

## FREEDOM OF INFORMATION (SCOTLAND) ACTS

This paper was originally written in November 2018 for the Public Audit and Post-Legislative Scrutiny (PAPLS) Committee, to inform its post-legislative consideration of the [Freedom of Information \(Scotland\) Act 2002](#). It has been updated to take account of the draft order, laid before Parliament in February 2019, to extend the 2002 Act to include registered social landlords.

### PROPOSED POST LEGISLATIVE SCRUTINY - ISSUES RAISED BY STAKEHOLDERS

On 22 March 2018, the Committee held a [roundtable](#) session with stakeholders. The [papers](#) for that meeting contained submissions from the Open Government Network and the Campaign for Freedom of Information in Scotland (CFoIS).

Concerns raised at the meeting, and in the submissions, included:

- bodies which fulfil a public role being outwith the coverage of the legislation
- lack of proactive publication of information, including FOI responses
- records management practices and the interaction of FOISA with Public Records (Scotland) Act 2011
- changes in minute keeping practices and the interaction of FOISA with Ministerial Code on public records
- potential rise in the use of informal, non-minuted, modes of decision making
- application of the present law by public bodies
- exemptions, including the cost threshold, length of commercial confidentiality and overuse of confidentiality claims, especially in the NHS
- unnecessary secrecy in government, undermining Scotland's credibility as an open government pioneer
- use of stalling tactics, such as using the full-time allowances for responding
- the use of the Scottish Public Information Forum (SPIF) and sharing of good practice having stalled.

In his contribution to the meeting, the Scottish Information Commissioner (the Commissioner) pointed out the importance of distinguishing between things that can be fixed by legislation and things that are a matter of practice and enforcement.

## Background

Before leaving office at the end of April 2017, the previous Scottish Information Commissioner, Rosemary Agnew, presented a special report, [Proactive Publication: time for a rethink?](#), to the Parliament. The report called for debate about a radical re-think of freedom of information.

The then Commissioner questioned whether public authorities now put greater emphasis on what not to disclose than on what ought to be released.

In January 2018, the Campaign for Freedom of Information in Scotland launched a [‘Get it Minuted’ Campaign](#) calling on people and organisations to ask and insist that there are agendas, notes and minutes for any meetings with the Scottish Government.

In response to a question in the Chamber on 18 January 2018, the First Minister stated that she agreed with that campaign’s view on the importance of ensuring that appropriate records of business are taken. She stated that when meetings involving ministers met the criteria set out in the civil service guidance and that appropriate records are routinely taken.

In June 2017, the CFoIS published [The Post Legislative Scrutiny of FoISA - Improving access to information rights in Scotland by examining international practice](#). This report aimed to contribute to a debate on integrating information rights within the broader human rights agenda in Scotland.

## Review of SG FOI practices

On 31 May 2017, an [open letter](#), signed by a number of journalists, was sent to the Scottish Parliamentary Corporate Body’s selection panel for the appointment of the new Scottish Information Commissioner.

The letter raised concerns about the journalists’ current experience when trying to use FOI legislation to report and investigate stories, particularly with respect to the SG and its agencies.

The example of poor practice they highlighted included:

- information requests being repeatedly delayed significantly beyond the 20 working day deadline without clear justification or warning
- officials delaying responses for so long that the initial requests only get answered under internal review, making it impossible for journalists to ask for incomplete replies to be internally reviewed again. This leaves them facing further longer delays by appealing to the Commissioner
- SG officials taking control of requests to other government agencies without the consent of the applicant
- requests being screened for potential political damage by special advisers and of responses to individual journalists being routinely handled by special advisers.

The journalists also questioned whether Scottish ministers and civil servants now have a practice of not recording information that would previously have been recorded.

On 13 June 2017, there was [members' business debate](#) in the Parliament on the complaints raised in the open letter.

