



The Scottish Parliament
Pàrlamaid na h-Alba

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

AGENDA

20th Meeting, 2019 (Session 5)

Thursday 19 September 2019

The Committee will meet at 9.00 am in the James Clerk Maxwell Room (CR4).

1. **Decision on taking business in private:** The Committee will decide whether to take items 4 and 5 in private.

2. **Post-legislative Scrutiny - Freedom of Information (Scotland) Act 2002:** The Committee will take evidence in a roundtable format from—

Claire Cairns, Network Coordinator, Coalition of Carers;

Severin Carrell, Scotland Editor, The Guardian;

Dr Craig Dalzell, Head of Policy and Research, Common Weal;

Rob Edwards, Director and co-founder, The Ferret;

Carole Ewart, Convener, Campaign for Freedom of Information;

Stephen Lowe, Policy Officer, UNISON Scotland;

Nick McGowan-Lowe, Organiser Scottish Office, National Union of Journalists;

Bailey-Lee Robb, MSYP and Trustee, Scottish Youth Parliament.

3. **Section 22 report - The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain and funicular railway:** The Committee will take evidence from—

Caroline Gardner, Auditor General for Scotland;

Gordon Smail, Audit Director, and Maggie Bruce, Senior Audit Manager, Audit Scotland.

4. **Section 22 report - The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain and funicular railway:** The Committee will consider the evidence heard at agenda item 3 and take further evidence from—

Caroline Gardner, Auditor General for Scotland;

Gordon Smail, Audit Director, and Maggie Bruce, Senior Audit Manager, Audit Scotland.

5. **Post-legislative Scrutiny- Freedom of Information (Scotland) Act 2002:** The Committee will consider the evidence heard at agenda item 2.

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The papers for this meeting are as follows—

Agenda Item 2

Note by the Clerk

PAPLS/S5/19/20/1

PRIVATE PAPER

PAPLS/S5/19/20/2
(P)

Agenda Item 3

Note by the Clerk

PAPLS/S5/19/20/3

PRIVATE PAPER

PAPLS/S5/19/20/4
(P)

Public Audit and Post-legislative Scrutiny Committee

20th Meeting, 2019 (Session 5), Thursday 19 September 2019

Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002

Introduction

1. At its meeting today, the Public Audit and Post-legislative Scrutiny Committee will take evidence in a roundtable format in connection with the Committee's post-legislative scrutiny of the [Freedom of Information \(Scotland\) Act 2002](#) (FOISA). This session will focus, in particular, on the experience of users of the Act. In subsequent evidence sessions, the Committee will hear from regulators and academics and then from public authorities and the Scottish Government.
2. A summary of the key themes based on the written submissions received in response to the call for evidence, with a particular focus on the issues raised by users of FOISA, is attached at **Annexe A**. The roundtable discussion will focus on the key themes outlined in the summary—
 - Making a request for information
 - Users' experience/responses from public authorities
 - Record keeping and proactive publication
 - Review, applications and appeals
3. The written submissions made by witnesses in response to the Committee's call for evidence are attached at **Annexe B**. Severin Carrell and Rob Edwards are appearing on behalf of the signatories to the submission from Journalists and Media Union representatives.
4. A roundtable discussion is designed to be a more informal format to taking evidence and to encourage discussion. Witnesses and Members are interspersed around the meeting table. The meeting will still be in public and broadcast and an Official Report of the meeting will also be produced.

Background

5. FOISA received Royal Assent on 28 May 2002 and came into force on 1 January 2005. In 2017, the Committee shortlisted FOISA as one of the Acts that it wished to consider for post-legislative scrutiny. The Committee took evidence from stakeholders on post-legislative scrutiny of FOISA at its meeting on [22 March 2018](#). The Committee subsequently took evidence from the Scottish Information Commissioner at its meeting on [10 January 2019](#) and, following that evidence session, agreed to undertake post-legislative scrutiny of FOISA.
6. The Committee launched a [call for evidence](#) on 6 March 2019. All written submissions received in response to the call for evidence can be found [here](#).

7. A [SPICe briefing](#) (published in January 2019) was prepared for the Committee and contains background information about FOISA and recent developments up to the point of publication. The Committee also invited SPICe to prepare a briefing on FOI practice in other jurisdictions with a particular focus on proactive publication. That briefing can be found [here](#).

**Clerks to the Committee
16 September 2019**

Annexe A

Post-legislative Scrutiny: Freedom of Information (Scotland) Act 2002

Key themes

Introduction

1. The Public Audit and Post-legislative Scrutiny Committee received 58 submissions in response to its call for evidence on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA).
2. The written submissions received by the Committee highlighted both positive and negative impacts of FOISA. On the positive impacts, [Strathclyde Partnership for Transport](#) stated that “FOISA encourages openness, transparency, and accessibility to information, enabling greater scrutiny and thereby better government (local or national) accountability”. While [Highlands and Islands Enterprise](#) considered that FOISA “has provided an impetus for a change in culture, to become more transparent with regards to decision making and the way in which money is spent.”
3. However, respondents were also circumspect. [Unite](#) stated that “On paper it would appear that Scotland has one of the most open and free rights to access information held by public bodies than any of the home nations...however the reality is somewhat more protracted, frustrating and less accessible than we would anticipate.” While [Alastair Clarke](#) stated that “The Act has broadly established the principle of the right to information and sets a clear standard of openness and accountability.” But “the spirit of the Act has not been upheld in the implementation by those public bodies subject to it.”
4. [Dr Ben Worthy](#) noted that—

“Research around the world has shown that FOI laws do make for greater openness, through both direct and indirect effects on the behaviour of officials. However, exactly how well a law functions very much depends on if or how it is used and the context it is placed in.”
5. The written submissions highlighted a number of issues in relation to how FOISA functions. Respondents suggested changes that needed to be made to practice and implementation of FOISA and also where further legislative change was required.
6. The key themes discussed below are—
 - making a request for information
 - users’ experience/responses from public authorities
 - record keeping and proactive publication

- reviews, applications and appeals
7. The briefing also highlights issues raised by public authorities on their experience of FOISA to provide an opportunity for users of the Act to respond to such evidence.

Making a request for information

Issues

8. Written evidence received by the Committee identified the following issues when making information requests:
- the request processes
 - confusion over which public body holds information
 - confusion over which legislation to apply through (FOISA or Environmental Information (Scotland) Regulations 2004 (EISR))
 - private companies delivering public services not subject to FOI.

The request processes

9. The [Coalition of Carers](#) evidence described difficulties when seeking information from multiple local authorities on Scottish Government funding in preparation of the commencement of the Carers Act. The submission stated:

“The process of ascertaining where to send the FOI requests was very time consuming. While there are some websites that can assist by submitting FOI requests to multiple areas at once, since the requests we submitted contained specific information for each area, we had to source information from each local authority area and send them separately. Each area had a slightly different process to follow, some simply gave an email address, others required you to complete a pro-forma, others provided a facility on their website.”

10. [Give Them Time Campaign](#) suggested that local authorities should have standardised processes for requesting information (e.g. standard email address formats for requests, confidentiality email signatures). It noted that—

“As part of our research for the Give Them Time campaign over the past ten months, we have encountered many time-consuming obstacles in obtaining such information from local authorities and believe the process has room for improvement.”

11. Clearer guidance was suggested to make it easier for the public to make requests. The submission from [Common Weal](#) states:

“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...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.”

12. [The Campaign for Freedom of Information in Scotland \(CFoIS\)](#) suggested there could be better communication of the process of making information requests and that the information on how to do that must follow the principles of inclusive communication.
13. The [Scottish Youth Parliament also suggested](#) that the process should be made clearer, more consistent and should be better communicated to young people. While [James McEnaney](#) stated that—

“I do not think anyone would argue that the average person on the street is likely to be able to explain how to exercise their “right to know” about an issue of importance to them. I think work needs to be done to look at making all stages of the process more accessible.”
14. Similarly, [F Mailer](#) suggested that public authorities should actively explain how to submit an FOI request if individuals require information, as well as encouraging them to do so.
15. Submissions from [the CFoIS](#) and [Dr Karen McCullagh](#), University of East Anglia, both highlighted the need for the legislation to be scrutinised in the context of obligations to the principles of human rights. The submission from CFoIS specifies obligations on the Scottish Government and Scottish Parliament in respect of Section 29 of the Scotland Act 1998 and Section 6 Human Rights Act 1998.

Which public authority to contact

16. Written evidence also pointed to confusion in some cases about which body to contact. For example, there was some confusion over whether the local authority, Health Board or Health and Social Care Partnership (HSCP) was responsible for responding to certain requests. This issue was raised by [NHS Greater Glasgow and Clyde](#):

“...dealing with FOI requests submitted to HSCPs is problematic. HSCPs are not public authorities for the purposes of FOISA, but have ‘parent’ organisations which are subject to FOISA (local authorities and NHS Boards). IJBs [Integration Joint Boards] are also subject to FOISA but it is not clear that an FOI submitted to an IJB can be passed to the HSCP to respond to. If the HSCP provides the information then in practice this comes from either the local authority or the NHS Board, or both. In those circumstances, who would handle a subsequent Review?”
17. [SOLAR and SOLACE Scotland](#) suggested that it would be helpful if authorities could transfer FOI requests in a similar manner to how authorities can transfer

requests under [the Environmental Information \(Scotland\) Regulations 2004](#). They stated that a “health and social care partnership is, in reality, three separate entities and the feedback we have received from applicants is that they see the HSCP as a single entity and find it frustrating when they are told they need to submit a fresh application to another part of the partnership.”

18. It was suggested that there was a lack of flexibility under the Act to allow for FOI requests to be transferred between different entities of HSCPs compared to requests under the EIRs (section 14).
19. On the other hand, the submission from former MSP [Tavish Scott](#) provided examples of a researcher’s contact details being forwarded by local authorities in email correspondence or receiving calls from a body that they had not initially contacted.

FOISA and EIRs

20. The submission from [Professor Colin Reid](#) and others at Dundee University shared findings from a research project investigating the use of public access to environmental information. Among the results was the finding that FOISA has overshadowed [the Environmental Information \(Scotland\) Regulations 2004 \(EIRs\)](#) leading to the public incorrectly using FOISA when seeking environmental information. The divergence of obligations for public authorities causes confusion over rights to information. He outlines the following negative impacts:
 - misunderstanding of procedural rights leading to unnecessary reviews
 - less emphasis under FOISA to proactively disclose information
 - FOISA’s focus on request may detract from efforts to increase proactive disclosure.
21. There was a suggestion that confusion between FOISA and EIRs could be remedied by merging the two Acts or by aligning their provisions.

