OFFICIAL REPORT
AITHISG OIFIGEIL

Public Audit and Post-legislative Scrutiny Committee

Thursday 10 January 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE
1st Meeting 2019, Session 5

CONVENER

*Jenny Marra (North East Scotland) (Lab)

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Bill Bowman (North East Scotland) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Alex Neil (Airdrie and Shotts) (SNP)
*Anas Sarwar (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Daren Fitzhenry (Scottish Information Commissioner)
Margaret Keyse (Office of the Scottish Information Commissioner)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Public Audit and Post-legislative Scrutiny Committee

Thursday 10 January 2019

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Jenny Marra): Good morning and welcome to the first meeting in 2019 of the Public Audit and Post-legislative Scrutiny Committee. I ask everyone to switch off or turn to silent their electronic devices so that they do not affect the committee's work.

Under agenda item 1, the committee is invited to decide whether to take items 3 and 4 in private. Do members agree to take those items in private?

Members *indicated agreement.*

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

10:00

The Convener: Agenda item 2 is post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. I welcome our witnesses: Daren Fitzhenry is the Scottish Information Commissioner and Margaret Keyse is the head of enforcement at the office of the Scottish Information Commissioner.

I invite Daren Fitzhenry to make a short opening statement.

Daren Fitzhenry (Scottish Information Commissioner): Thank you very much for the opportunity to give evidence as part of the committee's consideration of post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002.

As I set out in the evidence that I gave on 22 March last year, we have in Scotland a freedom of information system that has high levels of public awareness, that is actively used and that results in a lot of information being provided to people who can use it to get involved, to raise concerns, to campaign for change and to participate in the decisions that affect them.

However, it is important not to rest on our laurels. As the committee has heard, concerns have been raised about the system, and it is important to address those. A number of those concerns have been about the freedom of information performance and practice of public authorities and, in particular, the Scottish Government. I am aware that the committee wished to defer detailed consideration of post-legislative scrutiny until I had had the opportunity to proceed with my intervention so that it could consider how that work related to the broader calls for scrutiny.

I can confirm that, as is helpfully set out in the Scottish Parliament information centre briefing, I have completed the assessment phase of the intervention—that is, the consideration of what has gone wrong and the reasons for that—and my conclusions on that and my recommendations for improving the Government's FOI practice were set out in my intervention report. Those recommendations have been accepted by the Scottish Government, and we have now agreed an action plan for it to implement the recommendations.

Therefore, we are now in the implementation and monitoring phase of the intervention, and I stand ready to provide the committee with

answers to any questions that it might have on the intervention generally. However, that is just one intervention, albeit a major one, with a focus on the practice of a particular authority.

I also greatly appreciate the opportunity to update the committee on my views on the legislative and structural FOI issues that could fall within the scope of scrutiny. Areas that the committee might wish to consider include a greater focus on interventions, which would involve drawing on some of the lessons that we learned from the Scottish Government intervention, and changes to the rules on proactive publication to strengthen and update the duty and make the provisions more agile. That might include adding powers of enforcement and introducing a new code of practice to drive the development of proactive publication, taking into account changes in technology and changes in how people access information.

In addition, the current system excludes certain bodies from parts of the 2002 act, notably the Lord Advocate and procurators fiscal, and there is also the First Minister's veto. Those areas are also ripe for reassessment.

I know that the creation of a duty to document was raised by a number of contributors to the previous evidence session and I stand ready to provide evidence on that, if desired.

Finally, as members might expect, there are several technical amendments that my office has considered over the years and identified as being desirable, which I hope could also be considered as part of any post-legislative scrutiny.

The Convener: Thank you very much, Mr Fitzhenry. The committee has a post-legislative function and it will be up to us, at the end of today, to decide whether we undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002.

From looking back at the evidence you gave us on 22 March last year and from listening to you this morning, do I detect that you feel that the 2002 act now needs some post-legislative scrutiny?

Daren Fitzhenry: That is indeed the case, convener. It has been some time since the act was enacted. Society has changed somewhat during that time. In 2002, fewer than 50 per cent of households had internet access. That percentage is now comfortably into the 80s. Society expects and demands more information. There are a number of other initiatives such as open government, open data, digital strategies, and so on. The world has not stopped but the act is frozen in time.

We certainly had some scrutiny and amendment of the act in 2013 but it was not comprehensive. We could develop matters further in a number of areas, particularly in relation to proactive publication and proactive intervention to improve authority practice, which is where a lot of the concerns about the current system lie.

The Convener: You talk about proactive publication. From the evidence that we heard in March last year, I am aware that we operate within a system in which our public authorities hold information and, if members of the public want that information, they have to request it; their request goes through a process and the information comes back to them. It is clear from the evidence—and I think that this is what you are driving at in your point about proactive publication—that other countries, such as some Scandinavian countries, have a duty to publish such information so there is not the push and pull of requesting it. That seems to be a more open way to do business. Is that the kind of model that you would be looking to have here?

