

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : UNIVERSITY OF EDINBURGH

The University of Edinburgh and our context

The University of Edinburgh is a global university, rooted in Scotland. We are globally recognised for our research, development and innovation and we have provided world-class teaching to our students for more than 425 years. We are the largest university in Scotland and in 2017/18 our annual revenue was £984 million, of which over £279 million was research income. We have over 41,000 students and more than 15,000 staff. We are a founding member of the UK's Russell Group of leading research universities and a member of the League of European Research Universities.

The University operates a devolved management structure so that our schools and subject areas are managed according to their individual and distinctive operational needs. We have three academic colleges, subdivided into twenty schools, and three support groups, subdivided into some seventy support services.

Freedom of information compliance is co-ordinated by the Records Management Section (RMS). The RMS works with a network of approximately 150 'information practitioners' who receive additional information request handling training and act as their business unit's local freedom of information expertise.

Q1. In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?

The creation, dissemination and curation of knowledge to effectively address global challenges is fundamental to the University's mission. The University is a global leader in transforming knowledge, ideas, skills, and expertise into advice, innovation, intellectual property, and enterprise, thereby enriching society. We believe that openness and transparency support accountability, empower people and support good governance. The University is absolutely committed to FOISA and the transparency it brings. We believe changes to FOISA, along the lines suggested below, will ensure FOISA's future sustainability. Without change there will not be improved proactive publication because publication under the current regime cannot be truly effective.

Sustainability

We recognise many of the issues raised by Rosemary Agnew in 2017 in her last report before leaving the post of Scottish Information Commissioner, particularly where she asks "whether, as currently formulated, [FOISA] is sustainable or can take us far enough to

become a truly transparent society.”¹ In our experience the current system is not sustainable.

The numbers of requests received by the University under section 1 of FOISA have increased each year, and in some years dramatically. In eight of the last ten years, the percentage increase in requests received in comparison with the previous year has been more than 12%. In 2010 it was 38% and last year it was 20%. Remaining statutorily compliant therefore comes with increased financial and opportunity costs each year.

Costs

The University now employs seven full-time staff in RMS whose sole or primary role is the co-ordination of information requests. Some support services, for example Finance, HR, Estates, Accommodation Services, and Student Systems, employ staff whose role specifically includes the co-ordination of information requests. These and other professional support service teams have had to spend an increasing proportion of time on freedom of information request work in recent years.

All teams, but especially smaller teams, struggle to increase resource to keep pace with the increase in the number and complexity of requests received by the University. So teams must divert resource from core activities, resulting in opportunity cost. For example, for every hour spent by Student Systems producing statistics to respond to section 1 FOISA requests is an hour lost for internal University reporting and analysis, work that has a direct impact on strategic planning and improvements to systems and services for students.

The unpredictability of requests and short turnaround times cause significant difficulties at times of peak demand. Admissions teams struggle to resource request compliance during peak admissions periods such as April-May when processing applications and providing feedback to unsuccessful applicants is their priority. For Student Systems June is a particularly difficult time of year when they are at full stretch covering awards, graduations, quality assurance monitoring, and preparing for imminent HESA returns. For Finance, processing requests is particularly challenging at the end of the financial year when their priority is finalising the University accounts and preparing the financial statements. At these times teams face a choice between making slower progress on core activities (some of which are also statutory requirements) and meeting statutory FOISA deadlines.

The University is currently undertaking a project to procure more sophisticated request handling technology to cope with the significant increase in the number and complexity of requests received by the University, at an estimated financial cost of £50,000 over four years.

¹ Proactive Publication: time for a rethink?

<http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportProactivePublication2017.aspx>

Q2. Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.

FOISA was “intended to support the development of a culture of greater openness throughout the Scottish public sector.”² In the broadest sense we believe this policy intention is being met. Scotland’s freedom of information regime is internationally recognised as one of the most effective in the world, recognising the Scottish Information Commissioner’s independence and enforcement powers.

As the way public services are delivered evolves, the legislation has been amended to designate new public authorities, for example by the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019. So the objective for the legal right of access to information to cover a broad range of public authorities has also been met, if often with a time lag.

However, the objective “to encourage the proactive disclosure of information” has only partially been met. The quality of publication schemes can vary considerably. Rosemary Agnew concluded that “the [Model Publication Scheme] is seen as a way of ticking a box that shows the [public authority] is complying with FOISA, rather than an opportunity to use the framework to promote and enable the dissemination of information.”³ In 2004, Scottish universities invested considerable time and resource developing a comprehensive model publication scheme (MPS) for the sector, but gained limited advantage for doing so. In the University’s experience, our early investment in our publication scheme was not repaid.

