

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : COMMON WEAL

Introduction

Common Weal has been a consistent force arguing for greater transparency in government such as with our work which led to the creation of the Lobbying Register and our work to improve Scotland's provision of statistics. Without adequate public scrutiny, governments cannot be judged on whether or not they are acting in the public good and nor can they be shielded from the corruption inevitable when decisions are made behind closed doors. Some form of Freedom of Information is therefore a vital safeguard for democracy.

Freedom of Information – Current Status

Whilst an obvious improvement on the situation prior to the introduction of the legislation, the Freedom of Information (Scotland) Act (FOISA) is still too limited and prone to abuse and obstructionism.

Common reasons for the failure to publish or outright denial of FOI requests include the use of “confidentiality clauses” or appeals to methodological limits with claims that personal data could be inferred from sub-samples. In the case of the latter, methodologies should be reviewed to preclude – as far as possible – these effects and studies should be designed from the ground up with this in mind.

The former is a much more serious case. Commercial confidentiality during a tendering process is perfectly reasonable but once a contract has been issued there is no legitimate reason to prevent the public from understanding how public money is being spend and by whom.

This is particularly important in a time when outsourcing of public services to private companies is all too common. Not only can this lead to opacity in the level of public spending it may also result in obfuscation of the conditions under which that money is spent as it may be much harder to extract information from a private company than it would be from a public body which operates under Freedom of Information statues.

As a matter of principle, the FOISA should be extended to all users of public money – including private companies using that money for outsourced work – under the same regulations as a fully-public body would be.

The Limits of FOISA

Undoubtedly there will be many suggestions for improvements to legislation resulting from this call for views and many of them I'm sure Common Weal would agree with and endorse.

However there is an ultimate limit to the process which cannot be circumvented by making the legislation more open or tightening the conditions for denial of FOI requests and that is the proactive requirement for such requests in the first place.

Even a government which automatically accepts and complies with all FOI requests without debate, denial or obfuscation will still rely on the premise of disclose only after a request is made. For that request to be made, a user must submit an appropriate question to be answered.

Transparency cannot rely on the ability of members of the public to ask questions which may not be obvious based on the current availability of data (for example, one cannot submit an FOI request on the details of a procurement contract if the existence of the contract itself is not public or not adequately advertised). This is especially true in cases where the technical nature of the subject makes forming appropriate requests difficult. Provision should be made for better guidance on writing requests both in general and, in specific instances, personal assistance should be available so that any member of the public may access their right to FOI.

The Policy Memorandum which accompanied the FOISA Bill stated that one of the objectives was to “encourage the proactive disclosure of information through the requirement to maintain a publication scheme”. This is now far from adequate and Common Weal would now encourage consideration of a substantial strengthening of this requirement.

We would seek the Scottish Government and all other Scottish public bodies to maintain a “Glass Wall” approach to transparency in which no barriers stand in the way of information which could be made public. In essence, any information that would – under the current scheme – be ordinarily made public via an FOI request should be made public by default on an appropriate public database.

This would negate the need for FOI requests at all and would allow total transparency of public data.

To increase the accessibility of this data, the public database would have to be designed to the highest standards of openness and with a ground-up philosophy of making it as easy as possible for any member of the public to find data – examples of this kind of design already exist in the realm of public statistics such as databases produced by Eurostat and Gapminder. It is vital that the government and public bodies themselves also commit to this philosophy of openness by supporting the public database and ensuring that publications adhere to its standards and formats so that information is more searchable.

In addition it may be that a team of data handlers could be employed to help collate and disseminate public data and it could be reasonably envisaged that requests could be made to them to support a member of the public in their browsing or searching the database.

Commercial sensitivities may still be applied during critical phases such as ongoing tendering processes but these blocks should be made time limited and as short as possible.

Once again, this transparency rule should apply not only to public bodies but also to those sections of private bodies which accept and make use of public money or resources (though this need not impede on the privacy of other sections of those companies which operate in the private sector).

Questions from the PAPLS Committee

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

Principles of Freedom of Information have been largely positive in that transparency of data is a vital safeguard in a democracy. However, the tendency for government departments to hide behind the shield of restrictions such as “commercial sensitivity” or other excuses has been corrosive and instances have been noted of direct interference in the FOI process at a government level which is absolutely unacceptable.

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

Many of the policy intentions have not been met. Principally, the encouragement towards proactive disclosure is inadequate and should be strengthened.

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

The requirement to be able to voice an FOI request before disclosure is made represents the ultimate limit on the FOI process no matter how open it otherwise is. A “Glass Wall” approach as outlined above should now be considered.

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

The extension of FOI to private bodies which use public money and a significant tightening of the ways in which “commercial sensitivities” are used to shield against disclosure should be considered.

Personal assistance should be made more easily available on request to anyone who wishes to submit an FOI request so that their request can be checked and phrased for maximum disclosure.

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

The Further Reading section below offers more in depth discussion about Common Weal’s approach to transparency in the public sphere and is offered to the Committee for information.

Further Reading

B Simmons, "Agenda for Pioneering Open Government", Common Weal Policy Paper, November, (2016), <https://commonweal.scot/policy-library/agenda-pioneering-open-government-common-weal-contribution-open-government>

M Cuthbert, "Public Procurement In Scotland", Common Weal Policy Paper, May, (2017), <https://commonweal.scot/policy-library/public-procurement-scotland-case-scrutiny-accountability-and-transparency>

Common Weal, "Transparency in Public Finance", Common Weal Policy Note, October, (2017), <https://commonweal.scot/policy-library/open-government-note-transparency-public-finance-role-good-data>

J McEnaney, "Why a Public Inquiry Into @ScotGov's Handling of FOI is Now Vital", CommonSpace, 26th June, (2017), <https://www.commonspace.scot/articles/11234/james-mcenaney-why-public-inquiry-scotgovs-handling-foi-now-vital>

C Dalzell, "Scotland's Data Desert", Common Weal Policy Paper, February, (2018), <https://commonweal.scot/policy-library/scotlands-data-desert-case-scottish-statistics-agency>