



Scottish Information
Commissioner

**A Special Report to
the Scottish Parliament**
by the Scottish Information
Commissioner
January 2012

Scottish Information Commissioner

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Informing the Future

THE STATE OF FREEDOM OF
INFORMATION IN SCOTLAND

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FOREWORD

This Special Report to the Scottish Parliament is laid under section 46(3) of the Freedom of Information (Scotland) Act 2002 (FOISA) prior to my departure from office. The purpose of the report is to give an opinion on the current state of freedom of information (FOI) in Scotland, to draw attention to related matters which Parliament may wish to take into account and to make recommendations.

I believe it is particularly timely to do so given the current consultation by the Scottish Government on a proposed Freedom of Information (Amendment) (Scotland) Bill and also as an early contribution to the Government's intended consultation on a Transparency Agenda for Scotland in 2012.

**Kevin Dunion**

Scottish Information Commissioner



THE STATE OF FREEDOM OF INFORMATION IN SCOTLAND

The Freedom of Information (Scotland) Act 2002 (FOISA) was, at the time of its passage in 2002, generally viewed as amongst the stronger access to information laws in the world. It provides universal entitlements to request and be provided with information, largely unhindered by considerations of cost. While there are legitimate grounds for authorities to refuse to provide information, these are balanced in most cases by strong harm and public interest tests. Our legislation provides firm timescales for requests and reviews and a right of appeal to an independent commissioner.

PROGRESS IN ACTION

The implementation of FOISA can be regarded as having been successful:

- Public awareness of the right to information (since its full introduction in 2005) is demonstrably high.
- Citizens are making use of their freedom of information rights to request information and make appeals, the majority of which in Scotland are made by ordinary individuals rather than the press, politicians or commercial organisations.
- A cadre of skilled FOI professionals has emerged in public authorities, private legal practice and in civil society.
- Most authorities strive to meet their statutory obligations – timescales for complying with requests are generally adhered to and costs are very rarely imposed for providing information.
- Where assessments of practice have found performance failings, there is generally a preparedness to implement improvements.
- The Commissioner's decisions are complied with and only rarely challenged in the courts.
- Above all, information which would otherwise have been withheld is being regularly disclosed to the people who ask for it because of the rights afforded by FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs).

MOVING FORWARD

However, it would be complacent and misleading to suggest that there are not deficiencies in the law and practice:

- There is still substantial evidence of poor compliance affecting information disclosure.
- Still too many of the appeals made to the Commissioner are a result of late responses by authorities to requests, or by the failure of authorities to respond at all.
- Searches for information within the scope of a request can be inadequate.
- There can be insufficient recognition that requests may be for environmental information and a subsequent failure to consider properly such requests under the EIRs.
- The limited timescale within which prosecutions for deliberate destruction of information following a request must be brought hampers the effective use of this sanction.
- The right to information is being eroded in many places by the provision of public services by arm's length organisations and private contractors, yet the power to bring some of these bodies within the scope of FOISA by ministerial designation has not been used.

A POSITION OF STRENGTH

Scotland's freedom of information regime is widely recognised as being strong and withstanding international scrutiny. The law is progressive, authorities comply with their obligations and public use of FOI rights is widespread.

More information is being disclosed and proactively published as a result of FOISA.

I base this view not only on my experience as the independent appellate body for the legislation in Scotland, but also on substantial engagement with FOI regimes in many other countries. Modern FOI laws have spread across the globe. Following the USA in the 1960s came "old" democracies such as New Zealand and Canada in the 1980s and "new" democracies like Hungary, Czech Republic and Latvia in the 1990s. In the 21st century, Scotland and the UK have been joined by newcomers on every continent including India, Brazil and South Africa. There are more than 260 FOI or "access to information" laws worldwide at a national, state or provincial level. Through shared international experience and research, several standards¹ are emerging against which we can test our own legislation and its operation.