Daren Fitzhenry: At the moment, we have a mix of the two. Scotland has a system whereby requests can be made for information if people wish, but we also have an existing duty to publish information. That is centred around the duty to have a publication scheme. All authorities have to have a publication scheme that sets out the classes of information that they will publish. They have a guide to information under that, which sets out what they are actually publishing. Scotland therefore already has a proactive publication system. However, the focus in Scotland to date has been more on the applications than on the publication duty.

There are ways in which we can refocus the effort to show that the publication duty is every bit as important. It is that duty which gets more information to more people. We do not have records that show how many people access all the different public authorities' websites to get information. They are benefiting from FOI laws without recognising that they are doing so.

As set out in my predecessor's report, "Proactive Publication: time for a rethink?", the emphasis on proactive publication is not as strong in Scotland. We can improve on that. Some of the structures that are set up in the legislation, such as the concept of having a publication scheme, are quite old-fashioned. That concept comes from the idea of having a bit of paper that sets out the classes of information that will be published.

In practice, from when FOI started, we have moved from having a number of different publication schemes and morphed into a single-model publication scheme to which all authorities are now signed up. In many ways, we have taken

discretion away. The model has become more centralised. I wonder why we need to persist with the idea of having publication schemes per se when we could just have a code of practice that sets out the classes that need to be implemented and what classes of information need to be published. It would allow authorities to focus more on the information that they are publishing under that code, having regard to the public interest.

The Convener: How does the Scottish system compare with transparency and open government in other countries?

Daren Fitzhenry: There are a number of different ways of dealing with this. Ours is a relatively young system in comparison with those of a number of countries, especially the northern European countries, which have had their systems in place for a long time.

There is a right to information index, which is created by an international organisation. The index sets out a rating system for where the various countries lie in the process. Scotland is not currently rated, being sub-national for those purposes and, therefore, not on the list. However, the United Kingdom is on the list and it lies 42nd out of 123 countries, behind Sweden, which has 101 points, but in front of Russia, which has 98 points.

The UK generally is viewed as being quite good, but bear in mind that the process looks only at the legislation, not at the practice. If there was a system that looked at how good the practice is in different countries, I think that we would see the UK, and Scotland, higher up.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Mr Fitzhenry, your intervention was focused on requests from one particular group of individuals—journalists—to one organisation, namely the Scottish Government. Is that not a very narrow area to look at?

Daren Fitzhenry: The decision to proceed with the intervention was taken because of the amount of concern that had been expressed about the Scottish Government's performance in that area. The Scottish Government is obviously one of the biggest public authorities that we deal with. Within our remit, we have the power to deal with appeals from people who are unhappy with particular decisions, but we also have an assessment power and a power to intervene with authorities that are failing in their FOI practice.

In that case, there was unanimous agreement on a parliamentary motion following a debate, which criticised and, in fact, condemned the Scottish Government's FOI performance. In light of the concerns that were raised, I determined shortly after arriving in post that it was appropriate to look at those concerns, to address them and to see what improvements could be made. In trying to improve the practice of the authority, we focused on the concerns that were raised. As I say, we are in the middle of that process and looking at monitoring and implementation.

Yes, it was one authority, but the intervention related to the powers that I have and to one of my functions, which is to improve authority practice. One of the lessons that we are learning concerns the report that was issued. We go to various conferences and meetings with other authorities and invite them to look at that report to see whether any of our findings in relation to the Scottish Government have a wider read-across to those authorities. We are trying to spread good practice through that report, as well as addressing the specific concerns about that one important authority.

Colin Beattie: Are the journalists a major force in terms of FOI requests and so forth? Do they form a major group?

Daren Fitzhenry: They are certainly a major group of requesters, as we would expect, but they are not the major group, as far as we can ascertain from our statistics. Normal everyday people tend to be the largest group of requesters, but there is no doubt that the media are an important group. The power of the media is, of course, that any issue that they find through their FOI requests can gain wider visibility because they publish the information.

Colin Beattie: My understanding is that the Scottish Government is addressing the issues that were raised and is working with you to resolve them. Is that correct?

Daren Fitzhenry: Yes. The Government has now developed an action plan that we have agreed, and the action plan is in the process of being implemented. We will monitor the process throughout to ascertain how things are progressing and to see whether the plan is achieving the improvements that we would expect.

Colin Beattie: Journalists as a group have particular needs. You touched briefly on the fact that you are looking at how other organisations could learn lessons from this intervention. Will you produce a report on that, or is there anything that we can take from that?

Daren Fitzhenry: It is more a question of going to the authorities and explaining what interventions are, for a start. We are putting a greater emphasis on proactive regulation and on making an intervention that benefits the whole audience of requesters to an authority. We are benefiting a lot of people, rather just the one applicant in an appeal.

