



Submission of views on Post-Legislative Scrutiny of Lobbying (Scotland) Act 2016

Submitted to the Public Audit and Post-Legislative Scrutiny Committee of the Scottish Parliament

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SUBMISSION FROM DAREN FITZHENRY, SCOTTISH INFORMATION COMMISSIONER

Introduction

1. Both Freedom of Information (FOI) and the Lobbying (Scotland) Act 2016 ('the Act') have transparency and openness at their heart. One of the stated objectives of the Act was to increase the public transparency of elected representatives' activity, by introducing a register of lobbying activity that would complement existing parliamentary and governmental transparency mechanisms¹. One such mechanism is FOI.
2. The Committee has recently concluded its post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA), so some of the issues I raise in this response will be fresh in mind. However, it may be helpful to the Committee for me to set out areas of interplay between the Act and FOISA, to assist it in considering views put forward in this review.
3. I highlight below the specific ways in which FOI and the Act complement each other, and how developments in one area can affect the expected operation of the other. In particular I show how some of the views expressed by witnesses in post-legislative scrutiny of FOISA may be relevant to the Committee's considerations in relation to the Act.

Duty to record information / minute meetings

4. There is some crossover between the duty to register lobbying activity under the Act and the 'right to know' under FOI.
5. The Register will be, in some cases, a way for the public to know that a meeting has taken place, which they may wish to find out more about.
6. We know from some of the views expressed during post-legislative scrutiny of FOISA that there is public interest not only in knowing that these meetings have taken place, but also in being able to access minutes of those meetings.
7. FOI may be a route by which to find out more, but that is dependent on the public authority in question holding more information about the meeting in a recorded format. FOISA only

¹ Lobbying Scotland Bill Policy Memorandum:

[https://www.parliament.scot/S4_Bills/Lobbying%20\(Scotland\)%20Bill/SPBill82PMS042015.pdf](https://www.parliament.scot/S4_Bills/Lobbying%20(Scotland)%20Bill/SPBill82PMS042015.pdf)

applies to information held by, or on behalf of, a Scottish public authority (which does not include individual elected members²) in a recorded format at the point a request is received.

8. However, several witnesses to post-legislative scrutiny of FOISA expressed the view that information about important meetings was not being recorded, which prevented them from using their FOI rights to access this information.
9. For example, during the Committee's evidence session of 19 September 2019³, several witnesses expressed concern that FOI was made less effective through minutes not being taken or records not being made.
10. In its Report, the Committee noted:

"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".
11. It is also important to note that the Register currently captures some communications which may be less likely to be held in a recorded format by the public authority (e.g. the unplanned nature of an impromptu conversation at an event means it may be less likely that the existence of the communication will be recorded). I do, of course, acknowledge that certain public authorities, such as the Scottish Ministers, have a duty set out in their procedures or codes to record such meetings⁴. This is another way in which the Register and FOI complement one another.
12. Given that there are some communications that are captured in the Register which may not be available under FOI (such that FOI cannot complement the information available under the Register), one area the Committee may wish to consider is whether the information that is captured in the Register is detailed enough to meet the transparency objectives of the Act.

Extending the Act to cover other types of communications

13. If the Committee is minded to recommend extending the Act to cover other types of communication (email, letter etc), there may well be overlap with FOI, as these communications, if held in a recorded form by or on behalf of a public authority, will already be covered by FOISA.
14. Of course, as a result of the Coronavirus pandemic, there have been far fewer face-to-face communications in recent months. Some have embraced video conferencing, but others are using teleconferencing more (which would not appear to be covered by the Act). Telephone calls are only covered by FOISA if recorded (i.e. an audio recording, or by the taking of written notes/minutes).
15. This again raises the issues put forward by some in post-legislative scrutiny of FOISA about record creation and retention. Again, the Committee may wish to consider how much detail about such correspondence should be recorded in the Register.

² See <http://www.itspublicknowledge.info/home/SICResources/Guidanceforelectedmembers.aspx#covered>

³ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12271&mode=pdf>

⁴ For example, see the Scottish Ministerial Code, para 4.23

16. The Committee should bear in mind that the content of such communications may be subject to exemptions under FOI law, meaning that some content may be redacted before disclosure under FOISA. Where a particular communication is subject to the proactive publication duty in FOISA, such content can be redacted from communications before publication.

