



Note for Public Audit & Post Legislative Scrutiny Committee

Following evidence session on 5 December 2019

10 December 2019

Introduction

1. The purpose of this note is to provide further information and clarity on points raised during the Commissioner's evidence to the Committee on 5 December 2019.

Confidentiality clauses and contracted-out services

2. In his written evidence, the Commissioner drew the Committee's attention to the confidentiality exemption in section 35 of the Irish Freedom of Information Act 2014¹, and suggested that the Committee could consider whether to introduce a similar prohibition on relying on confidentiality clauses between authorities and contractors providing services on their behalf.
3. The Committee asked for more detail about the Commissioner's suggestion, and how the Irish provision works in practice. The Office of the Information Commissioner in Ireland has produced a Guidance Note² on how its confidentiality exemption should be applied in practice.
4. In contrast to the prohibition in the Irish Act, there is nothing in the Freedom of Information (Scotland) Act 2002 (FOISA) to prevent authorities relying on confidentiality clauses in contracts with organisations providing services on their behalf. As noted in the Commissioner's written evidence to the Committee³, the Section 60 Code of Practice provides some guidance on the use of confidentiality clauses (paragraph 8.4.4 makes it clear that authorities should not "implicitly" accept confidentiality terms in contracts). However, the Codes of Practice are not enforceable, and in the event of a breach of the Code, the most the Commissioner could do is to make a practice recommendation, in respect of which there are no penalties for failing to comply.
5. It should be noted that the confidentiality exemption in section 36(2) of FOISA establishes as a pre-requisite for reliance on the exemption that the authority must have obtained the information from a third party. If the information was created internally, the authority cannot rely on the exemption.

¹ <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/pdf>

² <https://www.oic.ie/guidance-and-resources/guidance-notes/1-Section-35-Guidance-Note.pdf>

³ See para 52

6. This means that information provided to an authority by its contractor about a service which it has contracted out might be subject to the exemption, whereas the same information about the same service, if it were not contracted out, could not be made subject to the confidentiality exemption. Therefore, had the service not been contracted out (i.e. if the authority were providing the service directly), the authority would not be able to rely on the confidentiality exemption.
7. The fact that the service has been contracted out should not make the information less accessible. If authorities were prevented from relying on the confidentiality exemption for information about services they have contracted out, it would remove this particular barrier to accessing information about those services.
8. The Scottish Government's consultation on extending coverage of FOISA to contractors providing services on behalf of public authorities has now closed. The Commissioner's response is published in full on his website⁴.

Young people and awareness of FOI

9. In 2017 the Commissioner commissioned research into FOI awareness among Scottish secondary school pupils. The research was commissioned as previous research into awareness among the general public⁵ had demonstrated a lower awareness level among 16-24 year olds.
10. The findings of the young people research⁶ showed that only 25% of secondary school pupils in Scotland knew they have freedom of information (FOI) rights, compared to 85% FOI awareness amongst the adult population.
11. In response, the Commissioner took a number of steps to raise awareness of FOI among children and young people, including holding a workshop at the National Sitting of the Scottish Youth Parliament in June 2018. The report from that workshop is available on the Commissioner's website⁷.

Data on use of cost refusal

12. In 2018/19, the cost refusal in section 12 of FOISA was used 2,295 times (approximately 3% of requests). In the first two quarters of 2019/20, it was used 1,109 times (approximately 3% of requests)⁸.

East Lothian Council intervention

13. The Commissioner referred to this intervention at the end of the session, as an example of the positive impact an intervention can have.
14. For clarity, the Council's performance improved from 30% of responses being on time (i.e. 70% of responses being late) to 99.4% (i.e. 0.6% of responses being late).

⁴ <http://itspublicknowledge.info/home/News/20191204.aspx>

⁵ <http://itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

⁶ <http://itspublicknowledge.info/home/News/20180628.aspx>

⁷ <http://itspublicknowledge.info/home/SICReports/OtherReports/Research.aspx>

⁸ This data is available at <http://itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx>, should the committee wish to review use over a longer period, or view more recent data once it available (Q3 data is due to be submitted by authorities by Feb 2020).

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