

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM: Severin Carrell, Rob Edwards, James McEnaney, Ally Tibbitt and 38 others

Submission from journalists and media union representatives

Dear convenor

We welcome the review of the Freedom of Information (Scotland) Act 2002 being conducted by the Scottish parliament's Public Audit and Post-legislative Scrutiny committee, and appreciate the opportunity to contribute.

This submission is being made on behalf of practising journalists working across the news media who make frequent use of freedom of information laws in Scotland and the UK, and is a compilation of our individual and collective concerns.

Many signatories to this submission signed the original open letter, of 31 May 2017, setting out concerns about the handling of information requests by public bodies which was sent to the Scottish parliament panel responsible for appointing the current Scottish Information Commissioner, Daren Fitzhenry, and to the Scottish government.

We welcome the commitments made in June and July 2017 by the then minister for parliamentary business, Joe Fitzpatrick, to improve the Scottish government's handling of information requests. In some key respects, our experience is that its processes have improved in line with those commitments. However, we agree with the committee there are a number of reasons to review the legislation.

We still experience problems with the Scottish government and have had repeated difficulties accessing information from other public bodies, including the NHS, local authorities, Police Scotland and universities. We believe there are strong, substantive reasons to consider updating, strengthening and expanding FoISA, many of which echo the suggestions made by Mr Fitzhenry in his evidence to the committee on 10 January 2019.

Many of the journalists who have signed this submission have encountered recent problems, a selection of which are included below as case studies (see appendix).

Those include:

- The direct involvement of government special advisers and ministers in the sifting, clearing and blocking of information requests to the media
- The frequent involvement of press officers across the public sector in the handling of information requests, and evidence media requests are still being treated differently to those from members of the public
- Unexplained and significant delays across the public sector in the release of information in breach of statutory deadlines
- Huge variations in the quality and pace of information request handling across the public sector, with some bodies routinely mishandling requests
- Public bodies repeatedly failing to properly apply the section 30 public interest test, making narrow interpretations of the scope of requests, or failing to properly justify their decisions by referring to the act's provisions

- Crown Office use of its nearly unique exemption from appeal to the Scottish Information Commissioner (SIC) which makes it impossible to challenge its decisions not to release information
- Officials using the Royal Family's special privileges under FoISA to prevent access to correspondence to and from members of the Royal Household
- The legislation's failure to include bodies whose sole purpose is to oversee the commissioning and building of public infrastructure worth billions of pounds
- Key meetings and telephone calls by ministers or senior officials with outside bodies or influential individuals not being minuted
- A public body choosing to recategorise a FoISA request as one under the EU environmental information regulations and then applying a charge for releasing the information
- A seemingly widespread shortage of staff dealing with requests, or a downgrading of the importance attached to information requests, leading to delays which breach statutory deadlines

Because on these experiences, we believe there is a compelling case for the legislation to be expanded and strengthened, and endorse many of the points made by Mr Fitzhenry. The act was written before digital technology and storage was in widespread use and we agree with Mr Fitzhenry public bodies should make much greater use of open data, with much greater emphasis on voluntary publication of data, procurement contracts and so on.

In general, the public sector needs to invest much more heavily and consistently in open data and information disclosure, underpinned by new legislative standards of transparency. It is remarkable how many times public bodies repeat failures to properly handle information requests after the SIC has upheld complaints in exactly those areas.

We would welcome consideration of whether the following is also needed:

- A clear duty to record, where civil servants are empowered to ensure meetings and other communications by ministers, special advisors and civil servants with external bodies or individuals are minuted or archived, except in strictly limited circumstances
- Expanding FoISA to bodies that derive all, or a substantial proportion of, their revenue from the public sector, including regional hubcos which oversee infrastructure contracts under the Scottish Futures Trust's hub programme, Cosla and the Improvement Service
- Removing the Crown Office's exemption from appeals to the SIC and stricter limits on what is deemed too sensitive to disclose
- Strictly limiting the rules on non-disclosure of material concerning the Royal Family to material which deals solely with the monarch's constitutional duties
- Limiting the rights of ministers and special advisors to oversee or influence information requests under FoISA, except in prescribed circumstances authorised by senior civil servants
- Much clearer duties on public bodies to follow best practice in the handling of requests, and to have regard to previous rulings by the SIC
- A review of the misuse of exemptions by public bodies which are frequently overturned on appeal, particularly S30 covering "prejudice to effective conduct of public affairs"
- A review of whether the sanctions for breaches of FoISA and the EIRs available to the SIC should be strengthened, to improve compliance
- Whether the SIC should itself be subject to stricter time limits in handling appeals, which may involve increasing its budget, and whether Scotland should have an independent process to review SIC decisions, similar to the Information Tribunal in place for the UK Information Commissioner

