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The Scottish Parliament
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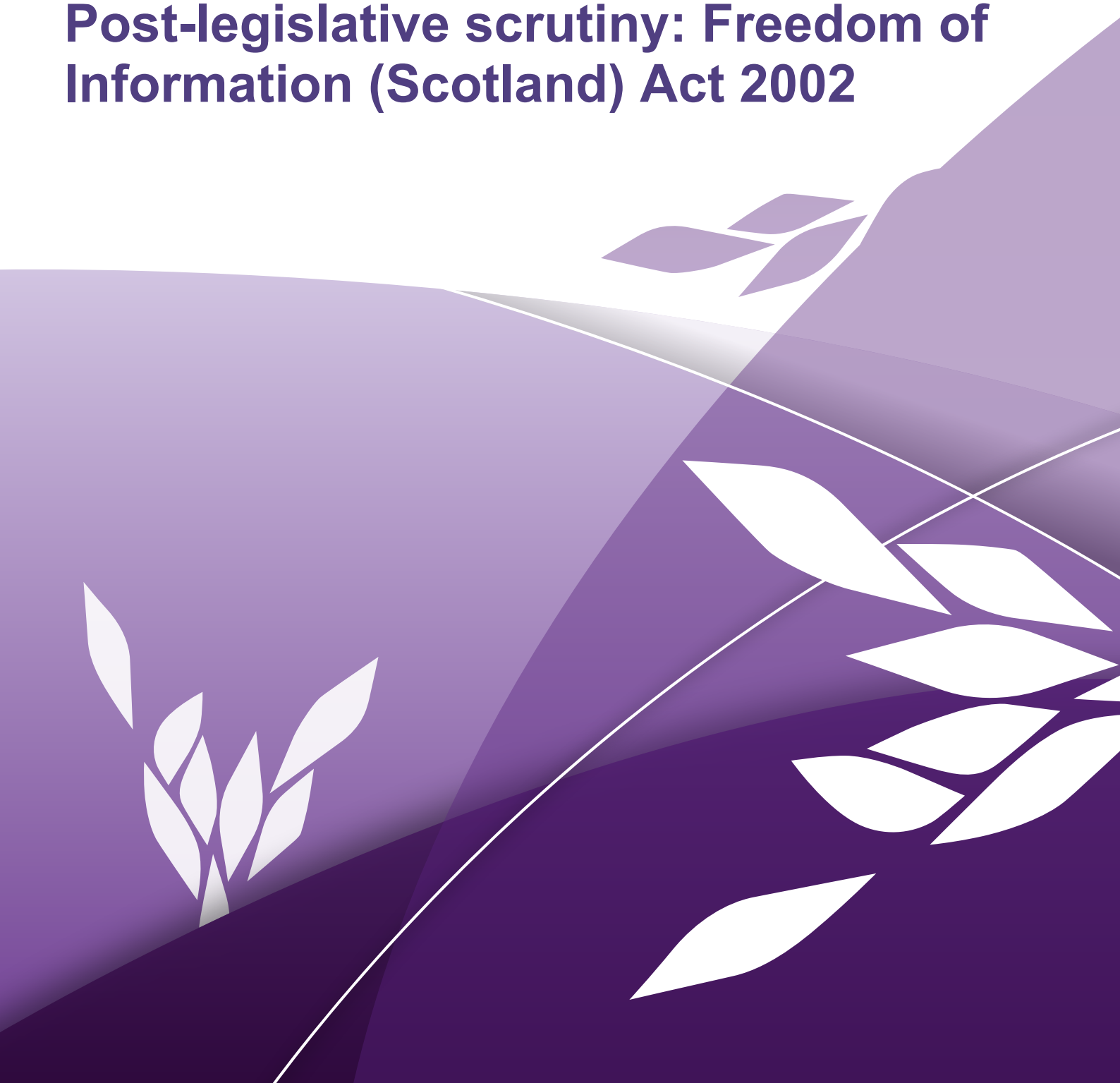
Public Audit and Post-legislative Scrutiny Committee
Comataidh Sgrùdadh Poblach agus Iar-reachdail

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



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Contents

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- Anas Sarwar MSP (Acting Convener from 5 March 2020).
- Neil Bibby MSP (From 5 March 2020).

Introduction

1. The Freedom of Information (Scotland) Act 2002 ("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 initially 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 ("SIC") at its meeting on 10 January 2019 and, following that evidence session, agreed to undertake post-legislative scrutiny of FOISA.

2. The Committee launched a call for evidence on 6 March 2019 in response to which 58 written submissions were received. Whilst a number of responses were received from journalists, MSPs and organisations who have used the Act, the Committee would have liked to have seen a greater number of responses from private individuals with experience of making requests for information. All written submissions received can be accessed on the Committee's website .

3. Between September and December 2019, the Committee held five oral evidence sessions in which it heard from a wide range of stakeholders including users of FOISA, public authorities subject to the Act, academics, the SIC and the Minister for Parliamentary Business and Veterans ("the Minister"). The official reports of these evidence sessions can be accessed on the Committee's website. The Committee wishes to place on record its thanks to all those organisations and individuals who helped inform its post-legislative scrutiny of FOISA.

4. This report summarises the evidence considered by the Committee and sets out its conclusions, findings and recommendations. The Committee's recommendations are reproduced below.

Conclusions and recommendations

Overall impact of FOISA

5. **The Committee recognises that FOISA has brought important benefits in terms of greater transparency and accountability of public authorities in Scotland. However, there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication. A number of recommendations are made throughout this report. While some of the proposed improvements are a matter of implementation, others are likely to require an amendment to FOISA. The Committee recommends that the Scottish Government consult on the detail of the proposed changes before bringing forward the necessary legislation.**

Who is covered

6. **It would appear to the Committee from the evidence that it has received that FOISA has failed to keep pace with the changing nature of public service delivery in Scotland, meaning that a number of organisations that deliver public services and/or are in receipt of significant public funds do not fall within its scope.**

7. **The Committee considers that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation**.

8. **The Committee notes that the Scottish Government's consultation on the extension of FOISA invites views on whether to include "organisations providing services on behalf of the public sector" not already subject to the Act. The Committee agrees that, in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.**

9. **The Committee is concerned at the slow pace by which organisations have been designated under section 5 of the Act. Witnesses commented that even where consultation has taken place, there has been considerable delay before a designation has been made. This suggests that the current legislation is insufficiently nimble to keep pace with the changing nature of**

the public sector landscape. As such, the Committee considers that changes need to be made to FOISA to address this.

10. **The Committee recognises that any solution needs to be proportionate. It therefore supports, in principle, the idea of a "factors" approach to the extension of FOISA, which is based on functional tests, such as the extent to which an organisation is delivering a public function; the degree of public interest in relation to the function/service being delivered and the cost to the public purse in delivering the function or service.**

11. **The Committee is also attracted to the idea of the legislation being amended to introduce a "gateway clause" which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. As such, the Committee recommends that the Scottish Government consults on amending FOISA to introduce a mechanism by which relevant elements of non-public sector bodies would automatically fall within the scope of FOISA if they fulfilled certain criteria relating to the provision of public services or functions and/or receipt of significant public funds.**

12. **The Committee also considers that the Scottish Government should consult on amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.**

13. **Finally, the Committee considers that FOISA should be amended to address the current anomaly whereby bodies jointly owned by two or more public authorities do not fall within the scope of FOISA.**

What is covered by the Act

14. **The evidence received by the Committee suggests that there has been a shift in recent years in the level of information being routinely recorded in connection with official public business. At the same time, a number of users of the Act have expressed concerns about the use of unofficial**

channels of communication, such as Whatsapp and private emails, and the extent to which such information is accessible under FOISA.

15. **The freedom of information regime is underpinned by effective record keeping and management. The Committee emphasises the importance of documenting and recording relevant information. It is clear that there should be no deliberate attempt to evade FOISA by failing to do so. The Committee considers that much greater emphasis needs to be given by the public sector as a whole to adequately creating information trails, such as relevant drafts, memos, emails, correspondence and minutes of meetings, which show how key decisions have been reached and how public funds have been spent.**

16. **The Committee notes suggestions raised in evidence that tools such as WhatsApp messages and texts were being used for official business along with concerns about the use of private email accounts by Ministers. While there appeared to be no dispute that such information is covered by FOISA, the Committee considers that there may be merit in the legislation being amended to make explicit what is meant by the term "information." Consideration should also be given by the Scottish Information Commissioner (SIC) and the Scottish Government as to whether further guidance is required to ensure that such information is retained and accessible in an appropriate format so that it can provided under FOISA.**

17. **The Committee recognises that any system requiring specified information to be recorded must be enforceable. As such, if there is a duty to record, it is important that there are clear definitions of what should be documented. The Committee considers that there would be merit in legislation setting a requirement for certain key information to be recorded; for example, minutes of ministerial meetings or Scottish Government meetings with external organisations. The Committee recommends that the Scottish Government consult on the type of provision that could be incorporated into legislation and how best to ensure that it would be enforceable. In the first instance, the Scottish Government may wish to commission research into the approaches to this issue in other jurisdictions to seek to identify what models work well (and what do not).**

18. **The Committee acknowledges the evidence from witnesses, including the SIC and the Scottish Government, that the section 61 code of practice has been superseded by relevant records management legislation and notes proposals that any provision concerning a duty to document should be made to that legislation rather than to FOISA. This appears to be a sensible approach and one that the Committee supports.**

Proactive publication

19. **It is clear from the evidence received by the Committee that the aspiration for FOISA to drive proactive publication has not been fully realised. While public authorities highlighted positive examples of proactive publication, the Campaign for Freedom of Information in Scotland (CFoIS) considered that there had been a "regression" in what was published.**

20. **There was a general consensus that the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information. The SIC recommended that the requirement for public authorities to adopt a publication scheme should be removed and replaced with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency. The Committee recommends that the Scottish Government consult on this amendment to FOISA.**

21. **The Committee also considers that public authorities should routinely publish their responses to FOI requests (with any personal data removed).**