10:15

We have taken the lessons learned and, in our normal meetings with groups of authorities and in conferences, we say what an intervention is and what some of the points that we have identified are. We say that people should not worry if they get an intervention because its key purpose is to make things better for the requester and to make the authority better able to meet its obligations, and that they should have a look at our intervention report and see what is there. We do not judge whether there is any improvement in other authorities because of the report; we invite them to read it to see how it might relate to them, bearing in mind that all authorities are different, as they deal with different functions and have different types of information. However, there could be a little nugget of gold in the report, and they might think, "Actually, that's a problem that we have, and that point could help us in our FOI performance."

Colin Beattie: How many interventions have you had up until now?

Daren Fitzhenry: Our interventions are scaleable. They range from a level 1 intervention, which might be a phone call or a quick email to an authority to say that we have noticed something that needs to be fixed, all the way up to a level 3 intervention, which is a Scottish Government, in-depth intervention, and a level 4 intervention, under which specific powers are used.

In 2017-18, there were more than 230 interventions, of which 223 were level 1 stitch-in-time interventions. We noticed that something was wrong and asked for it to be fixed. We hope that a quick phone call or email will solve the problem there and then. On the more detailed level 2 and level 3 interventions, we had seven level 2 interventions and two level 3 interventions. We recently completed two level 4 interventions, which involved enforcement action.

Alex Neil (Airdrie and Shotts) (SNP): My understanding is that there has been a 45 per cent increase in the number of freedom of information requests over the past two years. In 2017, there were 3,050 FOI requests; up until November 2018, there were more than 3,500 FOI requests. Why has there been such a massive increase in FOI requests?

Daren Fitzhenry: Will you clarify whether those are the Scottish Government's numbers?

Alex Neil: Yes, they are.

Daren Fitzhenry: It is difficult to tell exactly why that would be the case. Part of the reason is that there has been a general increase in the use of the provisions across the board in relation to a number of authorities. We have seen an incremental increase in requests for information across authorities. There is also greater public expectation about obtaining public information from authorities, and there is the greater visibility of freedom of information, perhaps because of interventions. Maybe they have made people think that they want to know the answer to a question. A number of the requests for information could be requests that go behind the interventions and look for details of witness statements or other pieces of information associated with them. I think that the increase is due to the increased visibility of freedom of information, an increased desire to use the provisions, and the increased visibility of the Scottish Government's role.

Alex Neil: Is it the case that, in each of those years, fewer than 50 per cent of the FOI requests were made by individual members of the public, and that the other requests came from other sources—from organisations? Is it also the case that about five individuals account for 20 per cent of the requests, and that one individual accounts for 12 per cent of all the requests, with an estimated cost to the public purse of £100,000? Is that a total abuse of the system?

Daren Fitzhenry: I certainly do not know the specific Scottish Government internal numbers and the numbers in relation—

Alex Neil: Those are the numbers that the Scottish Government gave me. Based on those numbers, is the system being abused by a handful of people?

Daren Fitzhenry: If there are any abuses or suspected abuses of the system, there are processes and procedures to deal with that.

Alex Neil: Why have abuses not been dealt with?

Daren Fitzhenry: Why the Scottish Government has not sought to apply provisions might be a question for it to answer.

There is a provision that allows a request for information to be refused on the ground that the request—not the requester—is vexatious. That can take into account several factors including the number of requests, the value of the information that is being sought and so on. We have provided detailed guidance on that. Just last month, a Court of Session judgment gave further clarification on use of the vexatious request provision and what it means.

Alex Neil: It is not just about the number, but the nature of the questions. At a recent *Holyrood* magazine conference, the Minister for Parliamentary Business gave a couple of examples of such questions: the Government was asked how many copies of Ruth Davidson's autobiography had been purchased by the

Scottish Government and how much it had spent in the previous three years on crayons. The FOI legislation was not intended for such purposes. I am probably the only member here who was an MSP when the 2002 act was passed, so I can say that such questions are a total abuse of the legislation.

I am told that in September, one individual sent 84 requests in less than an hour—one every 40 seconds. People are abusing the legislation. Is not it time that we cracked down on such abuse and freed up resources for genuine inquirers?

Daren Fitzhenry: There is a fundamental problem with how that could be achieved beyond the current provisions, because one would be seeking to come to a view on whether a request is worth while, which is a subjective view that will differ from person to person.

In relation to the extreme examples that you have mentioned, I sometimes question why authorities do not seek to rely on the existing provisions. Indeed, at the *Holyrood* conference at which examples were provided, one of the journalists who was speaking said that if he was to put in such a request he would expect to receive a response saying that it was vexatious.