Our freedom of information legislation has greatly improved the transparency and accountability of government and public sector bodies in Scotland. Even so, these examples and the continuing problems we encounter with the application of this legislation, as well as the significant advantages for transparency offered by the digital information revolution, suggest to us a refresh of the legislation is needed.

We hope our comments make a constructive contribution to that process. We would be very happy to provide additional information on any of the matters we have raised, in whatever way would be most helpful to the committee.

Thank you,

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Rob Edwards, The Ferret
James McEnaney, freelance
Ally Tibbitt, The Ferret

Kieran Andrews, The Times
Michael Blackley, Scottish Daily Mail
Alastair Brian, Billy Briggs, Fiona Davidson, Peter Geoghegan, Karin Goodwin, Rachel Hamada, Layla-Roxanne Hill, Joe Lo, Jamie Mann, The Ferret
Libby Brooks, The Guardian
David Clegg, Daily Record
Chris Diamond, chair of Glasgow Broadcasting Branch of the NUJ
Judith Duffy
John Ferguson, Sunday Mail
Tom Gordon, The Herald
Chris Harvey, STV North NUJ chapel
Paul Hutcheon, Herald on Sunday
Simon Johnson, Daily Telegraph
Andrew Learmonth, The National
David Leask, The Herald
Helen McArdle, The Herald
Mark McLaughlin, The Times
Martyn McLaughlin, Scotland on Sunday
Chris Musson, The Scottish Sun
Andy Philip, Daily Record
Hannah Rodger, Herald on Sunday
Gareth Rose, Scottish Mail on Sunday
Rachel Watson, Scottish Daily Mail
Craig Williams, chair of NUJ Scottish executive council
Ben Wray, David Jamieson, Sean Bell, Becca Toop, Rhiannon Davies, CommonSpace
Alasdair Clark, Freelance
Tristan Stewart-Robertson, Clydebank Post

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APPENDIX: CASE STUDIES

Royal Family exemptions

FoISA gives the Royal Household a unique exemption under Section 41(a) which can be used for all members of the Royal Family and on all correspondence, with other powers to refuse documents under section 30(b)(i) and 30(b)(ii) covering opinions and discussions on any topic; and section 30(c) to protect the confidentiality of all communications. The Scottish government's internal advice in 2017 instructed civil servants to tell the Royal Household immediately a request is received and seek its advice; it also gave the Royal Household prior sight of and rights to comment on the final release of documents. In 2017, the Scottish government applied those exemptions to FoI requests concerning Prince Charles's secret lobbying of the Scottish government in favour of the charity Teach First, which had no bearing on the constitutional role or interests of the monarchy.

Police Scotland

Has a reputation for offering the minimum amount of clarity on its reasons for refusal of information requests and fails to offer advice or assistance to applicants. In 2018, Police Scotland declined to release any information about the number of officers deployed to police President Trump's visit to Scotland in July 2018, and did not provide adequate reasons. It retrospectively applied the excessive cost exemption. The SIC found it had breached FoISA by failing to cite the correct clauses and failing to offer assistance to the requester.

Crown Office exemptions from appeal

The Crown Office and Lord Advocate are exempt under FoISA from their decisions being appealed to the SIC, even on basic points of interpretation of FoISA. One reporter asked for anonymised information on the number of compensation payouts to victims or witnesses for wrongful arrest, due to clerical or legal mistakes by prosecutors. That followed the unjustified arrest of an alleged attempted rape victim after a clerical error. The COPFS refused to release those figures, insinuating the public interest was best served by not disclosing them. The reporter was barred from challenging this with the SIC.