22. **However, it is evident to the Committee that, even with these developments, there needs to be a significant cultural shift in the way in which public authorities approach proactive publication. In particular, as a first step, authorities need to think carefully about how the public wishes to access the information that they hold - whether by topic, sector or geographical area - and reflect this in the way in which they create, store and publish information. The Committee recognises that, in the short term, the development of a coherent system of proactive publication may require an initial increase in resources, but notes the significant benefits in the longer-term, including increasing public trust in public authorities, but also in reducing the number of requests.**

23. **The Committee sees a clear role for both the SIC and the Scottish Government on leading in the promotion of proactive publication, including by developing comprehensive guidance and sharing good practice. The Committee also sees a continuing role for the SIC in monitoring progress on an ongoing basis and in intervening to encourage proactive publication where it appears that sufficient progress has not been made.**

Resourcing and fees

24. **A key issue raised by public authority respondents was the level of resources required to respond to requests for information, something that was seen as particularly challenging in the context of budget constraints and increased demand for public services. The Committee notes that last year the number of requests reached a record high of almost 84,000, a rise of 8% compared to the previous year.**

25. **While, in general, there was little appetite among witnesses to increase the fees that could be charged under FOISA for responding to requests for information, public authority respondents emphasised that, in practice, the fees that could be charged did not compensate for the amount of work involved. Both the Scottish Government and the SIC suggested that a better approach might be to estimate the amount of staff time involved in dealing with the request, rather than the cost of complying. The Committee recommends that the Scottish Government consult on this option as part of its consultation on other legislative changes recommended in this report.**

26. **The Committee considers that there needs to be a fundamental shift in the way in which FOI is viewed in many public bodies. In essence, public sector bodies need to view FOI as an essential element of public service provision and ensure that it is resourced accordingly.**

27. **Both the SIC and the Scottish Government emphasised that the resource issues could be addressed by better and more efficient ways of working. As noted above, the Committee considers that a significant shift towards proactive publication needs to take place, and notes that in the longer term, such an approach is likely to reduce the number of requests for information to which authorities are required to respond and, in so doing, reduce the pressure on their resources of responding to such requests.**

Requests for information

28. **The Committee understands the frustrations of users of the Act who have experienced difficulties in requesting information due to the different arrangements that public authorities have established to receive FOI requests. On the other hand, the Committee notes that establishing a specific format, route or template for requesting information could result in frustrating an individual's basic right to information.**

29. **The Committee considers, however, that there should be regular monitoring of the request process across public authorities to ensure that the process is as accessible as possible.**

30. **The Committee considers that there may be benefit in amending the law to allow public authorities to transfer requests in a similar manner to that permitted under the Environmental Information (Scotland) Regulations 2004 (EIRs). It recommends that the Scottish Government consult on this aspect when consulting on the other legislative changes proposed in this report.**

31. **The Committee emphasises the important principle of the legislation being applicant blind and that all those who make requests for information should be treated in the same way.**

32. **The Committee acknowledges that users of FOISA, including journalists and MSPs, have raised serious concerns about the way in which, on occasion, their FOI requests have been handled by public authorities, in particular by the Scottish Government. These issues have been examined in some detail in the SIC's intervention report and the Committee notes that the SIC is still monitoring the Scottish Government's implementation of its action plan. The Committee notes that the Scottish Government has subsequently put in place revised guidance for handling requests to address the SIC's concerns.**

33. **The Committee is in no doubt that journalists (and others) will continue to monitor the treatment of their requests by the Scottish Government (or by any other public authority) and raise concerns where they consider that their requests are being treated differently because of their profession.**

34. **The Committee anticipates that the SIC will continue to monitor the treatment of different classes or categories of applicants to ensure that there is no differential treatment of users of the Act.**

35. **The Committee notes that a number of authorities have put in place internal processes so that the identity of the applicant is not known by the team retrieving the information and considers this to be good practice.**

36. **The Committee recognises the concerns of users of the Act and campaigners about the potential extension of the term "vexatious" or by**

making it easier to use. It also acknowledges the sensitivities and difficulties in objectively assessing what might be considered a "vexatious" request.

37. **The Committee also notes the evidence from public authorities who indicated that there were a small number of individuals who were not using the Act in the spirit in which it was designed. The Committee further notes, however, that public authorities appear to be reluctant to use the vexatious provision within the Act (section 14) in such cases.**

38. **The Committee recommends that the use of section 14 of the Act is revisited to ensure that the SIC has sufficient powers to address concerns about vexatious requests. It recognises that the situation may be dealt with by the provision of more detailed guidance from the SIC, including case studies (for example) of requests that may or may not be considered vexatious.**

39. **A number of submissions from users of the Act commented on the delays experienced in receiving responses to FOI requests. On the other hand, the Committee notes the evidence from the SIC that, over the past three years, the rate of responses being made on time has been around 85 per cent consistently across public authorities, which is relatively high. It is clearly important for rates of responses across the public sector to be monitored and for appropriate action to be taken by the SIC if it appears that a public authority is regularly responding outwith the 20 day deadline or there is evidence to suggest that the level of late responses in respect of specific categories of requesters is particularly high.**

40. **Evidence from some public authorities also suggested that they worked to the 20 day limit rather than aiming to issue responses promptly, as required by the Act. The Committee considers that further promotion work may be required by the SIC to ensure that all public authorities are aware that the 20 day response timescale provided for by the Act is a limit, not a target and that authorities should be aiming to respond promptly.**

41. **In the event that a public authority needs to seek clarification from a requestor in respect of the information they are seeking, FOISA provides that the clock is effectively reset to zero and a new 20 day deadline applies from the date on which the clarification was received. Some evidence to the Committee suggested that officials were asking for further information towards the end of the 20 day limit, rather than requesting clarification in a timely manner. The Committee notes that the SIC indicated some sympathy**

for a change in the law whereby the clock was paused, rather than going back to zero. The Committee recommends that this revision is considered as part the Scottish Government's consultation on other legislative changes recommended in this report.

Reviews and appeals

42. **The Committee recommends that the revisions proposed by the SIC in his written submission in relation to sections 48 and 52 of FOISA along with the technical amendments identified in an appendix to his written submission are considered as part the Scottish Government's consultation on other legislative changes recommended in this report.**

Conclusion

43. **There is a broad consensus that FOISA has brought significant benefits by establishing a statutory right of access to information held by Scottish public authorities that fall within the scope of the legislation. However, witnesses have identified a number of areas for improvement, both in terms of the legislation itself and in its implementation. The Committee recommends that the Scottish Government consults on the legislative changes proposed in this report and works with the SIC and public authorities across Scotland, as appropriate, to address the areas where implementation of the Act could be strengthened.**

The Act

The Freedom of Information (Scotland) Act 2002

44. The Policy Memorandum [1] accompanying the Bill explained that the then Scottish Executive "believes that openness is central to a modern, mature and democratic society, and serves to strengthen government and empower people." It stated that the Bill was underpinned by "a presumption of openness and a belief that better government is born of better scrutiny" and that "the Bill is intended to support the development of a culture of greater openness throughout the Scottish public sector." The Policy Memorandum set out the Bill's policy objectives as follows—

- to establish a legal right of access to information held by a broad range of Scottish public authorities;
- to balance this right with provisions protecting sensitive information;
- to establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime;
- to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme; and
- to make provision for the application of the Freedom of Information regime to historical records.

45. The public authorities covered by FOISA are set out in schedule 1 of the Act. The Act also provides for Scottish Ministers to extend coverage to other public bodies not listed in schedule 1 by virtue of section 5. A section 5 order can designate persons or bodies that appear to Scottish Ministers to exercise functions of a public nature; or that provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority.

The Freedom of Information (Amendment) (Scotland) Act 2013

46. FOISA was amended by the Freedom of Information (Amendment) (Scotland) Act 2013 ("the 2013 Act") which, according to its accompanying Policy Memorandum, proposed "limited modification to the 2002 Act intended to add strength and clarity and improve its operation." [2]

Extension of coverage by order

47. Prior to the enactment of the 2013 Act, the order-making power to extend coverage under section 5 of the Act was not utilised by Scottish Ministers. Since then, the

Scottish Ministers have made section 5 orders in 2013, 2016 and 2019. The bodies that have been added are—

(a) arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities (2013 Order)

(b) grant-aided schools and independent special schools (2016 Order)

(c) providers of secure accommodation (2016 Order)

(d) Scottish Health Innovations Limited (2016 Order)

(e) private prison contractors (2016 Order)

(f) registered social landlords (2019 Order)

48. In August 2019, the Scottish Government launched a consultation ("The Section 5 Extension Consultation") inviting views on whether the scope of FOISA should be further extended to include “organisations providing services on behalf of the public sector” but not already subject to the Act. The consultation closed on 3 December 2019 and an analysis of responses is available on the Scottish Government website.

Overall impact of FOISA

49. There was a broad consensus among respondents to the Committee's call for evidence that FOISA had brought significant benefits by establishing a statutory right of access to information held by Scottish public authorities that fall within the scope of the legislation. Dr Ben Worthy from Birkbeck University, for example, highlighted the "greater transparency and accountability" which it fostered along with "more open organisational cultures within Scottish public bodies, improved records management and high levels of public awareness of and support for the legislation. [3] " Professor Dunion, a former Commissioner, emphasised that "information which would previously have been withheld is now much more commonly in the public domain" pointing out that information on the salaries, bonuses and expenses of those in prominent positions in public life is now routinely published. [4]

50. Users of the Act also spoke of the benefits it had brought with the National Union of Journalists ("NUJ") stating that the Act "has positively contributed to better reporting of information about public spending and decisions made by political representatives and public bodies." The joint submission from journalists and media representatives commented that the "legislation has greatly improved the transparency and accountability of government and public sector bodies in Scotland". [5]

51. The CFoIS indicated that—

> "FoISA has met the positive aim of providing people and organisations with a free, enforceable right to access information held by public authorities". [6]

52. Public authorities covered by FOISA also spoke of its benefits with Aberdeen City Council stating that its positive effects include a greater awareness "of the need for controlled and accurate record keeping" and encouragement of the proactive publication of data. Other local authorities including Angus, Edinburgh and Glasgow councils and Comhairle nan Eilean Siar agreed that FOISA had improved transparency as did Police Scotland, the Care Inspectorate and the Legal Complaints Commission.

