

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : The Scottish Courts and Tribunals Service

I refer to the above consultation/call for evidence to which I respond on behalf of the Scottish Courts and Tribunals Service (SCTS). The response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals and does not include the views of the Judiciary.

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

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

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

Section 37 of FOISA

Section 37 of FOISA provides that court records are exempt information for the purposes of the Act. Sections 57 and 58 provide that this exemption applies to records for a period of 15 years, (previously 30 years). The restriction on the time period to which the exemption applies has proved problematic for the SCTS in its application to court or tribunal cases, particularly in criminal proceedings. In practice, when the SCTS receives a request for information on a case which is over 15 years old, consideration has to be given to whether section 38 applies. Releasing information about the involvement of living individuals in a criminal case would be very problematic and run the risk of breaching Article 10 of the GPDR and possibly the provisions of the Rehabilitation of Offenders Act 1974.

Having carried out this assessment, very few criminal cases can be appropriately released in whole or in part after 15 years. The data protection assessment involved is complex and time-consuming. Where redaction work is possible, the information that can be released will often be disjointed and make little sense. The work required to assess if people involved in an historical case are still alive can be challenging. An example would be identifying if all witnesses in a case are still alive. In practical terms this can apply to a case from as early as the 1930s.

This issue is less pronounced in civil cases, but those cases do still contain a lot of personal information in particular those cases involving children.

In our view Scottish Ministers should (by virtue of their powers under section 59 of FOISA) consider reviewing the exemption period applied to court records. Consideration should also be given to making provision in FOISA to limit the work that public authorities are

required to carry out to identify if individuals are deceased, or for this to be addressed in the Scottish Ministers' Code of Practice.

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

Upper Cost Limit Section 12

Section 12 (2) of FOISA gives Scottish Ministers the power to make regulations to allow costs to be aggregated where two or more requests are made to any authority, but no regulations have been brought into force specifically when one person makes more than one or more requests to an authority.

In our view this is currently a loophole for members of the public to circumvent the cost limit by submitting multiple separate requests in place of one single request that would have exceeded the £600 cost limit. Where an application is refused under section 12 the applicant can simply reformulate their request into multiple smaller requests. This would bring each individual request within the cost limit forcing the public authority to provide the information sought. In our view, this issue could be addressed by Scottish Ministers through regulations.

Time Limits

Complying with the 20 working day timeframe can be challenging where public bodies are dealing with complex requests. Regulation 7 of The Environmental Information Regulations 2004 enables public authorities to extend the period to 40 working days where they believe that the complexity and volume of information requested means that it is impracticable to comply with the 20 day limit. We are of the view that it would be beneficial to make similar provision under FOISA. On occasion the SCTS has struggled to meet the 20 day limit where complex requests have been made for statistical data. The SCTS uses live operational case management systems designed for processing court business. The information held on the system is structured for these operational needs rather than for statistical reporting or research purposes. Issues in complying with the current timescales can arise as a result of the time it takes to retrieve the data and also the quality assurance work required to ensure the data is accurate before it is issued.

Provision to collaborate or ability to transfer requests to other authorities

FOISA legislation and the Ministers' Code of Practice make no provision for the ability of public bodies to either collaborate on requests where information is held by more than one public body or to transfer a request to another public body.

For example, the SCTS provides statistical information to the Scottish Government who collates and then publish this with information gathered from other public bodies. It would be more efficient for the public body that holds all of the information to respond. Allowing for transfers or collaboration would reduce the cost to public bodies involved in responding

to requests. It would additionally reduce the risk of inaccurate or distorted information being put into the public domain.

It would be beneficial if consideration could be given to amending the legislation to enable this.

Clarification

The Scottish Ministers' Code of Practice provides guidance around seeking clarification from an applicant in particular, the Code of Practice stipulates that the time limit for response is recalculated if clarification is requested. It also details the procedure to be followed where clarification is sought from the applicant but is not provided. FOISA does not specify the procedure to be followed to allow the request to be "closed off".

It would be helpful if specific provision to address these was set out in legislation. This would ensure clarity for both the applicant and the public authority.

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

Reviews

The SCTS has found, when dealing with reviews, that applicants often use this process to request new information rather than (or in addition to) seeking a review to the original request. Section 20 (3)(c)(ii) states that the applicant should specify:

"the matter which gives rise to the applicant's dissatisfaction".

It would be beneficial if the Act made provision for the process to be followed where a request for a review contains a request for new information. This would ensure that requests are handled consistently and that the applicant has the opportunity to seek a review of the response to their request for new information.

The provisions for inclusion in calculating upper cost limit of £600

The Scottish Ministers' Code of Practice provides guidance for use in calculating the upper cost limit of £600. It states that the following cannot be included in the cost calculations:

- any costs incurred in determining whether it actually holds the information;
- any costs incurred in determining whether information should or should not be disclosed; or
- the time spent deciding what parts of a document/report should be redacted (although the actual process of redacting can be charged).

Where data is extracted from the SCTS operational case management systems some quality assurance checks are required when the statistical figures generated show some anomalies, for example unexpectedly high or low figures. The quality assurance aspect can

bring the work involved over the prescribed cost limit, however without carrying out this exercise, inaccurate information could be provided to the requester.