Certain bodies not covered

22. A number of submissions highlighted that, in some cases, information was not held by the public authority but by a private contractor undertaking activity on behalf of the authority. Written evidence from the [Campaign for Freedom of Information](#), [journalists and media representatives](#), [Unison](#) and former MSP [Tavish Scott](#) all called for an extension of FOISA to cover private companies that are delivering services under contract to public bodies (e.g. construction and maintenance of schools, hospitals and transport infrastructure).
23. [Peter Cherbi](#) emphasised that “FOISA should be continually strengthened and organisations which play key roles in public life included in compliance.”
24. [UNISON](#) highlighted that this issue was raised by the Scottish Information Commissioner in 2009 when it was recommended that Public Finance Initiative

(PFI) and Public Private Partnership (PPP) projects should be subject to FOI requests.

25. On 30 August 2019, the [Scottish Government launched a consultation](#) on extending the coverage of FOISA. In particular, the consultation invites views about whether the Scottish Government should bring forward a further order under section 5 of FOISA to extend the application of the Act to organisations providing services on behalf of the public sector, and asks about the type of services or organisations that might be considered for such an extension. The consultation will close on 22 November.

Users' experience/responses from public authorities

Issues

26. The written evidence also raised a number of further issues about the experience of users, including the service and responses users received from public authorities. The issues included:

- delays in responding
- different clearance processes
- use of the fees' regulations
- use of exemptions and the public interest test

Delays in responding

27. A number of submissions commented on the delays experienced in receiving responses. [Alasdair Clark](#) remarked that information requests were regularly significantly delayed beyond the 20-day limit allowed by FOISA. He said—

“Officials regularly respond to requests asking for further information towards the end of the 20 day limit or after it, rather than requesting clarification in a timely manner.”

28. John Robins from [Animal Concern](#) indicated that many of his FOI requests to the Scottish Government were replied to on or shortly after the 20 working day deadline. While the [Give Them Time Campaign](#) noted that—

“On various occasions we have had to request internal reviews when local authorities have not responded to an FoIR within the statutory 20 working days. We do not feel that the responsibility to chase this up should be that of the person who submitted the FoIR. If there is a legal requirement for a council to reply within 20 working days, then the onus should be on them, rather than on the requester, to ensure this response is received. At present it can at times feel like councils use requests for review as a sort of reminder service.”

29. John Robins from [Animal Concern](#) considered that it was necessary to do more to make it clear to authorities covered by FOI legislation exactly what their duties are regarding supply of information.

Different clearance processes

30. Evidence submitted by journalists and MSPs described experiences of receiving different treatment when submitting requests compared to other requester groups. Evidence from the [National Union of Journalists](#) noted the findings of an [Intervention Report on the Scottish Government](#) published by the Scottish Information Commissioner which states:

“Journalists, together with MSPs and political researchers, are expressly made subject to a different process for clearance than other requester groups. As set out above, their requests are almost invariably subjected to an additional layer of clearance which is likely to delay the consideration of the case. This process is applied because of who/what they are, not what they asked for. This is far from the applicant-blind principle of freedom of information legislation.”

31. Evidence from [journalists and media representatives](#), [James McEnaney](#) and [Neil Findlay MSP](#) also raised the issue of Government Special Advisers interfering with FOI requests. The submission from journalists and media representatives provides the following examples:

“In one request on standardised testing, special advisers intervened to at first redact, and then entirely withhold, a draft risk register, which was eventually released after a referral to the SIC. Other cases include: responses being delayed beyond the 20-day statutory deadline to give special advisers time to review the material; advisers instructing officials to withhold information, despite a warning that a subsequent appeal would be lost; and a special adviser blocked the release of an overdue response to allow extra time to set up a media handling strategy.”

32. The submission from [journalists and media union representatives](#) recommended limiting the rights of Ministers and special advisers to oversee or influence information requests under FOISA, except in prescribed circumstances authorised by senior civil servants.
33. A similar point was made by [James McEnaney](#) who emphasised that the requirements imposed on the Scottish Ministers by FOISA should be exercised by impartial civil servants in all but the most extraordinary circumstances.

Use of exemptions and public interest test

34. Written evidence also criticised the use of exemptions under the Act. [Alasdair Clark](#) suggested that “the options available to refuse disclosure seem to be regularly interpreted too broadly by decision makers.”

35. [Tavish Scott](#) provided an example of a request submitted by his researchers for information on outstanding work on the Queensferry Crossing. The request was refused because it concluded that commercial interests of the contractor was greater than the public interest. However, the information was subsequently released when requested by the Rural Economy and Connectivity Committee. Tavish Scott states:

“...there was a significant public interest in the information. It was not clear what impact, if any, the release of the information had on the commercial interests of the contractors.”

36. [UNISON](#) indicated that it had certainly found problems with commercial confidentiality being used too widely, particularly with PPP/PFI problems.

37. Some submissions suggested that the public interest had not always been correctly applied, or that public authorities had not identified where requests were in the public interest.

38. Several respondents commented on the quality of the information that was received in response to requests. Respondents, such as [Bill Chisholm](#), expressed concern that there was nothing in FOISA which places a responsibility on public authorities to provide accurate information.

Charging

39. A number of submissions commented on the fees that are charged for requests. [Ian Clarke](#) provided examples of requests he had made to Police Scotland and to COPFS which were initially refused on the basis that providing the information would breach the cost threshold. He suggested that there should be a requirement for any request refused on cost grounds to evidence that all methods of searching data systems have been considered. [F Mailer](#) considered that all requests up to £450 (or £600 for central government) should be free.

Record keeping and proactive publication

Issues

40. Written evidence submissions identified issues such as:

- a lack of proper record keeping
- a lack of proactive (and monitoring of proactive) publication
- Publication scheme not fit for purpose

Record keeping

41. The [Care Inspectorate](#) suggested that the Act had “perhaps led to some change in procedure within local authorities where (for example) minutes/notes are no longer taken at certain meetings to avoid the information being available for

request under FOISA.” Other witnesses, including [Celia Pattle](#), raised concerns about minute taking.

42. Written evidence from MSPs provided examples of problems accessing records of Scottish Government Ministerial meetings. [Neil Findlay](#) stated the following:

“I have encountered on several occasions peculiar data retention practices that seem designed solely to prevent the information being revealed. One example is the habit of deleting records of Ministerial meetings after 3 months. The knowledge of these meetings is only published quarterly, as such it is impossible for the public to get this information despite it being subject to FOI.”

43. Former MSP [Tavish Scott](#) also provided examples:

“High profile meetings with no minutes available include a meeting between Justice Secretary Michael Matheson and SPA chairman Andrew Flanagan about the prospective return from leave of Chief Constable Phil Gormley. Similarly, no minutes or notes were available following meetings between three Scottish Government ministers, including the First Minister, and representatives of Teach First. This rips up the FOI rulebook, is secretive, and keeps Parliament and the public in the dark about what was really said and how decisions were reached. It is part of a culture of evasiveness that characterises the Scottish Government’s approach to open information.”

44. [Dr Karen McCullagh](#) made a recommendation for a statutory obligation for “a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,” as proposed by the CFoIS.

45. The [City of Edinburgh Council](#) stated that the “access regime is underpinned by effective records management and record keeping” and suggested that the section 61 Code of Practice on Records Management issued under FOISA was now out of date because of the Public Records (Scotland) Act 2011. It suggested that references to the Code should be replaced with reference to the 2011 Act to align the two. The submission from [Alistair Sloan, Inksters Solicitors](#) suggested that the code of practice is aspirational and the SIC has “very limited powers in respect of that code”. He also stated that the code is not enforceable and can be ignored by a public authority.

46. The [Scottish Government](#)’s submission also made the link between the section 61 Code of Practice and the 2011 Act stating that:

“Given the existence of bespoke modern records management legislation, which was informed by the experience of operating FOISA, we suggest that the section 61 Code may now be otiose.”

47. The submission from [Alistair Sloan, Inksters Solicitors](#) suggested that any legislative changes requiring records to be kept will be substantial and should therefore be dealt with in separate legislation rather than through changes to FOISA.

Proactive publication and publication schemes

48. Written evidence raised concerns about proactive publication and the inadequacy of publication schemes. The submission from [Journalists and media representatives](#) provided an example of a lack of awareness or adherence to publication schemes:

“the University of Edinburgh was asked for minutes from a sub-committee which would normally be published as routine, yet had not been for a year. The university treated this as an FoI request and said it was its prerogative to do so. The reporter pointed out that its own publication scheme stated those minutes were published on a regular basis; it was only after he consulted the SIC the university retreated and adhered to its own policy.”

49. Written submissions also identified problems in encouraging proactive publication through the publication scheme (Sections 23, 24). Issues identified included:
- Publication schemes have not led to more proactive publication of information and are resource and cost intensive.
 - The Model Publication Scheme being outdated and does not consider how people currently access information digitally.
 - Lack of compliance for proactive publication among newer ‘arm’s length/ public bodies.
 - Lack of awareness of existing publication schemes among users and responders.
 - Publication schemes regarded as ‘onerous’ and a box-ticking exercise in public authorities.
50. The [Campaign for Freedom of Information](#) suggested that pro-active publication of information should be monitored and requires regulatory overview to ensure timely publication. It highlighted that there have been no evaluations of the proactive publication of information since 2005.
51. There were mixed solutions proposed regarding issues with the publication scheme. Some submissions suggested the Model Publication Scheme should be updated or monitored more closely. Others felt that the scheme had failed to promote proactive publication and there should be a move away from this approach. For example, the [Scottish Government](#) and the [SIC](#) suggested that a greater emphasis on proactive publication could be underpinned by the Section 60 Code of Practice.

52. [S Yousaf](#) proposed that FOISA be amended to make it obligatory on public bodies to publish all FOI requests on their websites (with any personal identifiers redacted) with a view to increasing transparency, but also to assist in preventing duplication of requests. A similar point was made by the [Give Them Time Campaign](#), which stated that “All councils should follow the example of Moray Council and publish their responses to FoIRs on their websites.”
53. [Aberdeen City Council](#) suggested that proactive publication could be encouraged further if legislation could include more guidance on the promotion, frequency and approaches to publication. It also indicated that guidance for the publication of FOI requests is less specific than Environmental Information Requests, which is clearer.

Reviews, applications and appeals

Issues

54. FOISA contains a three-tier appeal process comprising: an internal review within the public body; an application to the Scottish Information Commissioner and, finally, an appeal to the Court of Session.

Internal reviews

55. The [Scottish Courts and Tribunals Service](#) stated that applicants sometimes use the internal review process to request new information, rather than seeking to review the original request. [Glasgow City Council](#) stated that it would be helpful to have a provision to allow the 20-day clock to be stopped at the internal review stages as it can be during clarification of an FOI request.
56. [James McEnaney](#) suggested a two-stage appeal process to deal with cases where the authority fails to respond within 20 days.

Application to SIC

57. [S Kerr](#) expressed some concern about the application process, indicating that while SIC did well in promoting the use of their office for appeal, a lay person “will have reservations in appealing to SIC for a decision, as they are asked to supply in some cases academic arguments to counteract the bodies knowledge of working round the system.”

