1 January 2005. Nor do we consider that there are general or widespread issues of practice arising from the legislation itself.

We recognise, of course, that individual authorities' practice may vary over time. However, we consider that the Commissioner's intervention policy, underpinned by the powers he has in FOISA to ensure that authorities are following good practice, is an appropriate and effective way of dealing with any issues around authorities' practice that may arise.

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

The Scottish Government's [six principles of FOI](#) set out our general policy in relation to FOISA: we operate within FOISA rather than proposing significant changes to it, but adjust the regime where it is necessary and sensible to do so. As noted, we have already brought forward amending legislation to deal with weaknesses in FOISA that could only be resolved by primary legislation, in accordance with that policy. Additionally, the Scottish Ministers exercise their powers to make subordinate legislation under FOISA where it is appropriate to do so, most recently in extending the coverage of the legislation to include registered social landlords and their subsidiaries.

However, we recognise that more could be done in order to strengthen FOISA and ensure that it operates as effectively as possible. We set out below a number of proposals which would, in our view, strengthen and improve FOISA for requesters, authorities and the Commissioner.

Proactive publication

As noted, we think it is questionable whether requiring public authorities to maintain a publication scheme is an effective way of encouraging the proactive publication of information.

Instead, we suggest the Committee should consider whether there is a more effective route to encourage dissemination that might remove a bureaucratic requirement on authorities (and the Commissioner) and place more emphasis on authorities making information proactively available (probably underpinned by the section 60 Code of Practice).

Records management

Section 61 of FOISA provides for the Scottish Ministers to issue a Code of Practice on Records Management. The purpose of that provision (and of the section 61 Code that has been issued) is to promote good practice in connection with the keeping, management and destruction of authorities' records.

Again, we question whether this provision may now have been overtaken by subsequent developments. In 2011, the Parliament passed the Public Records (Scotland) Act 2011. That legislation requires public authorities to prepare and implement Records Management Plans. The Keeper of the Records of Scotland produces a model Records Management Plan and monitors authorities' compliance. The policy memorandum for the Bill that became the 2011 Act discusses the importance of freedom of information on a number of occasions, observing that FOISA "drew attention to the importance of records, as it became clear that freedom of information is only as good as the records which contain that information".

It appears to us that there is a substantial overlap between the section 61 Code and the subject-matter of the 2011 Act. Indeed, the policy memorandum notes that an alternative policy would have involved amending FOISA to strengthen the section 61 Code approach instead of introducing the 2011 Act.

Given the existence of bespoke modern records management legislation, which was informed by the experience of operating FOISA, we suggest that the section 61 Code may now be otiose. We think that it is sensible to remove unnecessary duplication, and that it would be desirable for records management guidance to be issued by the Keeper of the Records rather than the Scottish Ministers, and so propose the repeal of the section 61 duty.

Vexatious requests

While the vast majority of requesters utilise their rights under FOISA responsibly, a small number of requesters do not. Section 14 provides tools for authorities to deal with the small number of requests which are unreasonable or would impose a significant burden on the authority.

We understand that the Parliament did not intend authorities to resort to the provisions of section 14 lightly, and that indiscriminate use would have the potential to impact negatively on the right to information. However, we are aware that authorities can sometimes struggle to apply the provision in appropriate cases because of a lack of clarity around what exactly constitutes vexatiousness.

Accordingly, we suggest that the Committee may wish to consider whether it would improve clarity for all concerned – requesters, authorities and the Commissioner – if a test for vexatiousness were specified on the face of the legislation.

For example, the Committee might wish to consider whether the recent reforms to the vexatious litigant provisions (in sections 100 to 102 of the Courts Reform (Scotland) Act 2014), which recognises that steps may be taken against an individual who has acted persistently or without any reasonable grounds, offer any insights for potential reform of FOISA. Those reforms were underpinned by a desire to minimise the impact of vexatious behaviour on others – not only on the courts and opponents, but also on other court users. Similarly, the vast majority of requesters have an interest in seeing effective control of vexatious use of FOISA in order to ensure that their own information rights do not suffer detriment.

Extension of coverage

Sections 4 and 5 of FOISA enable the Scottish Ministers to adjust the range of bodies that are subject to FOISA. The Freedom of Information (Amendment) (Scotland) Act 2013 updated the section 5 power by refining the consultation requirements and requiring the Ministers to report to the Parliament on its use every two years.