PUBLIC AWARENESS AND USE IS HIGH

Public awareness of FOISA has risen markedly. In 2011, an Ipsos MORI² survey of the Scottish public found 67% had definitely heard of FOISA compared to 30% of those surveyed just before FOISA came fully into effect on 1 January 2005.³

Anecdotally, public authorities tell us that the number of requests they receive has risen year on year since the legislation came into force. However, the precise extent to which people make use of their rights cannot be readily established. One of the important features of our legislation

is that any request made in a recorded format (such as a letter or email) constitutes an FOI request. There is no need for the requester to invoke their FOI rights or fill in a form, as is often required in other countries. People may not even be aware that *de facto* they have made a FOI request. Our laws ensure that authorities are obliged to respond to all the information requests they receive, regardless of the level of awareness that the requester has of their rights.

Given this, and to avoid burdensome demands on them, neither FOISA nor its associated Code of Practice require Scottish public authorities to keep count of the requests they receive. (In some other countries, such as Ireland, where requesters have to say that they are making an information request under the Freedom of Information Act, authorities must make an annual report to the Irish Information Commissioner of the number of FOI requests received.)

The reality is that we do not know how many people make FOI requests to Scottish authorities. Where records are voluntarily kept they will often not reflect fully the number of requests received. Authorities will often (for their own business purposes) keep track only of those requests which are complex, sensitive or from certain sources e.g. from journalists, or politicians. It is therefore challenging, if not impossible, to measure the impact of FOI on Scottish authorities such as identifying the costs of responding to requests. Indeed calculating the cost of FOI based only on more complex requests, rather than all requests, may artificially inflate the average cost of dealing with a request. It is also not possible to aggregate meaningfully FOI data from different authorities to provide regional or national statistics, as data definitions and collection methods vary.

PEOPLE ARE USING THEIR RIGHT OF APPEAL

The number of applications to me (often called appeals) is, however, known.

The projected figure for the number of applications in 2011/12 shows a sharp increase and will be the highest figure since 2005/6, when FOISA came into effect. This may be indicative of a greater number of requests being made to authorities or a greater level of dissatisfaction with the response from authorities. Around 75% of appeals come from members of the public in a personal capacity. The remainder comes primarily from the media, businesses and elected representatives.

THE APPEAL PROCESS IS WORKING

The number of formal decisions I have issued has increased in recent years from 41% of all cases in 2008/9 to 55% in 2010/11. I issued more formal decisions in 2011 than in any other calendar year. The reasons for this increase are not clear. In some cases there is a hardening of positions, with applicants insisting upon their right to a formal decision or authorities requiring a formal determination by the Commissioner before disclosing any information. It may indicate a somewhat adversarial relationship developing between some authorities and those who make frequent or extensive requests.

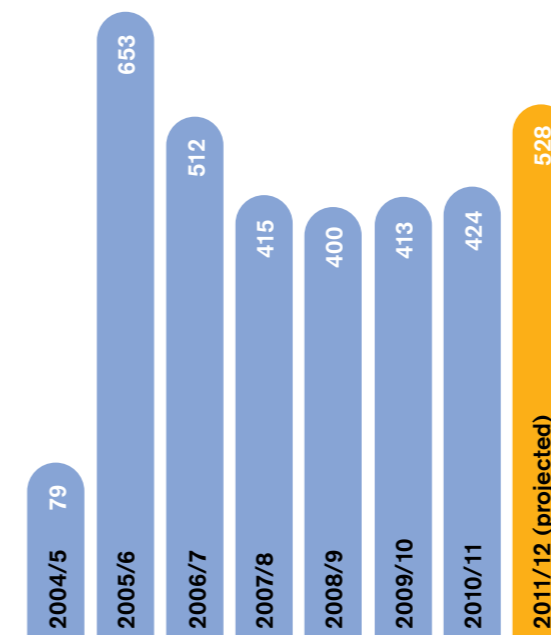
In a substantial proportion of such decisions, what is at stake is whether an authority has correctly applied the legislation when it withholds information. Cases frequently turn on whether the release of information would result in the level of harm claimed by an authority or whether the public interest has been appropriately assessed.

Statistics show that making an appeal to the Commissioner is worthwhile for the applicant. In formal decisions issued in 2010/11, 24% of appeals found fully in favour of the applicant and 46% partly in their favour.

This demonstrates the importance of having an independent appellate body, with the power to uphold or overturn the decisions of public authorities.