53. However, users of the legislation were also circumspect about its overall impact - particularly in relation to the handling of requests by public authorities - and highlighted a number of concerns about its application. CFoIS stated that FOISA "rights are being weakened in Scotland through stealth and omission." Common Weal echoed this view, stating that FOISA "is still too limited and prone to abuse and obstructionism." [6]

54. A number of current and previous politicians as well as journalists and media representatives expressed concerns about the handling of requests by the Scottish Government. Several respondents also argued that despite previous extensions to its coverage, the scope of the Act remained too narrow and should be further extended, particularly in relation to private companies delivering public services. For their part, a number of public authorities highlighted the resource impact of

responding to requests for information along with perceived misuse of the right as being problematic.

55. There was also a general consensus among respondents, both users and public authorities, that the publication scheme model, whereby public authorities are required to specify the classes of information which they publish, was outdated and no longer fit for purpose.

56. In oral evidence, the SIC welcomed the Committee's work on FOISA – "not because it is broken, but because it could be better and because it is important to keep it alive and up to date in order to meet the challenges ahead." [7]

57. **The Committee recognises that FOISA has brought important benefits in terms of greater transparency and accountability of public authorities in Scotland. However, there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication. A number of recommendations are made throughout this report. While some of the proposed improvements are a matter of implementation, others are likely to require an amendment to FOISA. The Committee recommends that the Scottish Government consult on the detail of the proposed changes before bringing forward the necessary legislation.**

Who is covered

58. A key theme to emerge during the Committee's scrutiny of FOISA related to those organisations covered by the Act and, perhaps more importantly, those that are not. There was a general view that the legislation had failed to keep pace with the changing nature of public service delivery in Scotland, meaning that a number of organisations that delivered public services and/or received significant public funds did not fall within its scope.

59. Unison suggested that the Act had "delivered up to a point" but stated "when the act came into force, we had a mosaic of public services. We now have a kaleidoscope and the Act is not sufficient to sustain transparency in that rapidly changing environment." Professor Reid stated—

> What we have seen in the past 40 years is a huge merging of the two—all sorts of arrangements, with partnerships, contracting and franchising—and that creates a huge problem. There is no longer a sharp divide between public and private, which is causing a problem in all sorts of areas.
>
> Source: Public Audit and Post-legislative Scrutiny Committee 03 October 2019, Professor Reid, contrib. 110[8]

60. He cautioned that "sticking to traditional public authorities—bodies that are constitutionally public authorities—reflects a narrowing of the scope, which should be extended." Severin Carrell made a similar point, stating that "the multiplicity of public agencies or bodies in the private sector that have public sector roles is becoming quite a significant part of the problem." [9]

61. Unison went on to emphasise that "when the service has been outsourced to a private company or a third sector body, that public body is putting itself beyond the accountability of FOI. Billions of pounds are being transferred from accountability and transparency to a much more opaque system." [10]

62. Unison highlighted an £800m IT contract Glasgow City Council held with a Canadian company where the work had previously been delivered in house, "so £800 million of public money is not interrogable for FOI purposes. It would have been interrogable when the council delivered the service directly."

63. Witnesses also pointed to delays in the use of powers under section 5 of the Act. Professor Dunion commented in his written submission that "there has been marked reluctance to make such designation and where consultation has taken place there has been considerable delay before a designation has been made." [4]

64. Dr Worthy noted that "there is a broad view, which is supported by the public, that freedom of information legislation should be extended. Polling shows that that would be a popular move." However, he also cautioned that this was not a straightforward process as "it takes, first, a great deal of time and, secondly, quite a bit of political capital and will." Professor Reid also recognised that it was "a hugely complicated area because of the complexity of the arrangements that Governments keep coming up with to fix things." [3]

65. In evidence to the Committee, witnesses identified a number of bodies and functions of bodies that, in their view, should be brought within the scope of the Act.

Private companies delivering public services

66. Written evidence from the CFoIS, journalists and media representatives, Unison and former MSP Tavish Scott all called for an extension of FOISA to cover private companies delivering services under contract to public bodies (e.g. construction and maintenance of schools, hospitals and transport infrastructure). Unison highlighted a recommendation by the then SIC in 2009 that Public Finance Initiative (PFI) and Public Private Partnership (PPP) projects should be subject to FOISA.

67. NHS Greater Glasgow and Clyde also advocated the inclusion of contractors/ organisations providing public services and funded by public money such as PFI hospitals, schools, hospices, and third sector organisations. It stated, "If services are being bought with public money, then the public should have a right of access to that information." [11]

68. NHS Lanarkshire noted that of the three hospitals in its area, two were PFI and one was NHS. It stated "members of the public do not see hospitals as being PFI or NHS. They see hospitals as being within Lanarkshire and the responsibility of NHS Lanarkshire, however the PFI contractors are not subject to FOI." NHS Greater Glasgow and Clyde agreed stating "it would be difficult to explain to a member of the public why information about one hospital is available when equivalent information about another hospital is not." [11] [12]

Bodies in receipt of significant public funds

69. Other witnesses took a broader view. Stephen Low from Unison suggested that corporate structure should not be the criteria used to assess whether or not an organisation should be subject to FOISA. He said:

> The single principle should be that with public money comes public accountability. The principle should not be about the name of the organisation or its corporate structure, the principle should be that we are allowed to follow the money.
>
> Source: Public Audit and Post-legislative Scrutiny Committee 19 September 2019, Stephen Lowe, contrib. 159[13]

70. In a supplementary submission, Severin Carrell proposed that the SIC should be given powers to make any body subject to FOISA where a) it wields statutory power in Scotland; and b) it is substantially funded or controlled by other Scottish public bodies, even if there is no single controlling authority. [14]

71. Common Weal suggested that "we need to extend it to places such as the Crown Office and private sector organisations that are using public money; they need to be under the same scrutiny as public bodies using public money." Common Weal also recommended what was described as a "glass wall approach" whereby "anything that would ordinarily be released under an FOI should be proactively released." However, Common Weal was "willing to accept a certain level of pragmatism - It

might not be entirely fair to say that FOI should apply to the entire company in the case of, for example, a hypothetical large multinational information technology services company that serves many different Governments." [15]

72. Professor Dunion agreed "that we should be following the public pound for the purposes of efficiency and economy," in part because "a lot of what was once done at the hand of public authorities directly is now done on their behalf by others, over a long period of time and for vast sums of public money." In his view—

> anything done with public funds—proportionately within the scale of the contract, perhaps—and anything that attracts a level of public interest in it should be within the scope of the law.
>
> Source: Public Audit and Post-legislative Scrutiny Committee 03 October 2019, Professor Dunion, contrib. 115[16]

73. Professor Dunion suggested in his written submission that consideration should be given to amending the law to introduce a gateway clause which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA. In oral evidence, he expanded on this point stating that the legislation was "not very nimble" and designation of private companies entailed a protracted process - often taking several years - meaning that, on occasion, contracts may have expired before they could be brought within the scope of FOISA. In his view, designation should be built into the contract process at an early stage to make clear that the recipient of the contract will be subject to FOISA. [4]

74. In his response to the Scottish Government's Section 5 Extension Consultation, the SIC stated that "the further extension of FOISA to organisations that provide public services on behalf of the public sector is, in my view, long overdue." [17]

75. The SIC's consultation response went on to highlight a range of organisations as being appropriate for further consideration by Ministers. These include health and social care services provided under contract to Scottish public authorities; services provided under PFI, PPP and Non-Profit Distributing (NPD) contract arrangements; hubCos and services provided under contract through the hubCo model, and transport services provided on behalf of Scottish public authorities. [17]

76. The SIC's written evidence to the Committee stated—

> "if information is public information, held by public authorities or relating to public services, then the public should be able to see it unless there is a very good reason why they should not. Where information was previously available from a public authority, but the contracting-out of the service has led to the information becoming unavailable, there is a loss of FOI rights." [18]

77. The SIC noted, however, that "there is some tension between having a system that includes as many bodies as possible, particularly those that receive substantial public funding, and having a system that is capable of being enforced in practice." He then confirmed that he was in general agreement with proposals for an approach based on functional tests and suggested that an important issue to consider was whether rights have been lost, "in other words, is a private body now carrying out functions that were previously carried out by a public body?" [18]

78. The factors-based approach was first proposed by the previous SIC, Rosemary Agnew, in her 2015 report " *FOI 10 Years On: Are the Right Organisations Covered.* " She proposed that factors could include, where relevant—

- the extent to which an organisation is delivering (or supporting the delivery of) a public function;
- the degree of public interest in relation to the function/service being delivered;
- the cost to the public purse in delivering the function or service.

79. In the SIC's view, the public function test should take precedence over following the public pound which, he indicated, if taken to extremes could prove counterproductive, for example, by facilitating requests relating to the minutiae of office stationery.

80. In his evidence to the Committee, the Minister stated, "our view is that private companies, or any organisations, should in principle be captured, but…we need to be clear about what, among their activities, would and should be captured." He went on to state his view that activities that are publicly funded "absolutely should" be captured, but that care should be taken "to ensure that FOISA captures only the public service element of their work and not anything else that leads perhaps to their competitors gaining a commercial advantage." [19]

81. In his view, the proposed factors-based approach "might be a proportionate way to proceed in terms of those safeguards…I guess that the only debate would be around what factors should be considered."

82. The Minister indicated that, "in principle," he agreed that third sector organisations in receipt of substantial amounts of Government funding – perhaps over 50% - should similarly be brought within the scope of FOISA. However, he expressed "a note of caution" in respect of small third sector organisations that periodically receive public funds, indicating that it would be "disproportionate to seek to make those small bodies fully subject to FOISA" and that a balance should be struck.