From my interviews with several individuals from the Scottish Government as part of my intervention, I know that there is reluctance to use the vexatious request provision. That is not something that I can control—I cannot make people use it. I can only tell them that the provision is available and that there is recent court guidance on how it can be used, as well as guidance from our office. There is a provision that allows a request to be refused because it is vexatious: it is up to authorities to use it. If an appeal were then to be made, I would consider whether the authority had applied the provision correctly.

Margaret Keyse (Office of the Scottish Information Commissioner): In the Court of Session judgment, we agreed with the Scottish Prison Service that a request that had been made to the service was vexatious. The decision was appealed, but the Court of Session upheld our decision.

Alex Neil: Finally, I remember that in the early days of the Scottish Parliament there were daily stories about members' expenses—for example, on someone who had claimed £6 for a fish supper, or something like that, which was rather stupid of the individual, but that is another matter. The Presiding Officer, George Reid, changed the system such that all expenses claims go on the Parliament's website. Since then, we have had practically no such FOI requests because the information is published.

Is there a lesson there—for example, for procurement contracts and everything that the Scottish Government orders, whether that is Ruth Davidson's autobiography or mine, when it comes out? There will be many more sales of that than of Ruth Davidson's—

The Convener: A question please, Mr Neil.

Alex Neil: Can we take a lesson from how the Scottish Parliament handled the expenses issue, which had become a victim of FOI, by publishing all information and leaving it up to people to dig for themselves? Can we not do something similar across the board, as other countries do?

The Convener: Did we not already touch on that in the point about proactive publication?

Alex Neil: My question is whether we should take a much more comprehensive approach.

Daren Fitzhenry: That is one of the benefits of proactive publication. Another example is that it builds up trust. Our Ipsos MORI polling shows that 77 per cent of people are more likely to trust an authority that publishes more information. There are many benefits to proactive publication. We cannot say for certain that publishing more things will mean fewer requests for information, which will vary according to the type of information that you put out. However, Alex Neil has highlighted a clear example of an area in which publication would greatly reduce requests for information.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Good morning. How did you deal with issues that came up last March—complaints about lack of minute taking and failure to create information? I remember that in the discussion that we had at committee, you clearly stated that such things do not fall within the scope of the 2002 act, so how have you dealt with them?

Daren Fitzhenry: The creation of records and the duty to document things, which a number of contributors mentioned, are difficult issues. Under the current system and freedom of information legislation, there is no duty to document, and the focus is very much on provision and publication of information that is held by the authority in question. However, in a number of decisions, we have drawn attention to the fact that information that we expected to be there was not there.

After what happened in March, we looked again at our various documents and policies, and we found reference in our section 61 code of practice to creation of records. However, that code of practice—which, I point out, sets out best practice and is not a legal duty—refers to authorities having procedures to decide what information they should keep, and the term "keep" is interpreted very widely to include creation of information. It means that authorities should consider a number

of factors in determining what information should be created. Again, it is all very procedural. The code does not go into detail on the issue and does not say—certainly, I cannot say—"You must record X and Y." The current processes are very quiet on that.

There is also the question whether such issues live under freedom of information or records management; different approaches are taken in different countries. For example, in British Columbia, a recent enactment very much places the matter with the chief records officer, who may issue directions or guidance on information, including on creation of records, whereas in Denmark, it is seen as more of a freedom of information function.

There are also different approaches to whether there should be a general duty to publish documents. New Zealand has a very wide duty in that respect, with the problem there being that that is difficult to enforce, while other countries have more specific lists of information that must be published.

Willie Coffey: What about the existence or otherwise of minutes? The big issue at the time was that no minutes were kept, but clearly that did not fall within the scope of the legislation. Have you made any comments about that? Are you making recommendations with regard to your expectations in that respect, or are you suggesting that we look at that as part of our post-legislative scrutiny function with a view to extending the powers in the legislation?

Daren Fitzhenry: That is certainly a very important area that should be looked at. Ultimately, not recording information frustrates the right to access the information later. As I have said, other countries are working on the issue. We already have Scottish legislation on records, so perhaps that is where this aspect should live. I am not saying that it should definitely live in the freedom of information legislation, but it is certainly an interesting area that justifies a closer look.

There are many ways of dealing with the problem, and it comes with a number of associated difficulties. Should central Government only or all public authorities be covered? What should be minuted? Most people would say that decisions and the reasons for those decisions should definitely be minuted, but the question then is which meetings should or should not be minuted. It is all about having a view on those matters. As far as I am concerned, the more that is minuted, the more we can release, which is a positive thing.

10:30

Willie Coffey: You said that you are in the implementation and monitoring phase, and you stressed the importance of observing practice from now on. How will you monitor practice? Will you let us know how it is going annually, for example?

Daren Fitzhenry: In relation to monitoring of practice, we are in active discussions with the Government about what policies it will put in place. If we think that a particular provision would not work or would create problems that we had previously, we will discuss how it can be changed. We have a good, solid baseline for that.