Appeals process

58. Written evidence also raised concerns about the cost of appealing to the Court of Session. [Alistair Sloan](#) highlighted that appeals made under section 56 of FOISA are prohibitively expensive because they are currently made to the Inner House of Court of Session. He states that appeals cost each party tens of thousands of pounds with the possibility of facing expenses awards of a similar sum. [Celia Pattle](#) also raised the issue of Court of Session costs.

59. [Alistair Sloan](#) suggests that appeals be referred to the Upper Tribunal for Scotland, with a right to appeal from the Upper Tribunal to the Court of Session if justified. This approach was also put forward by [Dr Karen McCullagh](#). [F Mailer](#) also considered that a tribunal should be established to consider appeals against the Scottish Information Commissioner.
60. However, the submission from the [Scottish Information Commissioner](#) (SIC) states that evidence provided to the Burns Commission by the UK Information Commissioner's Office pointed to the Scottish system as offering an example of how FOIA appeals could become more efficient.
61. The submission from SIC states that "Additional layers of appeal tribunals create more complexity in the system, an extra layer of cost, and it takes longer for the requester and authority to get to the final outcome".

Issues raised by public bodies

Resources

62. The public bodies which responded to the call for evidence often highlighted the resource burden of responding to FOI requests and the increased demand for information. [NHS Lanarkshire](#) wrote, for example, that:
- "our requests have quadrupled and resources have not. As a result the staff resource to manage the process is not always adequate to meet the increasing demand."*
63. NHS Lanarkshire made the point that it is not just the team directly tasked with FOI which is affected, but sometimes patient-facing clinicians and staff who are required to locate information.
64. [Aberdeen City Council](#) made a similar point suggesting that increasing demand in particular from "commercial, press and media applicants" was having a negative effect and that "the demand, in some instances, is diverting effort from the delivery of services".
65. [East Lothian Council](#) simply said that "The burden on already stretched resources can be overwhelming." [Highlands and Islands Enterprise](#) also said that resourcing FOI was challenging in times of budget constraint:
- "At a time when resources are already stretched to capacity, it can be extremely demanding to meet the required standards of compliance without compromising the productivity of the organisation as a whole."*
66. [Dr Ben Worthy](#) highlighted in his submission that the number of public bodies that it is estimated have dealt with more than 1000 requests per year has increased

from 20 in 2013/14 to 32 in 2016/17. Dr Worthy noted the resource pressure and limitations in public bodies, adding that:

"The combination of growing numbers and a general lack of resources for local government (the main recipients of requests) can undermine a law, and there should be greater help for FOI officers on the frontline in times of cuts."

67. The [University of Edinburgh](#) also noted increasing demands on FOI and the fact that *"remaining statutorily compliant therefore comes with increased financial and opportunity costs each year."* The University reported an increase of more than 12% in eight of the last ten years; with a 38% increase in 2010 and a 20% increase in 2018.

Use of FOI for certain purposes

68. Whether FOI was the appropriate route to take to obtain information was also raised in a number of submissions. The context was different and ranged from perceived political misuse of the FOI regime to users not understanding how best to obtain information such as health records.

69. Glasgow [City Council](#) stated that:

"Many freedom of information requests made to Glasgow City Council are made by commercial organisations. These commercial enterprises profit from public effort and oblige public bodies to expend public resources on collating information for their private commercial gain."

70. [NHS Greater Glasgow and Clyde](#) highlighted multiple FOI requests being made in single emails by parliamentary researchers as an example of *"Elected officials utilising FOISA where other appropriate avenues exist"*. NHS Greater Glasgow and Clyde also cited other examples of people seeking information through FOI, including surveys being submitted to ensure a response; students asking for information *"in place of researching"* and requests from individuals for their medical records.

71. There was some concern that FOI can be used vexatiously. [SOLAR and SOLACE](#) stated that:

"authorities occasionally have to deal with highly disgruntled individuals who will pursue any avenue of complaint open to them regardless of the merits of their case, and FOI has created another such route for these individuals, some of whom use FOI as a weapon to punish local authorities for supposed misdeeds".

72. [OSCR](#) raised a similar issue stating that it received numerous requests from *"serial requestors, making frivolous and vexatious requests"*. [Highlands and Islands Enterprise](#) and [Comhairle nan Eilean Siar](#) also reported "fishing trips" under FOI.

73. [Loch Lomond and the Trossachs National Park Authority](#) said that the “*definition and application of the vexatious provision is...extremely difficult to uphold*” and should be considered. The Authority added:

“The vexatious provision under FOISA does not match the ‘manifestly unreasonable’ provision under the EIRs. The term manifestly unreasonable is easier to quantify and apply.”

74. [Aberdeen City Council](#) suggested that “*vexatious requests could be strengthened to relate to the person and not just to the request*” and that there “*could be more clarity in the law on what is vexatious and how Local Authorities could apply it effectively*”. The Council also said that allowing public bodies to enquire as to the purpose of the request could help them to provide information more effectively.

Timeframes

75. A number of public bodies raised concern with the 20-day response period and thought that it should be extended particularly for more complex requests. These included [Strathclyde Partnership for Transport](#), [Police Scotland](#), [Glasgow City Council](#) (in relation to schools) and the [Scottish Courts and Tribunals Service](#) which stated that:

“Complying with the 20-working day timeframe can be challenging where public bodies are dealing with complex requests”

76. The [Scottish Courts and Tribunals Service](#) said that FOISA should be brought in line with the 40 day extended response time for certain cases in EIRs when it comes to timeframes:

“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.”

77. [Glasgow City Council](#) stated that—

“There continues to be an on-going issue in the Council’s ability to respond to FOI requests where information is held by a school when a request is received either during or across a school holiday period. We are aware that grant aided and independent special schools are subject to an extended response time of up to 60 days and it would be very helpful if these provisions were extended to local authority schools.”

Costs of responding to requests

78. A number of submissions also suggested that the charging regime should be reviewed. [Comhairle nan Eilean Siar](#), for example, said that the “*provisions in*

respect of charging fees for onerous requests are too restrictive and in practice impractical”.

79. [Loch Lomond and the Trossachs National Park Authority](#) also felt that fees should be reviewed and that “the *threshold for applying a fees notice is too high under FOISA and does not match the EIRs where there are not the same limitations*”.
80. [Strathclyde Partnership for Transport](#) said that the exemption on the cost of compliance, which has not been reviewed since 2005, should be looked at. Currently, this is limited to £600 capped at £15 per hour staff time (so 40 hours work). The UK Act is limited to £600 capped at £25 per hour (so 24 hours work). Police Scotland made the same point in its submission.

**SPICe and Clerks to the Committee
16 September 2019**

REF NO. PAPLS/S5/19/FOIA/12

**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE
POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland)
ACT 2002**

SUBMISSION FROM: The Coalition of Carers in Scotland

We welcome the opportunity to respond to the consultation the Public Audit and Post-legislative Scrutiny Committee (PAPLS) is undertaking on the Freedom of Information (Scotland) Act 2002.

We believe the FOI Act has allowed for greater transparency and accountability in relation to the information held by public bodies.

We have recently used the Act to request information from all local authority areas in Scotland on how they have directed resources towards the implementation of the Carers (Scotland) Act 2016.

In this submission we have focused on our experience of the process of submitting FOI requests and have addressed the following questions set out in the consultation:

- Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?
- Are there any other issues you would like to raise in connection with the operation of FOISA?

Background

Between October and November 2018 the Coalition of Carers in Scotland submitted FOI requests to 31 local authority areas in Scotland (Stirling and Clackmannanshire was a joint submission)

All areas (with the exception of the Highlands) were sent two FOI requests, one related to funding provided by the Scottish Government in 2017/18 for preparations in advance of the commencement of the Carers Act. This funding was provided as a package of funding by the Scottish Government to Health Boards, to be directed to Health and Social Care Partnerships for allocation.

The second FOI related to funding provided to Local Authorities for the implementation of the Carers Act in 2018/19. Again the expectation was that this would be directed to HSCPs.

In total 61 FOI requests were sent.

Process of Sending the FOI requests

The process of ascertaining where to send the FOI requests was very time-consuming. While there are some websites that can assist by submitting FOI requests to multiple areas at once, since the requests we submitted contained specific information for each area, we had to source information from each local authority area and send them separately.

Each area had a slightly different process to follow, some simply gave an email address, others required you to complete a pro-forma, others provided a facility on their website.

It would be much simpler if all information was provided on a single website and the process was the same for each area, perhaps with a standard proforma.

Confusion re HSCPs

In the first instance we sent the FOI requests to each local authority FOI department, with the exception of the Highlands where we sent it to the Health Board.

In most areas this did not cause an issue, however in 4 areas our requests were returned by the local authority and we were informed that this was because the information pertained to the HSCP and not the LA. In 2 areas we were told to send it to the local Health Board, in one of these areas we were then told by the Health Board that they did not hold this information either as it pertained to the HSCP. Eventually after challenging this we were provided with an email contact within the HSCP and the information request was fulfilled.

In the other areas once the LA rejected our request, we phoned and verified who we had to send the request to, but there appeared to be some confusion around this.

The confusion seemed to arise from the fact that the resources we were enquiring about were routed through the LA in one case and HB in the other, but ultimately were allocated through the HSCP. It did not appear that HSCPs routinely deal with FOI requests, certainly there was no information online directing you to this service. However, this is likely to be an ongoing issue as more services and resources come under the responsibility of Integration Authorities and the government continues to route resources in the same way.

We recommend that clarification is sought as to who is responsible for responding to FOI requests in these circumstances.

Timescales re responding

In relation to the timescales for responding to our requests, most areas returned them within the 20 day timescale, however 14 requests were received late and 3 requests are still outstanding. The table below outlines the number of responses which we received outwith the timescale.

| Response Time | Number of Late Responses |
|----------------------|---------------------------------|
| 5 to 7 weeks | 7 |
| 7 to 9 weeks | 2 |
| 9 to 11 weeks | 2 |
| 11 to 13 weeks | 3 |
| No response | 3 |

It should however be noted that the requests were sent out in October and November, so this did include non-working days over Christmas and the New Year.

Quality of information received

A significant proportion of the answers we received were incomplete, vague or ambiguous, this made it difficult for us to analyse our results. For example, when we asked how resources had been spent, many areas replied that either decisions hadn't been reached yet, the money had been set aside, or would be offset against future costs. This was the case even when the resources were for the previous financial year.

In addition, we have evidence that some of the information we received was inaccurate. For example, in one area they said they had allocated money to a specific organisation, but when we asked that organisations they said they had not received it and did not have any knowledge of it.

One explanation for this may be that the information was based on documents, such as IJB minutes, where decisions had been made, which were subsequently overturned or not followed through.

Conclusions

Overall we are of the opinion that the Freedom of Information (Scotland) Act 2002 is an essential piece of legislation that allows for greater transparency and public accountability in relation to the information held by public bodies. The information we received from our recent requests has been extremely valuable to our organisation and our members.