83. When asked whether it would be possible to introduce a "gateway provision" to bring within scope bodies that carry out public functions or that are in receipt of significant public funds without the need for primary or secondary legislation, the Minister replied, "yes is the answer." [19]

84. Scottish Government officials subsequently clarified that the circumstances under which current legislation could be extended were "quite tightly circumscribed." They continued "if ministers are going to extend FOISA using the powers that they currently have, they either need to find a public function of the body or they need to find that it is delivering services under contract with an existing authority that is subject to FOISA." [19]

85. The Minister confirmed that he was happy to consider any recommendations made by the Committee. He acknowledged, however, that it was "highly unlikely" that there was sufficient time left during this parliamentary session for primary legislation to be passed. However, this, he said, "should not be a barrier to our following up on your report and setting a direction of travel, in so far as we can." [19]

Organisations jointly owned by more than one public authority

86. Several witnesses, including the SIC, highlighted a loophole in the current legislation regarding jointly-owned bodies. The SIC explained that a body wholly owned by the Scottish Government or another public authority was subject to FOISA whereas a company jointly owned by two or more public authorities was not.

87. When invited to comment on this issue, the Minister described it as "an anomaly" which he thought would be "worth looking at." [19]

Use of the commercial confidentiality exemptions

88. On a related matter, several witnesses raised concerns about the use of exemptions to frustrate access to information in private sector contracts.

89. FOISA provides that a public authority may withhold information in response to a request if it can demonstrate that one of the exemptions set out in the Act applies. Section 33 of FOISA provides, among other things, that information may be withheld if disclosure would (or would be likely to) prejudice substantially the commercial interests of any person or organisation. Section 36 provides that information may be withheld if it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, or if the information was obtained by a Scottish public authority and disclosing it would constitute an actionable breach of confidence.

90. UNISON indicated that it had encountered problems with commercial confidentiality being used too widely, particularly in respect of PPP/PFI projects. Severin Carrell indicated that the privatisation of delivery of public services had frustrated FOISA as many secondary schools and hospitals operated through PFI are exempt. In his view, "the point at which commercial interest starts to be seen as superior to the public interest must be tested". Severin Carrell highlighted that the SIC "has upheld the defence by local authorities or public bodies that are using such companies that they are commercial, in-confidence contracts…that is a significant problem." [10]

91. In oral evidence, the SIC made clear his view that there should be a prohibition on confidentiality clauses being routinely included in public contracts and therefore being applied for FOISA purposes as a confidentiality exemption. [7]

92. In his written submission, the SIC suggested that consideration should be given to whether a prohibition on relying on confidentiality clauses between public authorities and contractors providing public services should be introduced. This, he explained, would be similar to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on such clauses to prevent access to information held by the public authority. At present, the section 60 Code of Practice on the discharge of functions under the FOI Act and EIRs in Scotland suggests only that confidentiality clauses are "not good practice". [18]

93. **It would appear to the Committee from the evidence that it has received that FOISA has failed to keep pace with the changing nature of public service delivery in Scotland, meaning that a number of organisations that deliver public services and/or are in receipt of significant public funds do not fall within its scope.**

94. **The Committee considers that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation**.

95. **The Committee notes that the Scottish Government's consultation on the extension of FOISA invites views on whether to include "organisations providing services on behalf of the public sector" not already subject to the Act. The Committee agrees that, in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.**

96. **The Committee is concerned at the slow pace by which organisations have been designated under section 5 of the Act. Witnesses commented that even where consultation has taken place, there has been considerable delay before a designation has been made. This suggests that the current legislation is insufficiently nimble to keep pace with the changing nature of the public sector landscape. As such, the Committee considers that changes need to be made to FOISA to address this.**

97. **The Committee recognises that any solution needs to be proportionate. It therefore supports, in principle, the idea of a "factors" approach to the extension of FOISA, which is based on functional tests, such as the extent to which an organisation is delivering a public function; the degree of public interest in relation to the function/service being delivered and the cost to the public purse in delivering the function or service.**

98. **The Committee is also attracted to the idea of the legislation being amended to introduce a "gateway clause" which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. As such, the Committee recommends that the Scottish Government consults on amending FOISA to introduce a mechanism by which relevant elements of non-public sector bodies would automatically fall within the scope of**

FOISA if they fulfilled certain criteria relating to the provision of public services or functions and/or receipt of significant public funds.

99. **The Committee also considers that the Scottish Government should consult on amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.**

100. **Finally, the Committee considers that FOISA should be amended to address the current anomaly whereby bodies jointly owned by two or more public authorities do not fall within the scope of FOISA.**

What is covered by the Act

101. The right to information under FOISA is underpinned by effective records management and record keeping. The evidence received by the Committee raised a number of issues linked to record keeping and changing methods of communication. These included concerns that records of meetings and minutes were not being recorded or made available to the public; concerns that records of Ministerial meetings were deleted after three months and issues around the use of private communication channels such as private emails, Whatsapp and other messaging services for official business.

102. Section 61 of FOISA requires Scottish Ministers to issue a code of practice providing guidance to Scottish public authorities in connection with the keeping, management and destruction of records ("section 61 code of practice"). However, FOISA does not explicitly make provision for a duty to record specific categories of information. [20]

103. In 2018, the CFoIS launched a 'Get it minuted' campaign which highlighted the lack of a specific duty under FOISA to make records. The CFoIS noted that "it used to be 'business as usual' to routinely produce agendas and take minutes of meetings" and questioned why, in its view, there had been a move away from this practice.

104. Some respondents, particularly those representing media organisations, expressed concerns that meetings and minutes were intentionally not being recorded by public authorities to circumvent FOISA. Severin Carrell spoke of Government meetings taking place "off campus" with no agendas or minutes being recorded. Unison provided an example of the Water Industry Commissioner, who had stopped keeping a diary of engagements after a ruling that such diaries should be publicly accessible. [10]

105. When asked whether officials deliberately avoided putting things down in writing to circumvent FOISA, Rob Edwards of "*the Ferret*" replied "I would be hard put to prove that in a court of law, but if you ask me for my personal opinion about whether that happens—yes. I do not know how widespread it is." [10]

106. Professor Dunion was also asked about this issue. He commented that "there is always that risk, and I think that it has got greater in some respects." He indicated that "when I was commissioner, I came across an authority that actively went out of its way to instruct staff not to write anything down, to verbally brief their colleagues if they came back from a meeting, for example, and to remove all their diary entries once their expenses claims had been submitted. Clearly, that was intended to frustrate FOI, so some of that gaming of the system will go on." [9]

107. When invited to respond to these comments in oral evidence, SOLAR/SOLACE, representing local authority lawyers and Chief Executives, stated that the absence of minutes "is mostly driven by the fact that none of us have the admin resource to take formal minutes any more and so are reduced to doing an action note at the end of the meeting…It is not because I am trying to hide anything; it is because we simply do not have the time and luxury to do full-blown minutes." [21]

108. Rob Edwards noted that "if it is the case that there are parallel systems for making decisions by public bodies that are designed to avoid FOI through the process not being recorded or being conducted informally or through minutes not being taken, that is a significant concern that needs to be addressed." [10]

109. In this regard, a number of stakeholders expressed concerns about the use of unofficial communication tools such as WhatsApp messages, texts and private email communications for official business and whether such communications were accessible under FOISA. Dr Worthy noted, for example, that—

> what we are seeing now is that FOI is interacting with all these new forms of communication. This is where it gets complicated. Dr McCullagh talked about the arrival of new technology and how that affects openness laws. The only positive that I can think of is that we are discussing these things in public and politicians keep getting caught out because, almost inevitably, there will be leaks or a whistleblower will point out what has happened. However, we are not really sure of the scale of it. There is a twin track in that we do not think that it happens every day, but we think that it can take place, particularly at controversial senior levels.
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> Source: Public Audit and Post-legislative Scrutiny Committee 03 October 2019, Dr Worthy, contrib. 99[22]

110. Professor Dunion commented that "that has always gone on since the advent of BlackBerrys, but the intention was that that information would still be copied into the official systems thereafter. It is quite clear that there have been instances where that has not happened." [9]

111. He confirmed, however, that the means of conveying such information was irrelevant "if it was on official business and, therefore, was still FOI-able". He indicated that the SIC would have the right to inspect any device that held such information although this was "not something the Commissioner would do lightly." He further stated that it "is quite clear and warnings are given that…if an FOI request comes in and you do not disclose the fact that you hold that information on that device, you are in danger of being prosecuted for obstructing the release of information." However, he expressed concern that "that is not being readily understood and people are endangering themselves by thinking that they are getting around the law." [9]

112. The City of Edinburgh Council suggested that the section 61 code of practice was now out of date because of the Public Records (Scotland) Act 2011 ("The 2011 Act"). The Council suggested that references to the code should be replaced with reference to the 2011 Act to align the two. Alistair Sloan from Inksters Solicitors was of the view that the code of practice is aspirational, noting that 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. [9]

113. Witnesses suggested a number of ways in which this issue could be addressed.

114. Professor Dunion drew a parallel with the requirements set out in the Lobbying (Scotland) Act 2016, stating that it would perhaps be useful to have a similar regime with FOI "if only for the protection of the minister or the official, to have at least some official record of the purpose of that meeting and any outcome from it." Dr McCullagh suggested 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". [9]

115. In evidence to the Committee on 10 January 2019, the SIC stated—

> in a number of decisions, we have drawn attention to the fact that information that we expected to be there was not there....
>
> 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... 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.
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> Source: Public Audit and Post-legislative Scrutiny Committee 10 January 2019, Daren Fitzhenry, contrib. 40[23]

116. He noted that different countries adopt different approaches to whether there should be a general duty to publish documents, but that different models raised different challenges. He explained "New Zealand has a very wide duty in that respect, with the problem there being that it is difficult to enforce, while other countries have more specific lists of information that must be published." [24]

117. Alistair Sloan cautioned against a duty to record suggesting to the Committee that "if there is just a general duty to document, you would probably end up with litigation over precisely what that means. You would probably have to define it fairly technically in a piece of legislation, and that might make the FOI act unwieldy". [9]

118. In oral evidence, the SIC made a similar point, stating—

> Whatever system we have in place, it has to be enforceable, because there is no point in having a duty that is so nebulous that it can lead to endless arguments about whether people are complying. Such a system would become almost unenforceable and serve no purpose.
>
> If we have a duty to document, it is important that we have clear definitions of what should be documented. Without doubt, if information is not documented, the freedom of information regime will be of no use to people. That is the bottom line. We need public authorities to record information if the freedom of information regime is to have utility.
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> Source: Public Audit and Post-legislative Scrutiny Committee 05 December 2019, Daren Fitzhenry, contrib. 93[25]