A number of bloggers and others have kept us up to date on cases in which they have had problems; we are looking at those to find out whether we are seeing a sea change yet. We are getting monthly inputs from the Government on its freedom of information statistics, so we are monitoring, in statistical terms, how things are going.

Willie Coffey: Surely you will not monitor just the Scottish Government.

Daren Fitzhenry: No—we monitor all authorities every three months, but in relation to the intervention in question, the Scottish Government is providing us with monthly figures, which is not the normal course, and we are monitoring them to see how things go.

The Scottish Parliament passed a motion that asked us to provide updates on the process, and it is my intention to honour that by providing an update, certainly for the first year. How many updates are provided thereafter will depend on how long the monitoring phase continues; there might be one or two updates after that.

The Convener: I want to pick up on Willie Coffey's question about minuting of meetings. Last March, on the back of a letter from 23 Scottish journalists, which you will be aware of, we heard evidence that they felt that the Scottish Government was no longer taking minutes of meetings because it knew that those minutes would be the subject of FOI requests. We were given the example of meetings that were held between the then finance secretary, John Swinney, and Sir Angus Grossart about the Scottish Futures Trust. Does that concern you?

Daren Fitzhenry: When an important meeting is not minuted, that means that there is a lack of information that might be of interest to people. The question of which meetings should be minuted and what detail should be included is dealt with in the ministerial code and other places. At the moment, we have codes of practice and a rather disjointed system. Currently, it is not within my remit to say, "You must have that type of minute and you must

record this type of meeting." It is important to have a detailed and intelligent conversation about where those parameters should truly lie. As you would expect, as information commissioner, I am keen on pushing out as much information as possible.

The Convener: This week, there is a debate about meetings that took place between the current First Minister and the former First Minister about a Scottish Government investigation. Given the enormity and severity of the issues, would you have expected those meetings to have been minuted?

Daren Fitzhenry: Again, unfortunately, in the system as it currently is, that is not an area that I have any superintendence over—but if somebody is looking for information about those meetings and there are no minutes, they cannot get the information.

The Convener: I think that you said earlier that for transparency, the more that can be minuted, the better.

Daren Fitzhenry: Yes. The question then is about what are the legal duties to minute. There is always a balance to be struck. If absolutely every email, every bit of correspondence and every conversation in the corridor was minuted, that would create the potential for bureaucracy that would cause everything to grind to a halt. Data protection issues must also be considered in respect of what is kept and for how long. There are a lot of moving parts: it is not a straightforward case of saying, "Everything must be recorded." However, in respect of freedom of information, the more information that is recorded, the more can be provided on request.

The Convener: I presume that the question of minuting meetings generally is one of the reasons why you feel that we need post-legislative scrutiny.

Daren Fitzhenry: It is because of that, absolutely—but it is not for me, at the moment, to say where the parameters lie.

The Convener: No—that could be a job for the committee.

Bill Bowman (North East Scotland) (Con): We have focused on the Scottish Government, but you said that you have made other interventions. When looking at other public bodies, have you identified any common issues?

Daren Fitzhenry: The issues vary between bodies. Some of them relate to clearance—for example, who signs off whether information is released. In some authorities—this is not universal—clearance is at a very high level. When decision making is always at the top level, that slows things down because there are a number of upward leaps to make before getting to the ultimate decision maker. We would much rather have power devolved down to people who could be trusted to make those judgment calls. Occasionally, something will be so sensitive that it has to be dealt with by people at the top end of the organisation, but requiring high-level clearance is a general issue in a number of authorities.

We sometimes spot general planning problems in authorities' quarterly statistics that are caused by staff planning issues, unexpected absences and the lack of a back-up. Procedures are needed to deal with that.

With larger organisations, training in particular can be more of an issue, because the more that you delegate the functions, the greater the need is for the people to whom the functions are delegated to be properly trained. In larger organisations, that is not always the case.

Those are just a few examples.

Bill Bowman: Those sound like operational issues rather than issues to do with things not being disclosed or to do with somebody abusing the system.

Daren Fitzhenry: Yes—it is often procedural. That is mentioned in my intervention into the Scottish Government. You are unlikely to find any malice behind any delays. It is very often to do with the procedures, and it is about real people having to deal with the real applications in real time. Things are not always perfect and problems occur. Sometimes bad habits creep in. It is a matter of looking at the structure of the system and asking, "Is your process actually helping you as an organisation and helping your people who have to manage it, or is your process part of the problem? Are you properly training your people to deal with it?"

Bill Bowman: Have the freedom of information processes just been set up and forgotten about, or are the processes under review?

Daren Fitzhenry: Largely, we find that the processes are under review. Certainly the larger organisations have them under review. We sometimes notice delays in updating publication schemes. There is not as much emphasis on the publication side as there is on the management of requests for information. As you might expect, the authorities that get fewer requests for information may be less likely to keep revisiting their policies and procedures. Because they have less demand, it is not as high up on their agenda.