We believe that the system could be simplified and streamlined by providing information on one site.

In addition, we believe there is a question around HSCPs and whether there is a need for them to have their own FOI processes or whether this responsibility sits with the lead agencies. This is something the Scottish Government may wish to clarify.

It is also our view that the Scottish Government should scrutinise the compliance with the Act, including returning requests according to the timescales set out in legislation and providing accurate and full information.

About The Coalition of Carers in Scotland

The Coalition of Carers in Scotland exists to advance the voice of carers by facilitating carer engagement and bringing carers and local carer organisations together with decision makers at a national and local level.

Since its inception in 1998 the Coalition has played a fundamental role in advancing carer recognition and support and more recently in establishing a Carers Rights agenda in Scotland.

It is our vision that carers in Scotland will achieve full recognition as equal partners in care. Carers will have the right to quality services and access to personalised support at every stage in their caring role to ensure they enjoy good health and a life outside of caring.

Through our membership we connect with carers and carer-led organisations from all local authority areas and from many different caring communities, ensuring that carers from the Borders to the Shetlands have the opportunity to have their views heard.

Further information: www.carersnet.org

Address: PO Box 21624, STIRLING, FK7 1EF

Email: coalition@carersnet.org

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM: Severin Carrell, Rob Edwards, James McEnaney, Ally Tibbitt and 38 others

Submission from journalists and media union representatives

Dear convenor

We welcome the review of the Freedom of Information (Scotland) Act 2002 being conducted by the Scottish parliament's Public Audit and Post-legislative Scrutiny committee, and appreciate the opportunity to contribute.

This submission is being made on behalf of practising journalists working across the news media who make frequent use of freedom of information laws in Scotland and the UK, and is a compilation of our individual and collective concerns.

Many signatories to this submission signed the original open letter, of 31 May 2017, setting out concerns about the handling of information requests by public bodies which was sent to the Scottish parliament panel responsible for appointing the current Scottish Information Commissioner, Daren Fitzhenry, and to the Scottish government.

We welcome the commitments made in June and July 2017 by the then minister for parliamentary business, Joe Fitzpatrick, to improve the Scottish government's handling of information requests. In some key respects, our experience is that its processes have improved in line with those commitments. However, we agree with the committee there are a number of reasons to review the legislation.

We still experience problems with the Scottish government and have had repeated difficulties accessing information from other public bodies, including the NHS, local authorities, Police Scotland and universities. We believe there are strong, substantive reasons to consider updating, strengthening and expanding FoISA, many of which echo the suggestions made by Mr Fitzhenry in his evidence to the committee on 10 January 2019.

Many of the journalists who have signed this submission have encountered recent problems, a selection of which are included below as case studies (see appendix).

Those include:

- The direct involvement of government special advisers and ministers in the sifting, clearing and blocking of information requests to the media
- The frequent involvement of press officers across the public sector in the handling of information requests, and evidence media requests are still being treated differently to those from members of the public
- Unexplained and significant delays across the public sector in the release of information in breach of statutory deadlines
- Huge variations in the quality and pace of information request handling across the public sector, with some bodies routinely mishandling requests
- Public bodies repeatedly failing to properly apply the section 30 public interest test, making narrow interpretations of the scope of requests, or failing to properly justify their decisions by referring to the act's provisions

- Crown Office use of its nearly unique exemption from appeal to the Scottish Information Commissioner (SIC) which makes it impossible to challenge its decisions not to release information
- Officials using the Royal Family's special privileges under FoISA to prevent access to correspondence to and from members of the Royal Household
- The legislation's failure to include bodies whose sole purpose is to oversee the commissioning and building of public infrastructure worth billions of pounds
- Key meetings and telephone calls by ministers or senior officials with outside bodies or influential individuals not being minuted
- A public body choosing to recategorise a FoISA request as one under the EU environmental information regulations and then applying a charge for releasing the information
- A seemingly widespread shortage of staff dealing with requests, or a downgrading of the importance attached to information requests, leading to delays which breach statutory deadlines

Because on these experiences, we believe there is a compelling case for the legislation to be expanded and strengthened, and endorse many of the points made by Mr Fitzhenry. The act was written before digital technology and storage was in widespread use and we agree with Mr Fitzhenry public bodies should make much greater use of open data, with much greater emphasis on voluntary publication of data, procurement contracts and so on.

In general, the public sector needs to invest much more heavily and consistently in open data and information disclosure, underpinned by new legislative standards of transparency. It is remarkable how many times public bodies repeat failures to properly handle information requests after the SIC has upheld complaints in exactly those areas.

We would welcome consideration of whether the following is also needed:

- A clear duty to record, where civil servants are empowered to ensure meetings and other communications by ministers, special advisors and civil servants with external bodies or individuals are minuted or archived, except in strictly limited circumstances
- Expanding FoISA to bodies that derive all, or a substantial proportion of, their revenue from the public sector, including regional hubcos which oversee infrastructure contracts under the Scottish Futures Trust's hub programme, Cosla and the Improvement Service
- Removing the Crown Office's exemption from appeals to the SIC and stricter limits on what is deemed too sensitive to disclose
- Strictly limiting the rules on non-disclosure of material concerning the Royal Family to material which deals solely with the monarch's constitutional duties
- Limiting the rights of ministers and special advisors to oversee or influence information requests under FoISA, except in prescribed circumstances authorised by senior civil servants
- Much clearer duties on public bodies to follow best practice in the handling of requests, and to have regard to previous rulings by the SIC
- A review of the misuse of exemptions by public bodies which are frequently overturned on appeal, particularly S30 covering "prejudice to effective conduct of public affairs"
- A review of whether the sanctions for breaches of FoISA and the EIRs available to the SIC should be strengthened, to improve compliance
- Whether the SIC should itself be subject to stricter time limits in handling appeals, which may involve increasing its budget, and whether Scotland should have an independent process to review SIC decisions, similar to the Information Tribunal in place for the UK Information Commissioner

Our freedom of information legislation has greatly improved the transparency and accountability of government and public sector bodies in Scotland. Even so, these examples and the continuing problems we encounter with the application of this legislation, as well as the significant advantages for transparency offered by the digital information revolution, suggest to us a refresh of the legislation is needed.

We hope our comments make a constructive contribution to that process. We would be very happy to provide additional information on any of the matters we have raised, in whatever way would be most helpful to the committee.

Thank you,

Severin Carrell, The Guardian
Rob Edwards, The Ferret
James McEnaney, freelance
Ally Tibbitt, The Ferret

Kieran Andrews, The Times
Michael Blackley, Scottish Daily Mail
Alastair Brian, Billy Briggs, Fiona Davidson, Peter Geoghegan, Karin Goodwin, Rachel Hamada, Layla-Roxanne Hill, Joe Lo, Jamie Mann, The Ferret
Libby Brooks, The Guardian
David Clegg, Daily Record
Chris Diamond, chair of Glasgow Broadcasting Branch of the NUJ
Judith Duffy
John Ferguson, Sunday Mail
Tom Gordon, The Herald
Chris Harvey, STV North NUJ chapel
Paul Hutcheon, Herald on Sunday
Simon Johnson, Daily Telegraph
Andrew Learmonth, The National
David Leask, The Herald
Helen McArdle, The Herald
Mark McLaughlin, The Times
Martyn McLaughlin, Scotland on Sunday
Chris Musson, The Scottish Sun
Andy Philip, Daily Record
Hannah Rodger, Herald on Sunday
Gareth Rose, Scottish Mail on Sunday
Rachel Watson, Scottish Daily Mail
Craig Williams, chair of NUJ Scottish executive council
Ben Wray, David Jamieson, Sean Bell, Becca Toop, Rhiannon Davies, CommonSpace
Alasdair Clark, Freelance
Tristan Stewart-Robertson, Clydebank Post

10 May 2019

APPENDIX: CASE STUDIES

Royal Family exemptions

FoISA gives the Royal Household a unique exemption under Section 41(a) which can be used for all members of the Royal Family and on all correspondence, with other powers to refuse documents under section 30(b)(i) and 30(b)(ii) covering opinions and discussions on any topic; and section 30(c) to protect the confidentiality of all communications. The Scottish government's internal advice in 2017 instructed civil servants to tell the Royal Household immediately a request is received and seek its advice; it also gave the Royal Household prior sight of and rights to comment on the final release of documents. In 2017, the Scottish government applied those exemptions to FoI requests concerning Prince Charles's secret lobbying of the Scottish government in favour of the charity Teach First, which had no bearing on the constitutional role or interests of the monarchy.

Police Scotland

Has a reputation for offering the minimum amount of clarity on its reasons for refusal of information requests and fails to offer advice or assistance to applicants. In 2018, Police Scotland declined to release any information about the number of officers deployed to police President Trump's visit to Scotland in July 2018, and did not provide adequate reasons. It retrospectively applied the excessive cost exemption. The SIC found it had breached FoISA by failing to cite the correct clauses and failing to offer assistance to the requester.

Crown Office exemptions from appeal

The Crown Office and Lord Advocate are exempt under FoISA from their decisions being appealed to the SIC, even on basic points of interpretation of FoISA. One reporter asked for anonymised information on the number of compensation payouts to victims or witnesses for wrongful arrest, due to clerical or legal mistakes by prosecutors. That followed the unjustified arrest of an alleged attempted rape victim after a clerical error. The COPFS refused to release those figures, insinuating the public interest was best served by not disclosing them. The reporter was barred from challenging this with the SIC.

The University of Edinburgh

FoI requests were sent to eight public bodies regarding their historic collections. The replies from several of those were exemplary, and in one case came in half the statutory time. The University of Edinburgh replied nearly three weeks late and failed to provide a full or clear response. Its officials tried to treat a request for clarification about the reasons for this as a request for a formal review under FoISA, even though the reporter had explicitly said no review was being sought at that stage. After being challenged, the university eventually released more information five weeks after the FoISA deadline.

In another case, the University of Edinburgh was asked for minutes from a sub-committee which would normally be published as routine, yet had not been for a year. The university treated this as an FoI request and said it was its prerogative to do so. The reporter pointed out that its own publication scheme stated those minutes were published on a regular basis; it was only after he consulted the SIC the university retreated and adhered to its own policy.

Special adviser and ministerial influence in FoI releases

Following the SIC's intervention on the Scottish government's handling of FoI requests in 2017, requests were made seeking internal communications regarding that investigation. Despite repeatedly claiming to hold no such information, the government eventually released more than 200 pages of heavily-redacted material. That included briefing papers for civil servants in advance of interviews with SIC officials and evidence special advisers and ministers intervened to delay or prevent the release of information they felt was too sensitive.

In one request on standardised testing, special advisers intervened to at first redact, and then entirely withhold, a draft risk register, which was eventually released after a referral to the SIC.

Other cases include: responses being delayed beyond the 20-day statutory deadline to give special advisers time to review the material; advisers instructing officials to withhold information, despite a warning that a subsequent appeal would be lost; and a special adviser blocked the release of an overdue response to allow extra time to set up a media-handling strategy.