On [21 June 2017](#), the Parliament held a debate on motion, S5M-06126, as originally lodged:

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 (Scotland) Act 2002.

In that debate the Scottish Government confirmed that the Commissioner was already scrutinising its FOI performance and that it was co-operating fully with that scrutiny and had a programme of action under way to improve its performance. This included adopting a policy of pro-actively publishing all material released under FOI to ensure that it is as widely available as possible.

On 15 November 2017, the Commissioner wrote to the Scottish Government confirming his intention to carry out a level 3 intervention into the Government's FOI practice.

At the PAPLS Committee meeting on 22 March 2018, the Commissioner told the Committee that the focus of his intervention was compliance with existing law.

The Commissioner's [Intervention report](#) was published on 13 June 2018, with the Commissioner making recommendations in seven areas:

- **Clearance procedures**, SG to undertake a detailed review of its procedures, including, setting out clearly the roles of case-handlers, senior managers, special advisers and Ministers
- **Quality assurance**, SG to examine if special advisers should have a role in cases not decided by Ministers, or if it is more appropriate for this work to be carried out by staff within the Directorate or Executive Agencies
- **Clearance of media requests**, SG should end the practice of treating requests from journalists, MSPs and political researchers differently
- **Case file records management**, SG should improve case file recording-keeping of case-handlers, including recording of decisions made
- **Case handling**, SG develop a larger core group of trained and experienced case-handlers and reassess its FOI training system
- **Monitoring FOI requests**, SG should monitor the clearance timescales, the FOI tracking system should provide an adequate reporting system and there should be arrangement for performance monitoring
- **Reviews**, SG should reappraise its procedures to remove risk to impartiality caused by personnel involved in the original decision-making process also being involved in the review stage.

The Commissioner required the SG, by 13 September 2018, to develop, for his approval, an action plan addressing his recommendations.

The Scottish Government made a [parliamentary statement](#) in response to the publication of the intervention report. The SG accepted all the report's recommendations and confirmed that, as required, it would prepare and publish an action plan to put them into effect.

The Minister stated that internal guidance had already been updated to make it clear that decisions about the sensitivity of requests should be based on the information that is being sought rather than on the identity or role of the person making the request.

The Minister also stated that the SG had:

- from July 2017, proactively published all information that has been released in response to requests received
- “significantly increased capacity” in its central FOI unit, which provides advice, training and guidance across the organisation
- introduced central oversight and clearance of review responses
- put in place reporting measures which enabled improved tracking of requests
- started work on improvements to guidance and training
- developed an improved tracking system to further improve reporting and monitoring.

The Parliament held a debate on 20 June 2018 on motion S5M-12861 on a [review of Scottish Government freedom of information request handling and record keeping](#).

As requested, on 13 September, the SG published its [Draft Action Plan](#) for consideration by the Commissioner.

The Commissioner provided a [response on the draft action plan](#) to the Minister for Parliamentary Business on 9 October 2018.

The Commissioner wrote that he was content that the majority of the proposed actions would achieve the desired practice or performance outcome, including:

- improved internal FOI performance reporting
- mandatory statement of compliance for responses
- FOI submission template.

However, the Commissioner noted that, before he could agree the action plan, revisions were required on the following:

- **Clarity about decision making** (Recommendation 1(i)-(iii))
- **Communications Team involvement in requests** (Recommendation 1(v))
- **Development of broader internal reporting** (Recommendation 6(ii))

The Commissioner requested that he receive the revised action plan, incorporating the amendments, by 30 October.

On 14 November 2018, in response to a Government initiated PQ (S5W-19901), the Minister for Parliamentary Business wrote that the SG had submitted a revised plan on 30 October, and that the Commissioner had replied to the SG on 8 November, approving the plan, subject to one further minor change, which has been made.

The [agreed plan](#) has been published and the Government will work with the Commissioner on its implementation.

Further background information about FOISA, including other developments in respect of the Act, is set out below.