Furthermore, around 25% of valid cases are closed during investigation. Often this happens because a case has been settled (that is, the investigating officer has helped to broker an informal agreement between the authority and the applicant to settle the dispute) or for some other reason the appeal is withdrawn. In the significant majority of these cases this has come as a result of some or all of the information being disclosed to the applicant. >

NUMBER OF APPLICATIONS TO COMMISSIONER



¹ e.g. Access Info Europe's Global Right to Information Rating

² Ipsos MORI Scottish Public Opinion Monitor Wave 10, November 2011

³ Report of Public Awareness Research 2005 conducted by Progressive Scottish Opinion for the Scottish Information Commissioner

THE APPEAL PROCESS (CONT'D)

The average time taken by my office to close valid cases has progressively reduced and now stands at less than four months.

This is an important milestone as the Commissioner is required, under section 46(2) of FOISA, to report the number of occasions on which a decision on an application has not been reached within four months.

However although the appeal process is working, there are still issues needing addressed. Around 25% of appeals to me are invalid and cannot proceed because of technical deficiencies. Principal amongst these is where an applicant has failed to ask the authority to review its original decision, a step which must be taken before appealing to me. In many instances this deficiency may be due to the authority failing to respond to the original request, or failing to inform the applicant of their right to a review.



The average time taken by my office to close valid cases has progressively reduced, and now stands at less than four months.



MORE INFORMATION IS BEING DISCLOSED

The key test of a freedom of information regime is whether more information is being disclosed than would be the case if there was no statutory right. FOI has caused more information to be made available in three ways:

1 Information is being proactively published by the authority as a result of its approved publication scheme. Increasingly, for example, public authorities are now publishing details of contracts awarded or expenses paid to senior staff and elected members – which largely was not the case before FOI was introduced.

2 Information is being provided in response to FOI requests. Authorities are complying with requests and are providing information to the satisfaction of requesters without the need to involve the Commissioner:

- The C Diff Justice Group used FOI to access information which they used to raise awareness of the incidence of hospital acquired infections in Scotland, and successfully campaigned for a new Healthcare Environment Inspectorate.
- Concerned parent Stephen Wilson discovered, through FOI, that NHS Highland did not have a screening programme for “lazy eye”, following the diagnoses of his daughters with the condition. He successfully campaigned for the introduction of local screening.
- In 2008, the Scottish Government released a wealth of information in relation to the Menie Estate planning application by Trump International Golf Links.

3 Information is disclosed as a result of the Commissioner's decisions. This includes information which authorities resist providing, which is disclosed only after using the independent appellate procedure of making an application to the Commissioner:

- Some decisions have been groundbreaking, such as the decision to disclose the surgical mortality rates of Scotland's surgeons in 2006.
- Some decisions encourage good practice. Requiring NHS Lothian to disclose the full PFI/PPP contract for the Edinburgh Royal Infirmary led to more such contracts being proactively published by other authorities.
- Many decisions show that information can be disclosed without the occurrence of harm claimed by authorities e.g. details of farm subsidy and other grant payments, information about proposals to close rural schools and the criteria for job evaluation within local authorities.

PUBLIC AUTHORITIES ARE DEMONSTRATING GOOD PRACTICE

Authorities are expected to exhibit good practice in meeting their FOI obligations. This includes, for example:

- responding to FOI requests promptly, certainly within statutory timescales
- providing advice and assistance to applicants
- conducting reviews independently and objectively.

I have made use of the provisions in FOISA to carry out assessments of authorities' overall practice and so far, some 32 authorities have been assessed. In almost all instances a voluntary action plan has been agreed with the authority to address any deficiencies which have been found without the need to issue a Practice Recommendation.

To date, therefore, I have issued just one Practice Recommendation under section 44(1) of FOISA. I have the power to issue such a Recommendation where an authority has failed to conform to the Ministerial Codes of Practice issued under section 60 and section 61 of FOISA. However, I am pleased to report that a voluntary action plan agreed following the issue of the recommendation led to marked improvements at the authority concerned.