Extent of exemption for communications made by or on behalf of a public authority within the meaning of FOISA

17. There is an exemption in paragraph 22(d) of the Schedule to the Act which lists as exempt from the Act:
- “A communication made by or on behalf of—...any other Scottish public authority within the meaning of the Freedom of Information (Scotland) Act 2002...”*
18. There are obvious reasons why communications between public authorities and elected representatives were made subject to an exemption.
19. The exemption could be interpreted to mean that public authorities which are made subject to FOISA, but only for certain functions, are exempt from registering any of their lobbying activities, not just for any lobbying related to the functions in respect of which they are covered by FOISA⁵.
20. Since the Act came into force, a number of new bodies have been designated as falling under FOISA, at least in respect of some of their functions. These further designations cover:
- (i) Privately run prisons;
 - (ii) Secure accommodation providers;
 - (iii) Grant-aided schools;
 - (iv) Independent special schools;
 - (v) Scottish Health and Innovations Ltd;
 - (vi) Registered Social Landlords (RSLs); and
 - (vii) Certain RSL subsidiaries.
21. In addition to the increased pace of designation, the designations have also become more nuanced. It is common for designations under FOISA to cover particular bodies insofar as they are carrying out specific functions, which are also defined in designation orders.
22. In the most recent designation (in 2019), RSLs and certain of their subsidiaries (dependent on the corporate structure under which the body was set up) were covered for the functions of “any activity in relation to housing services as defined in section 165 of the 2010 Act”, subject to certain modifications, and “the supply of information to the Scottish Housing Regulator by a registered social landlord or a connected body in relation to its financial well-being and standards of governance”. The definitions which set out which subsidiaries and which functions are covered are relatively complex, which prompted my office to produce detailed guidance on who is covered⁶. Certain functions of RSLs and their subsidiaries were

⁵ A news item on the Lobbying Register’s website from 7 November 2019 about extension of FOI to RSLs seems to suggest that RLS (and their subsidiaries), if covered by the definition in the order of persons covered, but with no consideration of functions covered, may no longer be subject to the Act:
<https://www.lobbying.scot/SPS/Home/News>

⁶ <http://www.itspublicknowledge.info/ScottishPublicAuthorities/NewAuthorities/RSLsandsubsidiaries.aspx>

explicitly omitted from FOISA coverage (e.g. factoring services were explicitly omitted from the functions of RSLs and subsidiaries which are covered by FOISA).

23. Contractors and sub-contractors which provide public services on behalf of the public sector can also be made “public authorities” for the purposes of FOISA. Those running private prisons under contract with the Scottish Ministers were designated in 2016⁷, for the functions of the provision or running of a prison or a part of a prison in Scotland under section 106(1) of the Criminal Justice and Public Order Act 1994. The Committee may wish to consider how the exemption would be interpreted in relation to these contractors, or others which may become “public authorities” for the purposes of FOISA in the future⁸.
24. In its Report on post-legislative scrutiny of FOISA⁹, the Committee confirmed that it “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”, and that “in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner”. Further, the Committee recommended that the Scottish Government consult 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”.
25. The Committee may wish to consider:
 - (i) whether public authorities under FOISA are completely exempt from the duty to register their lobbying communications, or only exempt for the public function(s) they deliver / public service(s) they provide under contract; and
 - (ii) whether this is something the Committee wishes to consider in its review of the Act, given the increased rate, and more nuanced approach, to FOI designation.

Conclusion

26. I trust this precis of the interplay between FOI and the Act, and how they can, and could, work together to meet the public interest in accessing information and improving transparency assists the Committee in its review. I would be happy to answer any questions the Committee may have about the content of this response.

⁷ <https://www.legislation.gov.uk/ssi/2019/143/contents/made>

⁸ The Scottish Government consulted last year on using the powers under section 5 of FOISA to make contractors providing public services on behalf of the public sector subject to FOISA:

<https://consult.gov.scot/constitution-and-cabinet/freedom-of-information-extension-of-coverage/>

⁹ Public Audit and Post-legislative Scrutiny Committee Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002, 2nd Report (Session 5):

<https://digitalpublications.parliament.scot/Committees/Report/PAPLS/2020/5/19/Post-legislative-scrutiny--Freedom-of-Information--Scotland--Act-2002>

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