Bill Bowman: I will follow on from Alex Neil's question about requests. Is the general trend across all bodies that the number of requests is increasing?

Daren Fitzhenry: Overall, the number of requests across Scotland has certainly gone up,

although I am quite sure that, in some authorities, the number has not gone up. I think that the number of total requests last year came to 77,528, which was up 5 per cent from the previous financial year. Those figures are given to us by the authorities.

Bill Bowman: There is an upward trend.

Daren Fitzhenry: There has been a gradual increase over a number of years.

Liam Kerr (North East Scotland) (Con): For the avoidance of doubt, do you consider that the 2002 act is frozen in time and ripe for post-legislative review? You mentioned the need for a new code, the need to consider technological changes and the need to reassess excluded bodies and the First Minister's veto.

If I understand your response to the convener's question correctly, there is merit in reviewing the act to ensure that meetings cannot be deemed informal in order to avoid scrutiny, as some people mentioned on 22 March 2018. Will you clarify whether you think that this committee should review the act?

Daren Fitzhenry: Yes, that is my view.

Liam Kerr: Fantastic—thank you.

You mentioned that there is a disconnect between the legislation and practice. You talked about how the legislation is, I think, ranked 42nd, but that practice is better. Does that concern you? Practice can change, but the legislation presumably cannot. Should we look at where the legislation falls short, so that we can make sure that it mirrors the practice, keeping it at a high level?

Daren Fitzhenry: It is certainly a case of making sure that the legislation supports the practice. As a regulator, I want to be able to give the best, most efficient and effective regulation that I can. That sometimes means changing how we do things; it also means having the correct tools in my toolkit to do it.

One thing that I mentioned in my initial statement was the increasing emphasis on intervention, because that is a way of improving practice across the board. My current enforcement powers need to be looked at as part of that. For example, although I can issue an enforcement notice for breaches of the act, I cannot issue an enforcement notice for breaches of the code of practice. All that I can do is issue a practice recommendation, which is just that—a recommendation.

That might work with public authorities because, to give them credit, they serve the public, they want to do a good job and they do not want to be criticised for not doing a good job. When we look at the future scope of freedom of information—we have a forthcoming consultation on expanding freedom of information to include privately owned bodies that deliver public services—we have to consider whether a practice recommendation, or the threat of one, would have the same weight with bodies that have shareholders and a bottom line to meet as it does with public bodies.

In the push to be more proactive in our regulation, I think that additional powers would be useful and, in particular, the ability to enforce more strongly codes of practice, should it come to that. Part of our intervention involved questioning witnesses. I have no powers under the act to compel witnesses to come and give evidence to me. We were fortunate that the Scottish Government was accommodating and agreed to do that. Again, if that was in the legislation, that would help our practice. It has worked okay to date, but if an authority decided to not be accommodating, that would make my life much more difficult and the product that I provide would not be as good.

In relation to proactive publication, as I mentioned before, if the tools are not flexible enough—such as relying on the old-fashioned concept of a publication scheme—it detracts from what the focus of the organisation should be, which is what it can publish and push out there.

Linked to that, having an enforceable code of practice that focuses on that area would allow the regulator to have much greater control and influence in keeping practice standards high. I agree that there is a close connection between practice and legislation, and the legislation should always support the improvement of better practice.

Liam Kerr: I understand.

I have a final question. Since the committee meeting on 22 March 2018, the general data protection regulation has come into force. Has that had any noticeable impact on FOI requests, the disclosures being made or the operation of the act?

Daren Fitzhenry: We have not yet seen any noticeable impact. We had partially expected to see an increased caution—if I can put it that way—on the part of authorities, but we are yet to see any material evidence of that. We are still in the early days of the GDPR coming into force. Of course, FOI applications have been made after that date, and there will be reviews and appeals, too. Perhaps Margaret Keyse has something to add.

10:45

Margaret Keyse: Unfortunately, we are on transitional provisions at the moment; we are still

making decisions under the old legislation for cases in which the initial decision by the public authority was made under that legislation. However, we are starting to see new applications coming through and we are pleasantly surprised at the practical and good-practice approach that is being taken by authorities.

Anas Sarwar (Glasgow) (Lab): Good morning, Mr Fitzhenry. Thank you for your frank answers and for clearly stating your view as the information commissioner that we should have post-legislative scrutiny of the 2002 act. That is very helpful and welcome.

I have a couple of follow-ups to Alex Neil's questions. I should say that I have already pre-ordered Alex's book. There is an alternative view on the increase in numbers, is there not? Has any analysis been done on the increase in the number of freedom of information requests that parliamentarians and parliamentary researchers have made to the Scottish Government? There could be a direct correlation between that and a drop in the quality of the answers to parliamentary questions, because that could result in an increase in the number of FOI requests.

