

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : Dr Karen Mc Cullagh

I am a Lecturer Law at the University of East Anglia (UEA). One stream of my research focuses on freedom of information laws. I have published articles commenting *inter alia* on significant cases e.g. *Evans* (concerning the exercise of ministerial veto power), and responded to UK government consultations on aspects of freedom of information e.g. Tribunal fees, and to the Independent Commission on Freedom of Information.

Executive Summary

- This consultation response addresses question 4: *Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.*
- In 2014, the then Deputy First Minister, Nicola Sturgeon proclaimed: “Scotland has the most robust Freedom of Information regime in the UK.”¹ Whilst a comparative analysis of The Freedom of Information (Scotland) Act 2002 (FOISA) and the Freedom of Information Act 2000 (FOIA) confirmed the accuracy of this statement, it is arguably the wrong benchmark to choose to evaluate the strengths and weaknesses of FOISA because it lacks objective measurement criteria.²
- A better benchmark, in my view is, the nine normative principles collated by the highly respected non-governmental organisation, ARTICLE 19, from international and regional laws (e.g. UN Declaration on Human Rights (UNHDR) and the European Convention on Human Rights (ECHR) and related judicial pronouncements. These United Nations endorsed principles collectively constitute best practice standards in respect of right to information legislation.³
- The nine normative principles are (1) Maximum disclosure, (2) Obligation to publish, (3) Promotion of open government, (4) Limited scope of exceptions, (5) Processes to facilitate access, (6) Reasonable Costs, (7) Open meetings, (8) Disclosure takes precedence, and (9) Protection for whistleblowers. This consultation response focuses only on the principles that FOISA is least compliant with. I have benchmarked FOISA against the first five principles only because FOISA is fully compliant with the sixth principle and the last three principles are covered by other laws, and beyond the scope of this consultation.
- Benchmarking FOISA against the normative principles reveals that the Scottish legislation does not fully comply with the five of the six normative principles (the exception being the reasonable costs principle – which FOISA fully complies with).
- If Scotland is to have a FOI law that is fit for purpose, these deficiencies should be addressed through implementation of the following seven recommendations.

¹ Scottish Government, More bodies eligible for FOI requests, (31st March 2014) <<https://news.gov.scot/news/more-bodies-eligible-for-foi-requests>>

² For a comparative analysis of FOISA and FOIA and assessment of their comparative strengths and weaknesses, and fitness for purpose when measured against UN endorsed normative principles, see: Mc Cullagh, K. “Information access rights in FOI and FOISA – fit for purpose?” *Edinburgh Law Review*, (2017) (1) 55-87, <<https://www.eupublishing.com/doi/10.3366/elr.2017.0389>>

³ UN HRC, Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies, UN Doc.E/CN.4/2000/63. It was referred to by the Commission in its 2000 resolution on freedom of expression; UN CHR, 2000/38: Resolution, Right to Freedom of Opinion and Expression, UN Doc.E/CN.4/RES/2000/63.

Recommendation 1: (maximum disclosure principle) – The scope of the Act should be broadened, particularly in relation to contracted-out public services, as the current rate of designation is both too slow and narrowly focused.

Recommendation 2: (obligation to publish principle) – FOISA should be amended to require publication schemes to be supplemented with disclosure logs to increase the transparency and accountability of public authorities.

Recommendation 3: (promotion of open government principle) – Appropriate levels of funding must be provided to the Scottish Information Commissioner.

Recommendation 4: (Limited scope of exceptions principle) - FOISA should be amended to include a statutory obligation for “a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,” as proposed by the CFI Scotland.⁴

Recommendation 5: (Limited scope of exceptions principle) - The ministerial veto power should be removed.

Recommendation 6: (Processes to facilitate access principle) – FOISA should be revised to include a Tribunal tier of appeal so that costs are reduced for those challenging non-disclosure decisions.

Recommendation 7: (Processes to facilitate access principle) - FOISA should be revised to permit a full merits review by the Inner House of the Court of Session.

⁴ Campaign for Freedom of Information in Scotland, (2018) A report on how recording discussions and decisions at meetings needs to be improved to ensure the public’s right to know remains robust under The Freedom of Information (Scotland) Act 2002, <<https://www.cfoi.org.uk/wp-content/uploads/2018/01/CFOIS-Minute-Taking-Report.pdf>>; This report sets out further suggestions which should also be used to inform the consultation and revised FOISA.