AWARENESS OF FOISA⁴

30%

of survey respondents had definitely heard of FOISA in 2005

61%

of survey respondents had definitely heard of FOISA in 2009

67%

of survey respondents had definitely heard of FOISA in 2011

⁴ Public Awareness Research by Progressive Scottish Opinion in 2005 and 2009, and the Ipsos MORI Scottish Public Opinion Monitor Wave 10, November 2011



Against this backdrop of generally satisfactory progress there are matters which could be, and indeed need to be, improved. Furthermore there is the need to guard against developments which may undermine the right to know and restrict access to information.

SCOPE FOR IMPROVEMENT

FAILING TO COMPLY WITHIN THE STATUTORY TIMESCALE

If the test of a freedom of information regime is the extent to which more information is being disclosed than would otherwise be the case, then a closely related test is whether that information is being issued promptly. Information may have lost its value if it is provided late.

Authorities are required by FOISA and the EIRs to respond to requests promptly and, in any event, within 20 working days – around a calendar month.

My experience suggests that the timescales provided for responses in FOISA are achievable and realistic. Assessments carried out by my staff have found, however, that performance varies.

Whilst some authorities comply with the statutory timescale in over 90% of the cases they deal with, for some others compliance is within a range of c.60-70%.

Some applicants experience considerable and unacceptable delay.

The most common causes of delay in information being disclosed are:

- a partial or complete failure to recognise that a request requires a response under FOISA or the EIRs
- inadequate attention being paid to the requirement to comply with the request within the specified timescale
- internal deliberation as to whether to disclose sensitive information.

Mute or deemed refusal

When an authority simply fails to respond to an applicant within the stipulated 20 working days, that is taken to be a mute or deemed refusal. If this occurs following a request for review, the applicant can appeal to the Commissioner. The number of applications to me caused by an authority's failure to respond to the request and/or the request for review is surprisingly high. For instance,

in the period July to September 2011, mute or deemed refusals constituted some 30% of all appeals made to my office.

This may be indicative of a failure by authorities to appreciate properly that a request has been made which is subject to FOISA or the EIRs. >



My experience suggests that the timescales provided for responses in FOISA are achievable and realistic. Assessments carried out by my staff have found, however, that performance varies.



TIMESCALES (CONT'D)

Delayed response

Even where an authority recognises that requests engage FOI obligations, the authority's internal case management procedures may be poor, causing deadlines for response to be missed. Often appeals are made to my office, only for a belated response to be made subsequently to the applicant by the authority.

These deficiencies can and should be remedied by management intervention. Staff skills can be improved through adequate induction and refresher training so that FOI requests are recognised, and the appropriate action to be taken is understood by staff receiving requests. Organisational systems for tracking and managing FOI requests contribute considerably to deadlines being met rather than missed. Appreciable improvements in performance have been achieved as a result of the voluntary action programmes following assessments. Some authorities have seen timescale compliance rates rise, in six months, from 72% to 88%.

There may be instances where authorities simply decline to respond or knowingly fail to respond in time, leaving it to the applicant to determine whether they wish to appeal to the Commissioner. There is some indication that this may be happening where the authority thinks the applicant is making frequent, challenging requests. Clearly if this is happening, it would be an unacceptable development.

In the few cases where the authority is simply unable to respond in time, applicants tend to be understanding if they are informed of the likelihood of delay. In my view there is no need to amend FOISA to generally extend the statutory period within which information should be given. My concern, if this should happen, is that information would not be disclosed "promptly" but rather that authorities may take advantage of the full extended period to respond to requests which could be dealt with more quickly.

FAILINGS IN RESPONSE

Applying late exemptions

After an appeal has been made, an authority will often withdraw reliance on certain exemptions and introduce new exemptions as justification for the information being withheld. This can occur well after an investigation has begun. This has the effect of delaying a decision – and consequently any disclosure of information – as fresh submissions often have to be sought from the authority expanding upon its reasons for applying the new exemptions, and the applicant may also need to be given the opportunity to make comment.

In most cases this is avoidable. Before an application is made to the Commissioner the authority has two opportunities to provide the applicant with its full response to their request for information. If the authority is going to refuse the request on the grounds that an exemption applies, then it must give the applicant a refusal notice specifying the exemption being applied and explaining why it applies. This is a formal process which should be given proper consideration. An applicant who is dissatisfied with such a refusal can ask the authority to review it. An appeal cannot be made to the Commissioner without first going through this internal appeal process. The authority therefore has a second opportunity to review its position and to apply correctly any exemptions.