119. He went on to explain that in his view, "the key things that need to be recorded are important decisions that are made in authorities, the rationale for those decisions and key bits of information that informed them." The introduction of a provision specifying, for example, that anything of importance must be documented "would just be to ask for argument, litigation and uncertainty." However, should the Committee consider it necessary for "important meetings with outside interests, or all such meetings, to be recorded…it would be relatively straightforward to define it and add it to a duty." [7]

120. The SIC did, however, point out that "there is a big issue to do with whether such a duty lives in the freedom of information legislation or the records management legislation…To a degree, the keeper [of the records of Scotland] can require information to be created, but that power lives in the records management legislation and not in the freedom of information legislation." [7]

121. When questioned by the Committee about the use of unofficial methods of exchanging information within the Scottish Government, the Minister stated that "the First Minister used her Scottish National Party account in exceptional circumstances to receive urgent information when she was not supported by Scottish Government officials." He confirmed that "Ministers do not routinely use private or party email accounts, for example, for substantive Government business. Such business is generally conducted in hard copy, using ministerial boxes, or via secure electronic methods" [19]

122. In subsequent correspondence, the Minister stated that "having consulted with colleagues, I can confirm there are three WhatsApp groups we are aware of which are used regularly or semi-regularly by Ministers and Special Advisers to assist with day to day communication in the Scottish Government work place. These are used for logistical or leave planning purposes, not for substantive discussion about Scottish Government business." [26]

123. The Minister further stated that "I understand these groups are used on an ad hoc basis, often when other forms of communication are unavailable. Ministers, Special Advisers and their offices are aware that any information communicated via Whatsapp is subject to FOISA, wherever it relates to the work of the Scottish Government." [26]

124. In oral evidence, the Minister did not accept that there was a significant problem with Government officials failing to record relevant information. He reminded the Committee that the Permanent Secretary had written to staff in 2018 in relation to the need to maintain appropriate records. He went on to note that the introduction of a duty to record "would capture everyone who is covered by FOISA, from a huge organisation such as the Scottish Government to local authorities and all the way down to individual general practitioners and pharmacists" and spoke of the need for proportionality. [19]

125. The Scottish Government's written submission states "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 of Practice may now be otiose. We think that it is sensible to remove unnecessary duplication, and that it would be desirable for records management guidance to be issued by the Keeper of the Records (of Scotland) rather than the Scottish Ministers, and so propose the repeal of the section 61 duty." [27]

126. **The evidence received by the Committee suggests that there has been a shift in recent years in the level of information being routinely recorded in connection with official public business. At the same time, a number of users of the Act have expressed concerns about the use of unofficial**

channels of communication, such as Whatsapp and private emails, and the extent to which such information is accessible under FOISA.

127. **The freedom of information regime is underpinned by effective record keeping and management. The Committee emphasises the importance of documenting and recording relevant information. It is clear that there should be no deliberate attempt to evade FOISA by failing to do so. The Committee considers that much greater emphasis needs to be given by the public sector as a whole to adequately creating information trails, such as relevant drafts, memos, emails, correspondence and minutes of meetings, which show how key decisions have been reached and how public funds have been spent.**

128. **The Committee notes suggestions raised in evidence that tools such as WhatsApp messages and texts were being used for official business along with concerns about the use of private email accounts by Ministers. While there appeared to be no dispute that such information is covered by FOISA, the Committee considers that there may be merit in the legislation being amended to make explicit what is meant by the term "information." Consideration should also be given by the SIC and the Scottish Government as to whether further guidance is required to ensure that such information is retained and accessible in an appropriate format so that it can be provided under FOISA.**

129. **The Committee recognises that any system requiring specified information to be recorded must be enforceable. As such, if there is a duty to record, it is important that there are clear definitions of what should be documented. The Committee considers that there would be merit in legislation setting a requirement for certain key information to be recorded; for example, minutes of ministerial meetings or Scottish Government meetings with external organisations. The Committee recommends that the Scottish Government consult on the type of provision that could be incorporated into legislation and how best to ensure that it would be enforceable. In the first instance, the Scottish Government may wish to commission research into the approaches to this issue in other jurisdictions to seek to identify what models work well (and what do not).**

130. **The Committee acknowledges the evidence from witnesses, including the SIC and the Scottish Government, that the section 61 code of practice has been superseded by relevant records management legislation and notes proposals that any provision concerning a duty to document should be taken forward by the Keeper of the Records of Scotland. This appears to be a sensible approach and one that the Committee supports.**

Proactive publication

131. Another key theme arising in the Committee's evidence sessions concerned proactive publication. The benefits of proactive publication – chiefly by making information easily and readily accessible and in so doing alleviating pressures on public body resources by reducing the number of requests received - were highlighted by a range of stakeholders. In oral evidence in January 2019, the SIC also noted that "Ipsos MORI polling shows that 77% of people are more likely to trust an authority that publishes more information. There are many benefits to proactive publication." [7]

132. Public authority witnesses highlighted positive examples of proactive publication, with several noting the consequent reduction in requests. For example, the Scottish Government publishes 'transparency data' including, monthly spend over £500 and information relating to Ministerial travel, engagements and gifts. The Committee also noted the benefits of the Scottish Parliament's decision to routinely and proactively publish MSP expenses during the Parliament's second session which, it considered, had reduced the number of requests received thereby reducing costs whilst also encouraging positive changes in behaviour in the knowledge that all claims would be published.

133. Similarly, SOLAR/SOLACE stated that proactive publication "has been done very successfully" by Glasgow City Council and the City of Edinburgh Council in relation to controversial issues, reducing the anticipated "flood" of requests in respect of matters of public concern. NHS Lanarkshire also stated that it had focused on increased proactive publication after analysing particular areas in which it received a high volume of requests. It confirmed that this approach had succeeded in reducing the number of requests in these areas. [21]

134. Nonetheless, it is clear from the evidence received by the Committee that the aspiration for FOISA to drive proactive publication has not been fully realised. Indeed, concerns were raised that things have moved backwards. The CFoIS stated in oral evidence that—

> we were involved at the early stages and throughout the passage of the bill. It is designed to work on two bases. The first is about people making FOI requests to force organisations to be transparent and accountable; the second is proactive disclosure of information, which was supposed to be progressive. That second element has failed to realise its potential. There are important problems in that there has been regression. What was previously published is no longer published.
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> Source: Public Audit and Post-legislative Scrutiny Committee 19 September 2019, Carole Ewart, contrib. 18[28]

135. Section 23 of FOISA requires public authorities to adopt and maintain a publication scheme setting out the classes of information which they publish or intend to publish without the need for request. However, there was a broad consensus that the publication scheme model had failed to deliver its intended results. [20]

136. Dr Worthy noted that "the idea was that the publication schemes…would help to drive the process. The idea was that an index would be available so that people could see what information was available and would be published." However, "research into the UK FOI Act found that publication schemes had been neglected because they had been superseded by search engines - users don't consult them but just Google what they are looking for." [9]

137. Similarly, the SIC's written evidence stated that the "current provisions for proactive publication are outdated…The existing duty was drafted at a time when access to the internet within Scottish households was less common than today, and before the era of smartphones and internet access on-the-go. Public expectations about access to information have changed in the intervening years." [18]

138. A number of witnesses suggested that, as a minimum, authorities should be publishing their responses to FOI requests. S Yousaf's written submission proposed that FOISA be amended to make it obligatory for public bodies to publish all FOI requests on their websites (with personal identifiers removed) with a view to increasing transparency, but also to assist in preventing duplication of requests. The Give Them Time Campaign made a similar suggestion indicating that "all councils should follow the example of Moray Council and publish their responses to FOIRs on their websites." In oral evidence, the NUJ pointed out that "if authorities proactively published even the results of FOI requests, that might help a bit." [10]

139. Police Scotland confirmed that it started its disclosure log in February 2018 and that all responses are published on the web within seven days. It noted that this has proved to be "a useful tool, because we can suggest to business areas that, on the basis that we have just published a response on the internet, we should proactively publish that information." [21]

140. The SIC advocated a move away from publication schemes and a focus on proactive publication instead. In his written submission he recommended that the requirement for public authorities to adopt a publication scheme should be removed and replaced with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency. In his view, such a code could evolve over time as technology advances and "would represent a more agile and modern way of doing things." It would also assist enforcement by providing clarity on what categories of information should be routinely and proactively published. [7]

141. The CFoIS suggested that proactive publication of information should be monitored and would require regulatory overview to ensure timely publication. [6]

142. The SIC recognised that a cultural shift was required and that "sometimes, regulation is needed behind that to kick-start things and make authorities go down that route but, once it is embedded, it becomes part of the normal day job…It is just how things are done, and more important information is pushed out to people." [7]

143. Professor Colin Reid suggested that public authorities also need to think about the way in which members of the public want information. He commented that "how information is created and stored does not reflect how the public requests information. Public authorities create and store information in a sectoral manner……However, this approach does not match how users of the right request

access to information, which tends to focus on specific locations rather than on sectoral areas." [9]

144. Responding to these points in oral evidence, the Minister agreed that the publication scheme "has probably been overtaken by time… I do not think that it is suitable for current purposes, so encouraging proactive publication is undoubtedly the way to go." He called for public authorities to "embrace more widely the concept of proactive publication" whilst also reminding the Committee that "it is worth recognising that huge volumes of additional information are already out there in the public domain compared with what happened in days gone by." [19]

145. **It is clear from the evidence received by the Committee that the aspiration for FOISA to drive proactive publication has not been fully realised. While public authorities highlighted positive examples of proactive publication, the CFoIS considered that there had been a "regression" in what was published.**

146. **There was a general consensus that the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information. The SIC recommended that the requirement for public authorities to adopt a publication scheme should be removed and replaced with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency. The Committee recommends that the Scottish Government consult on this amendment to FOISA.**

147. **The Committee also considers that public authorities should routinely publish their responses to FOI requests (with any personal data removed).**

148. **However, it is evident to the Committee that, even with these developments, there needs to be a significant cultural shift in the way in which public authorities approach proactive publication. In particular, as a first step, authorities need to think carefully about how the public wishes to access the information that they hold - whether by topic, sector or geographical area - and reflect this in the way in which they create, store and publish information. The Committee recognises that, in the short term, the development of a coherent system of proactive publication may require an initial increase in resources, but notes the significant benefits in the longer-term, including increasing public trust in public authorities, but also in reducing the number of requests.**

149. **The Committee sees a clear role for both the SIC and the Scottish Government on leading in the promotion of proactive publication, including by developing comprehensive guidance and sharing good practice. The**

Committee also sees a continuing role for the SIC in monitoring progress on an ongoing basis and in intervening to encourage proactive publication where it appears that sufficient progress has not been made.