NHS Greater Glasgow and Clyde

Journalists encounter repeated problems with NHS GGC. Reporters have had requests for correspondence and memos on the spate of infections at the Queen Elizabeth hospital covering the cryptococcus, mucormycosis and bacteraemia cases repeatedly blocked. Its responses ranged from automatic refusal on public interest grounds; internal reviews stalling beyond statutory deadlines; public interest justifications not set out; or non-statutory reasons for refusal offered. In another case, a reporter asked for specific data on complementary treatments: the response was factually inaccurate, incomplete, overdue and failed to disclose material it had previously released.

Community Safety Glasgow

A reporter sought information on environmental fixed penalty notices issued by Community Safety Glasgow (CSG). CSG first tried to process the request under environmental information regulations and apply a charge for it. Following a request for review, the agency reverted to treating the request under FoISA and provided a partial response. It justified withholding key information on referrals of unpaid fines to the Crown Office (COPFS) using section 35(1)(a) and (b) of FoISA. The requester ultimately had to refer CSG to the SIC and submit further FoI requests to confirm CSG did not hold any information on its failure to refer £1.5m worth of unpaid fines to COPFS. CSG, in other words, initially tried to charge for providing information that didn't exist. (AT)

Scottish Futures Trust hubcos

A reporter tried to establish whether hubcos, the private sector bodies set up by the Scottish Futures Trust to oversee billions of pounds worth of public spending and borrowing on capital projects, were subject to environmental information regulations (EIRs). Although hubcos have substantial public sector ownership and largely derive their income from taxpayers, the SIC said they were exempt because they were private bodies. Hubcos therefore remain shielded from public scrutiny, despite the scale and importance of their public spending.

Scottish government

The Scottish government was asked on 21 September 2018 to provide correspondence about proposals for commercial kelp harvesting. Despite repeated promises, it didn't respond until 7 March 2019, three days after a request for a review of the failure to respond. Its response withheld information, appeared muddled, and failed to make clear whether or not a public interest test had been applied. After a second request for an internal review was ignored, the case was appealed to the SIC on 24 April 2019.

NHS Fife

Two health boards - NHS Tayside and NHS Fife - were sent FoI requests about their preparations for Brexit last year. NHS Tayside responded promptly and thoroughly, providing additional background information, resulting in a story. NHS Fife, however, repeatedly failed to respond within the statutory deadline, despite reminders.

Aberdeen City council

Press officers have asked journalists to make formal freedom of information requests to avoid having to source and release information themselves, adding to the time and workload needed to access information. In September 2017 Aberdeen City council's press office was asked for information about a bond issued by the council, including how much was paid in advisory fees to the bank, HSBC, and for a copy of the prospectus. A press officer confirmed the council held this information but said the journalist "would have to send in an FoI request" in order to get it.

10 May 2019

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>

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE**POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002****SUBMISSION FROM** : The Campaign for Freedom of Information in Scotland (CFoIS)**Introduction**

FoI rights are being weakened in Scotland through stealth and omission. Therefore, the Campaign for Freedom of Information in Scotland (CFoIS) welcomes the post legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FoISA) as the beginning of the process of legal reform. CFoIS is committed to working with the Scottish Parliament and the Scottish Government to improve law and practice.

FoISA has met the positive aim of providing people and organisations with a free, enforceable right to access information held by public authorities. Opening up the decision-making process, knowing who and what information informs decisions and how our money is spent are fundamental to ensuring a fair and equal society. That is the good news, but the purpose of this submission is to evidence why FoISA requires radical reform to ensure the right remains robust, questions if its implementation fits with how our democracy actually operates and makes the case for better evidence of a culture of transparency in Scotland.

CFoIS has regularly provided scrutiny of FoISA over the last 14 years and issues of concern have included: the independence and effectiveness of civil society in Scotland to feel confident in using FoI to scrutinise government and the public sector¹; the inability of Audit Scotland to confirm how many ALEOs exist; the tactics of some designated bodies to circumvent FoISA such as not taking minutes of meetings; the need for designated bodies to improve the gathering of information and publish it in an accessible place/format so people are better informed. Now we set out how FoISA needs to be reformed, to strengthen and improve it.

1. Human Rights

Jurisprudence at the European Court of Human Rights regarding Article 10 of the European Convention on Human Rights (ECHR) reflects the view internationally that the right to information is a human right². Therefore, FoISA's purpose and operation need to be understood in the context of the obligations on the Scottish Government and the Scottish Parliament in respect of Section 29 of the Scotland Act 1998 and Section 6 Human Rights Act 1998. Furthermore, UN treaties that have been ratified by the UK, and to which the Scottish Government is committed to delivering, need to be factored into the review of FoISA.

¹ See research report 'Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector, available on the Scottish Information Commissioner website <http://www.itspublicknowledge.info/home/SICResources/voluntarysectorresearch.aspx>

² Decision of the Grand Chamber in Magyar Helsinki Bizottsag v Hungary (Application No. 18030/11)

The First Ministers' Advisory Group on 'Human Rights Leadership Report' made seven recommendations and the Equalities and Human Right Committee report 'Human Rights and the Scottish Parliament' made 40 recommendations. Both need to be factored into the work of the Committee. For example, number 32 in the latter recommended a human rights-based approach to scrutiny. FoISA has significant human rights impact as an individual right and as a tool by which other human rights are realised.

2. Public Authorities

The introductory text of FoISA sets out its purpose "An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes."³ Reform of FoISA must address this purpose. Currently there are mixed messages on what is a public authority⁴ and agree who "are providing services for them". CFoIS believes this definition covers voluntary and private organisations that are delivering services under contract. It is also useful to remember that the HRA refers to 'public services and 'services of a public nature' and this would be a helpful clarification in respect of designation under FoISA. The purpose of FoISA is to give people the right to access information when the public purse is paying and that will include services delivered by SCIOs⁵, professional bodies that undertake regulation such as the Law Society of Scotland and bodies which represent the interest of the public sector such as CoSLA which is funded by organisations which are subject to FoISA ie local authorities.

By launching an informed debate about what constitutes a public authority, there will be an opportunity to disentangle the charitable from the public, including in the health service, to ensure consistent rules on designation, transparency and accountability.

3. Publicly Owned Companies

Under Section 6 of FoISA, a person can make a section 1 request to a publicly owned company, but this right is ineffective as it is unclear which companies fit with this definition. Therefore, we are unable to say if the definition within FoISA needs to be amended. For example, the statistical publication 'Business in Scotland 2018' provides data on 210 companies although the names are not listed. However that is five down from 2017, which raises the question which companies no longer operate and has the FoI right been lost or taken over by another publicly owned company to which an FoI request can be directed.⁶

³FoISA at <https://www.legislation.gov.uk/asp/2002/13/introduction>

⁴ See for example analysis of the decision of the ONS to consider RSLs as private non-financial bodies <https://www.tcyoung.co.uk/blog/2018/social-housing/ons-reclassification-rsls-private-bodies>

⁵ The Scottish Charitable Incorporated Organisation (SCIO) is a legal form unique to Scottish charities and is able to enter into contracts, employ staff, incur debts, own property, sue and be sued. It also provides a high degree of protection against liability. See OSCR website <https://www.oscr.org.uk/becoming-a-charity/becoming-a-scio/>

⁶ 'Number of enterprises in the public sector in Scotland and their total Scottish employment by sectors March 2010 – 2018 'Business in Scotland' Table 12 pub 2018 at <https://www2.gov.scot/Resource/0054/00543007.pdf>

There needs to be a single source for this information, so people are aware of what publicly owned companies exist in Scotland and then decide if they want to make an FoI request.

4. ALEOs

All ALEOs must be covered by FoISA. Currently there is no precise information about how many actually exist, therefore, practically, it is difficult to designate them. It is noted that Leisure Trusts are already covered. However, a solution would be to designate ALEOs as a designated category.

5. RSLs

RSLs and all their subsidiaries are supposed to be covered by FoISA effective from 11th November 2019, 17 years after the promise on designation was made. The proposed SSI is unclear on which RSL subsidiaries will in practice be covered. It is a general principle that in order for people to have an affective right, they must know which bodies are subject to FoISA. We are disappointed about the lack of clarity. The draft SSI fails to provide clarity on what type of information is covered by the enforceable access right under FoISA. It is important to acknowledge that the Scottish Housing Regulator has repeatedly and promptly answered our FoI requests by providing a detailed list of all the 160 subsidiaries owned by RSLs in Scotland⁷.

6. Pro-active publication of information

There does not appear to be any quantitative and qualitative evaluations of the pro-active publication of information by designated bodies since 1st January 2005.

Authorities have to adopt a publication scheme approved by the Commissioner. All designated authorities have adopted the Scottish Information Commissioner's own Model Publication Scheme, which requires them to publish a Guide to Information that they make available. They have to make available the information they have committed to publish.⁸ For example lots of financial and operational information should be pro-actively published under FoISA but no monitoring seems to be undertaken to check if timely publication, and expansion of the range of information, is progressively realised. The system depends on self-action ie people researching the subject. There is a need for a regulatory overview of what is happening in practice on pro-active publication of information.

7. Joined Up Regulation

FoISA operates within a wider regulatory framework which places a layer of obligations on transparency. There is a need to examine what action regulatory public agencies require on transparency and accountability and analyse the fit with FoISA, such as the Office of the Scottish Charity Regulator, the Scottish Social Services Council and the Scottish Public Services Ombudsman.

⁷ See our commentary on the draft SSI, March 2019, at CFoIS website <https://www.cfoi.org.uk/wp-content/uploads/2019/03/draft-foisa-designation-of-persons-as-scottish-public-authorities-order-2019.pdf>

⁸ Scottish Information Commissioner <http://www.itspubliknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx>

It is a matter of good governance for designated bodies to comply with the spirit and detail of FoISA. If the Scottish Information Commissioner issues a decision on a designated body, it should be a matter of routine that this is brought to the attention of senior managers and those in governance roles so they are aware of any issues rather require to be remedied eg in respect of internal procedures, staffing issues especially with the recent focus on GDPR compliance, or what kind of information should be pro-actively published.

8. Best Practice

There is a need to learn from good practice elsewhere such as the considering the adoption of the European Ombudsman's Code of Good Administrative Behaviour.

9. Communication

Making a request and receiving information is something which FoISA sought to make simple however our awareness of the barriers to inclusive communication are now better understood. FoI officers within designated bodies need to be supported to achieve equal outcomes. The process of making an information request, and the information on how to do that must follow the principles of inclusive communication. These principles should be followed when pro-actively publishing information. Free tools and guidance are easy via the Inclusive Communication Hub.⁹

10. Operational Issues

As FoISA became operational, issues emerged which now need to be addressed. For example, when the Scottish Information Commissioner decides a designated body has failed to respond to a requirement for review within the timescale set out in FOISA, he can order it to carry out a review and is required, by law, to give the body at least six weeks to comply. Given that the review should be completed within 20 working days, it is extraordinary that the Commissioner must give an additional 6 weeks and we would suggest it should be no more than a further 20 working days.