I have sought to encourage authorities to "get it right first time" and to discourage submission of late exemptions at any stage in the investigative process.

However it still frequently occurs. The extent to which the Commissioner has discretion to accept or reject the late submission of exemptions has not been tested by the courts in Scotland, but has been a matter of debate in England.

Is it environmental information?

Authorities often fail to recognise that the information requested is environmental and must be dealt with under the EIRs.

It is now well established that authorities cannot elect to respond to requests for environmental information under FOISA alone – they must comply under the EIRs. In many cases the failure arises because it is not immediately apparent that the request is for environmental information, such as the emission of pollutants. Yet authorities need to be aware that what constitutes environmental information can be wide-ranging - for example I have determined that an Equalities Impact Assessment (for a proposed incinerator), tenders for the Scottish National Arena and Velodrome, costs of the Aberdeen Western Peripheral Route and the name of a fish farm (from which salmon had escaped) all constituted environmental information.

When the EIRs are only considered belatedly, then at the very least decisions are delayed whilst the authority looks afresh at the withheld information to determine which, if any, of the exceptions or other provisions in the EIRs it wishes to apply. As there are material differences between FOISA and the EIRs (particularly when dealing with emissions), it may be found that there is no basis under the EIRs to withhold the information, and that it has been incorrectly withheld from the applicant.

Authorities need to improve staff awareness of what constitutes environmental information and apply the EIRs in their first response to the requester, not only after being prompted to do so following an application to the Commissioner.

Failing to find information

On receipt of a request for information the onus is upon the authority to establish the extent to which it holds information within the scope of that request. I am aware of instances where information which has been requested has been held in: paper documents, including handwritten notes and diary entries; financial records including original receipts; e-mails; photographs; maps; CCTV and audio recordings. It may be found in central records management systems, archives or in an individual's computer or desk.

Finding all of the information within the scope of a request can be challenging, especially if an applicant asks for all information concerning a certain general matter. However where the request is on a limited subject matter, or covers a restricted timescale, then the search can be narrowed and authorities are expected to carry out intelligent searches e.g. identifying which operational areas or staff are likely to hold or have generated information relevant to the request, and asking them if they can identify anything falling within the scope of the request.

Not infrequently, information within the scope of a request only comes to light in the course of an investigation by my office. This may be due to inadequate searches by the authority e.g. failing to use all appropriate keywords when searching electronically, or failing to direct enquiries to a relevant member of staff who, it turns out, holds information which is not held on central systems.

My office presses authorities on the thoroughness of their searches, if the request concerns information which it would appear that the authority should hold, or there is evidence from elsewhere that it was once held.

Lack of information held

In some of my decisions I have noted that despite investigation there is an apparent paucity or indeed complete lack of information relevant to a request on matters of real and recent significance.

In general, where this occurs (whether in Scotland or elsewhere), there is a concern that the purpose of FOI is being frustrated if:

- information is in fact held, but sufficient enquiries are not being made of relevant individuals within an authority to locate it
- mindful of potential disclosure under FOI, information which the authority might be expected to hold is not being recorded or is being systematically disposed of
- information is being exchanged and held in a manner which the authority may claim is outwith the scope of FOI e.g. it is being held in private email accounts.

It is far from clear to what extent any of this is happening in Scotland. It would be naïve to believe that we were immune to such a response to FOI, and there have been some specific instances of poor practice. However it cannot yet be said that it is widespread.

Many of these deficiencies and uncertainties can be remedied by an organisational culture of transparency and accountability, underpinned by proper records management procedures.

For example:

- authorities should have a professional records management system and policy for the creation, retention and disposal of records
- all members of the authority should adhere to this policy
- the authority's policy regarding official information which is created, exchanged or stored on personal email accounts, handheld devices etc. should be made explicit¹

- where FOI requests are received it should not be assumed that all relevant information has been stored in an authority's electronic records management system. Enquiries should be made of all relevant individuals, no matter how senior, concerning information which may have been created or retained by them
- authorities must use an intelligent approach to locating information in response to a request – that is, they must look in all the places where the information is likely to be found, rather than assuming that a full search is required of every record held by the authority. This would invariably result in refusal on the grounds of excessive cost. A yardstick for authorities is to consider how they would respond to the request if it was made internally by their own chief executive or elected head.