Resourcing and fees

150. A key issue to arise in the evidence received by the Committee related to the resources needed to respond to requests within public authorities, something that was seen as particularly challenging in the context of budget constraints and increased pressures on public services.

151. Numerous public body respondents to the call for evidence highlighted the resource burden of responding to FOI requests when faced with an increasing demand for information. NHS Lanarkshire, for example, stated, 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." In written evidence, Glasgow City Council raised similar concerns, stating that requests "have increased from around 250 in financial year 2006/07 to almost 1,100 requests in 2018/19, but without an increase in resources equitable with this increasing challenge." [29]

152. The SIC's Annual Report for 2018-19 (published 17 October 2019) reported that requests had reached a record high with a rise of 8% compared to the previous year. A total of 83,963 requests were reported by Scottish public authorities with three quarters of these requests leading to a full or partial release of information. [30]

153. Unison's supplementary submission spoke of a survey of its members which highlighted pressures on staff, with one member commenting "I have been told to answer the absolute minimum as we do not have time. My boss doesn't understand these are legal requests. I often feel like a piggy in the middle." [31] Rob Edwards made a similar point in oral evidence, noting that FOI officers worked hard to adhere to the Act but "some of them are stuck in organisations in which the hierarchies still think that freedom of information is an add-on or an annoying thing that they have to do." [10]

154. Severin Carrell stated that "the basic point is that, if it is a statutory right and a public good, it ought to be embedded in everything that those bodies do. It is not a peripheral offering or something that they can do if they have sufficient time and resources; they need to make it part of their central service provision." He further stated that "local authorities need to work out why they do not regard public scrutiny, transparency and accountability as central to their core purpose. It seems to me that those things absolutely are central and that local authorities need to reorient the way they approach the topic." The NUJ agreed, stating that "providing or revealing information that should be in the public domain absolutely should be part of the day job for organisations that spend public money." [10]

155. The Minister stated that the Scottish Government had also experienced a significant increase in requests (increasing by 62% over three years). In his view, "It is not necessarily about throwing more resource in as the volume goes up. Sometimes, it is about taking a step back and reflecting on how you deal with that." For the Scottish Government this has involved reducing the numbers of people who deal with requests but ensuring that those that do, received better training. [19]

156. When asked whether the Government had considered providing additional funding to local authorities he replied, “In short, the answer is no, because I think that an organisation has to consider its own operating model and how it might deal with requests more efficiently.” He confirmed that Government officials “try to share and encourage best practice” with public authorities through training sessions, publicly available guidance and regular engagement with practitioners. [19]

157. In his evidence, the SIC reiterated the view that public authorities should not view FOISA as “another encumbrance or bit of governance” but as a public service. Whilst he viewed increased numbers of requests as “in some ways, a good thing because it shows the system is well used and people are interested,” he highlighted the benefits of proactive publication in reducing the need for people to make requests for information by making it readily accessible online. [7]

158. Given the impact on resources, a number of submissions called for a review of the fees that could be charged for responding to requests. Under FOISA, any charges imposed by a public authority for disclosure of information must be calculated in accordance with The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004, which makes provision for the following charges—

- requests costing under £100 to fulfil are free of charge;
- requests costing between £100 and the upper cost threshold of £600, will be charged at a maximum of 10% of the difference between the projected costs of providing the information, and £100;
- Scottish public authorities will not be required to respond to requests costing in excess of the upper cost threshold of £600 (although they may do so if they wish).

159. Professor Dunion told the Committee that in his view, “given the £15 per hour calculation, £600 represents a fairly generous amount of time to gather information; a lot of hours could be spent on gathering information before the figure of £600 would be reached.” [9]

160. SOLAR/SOLACE told the Committee that in practice the maximum fee that could ever be charged would be around £50 which is the same in cost terms as processing an invoice, meaning that “the fees regulations are effectively pointless.” Given that 40 hours equates to more than a week’s work for a member of staff and public authorities have no option other than to comply with statute, SOLAR/ SOLACE’s view was that “staffing resources at the moment mean that that is probably unsustainable.” However, SOLAR/SOLACE was clear that public authorities would not be keen on “charging the ordinary member of the public who is asking for something of local significance to them.” [21]

161. The SIC confirmed in a follow-up submission that "in 2018/19, the cost refusal in section 12 of FOISA was used 2,295 times (approximately 3% of requests). In the first two quarters of 2019/20, it was used 1,109 times (approximately 3% of requests).” [32]

162. The SIC suggested that it would be helpful to discuss whether cost was the most appropriate measure “or whether we should just go on how many hours it takes to

provide the information." [32] Similarly, the submission from the Scottish Government suggested that it might be "simpler to replace the requirement to estimate the cost of compliance with a requirement to estimate the amount of staff time spent in dealing with a request." In the Scottish Government's view, "this would be easier to apply for authorities, and easier for requesters to understand." [27]

163. Whilst the Minister confirmed in oral evidence that the Government had not held discussions with other agencies about the fees cap, his officials reiterated that, given inflation and changes to salaries over time, "instead of talking about money, we should look at hours." The Scottish Government did not support any increase to the ability to charge fees which "would undermine people's information rights." [19]

164. **A key issue raised by public authority respondents was the level of resources required to respond to requests for information, something that was seen as particularly challenging in the context of budget constraints and increased demand for public services. The Committee notes that last year the number of requests reached a record high of almost 84,000, a rise of 8% compared to the previous year.**

165. **While, in general, there was little appetite among witnesses to increase the fees that could be charged under FOISA for responding to requests for information, public authority respondents emphasised that, in practice, the fees that could be charged did not compensate for the amount of work involved. Both the Scottish Government and the SIC suggested that a better approach might be to estimate the amount of staff time involved in dealing with the request, rather than the cost of complying. The Committee recommends that the Scottish Government consult on this option as part of its consultation on other legislative changes recommended in this report.**

166. **The Committee considers that there needs to be a fundamental shift in the way in which FOI is viewed in many public bodies. In essence, public sector bodies need to view FOI as an essential element of public service provision and ensure that it is resourced accordingly.**

167. **Both the SIC and the Scottish Government emphasised that the resource issues could be addressed by better and more efficient ways of working. As noted above, the Committee considers that a significant shift towards proactive publication needs to take place, and notes that in the longer term, such an approach is likely to reduce the number of requests for information to which authorities are required to respond and, in so doing, reduce the pressure on their resources of responding to such requests.**

Requests for information

168. Section 1 of the Act gives any person the right to request information held by a public authority. Users of the Act raised a number of concerns about the way in which requests for information were handled by public authorities. While some of these issues do not require amendments to the legislation, it is apparent that improvements could be made to the implementation of the Act.

Requests process

169. Both the Coalition of Carers and the Give Them Time Campaign described the difficulties encountered when seeking information from different authorities. For example, the Coalition of Carers described the process of ascertaining where to send the FOI requests as "very time consuming" and indicated that each local authority had a slightly different process to follow with some simply giving an email address, others providing a pro-forma and others providing a facility on the website. 33

170. The CFoIS told the Committee that "it used to be simple to make an FOI request…we could go on to the websites of the designated organisations, click on the button and make an FOI request. Hurdles have now been put in the way." The CFoIS went on to suggest that the system "is deliberately designed to put people off from making FOI requests because the simple process that was used initially has become much more complicated." 10

171. 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." 34

172. The Coalition of Carers suggested that all FOISA contacts should be available in one place to help bring clarity in respect of to whom requests should be sent. The CFoIS also emphasised the importance of such a list "which would set out the 10,000 plus public sector bodies already designated", something that it felt would add even greater value as coverage is further extended. 33

173. The CFoIS suggested there could be better communication of the process for making information requests and that the information on how to do that must follow the principles of inclusive communication. Bailey-Lee Robb from the Scottish Youth Parliament suggested that the SIC should "create an easy-to-use template for young people to send to public authorities, and for all 32 [local authorities] to use the same standardised form across the board." 10

174. In response, SOLAR/SOLACE explained that "the problem with ensuring consistency is that the legislation says that any request for recorded information has to be treated as an FOI request" 21 and public authorities could not insist on a standardised means of request. NHS Lanarkshire stated that around 90% of its requests were made via an online form which aided consistency but "there is

potential for inquiries to come in via different routes". [12] Similar comments were made by local authority representatives.

175. Professor Dunion and Alistair Sloan also warned against the adoption of a single formalised route with Alistair Sloan stating that such a change "could be detrimental to the rights of individuals". [9]

176. The SIC agreed and cautioned that "it is important not to lose the general approach whereby someone who does not know the system or who does not have access to the internet can make a request through other routes." [7]

177. Certain public authorities argued that it would be helpful if they were able to transfer requests. In particular, SOLAR/SOLACE suggested that it would be helpful if authorities could transfer FOI requests in a similar manner to the way in which requests can be transferred under the Environmental Information (Scotland) Regulations 2004 (EIRs). Others, including Angus Council, supported such a change. NHS Greater Glasgow and Clyde stated that such a change "would help with regard to the administration processes, and I think that it would be of assistance to the individual applicants, too." [11]

178. **The Committee understands the frustrations of users of the Act who have experienced difficulties in requesting information due to the different arrangements that public authorities have established to receive FOI requests. On the other hand, the Committee notes that establishing a specific format, route or template for requesting information could result in frustrating an individual's basic right to information.**

179. **The Committee considers, however, that there should be regular monitoring of the request process across public authorities to ensure that the process is as accessible as possible.**

180. **The Committee considers that there may be benefit in amending the law to allow public authorities to transfer requests in a similar manner to that permitted under the EIRs. It recommends that the Scottish Government consults on this aspect when consulting on the other legislative changes proposed in this report.**

Treatment of certain applicants

Requests from journalists and politicians

181. Evidence submitted by journalists and MSPs described their perception of having received different treatment when submitting requests compared to other requester groups including additional levels of clearance, involvement from special advisers, Ministers and media teams, and delays to put in place a "media handling strategy."