Given the rapid change in the nature of communications, it is right that FoISA also considers how the legislation can capture Ministers and civil servants communicating via technology such as personal email accounts, What's App, text and other social media platforms. The law needs to be future proofed so that it keeps up with how human beings communicate.

Case Study 1

The Scottish Parliament has been operational for 20 years and was designed to be open, accessible and accountable. How the Parliament has evolved over that time has indeed been remarkable. Whilst a lot of information is proactively published, it is mainly around the already public fora such as the debating chambers and committee rooms. The more interesting aspects are where else business is done and how transparent are they? For example, Committee chairs are proposed at Committee meetings but what is the actual process of nominations and voting, and are there minutes of meetings where the

⁹ <http://inclusivecommunication.scot/>

discussions and decisions on the selected candidate take place? In respect of how Committee operate, do they have an annual budget to spend on the work they agree to undertake such as on training, research and advice? Who and where are decisions made on internal parliamentary budgets? In respect of the Leadership Group papers, they will be withheld if “The paper contains information which is considered may be exempt under the Freedom of Information (Scotland) Act 2002”.¹⁰ Lots of papers **may** be exempt but the question is **are** they exempt?

Case Study 2

An organisation may say it is publishing meetings of those who govern it but there are repeated delays in making the minutes public due to those attending being ill, off or some further actions needed. Minutes are a record of decisions taken at a meeting and it is routine for them to be presented in ‘draft’ form until approved at the next meeting. This is how an accessible and transparent organisation should work.

Conclusion

The enforceable right to access information has been a game changer in the balance of power between an elected parliament and the people. However, a number of reforms are necessary to restore FoISA’s strength and modernise its operation.

About CFoIS

CFoIS was set up in 1984 and we have built alliances to achieve cultural, organisational and operational change. CFoIS is happy to work with rights holders to ensure the equal enjoyment of rights as well as working with duty bearers so that their compliance is robust. We are an independent, non-party political organisation and assert that access to information rights, transparency and accountability are rooted in international human rights law. For more information, including previous submissions and reports on reforming FoISA, go to <https://www.cfoi.org.uk/scotland/>

¹⁰ See Scottish Parliament website at <https://www.parliament.scot/abouttheparliament/22721.aspx> accessed on 10th May 2019.

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : UNISON Scotland

UNISON Scotland response:

Public Audit and Post-Legislative Scrutiny Committee's Post Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002

Introduction

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. UNISON's interest in FoI includes our campaigns function, the fact that we make regular use of FOI at Scottish and local levels, and the fact that we are the union that represents most FoI staff in public bodies. UNISON has been campaigning for strong Freedom of Information legislation since before the Scottish Parliament was established. We were among those calling for this post legislative scrutiny and we welcome the opportunity to submit written views to the Committee.

General overview

UNISON believes that the right to information is fundamental to a democracy and that it should apply to all public services, however they are delivered. We support the submission from the Campaign for Freedom of Information in Scotland¹ (CFoIS), which does vital work to promote FOI rights, including the importance of the human right to access information.

There should be a universal, statutory, enforceable right to information about **all** public services, regardless of what type of body delivers the service. We have long called for the extension of the Freedom of Information (Scotland) Act 2002 (FOISA) to ensure this. We have raised concerns in particular, along with many others, about the ways in which the right to information has been undermined by the public losing rights through the changing way services are delivered, including some services being outsourced / transferred to different providers. As the Scottish Information Commissioner's Office has been saying for many years, information rights should follow the public pound. The CFoIS are right to describe FOI rights being weakened "through stealth and omission." We believe that the post-legislative scrutiny should address this as a top priority.

Our responses to the Committee questions:

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

UNISON believes that FOISA has been crucial in supporting and enabling public scrutiny of key decisions and policies and services that affect us all. This is essential and is now well understood, well used and ingrained in Scotland's political landscape. We pay tribute to the work of the Office of the Scottish Information Commissioner and Kevin Dunion, Scotland's first Information Commissioner, in establishing his role as an effective and respected

¹ <https://www.cfoi.org.uk/wp-content/uploads/2019/05/CFoIS-post-legislative-scrutiny-FOISA-submission.pdf>

independent Commissioner promoting and enforcing the FOI regime. We welcome work done by his successors Rosemary Agnew and Daren Fitzhenry to continue to stand up for information rights and argue the need for further extension of FOISA coverage, including to recover lost rights in particular.

In our view, a range of significant FOI releases have demonstrated the importance and success of the legislation at a national level – often starting from the local, while numerous campaign groups and other organisations and individuals have found it immensely beneficial at a local and/or personal level that can often ‘go national’. This scrutiny of the work of public bodies benefits society in countless ways. The fact that some politicians have gone to lengths to seek to hold back or limit information from being released through various strategies (including some of the issues highlighted in the criticisms of the Scottish Government’s handling of FOI requests, made in the letter² from journalists in May 2017 and updated in a follow up letter this month as a submission³ to the Committee) and/or to criticise FOI, as former Prime Minister Tony Blair did⁴, saying it was “utterly undermining sensible government”, shows that in fact FOISA and the UK Act are doing what they should, shining a light in areas of public interest. As Daren Fitzhenry, the Scottish Information Commissioner, says in paragraph 1 of his response⁵: “In particular, FOISA’s statutory entitlement to request and receive information, and its duty on public authorities to proactively publish information in which there is a public interest, have made a distinct and crucial contribution by focusing on the importance of ensuring that what is published is what the public actually wants to see, rather than information the public sector thinks the public should see.”

We need more light and the post-legislative scrutiny should focus on ensuring any changes deliver that, reinforcing the public’s right to know.

We do not believe there have been negative effects. We agree with the Commissioner, in the part of his response⁶ challenging ‘perceived negatives’, including his support for the case that the costs of FOI are outweighed by the increase in transparency and accountability, and on the importance of requesters’ right to know, therefore it is wrong to label requests as ‘unworthy’, given that something which on the face of it some might see as inconsequential could concern significant matters of public interest. However, we disagree with the example he chose. In our view – and this is at the core of the kind of work UNISON does in representing members and highlighting the impact of austerity cuts – the C-Diff Justice Group’s FOI requests about cleaning rotas and the frequency with which spaces within a public building were cleaned could never have justifiably been seen as trivial, inconsequential or frivolous or a ‘daft question’. However, we agree with the point he was trying to make – that requesters have to be able to ask something that some may see as trivial etc. As the Commissioner says, “labelling requests as unworthy, based on face value, can be detrimental to the right to know, and serve to conceal serious issues.”

² <https://www.commonspace.scot/articles/11072/journalists-open-letter-freedom-information-policy-scotland>

³ <https://www.commonspace.scot/articles/14311/40-journalists-sign-open-letter-calling-scottish-government-foi-legislation-refresh> <https://www.commonspace.scot/articles/14313/open-letter-expand-and-strengthen-freedom-information-legislation>

⁴ <https://www.cfoi.org.uk/2010/10/the-blair-memoirs-and-foi-2/>

⁵ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=12718&sID=377>

⁶ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=12718&sID=377>

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

UNISON believes that the policy intentions have been failed by the Scottish Government failing to ensure public information rights follow the public pound. As stated above, this must be rectified urgently and we hope the Committee's recommendations will prioritise restoring rights, in particular where public services are delivered by private companies. We urge the Committee to revisit the criticisms on this from successive Scottish Information Commissioners. While some efforts have been made to extend coverage, belatedly (RSLs 17 years after the promise on designation was made), it is still the case that many public services are not covered in the way they should be and was the intention of the legislation. As Kevin Dunion, then Commissioner, said in 2009⁷: "Prime candidates for designation would appear to be PFI/PPP projects." There has been consistently high public support for FOI covering private companies contracted to build and maintain hospitals and private companies contracted to build and maintain local authority schools. UNISON has long argued for PFI contractors to be covered. It is a disgrace that this has not yet been done under Section 5 of FOISA, ten years after the Commissioner made such a strong case.

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

UNISON supports the previously mentioned criticisms made by journalists and the NUJ. We also support the CFoIS criticisms in their response, and proposals for addressing these.

Our own experiences with making FOI requests have certainly found problems both with commercial confidentiality being used too widely, particularly with PPP/PFI projects⁸, and with delays in responding to FOI requests⁹. (Where we acknowledge the impact of austerity cuts on staff concerned, but public bodies have legal obligations under FOISA and should provide sufficient staff. In the case referred to, which we appealed to the Commissioner, Glasgow City Council said in its submissions to the Commissioner that funds for extra FOI staff had been approved. See below also.) We continue to monitor these and will make appeals to the Commissioner where appropriate.

In our view, a major factor in late responses, is the austerity cuts imposed on public bodies by Westminster and Holyrood governments. Understaffing in FOI teams, and severe staffing pressures in other areas, where FOI officers need to find the information requested, can make responding within the FOI legal deadlines difficult. That is not the fault of the staff concerned, but public bodies must make available sufficient resources to comply with the legislation. We hope the Committee would comment on this in their recommendations.

A separate funding issue, is that the Office of the Scottish Information Commissioner may well need increased funding to ensure it can carry out its duties properly. We would support increased funding, including to cover the new bodies being brought into FOISA coverage, as well as for increased work such as the intervention report into the Scottish Government handling of FOI requests.

⁷ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=3003&SID=3820>

⁸ <http://www.unison-scotland.org.uk/comms/atwhatcostoct07.pdf>

⁹ <https://unison-scotland.org/robust-action-promise-unison-public-bodies-poor-foi-practice/>

We note on commercial confidentiality that the Scottish Information Commissioner's submission (paragraph 50) suggests looking at the Irish legislation which has a clause preventing public authorities and bodies providing services to them relying on confidentiality clauses in their contracts to prevent access to information held by the authority. While this may be useful, we still insist that the private companies providing such services should be subject to FOI legislation in respect of those services.

Finally (due to space constraints, although there are many other issues we could raise), we address the question of proper minuting of meetings, highlighted by the CFoIS Get It Minuted campaign¹⁰. The report, which we supported, raised a range of crucial issues which we would like the Committee to consider, including looking at the possibilities around a duty to record. We think it would be helpful to assess whether the Scottish Government is properly recording meetings. Of course it is not just minute taking, or lack of it, that is a problem, but previous criticisms have noted cases of meetings not even recorded, with the abandonment of keeping diaries¹¹.

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

UNISON believes that Scotland should be seeking to learn from the best international practice. We supported a small research project by the Campaign for Freedom of Information in Scotland¹² which looked at improving access by examining international practice. We commend the recommendations to the Committee.