In her 28 January report on extending FOI to bodies providing public functions, the UK Information Commissioner acknowledged that greater progress on extending coverage has been made in Scotland than in the rest of the UK. Since 2013, the Scottish Government has used the section 5 powers on three occasions to extend FOISA to a range of bodies delivering functions of a public nature, with the extension to registered social landlords and their subsidiaries coming into force later this year. We regularly review the bodies that are subject to FOISA and expect to run a further consultation on extension later this year. In our view, these powers enable extension to be taken forward in a proportionate way and we do not think that they need to be further adjusted at this time. Nevertheless, we recognise that changes in delivery models for public services mean there are concerns about potential loss of information rights. We remain open to views on extension of coverage, based on considered assessment of what areas should and shouldn't be covered.

Section 6 defines publicly-owned companies which are subject to FOISA. Such a company must be wholly-owned by the Scottish Ministers or by any other authority listed in schedule 1. However, there is currently a loophole in that a company that is wholly-owned by a combination of authorities does not fall within the definition, and so is not subject to FOISA. We suggest that it would be desirable to amend section 6 so that companies that are wholly-owned by a combination of authorities are also subject to FOISA.

Simplifying the fee regime

FOISA allows public authorities to charge fees for responding to FOI requests in certain circumstances. However, the regime is complex and we are aware that many authorities (including the Scottish Government) choose not to use the fees regime. Additionally, charging a fee may act as a barrier to making requests for information. Accordingly, we suggest that the Committee may wish to consider the fee regime. We think this would send a positive message about openness and transparency. The Committee may wish to consider a similar change introduced by the General Data Protection Regulation – under GDPR, authorities can no longer charge for responding to a subject access request, unless it is excessive, manifestly unfounded, or repeated.

In a similar vein, section 12 of FOISA provides that authorities do not have to comply with requests for information where the estimated cost of compliance exceeds a prescribed amount. In reality, almost all of the costs associated with responding to an FOI request relate to the amount of time that members of the authority's staff spend in dealing with it – particularly as information is frequently held and disclosed in electronic formats. We therefore suggest that the Committee may wish to consider whether it would be simpler to replace the requirement to estimate the cost of compliance with a requirement to estimate the amount of staff time spent in dealing with a request. We think that this would be easier to apply for authorities, and easier for requesters to understand.

Equalities and accessibility

The Committee may wish to consider whether FOISA reflects best practice in terms of accessibility, and in particular whether the right to request that information is provided by a particular means (section 11) is sufficiently strong.

Relationship between FOISA and the EIRs

Section 39(2) provides that information is exempt information under FOISA if it has to be provided under the EIRs instead. This reflects that there is no particular benefit to requesters in an authority having to respond under both regimes – what matters is that it responds under the most appropriate one having regard to the nature of the information requested.

At present, the public interest test applies to this exemption. In our view, there is no benefit to applying it – the exemption is a technical one which ensures that information is disclosed under the correct regime, rather than an exemption that prevents its disclosure at all. In this respect, it has a parallel in section 38(1)(a), which applies where an individual requests

their own personal data under FOISA. In that case, it is exempt information because the more appropriate regime to obtain such information is the General Data Protection Regulation. Section 38(1)(a) is an absolute exemption, and we suggest that section 39(2) should become an absolute exemption too.

Working days: clarity of definition

Many of the timescales in FOISA are calculated by reference to “working days”, which according to section 73 is “any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday in Scotland”. The reference to bank holidays may cause some confusion, for the following reasons.

First, there are a number of differences between bank holidays in Scotland and elsewhere in the United Kingdom. For example, Easter Monday is not a Scottish bank holiday (although it is commonly supposed to be one), and there is a Scottish bank holiday in early August which is now rarely observed since the Scottish banks decided to take the same holidays as banks elsewhere in the UK in the mid-1990s. The dates of the Scottish bank holidays are accordingly not always well-known. Additionally, Scotland continues to have a tradition of local public holidays which are not bank holidays, although they may sometimes colloquially be referred to using that term.

Secondly, many public authorities do not observe the Scottish bank holidays (and they are not required to do so). Accordingly, they may be open for business on days that, under FOISA, are non-working days and, conversely, closed on working days such as local public holidays.

Accordingly, we suggest that the Committee may wish to explore whether the operation of FOISA would be improved if the definition of “working day” were revisited, such as by giving public authorities a limited right to vary non-working days to more accurately reflect local circumstances.

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

No.