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

1. *The maximum disclosure principle*: This principle states that FOI legislation should contain broad definitions of information and public authorities in order to foster a culture of strong information rights.
2. FOISA has complied with this principle to a greater degree since 2013 when the Scottish government amended FOISA to include a new designation power, section 7A, which provides that Ministers are obliged to report to Parliament on their use of the designation power every two years and give reasons for not using the power if it has not done so in the two-year reporting period. Although the designation powers have been used on a regular basis since then, the Act is not keeping pace with changes to the delivery of public functions and, as a result, rights are being eroded.
3. The Scottish government could and should draw inspiration from the broader scope of application of FOISA in other countries, for example:
 - a. Ireland: The Minister can prescribe as FOI bodies, in whole or in part, non-public bodies that receive significant funding from the Exchequer.⁵
 - b. Mexico: The law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by *government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake* (emphasis added).⁶
 - c. New Zealand: it extends to contractors engaged by a public authority in relation to that work⁷ and to information held by unincorporated bodies established to assist or perform functions for a public sector agency or local authority.⁸
4. **Recommendation**: – **The scope of the Act should be broadened, particularly in relation to contracted-out public services, as the current rate of designation is both too slow and narrowly focused.**

⁵ The Freedom of Information Act 2014, section 7,
<<https://data.oireachtas.ie/ie/oireachtas/act/2014/30/eng/enacted/a3014.pdf>>

⁶ Transparency and Access to Public Information Act 2015

⁷ s 2(5) OIA; s 2(6) Local Government Official Information and Meetings Act 1987

⁸ s 2(2)–(3) Official Information Act 1982.

5. The *obligation to publish principle*: This principle recommends that public authorities proactively publish key information as well as responding to information requests, to promote a culture of openness and transparency that should improve over time.⁹
6. In compliance with this principle, FOISA requires public authorities to develop, publish and implement a publication scheme, setting out the classes of information they will publish, the manner in which they will publish them, and whether or not they intend to charge for any particular publication.¹⁰
7. To assist with this, the SIC has produced "model" publication scheme¹¹ that Scottish public bodies are encouraged but not compelled to adopt - they may develop their own "bespoke" publication scheme.
8. However, publication schemes reflect the technology available at the time of legislative enactment – for example, the UK Government only started releasing information through an online search engine in 2004.¹² Current FOI practice is not exploiting the opportunities presented by technological progress, in the form of low cost, online publishing.
9. The current ease and low cost of making information available online means that FOISA should be amended to obligate public authorities to publish disclosure logs.
10. A disclosure log “lists all previous requests, and you can click on them and find out what the request was and what information was disclosed; it is, as it were, a back record of things that people have asked us.”¹³
11. Some, but not all, authorities in England & Wales currently publish disclosure logs, and those public authorities that already publish disclosure logs have reported that it helps them manage requests by directing requestors to information that has already been published on their website.¹⁴

⁹ The "obligation to publish" principle was updated in 2015 to include a recommendation that information proactively published or released in response to requests should be "made available in open and machine readable formats when applicable, and without restrictions on its further use and publication", but compliance with this aspect of the principle is not the focus of this consultation response since it is dealt with in a separate legislative measure: the Re-use of Public Sector Information Regulations 2015, SI 2015/1415 established a UK-wide (including Scotland) framework for the re-use of public sector information, enforcement of which is overseen by the ICO.

¹⁰ s 23 FOISA.

¹¹ SIC, The Model Publication Scheme, available at:

<<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/TheModelPublicationScheme.aspx>>.

¹² M. Cross, "Direct to your destination" The Guardian, (4 March 2004), available at:

<<http://www.theguardian.com/technology/2004/mar/04/internet.egovernment>>.

¹³ House of Commons, Justice Committee, Post Legislative Scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, Volume I, HC 96-I, Evidence by Professor Hazell, 14.

¹⁴ Independent Commission on Freedom of Information: call for evidence responses, Call for evidence responses from organisations: D to L, 149; London Borough of Richmond Upon Thames have introduced a disclosure log and early indications suggest that it has resulted in a small decrease in FOI requests received, available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491616/Responses_D_-_L.pdf>.