The implementation of the Public Records (Scotland) Act 2011 (PRSA) will, in due course, ensure that all those authorities subject to its provisions must produce and maintain a records management plan approved by the Keeper of the Records of Scotland. This new and welcome legislation will address a number of the above issues within the relevant authorities. Not all authorities subject to FOISA, however, are subject to the PRSA.

Records management is also a governance issue and, in this respect, I suggest that there is scope to increase the engagement between the Scottish Information Commissioner and regulatory bodies. It is important that external auditors, for example, are made aware of the Commissioner's decisions where these are critical of an authority's records management practices.

CHALLENGES IN SECURING INFORMATION RELEVANT TO AN APPLICATION

Most authorities have co-operated with my investigations concerning applications, providing information relevant to the case on a voluntary basis within two to three weeks.

However, where I do not receive information I have asked for, I can formalise proceedings by giving an authority an Information Notice with which it has to comply within a specified period. Clearly the Scottish Parliament made provision for this to prevent an investigation being delayed or hampered by the reluctance or refusal of an authority to provide information which the Commissioner reasonably requires in order to determine whether an authority has complied or is complying with FOISA.

However, in practice, I have not found an Information Notice to be a fast-track means by which to progress an investigation and it can lead to considerable delay in coming to a decision.

There is no explicit reference in FOISA as to how long an authority must be allowed to respond to notices given in respect of applications received by the Commissioner. However, it is now thought sensible to allow not less than 42 days, which is the period within which an appeal against the Notice can be made to the Court of Session. Consequently almost any case in which an Information Notice is required will not be completed within four months.

The issue of delay could become acute if we find it necessary to issue more than one Notice in any investigation. It is perhaps not widely appreciated that an Information Notice can also be used to require "unrecorded information".² In other words, such a Notice could be used to ask an authority for information which it can recall, or of which

it is aware, as well as recorded information. Legal commentators have concluded: "In effect therefore, the Commissioner can require individuals such as the employees of Scottish public authorities to give the equivalent of precognitions".³

This may appear to be a potentially powerful tool in pursuing an investigation. However, using an Information Notice to elicit that type of information, which might lead to the need for subsequent enquiries of the authority by means of a further Notice, is cumbersome and protracted.

In other regimes such as Canada, the Information Commissioner is able to pursue investigations by means of seeking affidavit evidence. Furthermore the Commissioner can institute a formal inquiry which includes conducting an examination under oath. In 2010/11 the Canadian Commissioner reports that 24 formal inquiries were undertaken.⁴

It would be useful if the Scottish Information Commissioner was equipped with a similar formal capacity to secure information, given the impractical nature of pursuing enquiries about what is known by an authority through a series of Information Notices for "unrecorded information", each with a timescale for response of not less than 42 days.



Many of these deficiencies and uncertainties can be remedied by an organisational culture of transparency and accountability, underpinned by proper records management procedures.



¹ The ICO published guidance on these matters in December 2011, which may inform the position in Scotland

² FOISA section 50(9)

³ Current Law Statutes, Freedom of Information (Scotland) Act 2002 asp13 para13-83

⁴ Office of the Information Commissioner of Canada Annual Report 2010/11 page 20

ALTERING RECORDS WITH INTENT TO PREVENT DISCLOSURE

The whole purpose of FOISA would be undermined if any person in an authority believed that an information request could be thwarted by destroying that information.

Under section 65 of FOISA, it is a criminal offence for a Scottish public authority (or any person who is employed by, is an officer of, or is subject to the direction of, the authority) to “alter, deface, block, erase, destroy or conceal” a record held by the authority, if a request has been made for information contained in it, and the applicant is entitled to be given the information.

There is a similar offence under regulation 19 of the EIRs.

The maximum penalty for committing these offences is £5,000. The offence is not subject to a custodial sentence.