The objectives “to establish a legal right of access to information” which also applies to “historical records”, and which is balanced “with provisions protecting sensitive information” has been met, but at an unsustainable cost, as outlined in this response.

Q3. Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?

Q4. Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

At a time when there are significant pressures on public resource, the University believes a more efficient, and a more effective way of meeting FOISA’s policy objectives is to adjust the balance in the legislation (and OSIC’s guidance) between proactive publication and section 1 requests. In a truly transparent society, information people need should be available without having to ask. A programme of proactive publication allows public authorities to assign resource in a planned way, rather than being forced to reassign resources with no notice in reaction to requests. We know that proactive publication is important to building and maintaining trust and confidence in public services, for example we know that publishing MSPs expenses has improved accountability. This was recognised by the Bill Memorandum, which stated “the proactive disclosure of information

² Freedom of Information (Scotland) Bill, Policy Memorandum, paragraph 2, [https://www.parliament.scot/S1_Bills/Freedom%20of%20Information%20\(Scotland\)%20Bill/b36s1pm.pdf](https://www.parliament.scot/S1_Bills/Freedom%20of%20Information%20(Scotland)%20Bill/b36s1pm.pdf)

³ Proactive Publication: time for a rethink? page 9

by public authorities will be vital to the effectiveness of the FOI regime and the promotion of a culture of openness.”⁴

Rosemary Agnew’s report described ways in which the proactive publication requirement could be strengthened. But increasing the proactive publication requirements is only one side of the scale. On the other side adjustments need to be made to reduce the burden of section 1 requests. We have noted five areas where this could be done.

Information intended for future publication (FOISA section 27)

The University wants to proactively publish more information, more regularly, to support the wider public interest in openness and transparency. But we are unable to release resource to do so because we are dealing with increasingly detailed and specific section 1 requests which cannot be satisfied with published information.

For example, the University Counselling Service would like to develop a new approach to proactively publish more statistical information about the Service in response to the legitimate public interest in mental health. In the last year the Service has received a 20% increase in the number of requests they receive (on top of a 60% increase between 2014/15 and 2017/18). Many of these requests are for very specific information from journalists and students writing essays/dissertations. The specific, bespoke nature of each request means that they cannot be answered by the statistics the Service currently publishes in their annual reports. Frequently applicants request data that is either not published or which will not be published for several months. Running bespoke reports to answer each request involves effort. Effort diverted from supporting students. In the last year the Service has had a 12% increase in referrals and a 53% increase in the number of students presenting at risk of suicide or significant self-harm. Staff time is better spent supporting these students rather than compiling bespoke statistical reports.

Under the current legislation there is limited incentive for public authorities to take a more proactive approach to publication. Published statistics rarely answer all of an applicant’s bespoke questions and unless they are updated quarterly may not qualify for the exemption provided by section 27(1). Alongside strengthened proactive publication requirements, we would like to see greater protection where authorities have or intend to publish similar but not exactly the same information as has been requested.

Information otherwise accessible (FOISA section 25)

Given the University’s commitment to education and the dissemination of knowledge, we are keen to provide applicants with advice and assistance concerning where information relating to their area of interest is available. However, we find an increasing number of applicants disagree that information is readily accessible to them if it requires them to pay a fee or expend effort retrieving or collating the information themselves. The Scottish Information Commissioner’s briefing on the section 25 exemption tells us that we must take

⁴ Freedom of Information (Scotland) Bill, Policy Memorandum, paragraph 42.

account of the individual circumstances of the requester, for example “If the requester’s means are limited or the fee payable to access the information is high, the information may not be reasonably obtainable to that requester and the exemption may not apply.”⁵ The Commissioner’s has also refused to uphold the exemption where the applicant would need to spend time collating the information.⁶

We find that applicants often send the same request for statistics to multiple universities. Frequently they do not realise that the Higher Education Statistics Agency (HESA) collates and analyses comparable data on all aspects of higher education in the UK. When we explain that the data they seek, or data that is very closely aligned to the data they seek, is available for a charge through HESA’s custom data service, applicants increasingly tell us that they do not have sufficient financial resources so the information is not reasonably accessible to them. We have no way of verifying this so are left with a choice of either complying with their request or spending time arguing our case to the Commissioner at appeal.

Recently we informed an applicant (a journalist) the information they sought (a list of individuals graduating in a particular year) had been published in the Scotsman and Herald and was therefore accessible using the newspaper archives, for example at the National Library. The journalist was dissatisfied with this response because it would require them to spend some time locating and retrieving the information themselves.