Daren Fitzhenry: I have not conducted an analysis of the Scottish Government's requests and where they are coming from, but we have seen a noticeable number of requests from political researchers and elected officials in public authorities. There will always be a link between what information is pushed out and the information that people have to seek.

Some people will use a scattergun approach and seek information from various sources in different ways, while others will look for the best and easiest way to get the information. If people are not getting answers in some of the more traditional ways, I have no doubt that they will move on and use freedom of information requests as an alternative way of getting the information.

Anas Sarwar: More often than not, if I submit a parliamentary question, I will submit an identical FOI request to the relevant Government department, in the hope that I will get the right answer from one of the two. Do you agree that the FOI scheme should not be seen as an alternative to parliamentary scrutiny and the answering of parliamentary questions, and that both processes should be robust?

Daren Fitzhenry: Absolutely. The issue of parliamentary questions is again squarely outside my bailiwick—I can speak only to freedom of information. However, it is very important that the FOI system is robust. It is a rights-based system; everyone has the right to access the information held by Scottish public authorities, which is why the request-for-information part of the legislation is still alive and kicking and fit for purpose. It is based on a simple right and it is important to safeguard that.

Anas Sarwar: Do you also accept that, if the number of FOI requests from parliamentarians and parliamentary researchers fell, it would be a significant saving to the public purse? That is perhaps another reason why parliamentary questions should be answered appropriately in the first place.

Daren Fitzhenry: Any publication or push-out of information may have an impact on the number of FOI requests, with a resultant saving. That will vary from public authority to public authority.

Anas Sarwar: Do you think that any meeting that takes place, whether it is with an individual or an organisation lobbying the Scottish Government or a minister on any matter relating to the Scottish Government, should be minuted?

Daren Fitzhenry: I am sorry, I—

Anas Sarwar: Should any meeting that takes place that involves lobbying the Government, whether that is by an individual or an organisation, be minuted?

Daren Fitzhenry: That is an interesting question. The Lobbying (Scotland) Act 2016 deals with one half of that—the individuals who are lobbying. The question then is whether the way to deal with the issue in legislation is to have the mirror image of that, whereby the official who holds the meeting also has to register it. That is certainly one potential way forward, but that is a matter—

Anas Sarwar: If, for example, an individual is lobbying the First Minister about a Scottish Government matter, should that meeting be minuted?

Daren Fitzhenry: Yes, assuming that that is in accordance with the current rules; they should do what is in accordance with the current rules. What the future rules are should—if the committee so chooses—be part of the discussion that the committee has. As I made clear, my position is that we should minute anything of importance—that is, any important decisions and issues that relate to those important decisions. The more information that is minuted, the more information that can go out to people. I am not, at the moment, in a position to go outside my bailiwick on the current construct.

Anas Sarwar: I have one last question. Do you think that only the decisions should be minuted, or should the content of the discussions—not the detailed content, but the issues that are discussed—be minuted, too?

Daren Fitzhenry: Simply recording that a meeting occurred does not provide an awful lot of information. In the spirit of openness and transparency, it will always be of benefit to those who are seeking information to have some indication of what was discussed at that meeting.

The Convener: When we took evidence on this issue in March 2018, a broad theme of that discussion was the scope of the 2002 act. The Scottish Government recently extended the scope of FOI to include some arm's-length organisations, such as those that provide leisure and culture services to councils and private prison contracts. However, we heard evidence last year that people felt that the extension had not gone far enough and that other bodies needed to fall within the act's ambit. I would like to hear Daren Fitzhenry's views on that issue. Do you feel that other organisations should be included? Specifically, should organisations that provide services to the Scottish Futures Trust come under the ambit of the act?

Daren Fitzhenry: The issue of scope is important. Over the years, we have seen a change in the way that public services are provided across the board, with a move towards more and more public services that were historically provided by public bodies being outsourced to other bodies. As a result, there is a deficit in the bodies that are subject to the 2002 act. The committee will not be surprised to hear that, in line with my predecessor, I support the expansion of the act to include bodies that provide those public functions.

The Scottish Government has announced its intention to have a consultation on a number of those bodies, and we will actively involve ourselves in that consultation to press for greater extension of the act. The functions of a number of arm's-length organisations that provide public services and which are involved in the expenditure of large sums of public money should be looked at. The detail has to be worked out to see which of those bodies—and particularly which functions—should be included. Private companies that provide a public function might also have a number of private functions as part of the rest of their duty, and it is important that we focus on their public functions. That is where the detail comes in.