I have entered into a Memorandum of Understanding with the Crown Office and Procurator Fiscal Service (COPFS) and Scottish police forces in relation to the investigation of such criminal offences. This provides that each alleged offence will be fully investigated where there is, at first sight, evidence which indicates that an offence may have been committed.

The investigation is conducted jointly by the Commissioner and the relevant police force (i.e. for the location where the alleged offence was committed). The police force is responsible for submitting reports of offences, where appropriate, to the COPFS. The power of entry, search and seizure, which it may be necessary to use in the course of an investigation, is limited to the Commissioner and his staff.

However, the capacity to pursue those who may be guilty of such an offence is constrained by the need to raise prosecutions within six months of the date of the offence being committed.⁵ In practice this is not readily achievable.

In most cases it will only become apparent that an offence has been committed as a result of investigations into an appeal which has been made to the Commissioner. It is likely that more than two months will have elapsed from the date of an original request before an appeal can be made to the Commissioner. Furthermore the evidence may come to light only after an Information Notice has been used to secure information from the authority, which may cause a further 42 days to elapse.

A remedy could be effected by a change to section 65 of FOISA, stipulating a period within which prosecutions should commence. This period could be for proceedings to commence within six months of the contravention coming to light (rather than six months from when it occurred, as currently required by section 136 of the Criminal Procedure Scotland Act 1995). Alternatively it could stipulate that the proceedings should commence within 12 months of the contravention having occurred, as proposed by the Scottish Government in its draft Freedom of Information (Amendment) (Scotland) Bill.



The capacity to pursue those who may be guilty of such an offence is constrained by the need to raise prosecutions within six months of the date of the offence being committed.



⁵ A similar deficiency exists in the UK's Freedom of Information Act 2000

CHARGING FOR INFORMATION

International experience shows that a country's arrangements for charging requesters for information significantly affect the take-up of FOI rights.

I have consistently advocated for a liberal charging regime for Scotland, designed to assist rather than inhibit the release of information. In my first year as Commissioner, I worked with the (then) Scottish Executive to propose a workable framework of fees which means that most information can be accessed without charge, but also limits demand by giving the opportunity for authorities to recoup a percentage of the cost of providing information and places an upper limit on such costs.

In the past various changes to fees have been mooted, including:

- increasing the hourly rate at which staff time spent on locating, retrieving and providing information can be charged (currently £15 per hour)
- removing the right to the free provision of information costing less than £100
- reducing the upper cost limit of £600 so that many demanding requests need not be complied with
- aggregating the costs of responding to more than one request from the same person, for the purpose of charging a fee or establishing that the upper limit had been exceeded.

I am pleased that the Minister for Parliamentary Business confirmed that the Scottish Government has no intention of altering the charging regime in the limited proposals to amend FOISA announced in December 2011.⁶ However none of the potential changes above would require a statutory amendment to be made to FOISA to be brought into effect. All could be introduced at any time through statutory instrument to amend the current Fees Regulations.⁷ Furthermore some authorities are already making provision to impose higher charges for environmental information, by increasing hourly staff rates and by making no allowance for providing the first £100 of information free. They can do so by taking advantage of the fact that the Fees Regulations do not apply to information disclosed under the EIRs.

Throughout my tenure, where consideration appeared to be given to departing from the current fee charging regime, I have indicated the consequences – unintended as well as intended – of change. I would like to re-state some of the key issues of concern, should the issue of charging be raised in any future consultation on the Government's proposed Transparency Agenda.

Social exclusion

Certain charges may have the effect of undermining the primary intent of the legislation, by effectively excluding people or groups from using their rights. It would be particularly regressive if the change to the fees regime removed or reduced the “first £100 free” provision, so that almost any information provided would need to be paid for. People living on low incomes or with no income – such as those on benefits or young people – who could not afford to make payment, or may not even have access to cash or bank accounts to enable them to do so, would simply have to decline the opportunity to receive information and may be deterred from even making a request.

Discretionary charging

Authorities might argue that they have discretion over whether to seek payment. It would be a major departure from the “applicant blind” nature of FOISA i.e. where rights to information are not dependent on the identity or status of the requester, if applicants were asked to justify a financial concession on the basis of their status.

