

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM :Audit Scotland

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

Openness and transparency are important principles which underpin the trust in government, governance and how public services are managed.

Freedom of Information legislation has an important part to play in this and the overall effect of FOISA has been positive in providing the public with access to information.

Openness and transparency are also central to the public audit model in Scotland. Audit Scotland provides services to the Auditor General for Scotland and the Accounts Commission. We audit over 220 public sector organisations across Scotland who spend over £40 billion of public money annually. We believe it is our responsibility to be open and transparent in reporting to the public in how effectively this money is spent, and how organisations manage their finances and deliver services to help improve outcomes for the people of Scotland.

As the auditors of public services across Scotland we hold information on hundreds of public sector organisations as well as information about how we run our own organisation.

All audit reports are published on our website. In addition, we publish audit plans and a wide range of additional information including briefings, infographics, interactive data tools, checklists and technical guidance to support the scrutiny of public services. We also publish lots of information about our own organisation.

It is Audit Scotland's policy to treat information requests as a 'business as usual' activity.

The Scottish Information Commissioners Office completed an onsite assessment of Audit Scotland in November 2012 and the assessment found many areas of good practice, some of which were considered to be unique. The Commissioner's highlighted:

- An organisational culture of proactive disclosure.
- Strong FOI governance supported by appropriate structures and appropriate levels of accountability by senior management.
- A performance management framework which identifies emerging risks.
- A focus on getting requests "right first time" (senior managers approve every refusal).
- Appropriate training for all staff and in-depth training for all senior managers.

We continue to refine our approach to Freedom of Information and our [approach to dealing with FOI requests](#) and our [FOI policy](#) are available on our website.

We actively support Freedom of information through engaging with various networks and forums, including the part 7 network meetings, in which practitioners meet to discuss and

learn from current issues in relation to both FOISA and data protection. In addition, we are members of the Information Commissioners advisory group for FOISA and participate in the Scottish Public Information forum.

We commend the contribution FOISA and the Scottish Information Commissioners (SIC) Office have made in contributing to a culture of greater openness and transparency. This positive impact was evidenced in the Mori poll conducted for the commissioner's office in March 2017 which found:

- 85% of respondents had heard of the Freedom of Information Scotland Act 2002, similar to 2015. There is a reduction in "definitely aware", from 71% in 2015 to 64% in 2017.
- 94% agreed ("strongly" or "tend to") that it is important for the public to be able to access information.
- 77% would be more likely to trust an authority that publishes a lot of information about its work.

The SIC Statistics portal continues to show an increase in the number of FOISA requests, giving assurance that the current legislation is being used.

We support the right to information while noting that the continuing increase in both the number and complexity of FOISA requests will have an impact on public bodies in terms of cost and resources in responding to requests.

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

The policy intentions of FOISA have largely been met, but in some cases have not kept pace with changes in the way public services are delivered.

(i) to establish a legal right of access to information held by a broad range of Scottish public authorities

The legal right of access to information held by the designated Scottish public authorities is working, but changes to the way public services are delivered, and the way that public money is spent means that a number of organisations which deliver public services using public money are not subject to the same requirements. This has been reflected in previous consultations on the bodies to which FOI should apply.

(ii) to balance this right with provisions protecting sensitive information

FOISA has a range of applicable exemptions that may be applied, and these used in conjunction with the 'harm' test and the 'public' interest test gives a good balance to the act.

This intention has largely been met.

(iii) to establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime.

This intention has been met.

(iv) to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme

This intention has been met and as far as we are aware public bodies have adopted the Commissioner's model publication scheme.

(v) to make provision for the application of the Freedom of Information regime to historical records

These intentions have largely been met as most information can become a historical record after 15 years.

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 Act references 'the disclosure of information held by Scottish Public authorities or by persons providing services for them; and for connected purposes.'

Since FOISA came into effect the way that public services are delivered has become significantly more diverse and complex. This means that significant areas of service delivery and public expenditure are not covered by FOISA.

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

The bodies to which the Act applies are set out in schedule 1. As referenced in 3 above we believe that further consideration could be given to the extension to the 'legislative reach' of FOISA given that there are organisations using public money which are not currently subject to FOI.

We recognise that this is a complex matter given that new and flexible approaches to service delivery are being developed on an ongoing basis. As with many aspects of legislation we also recognise the complexities and challenges associated with developing clear definitions in an ever changing landscape of public service delivery.

Continuing a regular review and update of the defined list of organisations in Schedule 1 would be one way to address this and we note the amendments which have been made to date.

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

FOISA exemptions

FOISA includes provision for exemptions to be applied. The exemptions recognise the sometimes complex relationship between FOISA and other legislation, most notably GDPR requirements. Despite the complexity we find this works well in practice.

Section 40 of FOISA, the 'audit functions exemption' is vital to the effective conduct of public audit. We remain strongly supportive of this exemption.

In practice we apply this exemption very sparingly and only after careful consideration. We have applied the exemption only six times since 2013.

Information requests about other organisations

In order to carry out our audit work we require access to information, this is provided for in Section 24 of the Public Finance and Accountability (Scotland) Act 2000. We hold a lot of information about the bodies the audit, this includes personal, confidential or commercially sensitive information.

We audit over 200 public sector bodies and approximately 30% of the information requests received in 2018/19 related to information that originated in audited bodies. It is not uncommon for people to make information request to the to the organisation concerned and Audit Scotland at the same time.

On receipt of such requests we routinely inform the public body in question as a matter of professional courtesy and in accordance with the FOISA Code of Practice. This process also provides for organisations to offer a view as to whether it considers any exemption should apply. Audit Scotland always makes the final decision on the information to be released.

This 'consultation stage' has an impact on how quickly we are able to respond to the person making the information request. Despite this we responded to 100% of FOI requests within the statutory deadline in 2018/19.