12. **Recommendation:** – FOISA should be amended to require publication schemes to be supplemented with disclosure logs to increase the transparency and accountability of public authorities.
13. *The promotion of open government principle:* This principle aims to promote a change of culture within government and public bodies so that, over time, they become more transparent. This goal should be achieved through public education measures and through measures that promote public authority compliance with codes of practice on good practice in dealing with requests for information¹⁵ and on good practice in keeping, managing, and destroying records.¹⁶
14. This principle recommends: "the law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation".
15. However, the SIC has suffered significant budget cuts (15% during the period 2011 to 2014).¹⁷ The SIC anticipated further cuts in its 2016-2020 plan.¹⁸
16. Evidently, the SIC will struggle to meet its statutory obligations if it is not properly resourced. Further SIC budgetary cuts will negatively impact upon the SIC's ability to dedicate resources to promotional and educational activities.
17. **Recommendation:** – Appropriate levels of funding must be provided to the Scottish Information Commissioner.
18. *Limited scope of exceptions principle:* This principle states that no public authorities should be completely excluded from the ambit of the law; that information requested should be supplied unless it falls within the scope of limited exceptions, and that refusal to disclose information should not be justified unless it satisfies a strict three-part test: (i) the information relates to a legitimate aim listed in the law; (ii) disclosure would cause substantial harm to that aim; and (iii) the harm to the aim would be greater than the public interest in disclosing the information. This principle also states that information that is withheld should be routinely reviewed to ensure that the exemption still applies, and that exceptions should be limited to no more than 15 years, except in extraordinary circumstances.
19. Increasing transparency and accountability through the disclosure of information underpinning government decisions lies at the heart of FOISA.

¹⁵ s15 FOISA.

¹⁶ S60 FOISA.

¹⁷ SIC, "2013/14 Annual Report Taking FOI forward" (2014) 28, available at: <<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=7920&sID=234>>; The SIC confirmed that the budget reduction referred to in the 2013/14 annual report was 15% (in real-terms) in total over the financial years 2011/12, 2012/13 and 2013/14 in response to an information request made by the author, SIC letter Ref: 201501311 (23 rd July 2015).

¹⁸ Scottish Information Commissioner, Strategic Plan 2016-20, FOI: realising the benefits and supporting openness, <<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=9410&sID=2746>>

20. However, the Scottish government could not develop policies or operate effectively if it did not have "safe space" for discussion, debate, and disagreement as enshrined in the constitutional convention of cabinet responsibility, and in International law.¹⁹
21. Accordingly, FOISA contained qualified exemptions regarding the formulation of government policy²⁰ and the disclosure of material that would prejudice the effective conduct of public affairs.²¹
22. Requests for information regarding policy have been met with stiff resistance, with the Scottish government making extensive claims that disclosure would substantially inhibit free and frank exchanges inside government.
23. FOISA does not contain a duty to make a record. If a record of a meeting is not taken then there is no information to access. A lack of transparency makes it more difficult, if not impossible, to hold public bodies and decision makers to account for their decisions.
24. In recent years, a culture of omitting to record minutes of meetings has arisen. This appears to have been a deliberate attempt to frustrate the operation of FOISA.
25. The Scottish Parliament acknowledged that failing in a motion unanimously passed on 21 June 2017. It further agreed to take steps to address the problem: *"That the Parliament condemns the Scottish Government's poor performance in responding to freedom of information requests; calls for an independent inquiry into the way that it deals with these, and agrees to undertake post-legislative scrutiny of the Freedom of Information Act 2002, and welcomes commitments by the Scottish Government to adopt a policy of pro-actively publishing all material released under Fol to ensure that it is as widely available as possible."*²²
26. **Recommendation: - FOISA should be amended to include a statutory obligation for "a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,"** as proposed by the CFI Scotland.²³
27. Given that this principle recommends narrow, exhaustive limitations, the inclusion of a ministerial power to issue certificates that override decisions in favour of disclosure on public interest grounds in FOISA is problematic.

¹⁹ The Council of Europe Convention on Access to Official Documents (not yet ratified by the United Kingdom) recognizes that the protection of deliberations within or between public authorities concerning the examination of a matter is a legitimate limitation to the right of access to information. The Convention however, states that this is not an absolute exception - it is only applicable when the protected interest may be harmed by its publication, unless there is an overriding public interest in disclosure.

²⁰ s29 FOISA.

²¹ s30 FOISA.

²² Scottish Parliament, Minutes Of Proceedings, Parliamentary Year 2, No. 16, Session 5, Meeting of the Parliament, 21st June 2017, Available at: <https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20170621.pdf>

²³ Campaign for Freedom of Information in Scotland, (2018) A report on how recording discussions and decisions at meetings needs to be improved to ensure the public's right to know remains robust under The Freedom of Information (Scotland) Act 2002, <<https://www.cfoi.org.uk/wp-content/uploads/2018/01/CFOIS-Minute-Taking-Report.pdf>>; This report sets out further suggestions which should also be used to inform the consultation and revised FOISA.

