

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : Police Scotland

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

Positives

FOISA has provided individuals access to and provision of information not previously provided - from public authorities

FOISA has made public authorities more accountable and transparent however some still perform better than others with regards to the levels of information proactively disclosed and also with regard to the culture e.g. disclosure is the default position in some organisations with exemptions only being applied in particularly highly contentious instances.

FOISA also provides a gateway to requests for ad-hoc information as/when a particular subject matter arises which, when not misused, feeds the public domain with valid, accurate information, enabling an informed society.

Negatives

FOISA has been extremely resource intensive and costly to public authorities (PAs). As there is no direct charge for this service (with exception to very specific cases), in certain situations, PAs can receive extremely high numbers of requests which have an associated cost to the organisation - with no recompense available. Police Scotland has the highest number of requests in Scotland with Scottish Government close behind.

With regards to the Cost Exemption (Section 12), the current £15 per hour rate is not appropriate as a maximum given the passage of time since implementation. There is also an unfair disparity between Scotland and E&W (FOISA -v- FOIA). FOI has a £450 limit with a maximum rate of £25 per hour - 18 hours as compared to 40 for FOISA. This is also in contrast to the charging regime for the Environmental Information (Scotland) Regulations 2004.

This consultation may be an opportunity to charge for FOISA requests which may be supported by OSIC if the issue of the 'spirit' was challenged i.e. the Act was created for individuals and not media houses. This is an area that is being explored by Police Forces south of the Border - [Leicestershire Police](#)

It is questionable where the 'public interest' is in some requests – some clearly being a data gathering exercise for commercial gain, a potential research project or journalism exercise. With regards to the point about 'commercial gain', FOISA appears to be used by the private sector in order to gain an upper hand in tender exercises, which can have negative consequences not only on private companies but also on the public purse where this skews the tendering process. There is, of course, the exemption under Section 30, however in the era of 'big data' it is increasingly likely that this will occur even when following the letter of the law.

The Act can also then be another vehicle for applicants with particular 'issues' to progress their personal concerns leaving the organisation having to address their requests through this other route, resulting in further time and resources being allocated.

FOISA is often confused with DP rights and applicants are frustrated when the personal information they request is exempt from release.

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

The policy intentions were to

- **establish a legal right of access to information held by a broad range of Scottish public authorities;**

YES, and public awareness has increased re FOISA which has led to an increase in applications.

However, while the Act is a good starting point, it needs strengthened if its principal design (scrutiny of government/public authority decision making and spend) is ever to be fully realised. For instance, if the Act was to be extended to cover organisations that carry out large contracts for public sectors such as Carillion, SERCO, GEOAmeY, it would allow for greater transparency of these services and perhaps provide some public assurance of transparency and scrutiny.

It is also clear that the Act is being used by some applicants as an alternative to them undertaking their own research and that feels like a potential 'misuse'. Anecdotally, in a 'self-serve world' where individuals can access much of the information they require (ie banking, utility bills, etc.) there does not appear to be a similar appetite for public information and instead answers to direct questions are typically sought. Whilst FOISA covers information, majority of applicants are seeking knowledge.

- **balance this right with provisions protecting sensitive information;**

YES, through the exemptions provided

- **establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime;**

YES

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

YES

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

YES, though there are two definitions to consider here.

The first is where 'historical records' has come to mean 'non-current records' that an organisation will hold. These can be held on old systems or often as paper records within a store. The FOISA regime is still applied to these and measures put in place to search and retrieve the information requested.

The second definition that applies are records that are deemed by a professional to be historically significant and have been brought together within an archive. In this case, the FOISA regime is by default placed on the records because the purpose of any archive is to preserve records for posterity and in the case of public records archives, to provide access to what is held. The same considerations on how long a collection would remain closed were in place before FOISA due to data protection and confidentiality concerns.

It is also worth noting that the majority of Scottish Public Authorities are obliged by the Public Records (Scotland) Act 2011 to make provision for the preservation of records of historical significance. Therefore this is an area that would appear to be well covered by legislation.

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

In relation to implementation of, issues arise regarding interpretation. For example, with regards to the interpretation of Section 17 - information not held, there have been a number of cases where the interpretation is at odds.

Section 3(2)(a)(i) of FOISA (Fees for Required Disclosure) (Scotland) Regulations 2004 sets out that no account can be taken of costs incurred in determining whether the authority holds the information specified in the request. That appears to be at odds with the interpretation of section 17 with particular regard to requests which seek a numerical response.

Police Scotland has a number of cases with related Decision Notices that further explain the issues of concern – if required, these can be provided separately as they relate to specific

scenarios which are better assessed by policy makers/OSIC aside from the general consultation exercise.

In relation to practice, PAs are aware that this is a crucial area of business which, in terms of reputational damage carries a significantly serious risk. However, it appears to be viewed by some authorities that it is a hindrance, so consequently is not resourced appropriately, FOISA practitioners are not given the recognition, standing or autonomy required to fulfil the role as per the Act and can often be stymied by hierarchical scrutiny or organisational interference.

OSIC could provide more practical advice / training to authorities rather than simply enforcing the legislation and it would be helpful if there was some recognition that resources are limited and PAs have not been allocated additional funding to deal with the increasing number of requests received.

Being a Regulator and requiring to be seen as independent, OSIC can sometimes be regarded as keeping themselves at arm's length.

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

Please refer to previous comments specifically re the charging regimes and costings for Section 12;

The 20 day deadline could be extended for more complex requests (similar to GDPR).

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

No, internal practices and processes are a matter for authorities to manage.