This was an issue explored in some detail in connection with the SIC's intervention into the Scottish Government.

182. The submission from journalists and media representatives provided 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." [5]

183. In oral evidence the NUJ suggested that "a culture seems to be creeping in whereby journalistic requests are seen as annoying flies to be batted away, rather than as being in keeping with the aims of openness and transparency." Severin Carrell expressed concerns about a "backdoor route" where "there are unrecorded ways in which special advisers or ministers can influence the disclosure or handling of FOI requests that journalists have made". [10]

184. Severin Carrell highlighted a case where a colleague made a request to numerous local authorities but was "blocked" by East Lothian Council whereas other councils "responded to it with no fuss". Expanding on this point, he stated "East Lothian Council attempted to charge for one hour of work, saying that it was unfair that councils had to fund our research." Severin Carrell suggested there needed to be "greater emphasis on a neutrality of approach that is blind to the identity of the organisation that has made the application". [10]

185. Alistair Sloan's written submission suggested that requests should be anonymised before being passed to the team that would deal with them other than in cases where the requestor's identity was directly relevant to the request. In his view, failure to do so "may amount to a breach of data protection law." [35]

186. Responding to these comments, NHS Greater Glasgow and Clyde stated that it was standard practice for applicant details to be stripped out before requests were passed to the appropriate team and "where possible, we try to be entirely applicant blind. When the people in my team ask for the information that they will collate, those who provide that information do not know from whom the request has been received." Police Scotland had adopted a similar approach and its "process for dealing with all requests is applicant and purpose blind." [21]

187. SOLAR/SOLACE agreed that this approach was "fairly standard practice now" whilst noting that a "subtle distinction that most organisations make is that they let the press office know if the inquiry is from a journalist…not for prior clearance but simply so that it knows what has been provided to the journalist when the inevitable follow-up inquiry comes in." [21]

188. When asked by the Committee whether there was a difference in the initial process and the sign-off process immediately prior to a response being issued, NHS Greater Glasgow and Clyde agreed that there was "a fair distinction between the

information-gathering stage and the stage for collation and issuing." It confirmed that "if we are about to put into the public domain some information that might be difficult or challenging, the press team is often keen to be aware to prepare lines." However, in its experience, media teams did not ask for additional time or for information to be amended prior to being issued. [21]

189. Police Scotland had a similar experience, explaining "perhaps if the subject is more challenging…that is when one would alert certain people to what we are putting out…There will be individuals who will have an interest, and there will be certain senior staff who will want to sign something off." However, Police Scotland continued "we are not in the business of giving more time, because—to be quite honest—our performance and getting the response back to the applicant are more key." [21]

190. SOLAR/SOLACE agreed "that the sensitivity or escalation of a request relates much more to its subject matter than to the identity of the applicant" but it was "certainly not aware of anyone trying to interfere with an internal review process." [21]

191. The SIC explained that he "certainly agreed" with the applicant-blind principle and had made clear in his intervention with the Scottish Government that decisions "should not be dictated by the fact that an individual happens to be a journalist or a political researcher…Having a universal right removes any of those barriers and means that every request is treated in the same way, because everybody has the same right to the information." [7]

192. However, he accepted that it was "understandable" that complex or sensitive information was likely to be dealt with by more senior staff. He went on to explain that the legislation was not completely applicant blind, for example in relation to vexatious requests, which demonstrated that "there are circumstances in which the identity of the individual is relevant to the process." [7]

193. Commenting on the SIC's intervention, the Minister explained that a new system has since come into force. His officials explained that, previously, guidance stated that most requests from journalists, along with sensitive requests from any other individual, should be brought to the attention of the relevant minister. The guidance was amended immediately after the intervention to make clear that the sensitivity of the information was the only criteria on which any decision to involve ministers should be taken. [19]

194. When asked whether it would be fairer for all requests to be anonymised, Government officials replied that in practical terms, "there are very good reasons why the FOI process should not be anonymised" although anonymisation could be necessary in certain circumstances. The Minister explained that for him, "the key point is that it is about the application. The process has to be seen as applicant neutral. It is not about the person; it is about the application and its consideration." He continued "frankly, we are more interested in what the request says, rather than who is asking." [19]

Request from commercial organisations

195. Nonetheless, some public body respondents did raise concerns regarding requests made for commercial or research purposes which, they considered, were not in keeping with the spirit of the Act. Aberdeen City Council, for example, suggested that increasing demand in particular from "commercial, press and media applicants" was having a negative impact and that "the demand, in some instances, is diverting effort from the delivery of services". Similarly, 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." [29]

196. Unison disagreed, suggesting that if a public authority "puts so many of its services out to the marketplace, it has to expect people to seek market information. Perhaps a way round that would be to deliver more services in-house for the public good rather than private profit." [10] Severin Carrell pointed out that FOI amounted to a statutory "basic universal right" and cautioned against treating different categories of requestors in different ways. [10]

197. In oral evidence, the Minister expressed concern about proposals for what could be described as "a two-tier system for commercial application. He doubted that attempting to define a commercial request "is a road that we would want to go down, and I am pretty sure that it is not a road that the commissioner would want us to go down." Such attempts would inevitably involve the making of "value judgements" and "it goes against the spirit of the legislation as a whole to be analysing people's motives in that way. [19]

198. **The Committee emphasises the important principle of the legislation being applicant blind and that all those who make requests for information should be treated in the same way.**

199. **The Committee acknowledges that users of FOISA, including journalists and MSPs, have raised serious concerns about the way in which, on occasion, their FOI requests have been handled by public authorities, in particular by the Scottish Government. These issues have been examined in some detail in the SIC's intervention report and the Committee notes that the SIC is still monitoring the Scottish Government's implementation of its action plan. The Committee notes that the Scottish Government has subsequently put in place revised guidance for handling requests to address the SIC's concerns.**

200. **The Committee is in no doubt that journalists (and others) will continue to monitor the treatment of their requests by the Scottish Government (or by any other public authority) and raise concerns where they consider that their requests are being treated differently because of their profession.**

201. **The Committee anticipates that the SIC will continue to monitor the treatment of different classes or categories of applicants to ensure that there is no differential treatment of users of the Act.**

202. **The Committee notes that a number of authorities have put in place internal processes so that the identity of the applicant is not known by the team retrieving the information and considers this to be good practice.**

Vexatious requests

203. Section 14 of FOISA provides that a Scottish public authority is not obliged to comply with a request for information if the request is vexatious. Concerns about the vexatious use of FOISA were raised by a number of public authorities. For example, SOLAR/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." [36]

204. Similarly, NHS Greater Glasgow and Clyde stated that “there are a small number of individuals who will use FOI together with a range of other processes available to them (e.g. complaints, whistleblowing).” In its view, isolating the request rather than the requester as vexatious was not helpful as “such applicants will invariably submit further FOI requests on a different subject, making the applicant extremely difficult to deal with.” [11] NHS Lanarkshire echoed this point, stating “in reality it is often the applicant rather than the subject matter that we would want to apply vexatious exemption to.” [12]

205. The University of Edinburgh stated that the SIC required “robust evidence to support any claim that a request is vexatious, but the quantity of evidence required can mean that it is almost impossible to use the provision.” The University suggested that the SIC should review his guidance to include “occasions where an applicant is trying to pursue a grievance which has exhausted the appropriate route.” [37] Similar views were expressed by Aberdeen City Council. [38]

206. However, users of FOISA and representative groups expressed concern about expanding on the definition of vexatious or making it easier to use. In oral evidence, Unison asked “how do you define “vexatious”? Once you start going down that route, you are quickly in fairly dodgy territory. Either it is a right or it is not a right.” The NUJ supported this position and cautioned against “an idea that our public services such as..freedom of information should under certain circumstances be taken away from people who abuse them.” The NUJ was clear that “We do not want what is vexatious to be defined by the person who receives the question.” [10]

207. Rob Edwards agreed stating "it might seem like a request is vexatious to a highly pressured public official, but that is what the act is for. I would be very worried if, as some of the submissions to the committee have suggested, we widened the vexatious request exemption or made it easier to use, because that would deprive lots of people of their rights." [10]

208. In his written evidence, the SIC drew a distinction between vexatious requests and those that were, by virtue of their subject matter, "unworthy requests". He indicated that to allow authorities to refuse a request on the basis that it is not sufficiently serious would be a "major retrograde step," which would allow "authorities to go back to a position of deciding what the public should see rather than what they want to see." [39]

209. The SIC informed the Committee that in 2018/19 the vexatious exemption was used 175 times out of a total of 83,000 requests in the same time period. The SIC told the Committee that he thought the exemption could be used more but that there appeared to be a natural reticence to using it. [7]

210. Professor Dunion agreed, stating "I think that authorities have been remarkably restrained. They hardly ever use vexatiousness as a reason to refuse information. I think that they shy away from doing so. It may be that they should use it more often to deal with the concerns that they have raised, but they do not choose to do so." [9]

211. The Scottish Government's written evidence suggests that greater clarity could be achieved "if a test for vexatiousness were specified on the face of the legislation," perhaps on a similar basis to the vexatious litigant provisions of the Courts Reform (Scotland) Act 2014. [27]

212. In oral evidence, the Minister highlighted an occasion where the Government received 84 requests from a single individual in the space of 56 minutes including a mix of "some perfectly serious and legitimate requests, alongside some that many people would consider to be quite frivolous." He further noted that 20% of requests received in 2018 came from just five individuals, of whom four were political researchers. [7]

213. However, he agreed that public authorities were reluctant to use vexatiousness as "a get-out" and suggested that there may be merit in considering whether a requestor could be designated vexatious as opposed to the request itself. In his view, however, any changes to the scheme "would have to be very carefully drafted and there would perhaps have to be a right of appeal to the commissioner if someone objected." [7]

214. **The Committee recognises the concerns of users of the Act and campaigners about the potential extension of the term "vexatious" or by making it easier to use. It also acknowledges the sensitivities and difficulties in objectively assessing what might be considered a "vexatious" request.**

215. **The Committee also notes the evidence from public authorities who indicated that there were a small number of individuals who were not using the Act in the spirit in which it was designed. The Committee further notes, however, that public authorities appear to be reluctant to use the vexatious provision within the Act (section 14) in such cases.**

216. **The Committee recommends that the use of section 14 of the Act is revisited to ensure that the SIC has sufficient powers to address concerns about vexatious requests. It recognises that the situation may be dealt with by the provision of more detailed guidance from the SIC, including case studies (for example) of requests that may or may not be considered vexatious.**

Timescales for responses

217. FOISA states that a public authority must comply promptly with a request for information and in any event not later than 20 working days from receipt of the request.