With regard to scrutiny, there might be merit in looking at sections 5 and 7 of FOISA. For example, a participant at the *Holyrood* FOI conference in December mentioned to me that, under one reading of the current legislation, a body could be designated in respect of a specific function under the Freedom of Information (Scotland) Act 2002 and thereby made subject to the environmental information regulations for all of their functions. I have not yet come to a definitive view on whether that interpretation is correct but, on the face of it, that would be an arguable position to take. If we are looking at extending the act to cover other bodies, we should remove blocks to that happening and make the process as easy as possible to assure bodies that, if we are pushing the act out to them, it will cover their public functions and no more than that.

The Convener: I am sorry to interrupt, but, again, is that something that could be done through post-legislative scrutiny?

Daren Fitzhenry: Yes.

The Convener: I want to drill down a wee bit into the Scottish Futures Trust issue. From reports in the press, I understand that the Scottish Government consultation that you mentioned is going ahead and that other bodies are being considered, but I believe that the Scottish Government was unable to confirm that the companies that provide services to the Scottish Futures Trust would be included within the ambit of that consultation. Do you believe that they should be?

Daren Fitzhenry: I think that we should be having that discussion as part of the consultation, and a view can be taken thereafter. We should be casting quite a wide net in the consultation. Of course, that is a matter for the Government, but I think that it would be wrong to cut off the discussion at that level. There should be a wider discussion, and a view can be taken at the end of that, once everybody has been able to put their views.

Margaret Keyse: There is, in fact, a duty on the Scottish ministers to consult everyone whom they are considering covering, everyone whom they consider to represent such persons and other persons whom they consider appropriate. That is in the legislation.

The Convener: The issue is of huge interest to this committee, because it is our job to follow the public pound. Currently, the budget contains £2.7 billion of public money involving projects that come under the remit of the Scottish Futures Trust, but all of that could cost the taxpayer something in the region of £9 billion once the interest comes in. Given the enormity of that expenditure—and if, at the end of our post-legislative scrutiny, we decide to pursue the matter—would you like to see those companies covered by FOI?

Daren Fitzhenry: Yes. I would certainly like a lot more focus on such large amounts of public money and on the public functions that that money is concerned with, and I would like the scope of the 2002 act to be extended to cover those areas. As for the detail of how that would work, that is, as you would expect, something that we will have to work up in our consultation response.

The Convener: I do not want to let you leave this morning without giving you a chance to tell us whether you would like any other parts of the 2002 act to be reviewed. First, are there other areas that you think should fall within the scope and remit of FOI? Secondly, are there any other parts of the act that you would like to be reviewed?

Daren Fitzhenry: In relation to the scope of the 2002 act, the consultation is the one big area in which there is a lot of interest both internationally and nationally. It is important to focus on that. Obviously, we are still awaiting the section 5 order to extend FOISA to registered social landlords, but we are looking forward to that occurring imminently so that we can proceed with our work on the matter.

Sections 48 and 52 of the 2002 act relate to issues that I briefly mentioned earlier. On section 48, which concerns the exclusion of an appeal to me in relation to decisions taken by procurators fiscal and the Lord Advocate, I know from the memoranda that were produced at the time that it is based on section 48 of the Scotland Act 1998. That section is about the decisions of the Lord Advocate in relation to his role as the head of the system of prosecutions in Scotland and the investigation of deaths being carried out independently of any other person, and the view was that a decision whether to release information under FOISA was also prohibited by that.

However, I am not sure that section 48 of the 1998 act is as prescriptive as that, because I do not believe that, when making a decision on freedom of information, the Lord Advocate is acting in his capacity as the head of those systems. I think that he is acting very much as any other Scottish public authority acts under the freedom of information system. We have a system in Scotland whereby there is no appeal to an independent body in relation to that information. That is not the case in England and Wales, where the decisions of the Crown Prosecution Service can be examined by the Information Commissioner's Office, and it means that we have a deficit in relation to the rest of the United Kingdom in that respect. I think that that is worthy of examination.

11:00

Section 52 of the 2002 act concerns the First Minister's veto. It relates to the Scottish Administration and cases involving certain exemptions, in relation to which the First Minister can, in effect, state that a decision notice or an enforcement notice that I have issued is to have no effect. That power has never been used in Scotland. The equivalent provisions in England and Wales have been used on a number of occasions by ministers, although courts have clamped down on the use of that power and have reduced its scope.

However, there seems to be an anomaly here. We have a system in which a matter goes to an independent regulator, but there can be an appeal on a point of law with regard to whether I have got it wrong. I think that the law should apply to all parts of the Scottish Administration as it does to any other Scottish public body, and I do not think that there is any need for this get-out-of-jail-free card. That said, I am pleased that, to date, the view has been that there has been no need for any of the First Ministers to apply the power.

Those are two areas where there is an anomaly in scope, and I would like those areas to be revisited, if the committee would consider doing so.

The Convener: As members have no more questions, I thank both witnesses for giving evidence this morning, and I close the public part of this meeting.

11:01

Meeting continued in private until 11:11.

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