

**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE**

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

**SUBMISSION FROM :TAVISH SCOTT MSP**

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

Members of the public, journalists, researchers and others have been given a powerful tool through which they can hold people and organisations to account. It would be unthinkable to remove these rights today.

Regrettably, some organisations, and in particular the Scottish Government, has responded by adopting measures to avoid paper trails and practices that are not compliant with good governance. This has been regularly documented and helped inspire the Get It Minuted campaign.

High profile meetings with no minutes available include a meeting between Justice Secretary Michael Matheson and SPA chairman Andrew Flanagan about the prospective return from leave of Chief Constable Phil Gormley. Similarly, no minutes or notes were available following meetings between three Scottish Government ministers, including the First Minister, and representatives of Teach First.

This rips up the FOI rulebook, is secretive, and keeps Parliament and the public in the dark about what was really said and how decisions were reached. It is part of a culture of evasiveness that characterises the Scottish Government's approach to open information.

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

The Freedom of Information (Scotland) Act revolutionised the public's right to access and information. However, there is a substantial amount of work to be done to ensure that it is operating effectively, protect existing rights and expand entitlements as was originally envisaged.

The overwhelming majority of the organisations that are subject to freedom of information do so in good faith and have no intention of minimising people's rights.

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

As the Committee will be aware, the role of special advisers was considered as part of the Information Commissioner's investigation into the Scottish Government's practices. However, I continue to be concerned that they exert undue influence over the freedom of information process within the Scottish Government, on a manner and scale that as a former minister I don't believe occurred at the inception of freedom of information.

I am also concerned that organisations may prioritise the handling of a publication, such as the resulting media impact, over complying with the legislation and meeting their obligations to the person making the request. The provision of information should never unnecessarily be delayed while an organisation constructs a media strategy to accompany its release, especially if the response is already overdue.

For example, documents were published by the journalist James McEnaney on 5 November 2018 - after the Information Commissioner's investigation. They showed, amongst other things, the First Minister's Chief of Staff stalling the release of overdue information until a suitable "handling plan" had been agreed.

Another incident highlighted by Mr McEnaney on the same day involved the Scottish Government's FOI Unit telling special advisers that the edits they requested would result in the response not properly complying with the legislation. The response was issued but the unit noted that if an appeal was received then the additional information removed would need to be released. As Mr McEnaney succinctly summarised:

*"So the end result is that the Scottish Government issued an FOI response which it knew did not comply with the law, on the basis that if the requester complained they would change their approach. According to the files available, the requester did not seek a review."*

I am also concerned that there is evidence of interactions between bodies that merits concern.

Staff recall one example where an FOI request was sent to all 32 local authorities. A Scottish Government official then called the parliamentary researcher concerned to advise that he could compile the information requested of all the councils and publish it on the Scottish Government's website, something that was done almost immediately. The local authorities then, unsurprisingly, pointed to the availability of the information online in their subsequent responses.

The researcher was understandably perplexed to receive a call from a body that they had not contacted, begging the question of how this request came to their attention and how the applicant's details came to be in their possession.

Further enquiries revealed that the Scottish Government routinely collated the data in question from all local authorities and that they "were asked to help out by one local authority which was having difficulty" undertaking the required analysis. It was explained that:

*"In any case, it's much more efficient for us to help out centrally. It takes us the same amount of time to produce the tables for one LA as it does for 32 LAs. Conversely, if 32 LAs are asked the same information separately, this can be take a great deal of their time, specifically if the request is complex, and result in massive duplication of effort and stress for LA officers. It also take [sic] the requestor time to collate all the information."*

*“All local authorities will still be answering your FOI as they are duty bound to do so. It is likely that they will point to the results on the website. There has been no transfer of the FOI, it [sic] just that we’ve helped out by analysing the data we already hold centrally.”*

This further raises the question of why, if only one local authority had been in touch, the Scottish Government would feel the need to compile and publish information relating to all local authorities and not just the authority in question.

It was subsequently clarified that a local authority had forwarded the email that it had received, including the applicants contact details.