218. 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. 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." [40]

219. The Coalition of Carers provided an example where 32 identical requests were made to local authorities of which 14 were responded to after the 20 working day deadline with three having received no response at all. [33]

220. A number of public authorities indicated that they generally met statutory deadlines for around 90% of requests, including the Scottish Courts and Tribunals Service, Aberdeen City Council, Glasgow City Council and NHS Lanarkshire. NHS Greater Glasgow and Clyde also confirmed that around 90% of applications are dealt with within 20 days but acknowledged that whilst "there is an intention within organisations to provide information when it is available, I realise that a prevalence of responses are being issued at around the 18, 19 or 20 day mark. I do not think that we can escape that point." [11]

221. In oral evidence, the SIC confirmed that "over the past three years, the rate of responses being made on time has been around 85 per cent consistently across

authorities. That is obviously something that we want to improve on, but the rate is still relatively high, despite the increasing volume of requests." [7]

222. Some public authorities suggested that the 20 day response period should be extended, particularly for more complex requests. East Lothian Council, for example, suggested that "consideration should be given to allowing for a possible extension to the 20 working day time frame where the volume of FOI requests received or the size of any particular individual request dictates." [41] Similarly, NHS Greater Glasgow and Clyde, SOLAR/SOLACE and Police Scotland all supported an extension in certain circumstances, pointing out that extensions were possible under EIR and data protection legislation. [42] [36] [11]

223. However, Dr Worthy warned of what he described as an "anchoring effect", whereby people work to the deadline, and expressed fears that this "anchoring effect will mean that the longer the period the more people will work to the limit. In a way, that is human nature." [9]

224. In his oral evidence to the Committee, the SIC indicated that he thought that 20 days was "long enough." While he wished to see an on-time response rate higher than 85%, in his view this rate did "not suggest that the system is keeling over because of an inability to meet the deadline." [7]

225. The Minister took a similar view, indicating that "we do not favour extensions per se" given that "the overwhelming majority of requests can be addressed within the existing timeframes." [19]

Interpretation of timescales

226. Nonetheless, a tension appears to have emerged between what is provided for in legislation and how this has been interpreted by some public authorities. Professor Dunion confirmed that whilst 20 days is the limit, full compliance should mean "as soon as reasonably practicable" as provided for in the Act. [9]

227. Evidence from some public authorities suggested that they worked to the 20 day limit rather than aiming to issue responses as soon as reasonably practicable. Police Scotland, for example, stated "in terms of the legislation, we are aiming for 20 working days". NHS Lanarkshire highlighted the importance of quality assurance, stating "sometimes we could get responses out quicker, but if we want to be absolutely sure that we have the full information, we take a bit more time with a response. There are plenty of examples in which we have deliberately taken a bit longer with an inquiry just to be sure that we get the response right." [21]

228. In his evidence to the Committee, the Minister stated that "updated guidance tells staff that they should turn around FOI requests as quickly as practical." He pointed out that 20 days was "a limit, not a target" and that "most requests can and should be responded to well before then." He went on to state that the Scottish Government's average response time had fallen from 17 days in 2017 to 16 days in 2018 and looked likely to drop to 15 days for 2019. [19]

Stopping the clock - requests for clarification

229. In the event that a public authority needs to seek clarification from a requestor in respect of the information they are seeking, FOISA provides that the clock is effectively reset to zero and a new 20 day deadline applies from the date on which the clarification was received. Alasdair Clark's written evidence suggested that "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." [43]

230. The SIC indicated that, as far as he was aware, this kind of delaying tactic was not often used. However, he made clear that he would "certainly want to have a close look at any case where I thought that there was a suggestion that it had been deliberately used to delay the provision of information." The SIC went on to explain that he did not consider the current arrangements whereby the clock went back to zero to be helpful and would prefer a pause which "might prevent that option from being perceived as an attractive way of delaying providing a response." [7]

231. In his evidence to the Committee, the Minister appeared to have some sympathy for such an approach. The Minister indicated that "I can see the sense of a pause-the-clock mechanism to avoid such situations." [19]

232. **A number of submissions from users of the Act commented on the delays experienced in receiving responses to FOI requests. On the other hand, the Committee notes the evidence from the SIC that, over the past three years, the rate of responses being made on time has been around 85 per cent consistently across public authorities, which is relatively high. It is clearly important for rates of responses across the public sector to be monitored and for appropriate action to be taken by the SIC if it appears that a public authority is regularly responding outwith the 20 day deadline or there is evidence to suggest that the level of late responses in respect of specific categories of requesters is particularly high.**

233. **Evidence from some public authorities also suggested that they worked to the 20 day limit rather than aiming to issue responses promptly, as required by the Act. The Committee considers that further promotion work may be required by the SIC to ensure that all public authorities are aware that the 20 day response timescale provided for by the Act is a limit, not a target and that authorities should be aiming to respond promptly.**

234. **In the event that a public authority needs to seek clarification from a requestor in respect of the information they are seeking, FOISA provides that the clock is effectively reset to zero and a new 20 day deadline applies from the date on which the clarification was received. Some evidence to the Committee suggested that officials were asking for further information towards the end of the 20 day limit, rather than requesting clarification in a timely manner. The Committee notes that the SIC indicated some sympathy**

for a change in the law whereby the clock was paused, rather than going back to zero. The Committee recommends that this revision is considered as part the Scottish Government's consultation on other legislative changes recommended in this report.

Reviews and appeals

235. FOISA provides for a three-tier appeal process. If an individual is dissatisfied with the response they receive, in the first instance, they can request an internal review from the public authority and, if still dissatisfied, apply to the SIC. If an applicant is dissatisfied with the SIC's decision, they are entitled to appeal to the Court of Session on a point of law. The Committee heard of a number of issues with the review and appeals process and these are briefly set out below.

Section 48

236. Section 48 of FOISA specifies three circumstances where an application to the SIC is excluded, namely where the request for information was made to a procurator fiscal, the Lord Advocate or the SIC. There is no equivalent exemption in the UK FOI Act. As there is no decision of the Commissioner in section 48 cases, there is no right of appeal under section 56 and so the process ends at the conclusion of the internal review stage. The only remaining option is then an expensive and time-consuming judicial review at the Court of Session. [20]

237. Alistair Sloan's written evidence states that "there have, to my knowledge, been no petitions for judicial review lodged with the Court of Session against either COPFS or the Commissioner in respect of decisions made by them in response to a requirement for review. That may be because there is a lack of knowledge that such a route exists." [35]

238. The SIC has suggested removing the prohibition in section 48 against appeals being made to his office against certain bodies. The SIC's written evidence indicates that between four and ten cases per year currently fall under this exemption. [39]

Section 52

239. Section 52 applies to a decision notice or enforcement notice which is "given to the Scottish Administration; and relates to a perceived failure, in respect of one or more requests for information, to comply with section 1(1)" of FOISA where certain exemptions apply. It provides a power of veto to the First Minister which means that the decision notice or enforcement notice ceases to have effect. [20]

240. In his submission, the SIC commented that the power of veto given to the First Minister in section 52 is contrary to the fundamental principles of FOI. He stated that after "14 years of operation of FOISA, this provision has never been used and this suggests it serves no useful purpose. To remove this provision would strengthen our FOI law." [39]

Technical amendments

241. The SIC also identified a number of technical amendments which have been noted by his office over a number of years of applying the legislation, and which would remedy oversights and inconsistencies in the legislation. These are attached as an appendix to his submission. [39]

242. **The Committee recommends that the revisions proposed by the SIC in his written submission in relation to sections 48 and 52 of FOISA along with the technical amendments identified in an appendix to his written submission are considered as part the Scottish Government's consultation on other legislative changes recommended in this report.**

Appeals

243. Finally, the Committee received limited information about the appeal process. Alastair Sloan raised concerns about the cost of appealing against a decision made by the SIC to the Court of Session which he described as "prohibitively expensive." Both he and Dr McCullagh suggested that instead, appeals should be made to Upper Tribunal for Scotland, with a further right to appeal to the Upper Tribunal of the Court of Session if justified. [9]

Conclusion

244. **There is a broad consensus that FOISA has brought significant benefits by establishing a statutory right of access to information held by Scottish public authorities that fall within the scope of the legislation. However, witnesses have identified a number of areas for improvement, both in terms of the legislation itself and in its implementation. The Committee recommends that the Scottish Government consults on the legislative changes proposed in this report and works with the SIC and public authorities across Scotland, as appropriate, to address the areas where implementation of the Act could be strengthened.**

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[10] The Scottish Parliament. (2019, September 19). Official Report of PAPLS Committee meeting 19 September 2019. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12271&mode=pdf

[11] NHS Greater Glasgow and Clyde. (n.d.) Post-legislative scrutiny - Freedom of Information (Scotland) Act 2002 Written submission. Retrieved from https://www.parliament.scot/S5_Public_Audit/General%20Documents/26_NHS_Greater_Glasgow_and_Clyde.pdf

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