We refer to the comments above and the need for bringing all public services under FOISA, however they are delivered – in particular PPP/PFI projects, but also many other services provided by private contractors. We want to see action to address delays in responding/failure to comply with timescales and action on minutes/record keeping as if the information is not recorded, the public cannot find out about it. This means also updating the legislation if/where necessary to ensure that FOI cannot be 'avoided' by use of private email addresses and other communications methods where they are used for conducting the business of public bodies.

The journalists' letters referred to some of the above – indeed they specifically called for, re extending coverage:

"Expanding FoISA to bodies that derive all, or a substantial proportion of, their revenue from the public sector, including regional hubcos which oversee infrastructure contracts under the Scottish Futures Trust's hub programme, Cosla and the Improvement Service"

¹⁰ <https://unison-scotland.org/library/Minute-Taking-report-final-Jan-2018.pdf>

¹¹ WICS' Directors do not record information as a result of meetings or conversations and take a mental note. If actions are required, the Directors will advise the appropriate staff verbally.

<http://www.itspublicknowledge.info/UploadedFiles/Decision140-2011.pdf>

¹² <https://unison-scotland.org/library/Learning-from-Others-Final-Report.pdf>

5. Are there any other issues you would like to raise in connection with the operation of FOISA? Please note that it is not necessary to answer every question and you can provide any other information that you consider to be relevant.

UNISON believes that the proper resourcing of FOI by public bodies is essential to a functioning FOI regime and that this is under threat by continuing austerity cuts impacting severely on public bodies. This must not be used as a reason not to comply with FOISA. However, we would like the Committee to look at this and consider also the impact of cuts on requesters, which can mean that civil society organisations do not have the resources to conduct the proper level of scrutiny, using FOISA, that they would like and which benefits us all. The £600 cost limit and hourly rate for calculating this should not be changed.

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : NATIONAL UNION OF JOURNALISTS

The National Union of Journalists (NUJ) is the representative voice for journalists and media workers across the UK and Ireland. It was founded in 1907 and has around 30,000 members, including around 2,000 in Scotland. We represent staff and freelance journalists, as well as retired members and students. Our members work across all sectors of the industry including broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media, photographers and videographers. For the purposes of this submission it is important to note it represents not just journalists making freedom of information requests, but also communications officers tasked with answering the requests.

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

The NUJ's Code of Conduct was first established in 1936 and remains the only ethical code for journalists written by journalists. The code states as its first point that "[a journalist] at all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed." As such, the NUJ supports provisions which enable the public to be better informed, and campaigns for the right of journalists to investigate and publish information which is in the public interest.

As such, the NUJ is supportive of the aims of the Freedom of Information (Scotland) Act (2002) and believes it has positively contributed to better reporting of information about public spending and decisions made by political representatives and public bodies.

To take just three examples, this reporting includes recent stories concerning the doubled cost to taxpayers for disposal of medical waste following the collapse of Healthcare Environmental Services; media reports on the number of assaults on NHS staff in Scotland, and reports on how Scottish Enterprise had given almost £3m of funding to arms firms which were profiting from a war in Yemen that had killed 70,000 people. These are clearly matters of public concern.

It has been agreed NUJ policy since our 2011 Delegate Meeting that the Freedom of Information Act (2000) has "brought about a profound change for the better in the political life of [the UK]", and we see the provisions and intentions of the 2002 Act in the same light.

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

While the policy intentions of the Freedom of Information (Scotland) Act (2002) are laudable in working towards a right of access to information which is straightforward, and easily implemented, the NUJ remains concerned that the day-to-day experience of its members suggests the delivery has fallen short of these ambitions.

It is of particular concern to us that Information Commissioner Daren Fitzhenry found that journalists were “significantly less likely to receive information” and suffered “unjustifiable, significant delays”. His report said “Journalists, together with MSPs and political researchers, are expressly made subject to a different process for clearance than other requester groups. This is inconsistent with the applicant-blind principle of FOI legislation. Their requests are almost invariably subjected to an additional layer of clearance which is likely to delay consideration of the case.”

In seeking Freedom of Information requests journalists are acting on behalf of the public and should not be treated as second class citizens.

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 NUJ is concerned, given ongoing cuts in the funding of public services, that the provision of handling FOISA requests will be seen as less of a priority, and that either fewer resources will be allocated, or that there will be increased calls for a standard charge for FOISA requests.

We believe that the encouragement of open and accountable government is an aim that should be shared by the news industry and by public bodies, and would oppose both attempts above.

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

The NUJ remains concerned that as council and government services are outsourced and privatised these companies are exempt from FOISA requests, despite being responsible for the fulfilling of public services. There is a serious risk that the aim of improving accountability will be severely undermined if the provision is not extended.

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : SCOTTISH YOUTH PARLIAMENT

Introduction

The Scottish Youth Parliament (SYP) represents Scotland's young people. Our vision for Scotland is of a nation that actively listens to and values the meaningful participation of its children and young people. Our goal is to make this vision a reality, in order to ensure Scotland is the best place in the world to grow up.

Our democratically elected members listen to and recognise the issues that are most important to young people, ensuring that their voices are heard by decision-makers. We exist to provide a national platform for young people to discuss the issues that are important to them, and campaign to effect the change they wish to see.

SYP's values are:

Democracy – We are youth-led and accountable to young people aged 12 to 25. Our democratic structure, and the scale of our engagement across Scotland, gives us a mandate that sets us apart from other organisations.

Rights – We are a fundamentally rights-based organisation. We are passionate about making young people aware of their rights, and ensuring that local and national government deliver policies that allow those rights to be upheld.

Inclusion – We are committed to being truly inclusive and work tirelessly to ensure the voices of every young person from every community and background in Scotland are heard.

Political Impartiality – We are independent from all political parties. By working with all stakeholders, groups, and individuals who share our values, we can deliver the policies that are most important to young people.

Our approach

SYP welcomes the opportunity to respond to the 'Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002' inquiry by the Public Audit and Post-legislative Scrutiny Committee (hereinafter referred to as 'the Committee') at the Scottish Parliament. This response is based on the findings of a [research project](#) carried out by Abigail Wallace MSYP for Edinburgh Central for the Campaign for Freedom of Information in Scotland; co-designed questions by Kit McCarthy MSYP with the Scottish Information Commissioner (SIC) in the #WhatsYourTake survey prior to SYP's 66th National Sitting in Stranraer, Dumfries and Galloway; and the SIC's consultation workshop fuller write-up by the Scottish which was delivered by SIC and John Walker MSYP on 9 June 2018 (see [here](#), including

research findings on young people's views). MSYPs have also taken part in two Holyrood Conferences on FOI, and used FOI to support their local campaigning on topics such as instrumental music tuition and mosquito devices.

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

We believe that FOISA should benefit from an extension in scope would extend the scope of the Freedom of Information (Scotland) Act to private companies that have public contracts as well as other organisations that provide public services such as housing associations.

We believe that all public bodies should make it easier for young people to ask for information by making it clear that you will get a response to your Freedom of Information request in 20 days, creating simple forms which are consistent across local authorities, having accessible information online in plain English, advertising how you can make a request and increasing transparency.

We believe that the Scottish Information Commissioner should educate and engage with young people with partners on Freedom of Information (FOI) and call on the government for it to be taught in schools, to raise awareness of FOI among young people.

We believe that the Scottish Information Commissioner should create young-person-specific media campaign and online resources on Freedom of Information (FOI), to raise awareness of FOI among young people.

We believe that the Scottish Information Commissioner should create a template Freedom of Information (FOI) request form for public authorities to use, to raise awareness of FOI among young people.

In conclusion

Should you wish to meet with us, have us give evidence to your Committee or update us on how the findings will feed into your work, please do not hesitate to get in touch with us using the details below.

Contact us

Laura Pasternak, SYP's Policy and Public Affairs Manager, www.syp.org.uk, and follow us on Twitter: @OfficialSYP

With special thanks to Keiran O'Neill MSYP who drafted this consultation response, approved by our Conveners Group – ten young people who lead on policy and campaigns at SYP.

Public Audit and Post-legislative Scrutiny Committee

20th Meeting, 2019 (Session 5), Thursday 19 September 2019

**The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain
and funicular railway**

Introduction

1. At its meeting today, the Public Audit and Post-legislative Scrutiny Committee will take evidence from the Auditor General for Scotland on her report entitled [The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain and funicular railway](#).
2. The Auditor General has prepared a briefing on the key messages and this is attached at **Annexe A**. A copy of the report is attached at **Annexe B**.
3. Also relevant to today's consideration are the [Highlands and Islands Enterprise 2018/19 annual audit report](#) and the [Highland and Islands Enterprise annual report and accounts 2018/19](#).

**Clerks to the Committee
16 September 2019**

Annexe A

REPORT BY THE AUDITOR GENERAL FOR SCOTLAND
THE 2018/19 AUDIT OF HIGHLANDS AND ISLANDS ENTERPRISE:
CAIRNGORM MOUNTAIN AND FUNICULAR RAILWAY

1. The Auditor General's report on *The 2018/19 audit of Highlands and Islands Enterprise* was published on 30 August 2019. The report provides a summary of the circumstances relating to Highlands and Islands Enterprise's (HIE) establishment of a subsidiary company, Cairngorm Mountain (Scotland) Ltd (CMSL) to take over the operation of the Cairngorm Mountain ski resort. The report is a precursor to a performance audit report under section 23 of the Public Finance and Accountability (Scotland) Act 2000, which will provide a more detailed account of HIE's management of the ski resort, including the funicular railway.
2. HIE began the construction of a funicular railway to serve the ski resort in 1999, which was expected to bring a range of economic and other benefits. Cairngorm Mountain Ltd (CML) began operating the funicular railway when it opened in 2001 but it has experienced financial difficulties over the years, and ownership of CML has alternated between the private and public sectors.
3. In September 2018, CML took the funicular railway out of service because of potential safety concerns. In October 2018, it requested a working capital loan of up to £1.8 million from HIE in order to ensure the continuation of winter sports activities while the funicular was closed. HIE's board rejected the request because of concerns over CML's ability to repay the loan and because CML's parent company, Natural Assets Investments Ltd, was not offering any security if CML defaulted. CML subsequently went into administration and HIE established CMSL in December 2018 to take over operation of the ski resort.
4. HIE's 2018/19 financial statements make a number of references to CMSL, including:
 - HIE invested £0.461 million in share capital in CMSL in order to fund the purchase of CML and its assets. It also provided CMSL a working capital loan of £0.7 million. These amounts have been impaired in the accounts by 90 per cent, in the first instance to reflect HIE's valuation of CMSL, and in the second, to reflect the uncertainty of repayment.