## **FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

The Freedom of Information (Scotland) Act 2002 received Royal Assent on 28 May 2002 and came into force on 1 January 2005.

The Freedom of Information (Amendment) (Scotland) Act 2013 made provision in relation to:

- Extending FOISA to include more public service bodies;
- requiring the Government to report to the Parliament on its use of the power to designate new bodies;
- historical records;
- publication schemes;
- 'neither confirm nor deny' responses in relation a personal information requests;
- prosecution for offences under Section 65 of FOISA.

## **Biennial reports to the Parliament**

The Government has published two statutory reports:

- 30 October 2015, [Scottish Government Report on the use of the Section 5 power under the Freedom of Information \(Scotland\) Act 2002 \(as amended\)](#)
- October 2017, [Scottish Government Report on the exercise of the Section 5 power under the Freedom of Information \(Scotland\) Act 2002 \(as amended\)](#).

## **EXTENSION OF COVERAGE OF FOISA**

The Scottish Government has stated that it takes an incremental approach to extension of coverage and seeks to promote openness and transparency in the delivery of public services.

Authorities are subject to the FOISA either due to being listed in Schedule 1 of the Act, by being a 'publicly-owned company', or by designation by Scottish Ministers.

There is no comprehensive list of authorities covered by the Act, which by its nature would be subject to constant change. In 2015, a response to a PQ (parliamentary question),

S4W-28604, stated that while the SG recognised the value of a register of the local authority arms-length external organisations and bodies designated under section 5 of the Act, it considered that the Commissioner, as the regulator and promoter of the legislation, was best placed to take this forward.

[The Code of Practice on the discharge of functions by Scottish public authorities under FOISA](#), produced by the Scottish Ministers, requires that a public authority, when considering outsourcing any of its functions, takes steps to ensure that there is no resulting reduction in the public's rights to access information through requests and proactive publications.

Compliance with the code is enforced by the Scottish Information Commissioner and should mean that authorities outsourcing any of their functions consider the implications for access to information.

To date, and following consultations, two orders have been made extending coverage of FOISA:

- [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2013](#) (approved 11 September 2013)
  - covers arms-length culture, sport and leisure trusts established by local authorities
- [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2016](#) (approved 24 February 2016)
  - covers contractors overseeing and managing private prisons, bodies providing secure accommodation for children and young people, grant-aided schools, independent special schools and Scottish Health Innovations Limited (SHIL).

[In October 2016 the Parliament approved the Freedom of Information \(Scotland\) Act 2002 \(Time for Compliance\) Regulations 2016](#). The regulations apply exclusively to grant-aided and independent special schools and were made specifically to take into account holiday periods when the school may be closed and/or staff are not available. In October 2018, in response to a PQ (S5W-15459) the Government confirmed that it had no plans to bring forward similar legislation for other designated bodies.

About a year after the 2016 designation Order came into effect the Scottish Government (SG) conducted an evaluation of it with all the newly designated public authorities. The SG also invited the schools designated to comment on the Time for Compliance Regulations 2016.

The statutory [biennial report](#), published in October 2017, summarised the comments received on these evaluations.

## **Extension to registered social landlords**

The Government's first biennial report on the use of the powers to extend coverage (October 2015) noted the strong opinions expressed by tenants, registered social landlords (RSLs) and others on the issue of whether RSLs should be subject to FOI legislation.

On 1 December 2016, linked to the review of the Scottish Social Housing Charter, the Scottish Government launched a [consultation](#) with a view to extending coverage of FOI legislation to RSLs. The consultation concluded on 23 February 2017.

On 29 June 2017, the Scottish Government published an [Interim Report](#) on the consultation. The Government found that the consultation had raised a number of issues which it considered necessary to explore further before formally responding. For example, the terms of an order, the role and nature of subsidiaries, and the financial and resource impact on RSLs of extending coverage of the Act.