28. Under FOISA, the First Minister can (following consultation with the Scottish Ministers) issue a certificate overriding a decision of the Commissioner where certain exemptions have been applied²⁴ in relation to a decision notice served on the Scottish Administration. The First Minister must be satisfied on reasonable grounds that the information is "of exceptional sensitivity" before a certificate can be applied.²⁵
29. On a positive note, no First Minister has ever sought to exercise the veto power, and the Scottish Parliament did not review the ministerial veto power when debating whether to reclassify royal correspondence as "absolute" or signal any intention to do so post-*Evans*²⁶ - a sign that the Scottish Government has no intention of strengthening the veto power.
30. Although the Scottish Government has complied with the "spirit" of this principle in never exercising the veto power, it should amend FOISA to remove it in order to fully comply with this principle.
31. **Recommendation: - The ministerial veto power should be removed from FOISA.**
32. *Processes to facilitate access principle*: This principle contains measures concerning the processing of requests and an independent appeal process in recognition of the fact that a recalcitrant public authority could employ strategies such as making the application process difficult, delaying responding, and either having no appeal process to challenge non-disclosure decisions or having an excessively lengthy and expensive appeal process to avoid fulfilling information requests.
33. This principle recommends a three-tier appeal process comprising: an internal review within the public body; appeal to an independent administrative body (e.g. a Tribunal); and a "merits" appeal to the courts. The aim is to provide a fast, cost-effective appeal process.
34. FOISA contains a three-tier appeal process. The first tier comprises a right to ask a public body to conduct an internal review of its decision, which must be conducted and responded to within 20 working days of the request for review.²⁷ The second tier permits a requester who remains dissatisfied after the mandatory internal review to ask the SIC to "make a decision" which should be issued within four months, or a reasonable time period.²⁸ FOISA permits the SIC to attempt to informally effect a settlement before reaching a decision, in an effort to provide a speedy, cost-effective

²⁴ Sections 29, 31(1), 32(1)(b), 34, 36(1) and 41(b).

²⁵ Section 52 (2).

²⁶ *Evans, R (on the application of) v HM Attorney General & Anor* [2013] EWHC 1960 (Admin); For an overview of the case see K Mc Cullagh, "A tangled web of access to information: reflections on R (on the application of Evans) and another v Her Majesty's Attorney General" (2015) 21 European Journal of Current Legal Issues 2, available at: <<http://webjcli.org/article/view/432>>.

²⁷ Section 21; (thirty days if information held by Keeper and another authority has to carry out review).

²⁸ Appeals should be made to the SIC within six months - although the SIC can accept a late appeal where appropriate to do so (s 49(4)). If the SIC fails to make a decision within four months, or other reasonable period, then an information requester has the right to seek a judicial review by the Court of Session. The SIC must report annually to Scottish Parliament on the number of decisions which take longer than four months - s 46(2).

solution.²⁹ A right of appeal to a tribunal was considered but rejected during the legislative drafting process of FOISA on the basis that it would: "add an unnecessary layer of bureaucracy and possibly undermine the Commissioner's powers".³⁰ Decisions would be more likely to be challenged if information requesters and public authorities knew they could be appealed to a tribunal, and public authorities could use it to delay releasing information that loses "currency" over time.

35. However, one consequence of the lack of Tribunal appeal stage is that appeals are more expensive in Scotland. Also, although FOISA does contain a third level of appeal it may only be made "on a point of law" against a decision by the SIC to the Inner House of the Court of Session, instead of a full "merits" review by a court, as this principle recommends.³¹

36. Recommendation: – FOISA should be revised to include a Tribunal tier of appeal so that costs are reduced for those challenging non-disclosure decisions.

37. Recommendation: - FOISA should be revised to permit a full merits review by the Inner House of the Court of Session.

²⁹ s 49(4)).

³⁰ CFOI (2009) "Freedom of Information in the Devolved Scotland, available at: <http://www.centrefoi.org.uk/portal/images/foi_devolved_scotland_speech09.pdf>.

³¹ A further right of appeal to the Supreme Court in London exists (Scotland Act 1998 s 29(2)) for matters outwith the legislative competence of the Scottish Parliament such as cases concerned with human rights issues under the ECHR. The Supreme Court serves as the final court of appeal in such matters. To date just one FOISA case has been considered: South Lanarkshire Council v The Scottish Information Commissioner [2013] UKSC 55.