- In the period between its establishment in December 2018 and 31 March 2019, CMSL reported income of £0.243 million and expenditure of £0.804 million, resulting in an overall deficit for the period of £0.561 million.
 - The Scottish Government gave HIE approval to overspend by up to £2.3 million in 2018/19 to cover the cost of operating CMSL. In the event, HIE's overspend across all activities was £1.8 million. Similar arrangements are in place if CMSL's operating costs result in an overspend in 2019/20.
 - HIE's financial statements also include an accounting provision of £9.6 million to reflect its obligation to repair the funicular.
5. HIE continues to develop proposals for the future operation of the Cairngorm funicular railway. A key issue for it is the likely cost of bringing the funicular back to full working order and the development of a business strategy which will provide for the long-term sustainability of the resort. This is likely to require some tough decisions to be made over the coming months. The circumstances of CML entering administration and the future of the Cairngorm funicular railway have generated significant public and media interest. The Auditor General intends to prepare a further report on HIE's management of the ski resort including the funicular railway, by spring 2020.

The 2018/19 audit of Highlands and Islands Enterprise

Cairngorm mountain and funicular railway



AUDITOR GENERAL 

Prepared for the Public Audit and Post-Legislative Scrutiny Committee by the Auditor General for Scotland
Made under section 22 of the Public Finance and Accountability (Scotland) Act 2000
August 2019

Auditor General for Scotland

The Auditor General's role is to:

- appoint auditors to Scotland's central government and NHS bodies
- examine how public bodies spend public money
- help them to manage their finances to the highest standards
- check whether they achieve value for money.

The Auditor General is independent and reports to the Scottish Parliament on the performance of:

- directorates of the Scottish Government
- government agencies, eg the Scottish Prison Service, Historic Environment Scotland
- NHS bodies
- further education colleges
- Scottish Water
- NDPBs and others, eg Scottish Police Authority, Scottish Fire and Rescue Service.

You can find out more about the work of the Auditor General on our website:

www.audit-scotland.gov.uk/about-us/auditor-general 

Audit Scotland is a statutory body set up in April 2000 under the Public Finance and Accountability (Scotland) Act 2000. We help the Auditor General for Scotland and the Accounts Commission check that organisations spending public money use it properly, efficiently and effectively.

Contents

| | |
|--|---|
| Introduction | 4 |
| Background..... | 4 |
| Events leading to the establishment of Cairngorm Mountain (Scotland) Ltd | 5 |
| Treatment in HIE's financial statements..... | 5 |
| Next steps for HIE | 6 |
| Conclusions..... | 7 |

Introduction

1. I have received the audited annual report and accounts and the independent auditor's report for Highlands and Islands Enterprise (HIE) for 2018/19. I am submitting these financial statements and the auditor's report under section 22(4) of the Public Finance and Accountability (Scotland) Act 2000, together with this report that I have prepared under section 22(3) of the Act.
2. The auditor issued an unqualified opinion on HIE's financial statements for 2018/19. I have prepared this report to draw to the attention of the Scottish Parliament the circumstances related to HIE's establishment of a subsidiary company, Cairngorm Mountain (Scotland) Ltd (CMSL), to take over the operation of the Cairngorm Mountain ski resort, including the funicular railway. This was in response to the previous operator, Cairngorm Mountain Ltd (CML), entering administration in November 2018.

Background

3. Cairngorm Mountain range is regarded as an environmental and economic asset for Scotland, playing a key role in underpinning the local tourism industry, which is a vital component of the economy around Aviemore and Strathspey. HIE is the long-term owner and custodian of Cairngorm Mountain. This comes with responsibilities to ensure there are effective arrangements in place to manage and maintain the mountain environment and provide a stable operating environment for the business within the ski area.
4. HIE began the construction of a funicular railway to serve the Cairngorm Mountain ski resort in 1999. It expected the funicular railway would benefit the area by:
 - helping to strengthen its economic base
 - encouraging others to invest in the area
 - providing more secure employment
 - improving the appeal of the area as a tourist destination
 - improving the controlled use of the area to minimise environmental impacts.
5. CML assumed operation of the funicular railway in 2001 under a lease agreement with HIE which owns the land, buildings and facilities including the funicular railway. HIE took CML into public ownership in May 2008, after CML reported financial losses, to ensure the resort remained operating and to protect its investment. At the time, HIE stated that it did not envisage itself as the most appropriate long-term owner of the operating company and that it would plan to seek an alternative ownership arrangement in due course. The then Auditor General published a performance audit report about the funicular in October 2009.¹
6. HIE transferred ownership of CML to Natural Assets Investments Ltd (NAIL) in June 2014, following a competitive dialogue procurement exercise. CML thus became a wholly-owned subsidiary of NAIL.

¹ <https://www.audit-scotland.gov.uk/report/review-of-cairngorm-funicular-railway>

Events leading to the establishment of Cairngorm Mountain (Scotland) Ltd

7. In July 2018, CML's consultant engineers undertook a routine annual inspection of the funicular railway and a more detailed inspection shortly after. Following receipt of the engineers' report, which raised potential safety concerns, CML took the funicular railway out of service in September 2018. At the same time, HIE and CML commissioned a specialist engineering company to undertake initial structural assessments. HIE subsequently commissioned additional assessments and peer reviews to include options and costings for any repairs that may be needed.
8. In October 2018, CML requested a working capital loan of up to £1.8 million from HIE in order to ensure the continuation of winter sports activities while the funicular was closed. At its October board meeting HIE rejected CML's request because it concluded that CML could not afford to repay the loan and because CML's parent company, NAIL, was not offering any security if CML defaulted.
9. At the same October meeting, the HIE Board considered wider challenges relating to operations at Cairngorm Mountain and approved expenditure of £1 million to purchase snow-making and snow-spreading equipment in order to provide access to lower level ski areas. It also agreed that HIE officials should consider options to ensure the sustainability of the resort as a viable business and employment provider if CML was unable to continue.
10. On 29 November 2018, CML directors placed the company in administration due to mounting cash flow and creditor pressures. It considered that the suspension of the funicular, with a consequent downturn in business, was a key factor in this. HIE announced in December 2018 that it had established a new subsidiary, Cairngorm Mountain (Scotland) Limited (CMSL), and had reached agreement with the administrators for CMSL to acquire the business and assets of CML. Staff of CML were also to transfer to the new company.

Treatment in HIE's financial statements

11. HIE invested £0.461 million by way of share capital in CMSL to fund the purchase price of the business and assets of CML acquired from the administrator. This investment has been impaired to £0.046 million in HIE's accounts to reflect HIE's valuation of its subsidiary as at 31 March 2019.
12. HIE's 2018/19 accounts value the total ski resort, including the snow-making and snow-spreading equipment, at £0.7 million. A loan of £0.7 million, made to CMSL to provide working capital, has been impaired by 90 per cent in HIE's 2018/19 accounts to reflect the uncertainty of the amount and timing of the loan repayment. HIE has also included an accounting provision of £9.6 million to reflect its obligation to repair the funicular railway on Cairngorm Mountain, a net debtor recoverable from CMSL of £0.111 million for rent, insurance and other expenses incurred on its behalf, and a creditor of £0.287 million relating to CMSL's operations at Cairngorm Mountain.

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13. As a company wholly owned by HIE, CMSL's financial results are consolidated into HIE's 2018/19 group accounts. CMSL generated income of £0.243 million and expenditure of £0.804 million between its establishment in December 2018 and 31 March 2019, an overall deficit for the period of £0.561 million.
 14. HIE spent £0.244 million during 2018/19 on professional legal and accountancy advice associated with establishing CMSL and considering options for the future financial sustainability of the ski resort. HIE has assessed the cost of staff time involved in responding to the situation to date as £0.262 million. Cairngorm Mountain is considered as high risk by HIE and is resulting in significant capacity and resource challenges.
 15. The Parliamentary Accountability Report on page 60 of HIE's accounts notes that the Scottish Government provided HIE with approval to overspend by up to £2.3 million in 2018/19 to cover the cost of operating CMSL. In the event, HIE's total overspend against its resource budget, across all its activities, was £1.8 million. HIE has subsequently confirmed that a similar arrangement has been put in place with the Scottish Government for 2019/20 if CMSL's operating costs result in an overspend. The extent to which the Scottish Government may authorise similar budget flexibility in the longer-term has still to be determined.
 16. HIE's 2018/19 annual report and accounts includes other references to the Cairngorm Mountain:
 - An overview of the circumstances of CML entering administration and its replacement by CMSL (Performance Report page 5)
 - Recognition of the significant financial implications for HIE in funding CMSL and in meeting the costs associated with a solution for the funicular railway (Governance Statement page 49)
 - Recognition that HIE, as owners of the Cairngorm Mountain ski resort, has responsibility for the costs of removing equipment and re-instating the site of the funicular railway to a natural condition (Note 22 Contingent Liabilities page 103).

Next steps for HIE

17. HIE continues to develop proposals for the future operation of the Cairngorm funicular railway, and a Cairngorm Mountain Programme Team has been established to oversee key operational, finance and technical issues. HIE's Director of Communities and Place leads the programme team, which includes staff with experience of business development and property management. One of the programme team's tasks is to work closely with the multi-partner Cairngorm Funicular Response Group to communicate with local communities and businesses over future plans.
18. The original HIE Board Cairngorm Sub-Group, established to consider the future of the resort when CML was expressing concerns about its ability to continue, has remained in place and is supporting HIE's Executive Team in considering issues relating to: the funicular railway, CMSL operations, legacy issues, communications and strategic engagement, and future strategy.

An Advisory Group was also put in place for a short period to support the establishment of CMSL and has now been amalgamated with the Cairngorm Sub-Group.

19. A key issue for HIE is the likely cost of bringing the funicular back to full working order and the development of a business strategy which will provide for the long-term sustainability of the resort. HIE has indicated that its approach will be subject to an options appraisal and a deliverable business case.
20. In early 2018, HIE appointed consultants to develop a five-to-ten-year vision for Cairngorm. The consultants' original report, in November 2018, identified potential for investment of £27 million to transform the resort over the next five-to-ten years. An addendum to the original report was published in June 2019 and provides immediate investment priorities while the funicular railway is out of operation. HIE has confirmed that the funicular will remain out of service over the 2019/20 winter.
21. HIE is seeking to recover amounts due from the previous operator of Cairngorm Mountain under guarantees. HIE has also taken action to protect its legal position as specialist engineering investigations continue in relation to the funicular.

Conclusions


22. The circumstances of CML entering administration and the future of the Cairngorm funicular railway have generated significant public and media interest. It is important that HIE can demonstrate that its decision to transfer CML to NAIL was robust, that it managed its relationship with CML well and that its decision-making around events leading to the company's administration was robust and well-founded. While HIE's intention is to repair and reopen the funicular, it is still not clear how much it will cost to do so, how it will be afforded, or what impact it will have on HIE's financial sustainability. HIE has recognised these risks and raised them with the Scottish Government. Tough decisions are likely to be required over the coming months. As a result, I have decided to prepare a further report on the Cairngorm funicular railway under section 23 of the Public Finance and Accountability (Scotland) Act 2000. I expect to present this report to the Scottish Parliament by spring 2020.

The 2018/19 audit of Highlands and Islands Enterprise

Cairngorm mountain and funicular railway

This report is available in PDF and RTF formats,
along with a podcast summary at:

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