We would ask the Commissioner to review his guidance to rebalance the evidence an applicant needs to present if disagreeing that information is reasonably accessible.

Fee Regulations

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 do not work well so many public authorities do not use them. The Regulations permit public authorities to recoup a small proportion of the cost of answering a request in limited circumstances. Calculating the fee for such requests is time consuming and the cost of processing the fee (a maximum of £50) is normally greater than the fee. In calculating the fee, staff time is capped at £15 per hour.

The University is accredited as a Living Wage employer. The lowest hourly cost of staff on the University’s lowest grade is £10.71 (including on-costs). Only staff on grades 4 and below have an hourly cost below £15 per hour. Many departments do not have staff on these grades and where they do, these staff do not usually have the knowledge, skills and experience to collate the information requested by applicants. This means the projected costs do not represent the actual cost to the University. Moreover, as the Scottish Ministers have not made regulations to allow public authorities to aggregate the costs of responding to an applicant’s requests, we must cost each standalone question of a request separately. So for each standalone element of an applicant’s request the University is required to

⁵ Scottish Information Commissioner, FOISA Guidance, Section 25: Information otherwise accessible, paragraph 12, <http://itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>

⁶ For example, Decision 206/2019 Iain Benson and the University of Glasgow

undertake up to one day's work free of charge, and over a week's work for no more than £50.

The University rarely receives a request with only one standalone element. Most requests ask several questions, some ask dozens. We recently received a request with 15 questions, one of which had 17 sub questions. The applicant followed up on the same day with two further requests. Another applicant recently made a request containing 22 questions. The University is unable to make a charge for responding to any part of these requests and neither do any of them meet the Commissioner's definition of vexatious. Responding to these types of requests is very time consuming and responding within the statutory 20 working day deadline can be unrealistic.

The University collates estimates of the amount of time taken on each request. It is unusual to obtain estimates from every colleague involved in a request so we know that we consistently under record this information. However, in 2018 the University recorded spending an estimated average of 6 hours on each request.

In the last 18 months the University has received 45 items of information request related correspondence from one applicant containing 14 FOISA requests and approximately 70 standalone questions. The University has carried out approximately 25 days' work to respond to this applicant's freedom of information requests (excluding time spent on internal reviews and appeals) and has been able to recoup less than £30 from the applicant.

In contrast, the Environmental Information (Scotland) Regulations 2004 (EISRs) allow the University to recoup the actual cost of answering a request for environmental information. Given the similarities in the policy objectives of both FOISA and the EISRs it seems strange that the fee regulations are so different.

We would like to see the cap for staff time removed and for Scottish Ministers to make regulations to allow public authorities to aggregate the costs of responding to an applicant's requests.

Vexatious requests

FOISA does not require public authorities to comply with vexatious requests, but does not define 'vexatious'. The Commissioner rightly asks public authorities to present robust evidence to support any claim that a request is vexatious, but the quantity of evidence required can mean that it is almost impossible to use the provision.

It is becoming more common for an individual to exhaust the legitimate channels for redress of a perceived grievance (for example the complaint/grievance/appeal procedure) and to continue using FOISA. In other cases an applicant can pursue a personal grievance against an individual member of staff by targeting requests to cause them additional work and discomfort. It often takes weeks of work over the course of many months before the University is able to accumulate sufficient evidence to demonstrate that any individual request is vexatious. During this period the University will often have provided detailed

explanations, advice and assistance, but the applicant is unable/unwilling to understand/engage.

The University recognises that FOISA can be a legitimate tool in helping individuals to understand decisions that affect them and in making public authorities accountable for their actions. But frequently the perceived grievance is specific and has been dealt with thoroughly by the relevant procedure which often includes external scrutiny (e.g. by the Scottish Public Services Ombudsman or an employment tribunal). Using FOISA in this way is wasteful of limited public resource.

We would ask the Commissioner to review his guidance to include occasions where an applicant is trying to pursue a grievance which has exhausted the appropriate route.

Deadline extension for consultation with third parties

The section 60 Code of Practice⁷ recommends consulting third parties affected by requests wherever doing so will help to determine whether an exemption applies. However, FOISA, unlike the EISRs has no provision to extend the 20 working day deadline for responding to requests in these circumstances. In some cases this means the University must decide between a risk of breach of contract (resulting in legal action) and failing to meet the statutory FOISA deadline.

We would like provision to be added to FOISA similar to Regulation 7 of the EISRs.

⁷ Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, Paragraph 7.2.2