Therefore, following further engagement, including with key stakeholders, the SG launched a [consultation on a draft Order](#), which ran from 6 December 2017 to 7 March 2018.

The consultation page stated that, subject to the responses on the terms of the proposed order, the Government anticipated laying an order in the Parliament in spring 2018, and, following Parliamentary approval, it was proposed that the order would come into effect on 1 April 2019.

In Session 4, [Public Petition PE1539](#) was lodged, it called for Housing Associations to come under FOISA. On 24 January 2018, since the Scottish Government had agreed to seek to extend FOISA to RSLs and was currently consulting on a draft Section 5 Order, the Public Petitions Committee agreed to close the petition.

On 20 June 2018, in response to PQ S5W-17127, the Minister stated that a draft order extending the Act to RSLs was currently under consideration.

On 7 February 2019, the Scottish Government laid the draft [Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2019](#).

As set out in the [policy note](#) the purpose of the instrument is:

“To extend the rights of the public to request information from registered social landlords and their subsidiaries about the functions of a public nature that they deliver.”

The draft affirmative order will be considered by the Local Government and Communities Committee and a report produced by 27 March 2019.

The Parliament will then be asked to decide on the [motion to approve the draft order](#), lodged by the Scottish Government on 20 February 2019.

### **Further consultations on extending coverage**

On 31 July 2018, in response to PQ S5W-17777, on when the consultation into extending coverage of Freedom of Information legislation will begin, and what the expected timeline would be, the Government confirmed that it was committed to consulting on further extension of coverage, for example, to companies that carry out services on behalf of the public sector.

This reply went on to state that the consultation, subject to the usual Scottish Government consultation procedures, was expected to commence towards the end 2018. To date, no such consultation has been launched.

## COMPLIANCE WITH FOISA BY PUBLIC BODIES

Compliance with the Freedom of Information (Scotland) Act 2002 is a matter for the independent Scottish Information Commissioner.

### Guidance for public bodies

In December 2016, the Scottish Government published the latest version of its [Scottish ministers' code of practice on the discharge of functions by Scottish public authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004](#).

The Government also produced a [Section 61 code of practice on records management](#), which is guidance for public authorities about the keeping, management and destruction of their records.

In addition, the SG's external sharepoint site: <https://foiguideance.sgworksite.org.uk/> provides access to a range of FOI training and guidance materials for Scottish Government staff and public bodies.

This includes the Step-by-Step Guide to answering FOI requests, which has details of the Scottish Government's policy on Ministerial clearance of responses to FOI requests set out at Step 33.

To access the sharepoint site use the following guest log-in:

Username: SCOTLAND\foi

Password: Scotland1.

In December 2016, the Scottish Government published the [Open Government Partnership Scottish National Action Plan 2016-2017](#). It was developed jointly by the Scottish Government and the Scottish Civil Society Network with the OGP.

## EXEMPTIONS IN FOISA

### Historical Periods

In December 2013, the Parliament approved the Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 2013. The policy objective was to promote openness and transparency across Scottish public authorities by reducing the lifespans of certain exemptions in the Act.

Once the Order was in force, most time-limited exemptions under the Act can only be applied for up to 15 years after information was created.

### Other exemptions

In September 2016, in response to PQ S5W-02616, the Scottish Government confirmed that it had no plans to raise the £600 exemption threshold. During the Members Business debate on [13 June 2017](#), the Minister for Parliamentary Business stated:

“It is important to point out that the limit of £600 has remained the same since 2005, as has the hourly rate of £15. It means that the cost limit has much the same effect now as it had back in 2005, and a request can be refused only if it requires more than 40 hours' work. Again, in that respect, the Scottish legislation compares very



favourably with the legislation in the rest of the UK, where, although the cost limit is also £600, the work is calculated at £25 an hour, which means that the UK Government routinely rejects requests on cost after only 24 hours' work.”

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**28 February 2019**

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