The University of Edinburgh

FoI requests were sent to eight public bodies regarding their historic collections. The replies from several of those were exemplary, and in one case came in half the statutory time. The University of Edinburgh replied nearly three weeks late and failed to provide a full or clear response. Its officials tried to treat a request for clarification about the reasons for this as a request for a formal review under FoISA, even though the reporter had explicitly said no review was being sought at that stage. After being challenged, the university eventually released more information five weeks after the FoISA deadline.

In another case, the University of Edinburgh was asked for minutes from a sub-committee which would normally be published as routine, yet had not been for a year. The university treated this as an FoI request and said it was its prerogative to do so. The reporter pointed out that its own publication scheme stated those minutes were published on a regular basis; it was only after he consulted the SIC the university retreated and adhered to its own policy.

Special adviser and ministerial influence in FoI releases

Following the SIC's intervention on the Scottish government's handling of FoI requests in 2017, requests were made seeking internal communications regarding that investigation. Despite repeatedly claiming to hold no such information, the government eventually released more than 200 pages of heavily-redacted material. That included briefing papers for civil servants in advance of interviews with SIC officials and evidence special advisers and ministers intervened to delay or prevent the release of information they felt was too sensitive.

In one request on standardised testing, special advisers intervened to at first redact, and then entirely withhold, a draft risk register, which was eventually released after a referral to the SIC.

Other cases include: responses being delayed beyond the 20-day statutory deadline to give special advisers time to review the material; advisers instructing officials to withhold information, despite a warning that a subsequent appeal would be lost; and a special adviser blocked the release of an overdue response to allow extra time to set up a media-handling strategy.

NHS Greater Glasgow and Clyde

Journalists encounter repeated problems with NHS GGC. Reporters have had requests for correspondence and memos on the spate of infections at the Queen Elizabeth hospital covering the cryptococcus, mucormycosis and bacteraemia cases repeatedly blocked. Its responses ranged from automatic refusal on public interest grounds; internal reviews stalling beyond statutory deadlines; public interest justifications not set out; or non-statutory reasons for refusal offered. In another case, a reporter asked for specific data on complementary treatments: the response was factually inaccurate, incomplete, overdue and failed to disclose material it had previously released.

Community Safety Glasgow

A reporter sought information on environmental fixed penalty notices issued by Community Safety Glasgow (CSG). CSG first tried to process the request under environmental information regulations and apply a charge for it. Following a request for review, the agency reverted to treating the request under FoISA and provided a partial response. It justified withholding key information on referrals of unpaid fines to the Crown Office (COPFS) using section 35(1)(a) and (b) of FoISA. The requester ultimately had to refer CSG to the SIC and submit further FoI requests to confirm CSG did not hold any information on its failure to refer £1.5m worth of unpaid fines to COPFS. CSG, in other words, initially tried to charge for providing information that didn't exist. (AT)

Scottish Futures Trust hubcos

A reporter tried to establish whether hubcos, the private sector bodies set up by the Scottish Futures Trust to oversee billions of pounds worth of public spending and borrowing on capital projects, were subject to environmental information regulations (EIRs). Although hubcos have substantial public sector ownership and largely derive their income from taxpayers, the SIC said they were exempt because they were private bodies. Hubcos therefore remain shielded from public scrutiny, despite the scale and importance of their public spending.

Scottish government

The Scottish government was asked on 21 September 2018 to provide correspondence about proposals for commercial kelp harvesting. Despite repeated promises, it didn't respond until 7 March 2019, three days after a request for a review of the failure to respond. Its response withheld information, appeared muddled, and failed to make clear whether or not a public interest test had been applied. After a second request for an internal review was ignored, the case was appealed to the SIC on 24 April 2019.

NHS Fife

Two health boards - NHS Tayside and NHS Fife - were sent FoI requests about their preparations for Brexit last year. NHS Tayside responded promptly and thoroughly, providing additional background information, resulting in a story. NHS Fife, however, repeatedly failed to respond within the statutory deadline, despite reminders.

Aberdeen City council

Press officers have asked journalists to make formal freedom of information requests to avoid having to source and release information themselves, adding to the time and workload needed to access information. In September 2017 Aberdeen City council's press office was asked for information about a bond issued by the council, including how much was paid in advisory fees to the bank, HSBC, and for a copy of the prospectus. A press officer confirmed the council held this information but said the journalist "would have to send in an FoI request" in order to get it.

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