It was also subsequently confirmed by a council that the Scottish Government - which this particular council had not contacted - had been in touch to advise that it had made information available centrally and a link was provided.

While the impression was given that officials were trying to be helpful, I find this coordination troubling.

It is worth noting that there are advantages in a journalist, researcher or member of the public asking the questions of each of, say, the 32 councils or 14 regional health boards separately, not least it means they can gauge the quality of the response, seek clarification if necessary, have a greater degree of control over the data, present it in their preferred manner and choose when to publish the results they have compiled.

I also believe that the interpretation and use of the public interest test is worthy of further reflection.

My party sent a series of freedom of information requests relating to the Queensferry Crossing around the time of it opening in September 2017. Amongst the information asked for was “(a) a summary and (b) a list of all outstanding work on the Queensferry Crossing as of 30 August 2017.” Colleagues were accused of ‘talking Scotland down’ when they questioned whether the work on the Queensferry Crossing had been completed at the time of its opening.

At the point where the request was more than seven weeks overdue (30 November 2017), Transport Scotland was informed that a referral would be made to the Commissioner if a full response was not issued immediately.

The response issued on 19 December 2017 then concluded that the commercial interests of the contractor trumped the public interest in finding out what work still had to be done on the new bridge, and that the request for the list of outstanding jobs was being refused on that basis:

*“You requested:*

*“1. (a): a summary, and 1. (b): a list of all outstanding work on the Queensferry Crossing as of 30 August 2017”...*

*“1. (a & b) While our aim is to provide information whenever possible, your request for this information is refused under Freedom of Information (Scotland) Act 2002 (FOISA) Section 33(1) (b). This exemption applies because disclosure of this information would (or would be likely to) prejudice substantially and have a detrimental effect on the commercial interests of the contractors - Forth Crossing Bridge Constructors (FCBC).*

*“This exemption is subject to the ‘public interest test’. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open and transparent government, and to help account for the expenditure of public money. However, there is a greater public interest in protecting the commercial interests of companies which enter into Transport Scotland contracts, to ensure that we are always able to obtain the best value for public money.”*

I believe it would strike many people as reasonable information for parliamentarians and the public to possess.

However, this very information was subsequently released to the Rural Economy and Connectivity Committee on 9 January 2018 after members requested the information from bridge officials in November. As evidenced by the extensive media coverage it received (for example, <https://www.scotsman.com/news-2-15012/list-of-unfinished-jobs-on-queensferry-crossing-revealed-1-4657091>), there was a significant public interest in the information. It was not clear what impact, if any, the release of the information had on the commercial interests of the contractors.

As Alex Cole-Hamilton MSP, the member for Edinburgh Western, put it, “a cynic might suggest that the Scottish Government were deliberately avoiding releasing anything that would overshadow their photo opportunity”.

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

Scottish Liberal Democrats are determined to strengthen and expand the public’s right to information.

For example, the public have a right to know more about the multi-million-pound deals with private firms delivering schools, hospitals, major infrastructure projects and routine public services.

In 2015, Rosemary Agnew, then Scottish Information Commissioner, concluded “people think it is important, if not essential, to be able to hold organisations that spend public money to account”. The Commissioner’s poll found 81% of people thought organisations building and maintaining schools and hospitals should be subject to FOI.

The public want to know whether the contractors maintaining our roads, or running our railways and prisons, are doing a good job. For example, it seems absurd that Abellio, the operator of the £7 billion ScotRail franchise, is not subject to freedom of information. It is providing basic infrastructure on which we all rely, handling as much public money as a government department or council, and as such should be made accountable to the public in return.

I would also like to draw the Committee's attention to the speech Sir Vince Cable gave to the IPPR think tank in which he called for reform of FOI laws in England to allow closer scrutiny of firms delivering public contracts as well as for consideration be given to the creation of new legal entities for companies that regularly deliver public sector contracts.

FOI rights have steadily diminished as public service delivery models have changed. The Scottish Government's incremental approach to the extension of coverage has proven totally inadequate.

It is time the Scottish Government caught up and not only reinstated information rights but expanded them, as the authors of Scotland's FOI legislation had intended and expected to occur.