More likely, even if it was not thought generally equitable or cost effective to issue Fees Notices, authorities might choose to make more use of discretionary charges to discourage demanding requests from the press, businesses or frequent requesters. Changes in the fee regime such as removing the “first £100 free” provision, increasing the level of charges and allowing aggregation would allow more frequent recourse to Fee Notices.

⁶ <http://www.scotland.gov.uk/Publications/2011/12/13125045/0>

⁷ The Freedom of Information (Fees for Required Disclosure)(Scotland) Regulations 2004

“Deterrence” charging

Most authorities do not currently charge for information, even where they could, because the cost of issuing a fees notice and administering payment makes it uneconomic to do so. Similarly, in the course of approving publication schemes I often find that authorities have made a positive policy choice to waive all fees that they could legitimately impose for their information. While this is about providing a good service to the public, authorities often explicitly state that it can cost them more to raise an invoice than they can expect to receive back in revenue.

Increasing the amount which an applicant can be charged for staff time may not offset the administrative costs to issue Fees Notices, far less raise significant net revenues to defray the cost of complying with requests. It would, however, allow more substantial Fees Notices to be issued in the expectation that this would discourage applicants from persisting with their requests. The deterrence value of charges is clearly not without its attractions for public authorities who want to discourage potential requesters.

It is worth noting that other countries have measures to guard against deterrence charging. The US Freedom of Information Act states: “No fee may be charged by any agency under this section - (1) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.”⁷

Should authorities make greater use of Fees Notices, the Commissioner’s office may find its time more taken up with establishing whether fees have been correctly calculated and properly applied to information which is to be disclosed, rather than determining whether the information should be disclosed. Currently the few cases I receive involving fees tend to concern disputes as to whether in fact complying with an information request would exceed the upper limit of £600. Many cases show costs to have been overstated.

Aggregation of requests

The capacity to aggregate requests might address the frustration felt by an authority which receives a letter with several specific questions on the same matter – each of which may have to be treated as a separate FOI request under section 1. Section 12(2)(a) of FOISA permits the Scottish Ministers to make regulations to allow costs to be aggregated where two or more requests are made to an authority by one person. However, such regulations have not yet been made, not least perhaps because of the practical consequences. For instance, if aggregation was permitted on unrelated matters, an applicant might make a request and receive no response from an authority for, say, a month and, whilst waiting for response to a request for review, the applicant might make another request for information to the same authority on an entirely unrelated matter. Even though these requests were made seven weeks apart, the authority could aggregate them and decline to comply with either of them if, in total, the costs of doing so exceeded the upper limit. Aggregation would reward the dilatory authority.

The equivalent UK legislation⁸ does permit the aggregation of same or similar requests by authorities for the purposes of the calculation of fees. There is little evidence that this is a particularly beneficial provision for authorities and some evidence⁹ that it causes more difficulty in determining whether requests are the same or substantially similar.

Aggregation could also affect different individuals who appear to the authority to be acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than the obtaining of the information itself.¹⁰ Certainly, FOI should not reward those who wish to abuse it by overwhelming or tying up the resources of an authority.

However, if an authority felt this was the purpose of a request, then the authority may well be able to argue that, taken in context, the request was vexatious – and there are provisions within FOISA already to deal with that.

My concern with combining requests from different people appearing to act in concert is that it might permit an authority to refuse to respond to demands for information on a matter of significant local or national concern which had prompted requests for information from many individuals.

Although the cost to comply with each request might have been less than £100 (and therefore no fee could be charged by the authority) if, in total, the cost of replying to any or all of them exceeded £600 then there would be no obligation upon the authority to comply with any of them.



¹¹ Ipsos MORI Scottish Public Opinion Monitor Wave 10, November 2011

¹² Scottish Parliament Official Report 24 April 2002

¹³ Scottish Parliament Corporate Body (2001) Freedom of Information (Scotland) Bill Policy Memorandum (SP Bill-36 PM) Edinburgh

DESIGNATION OF ADDITIONAL PUBLIC BODIES

In Scotland there has been faltering progress to expand the scope of access to information. The focus of activity has been on the potential designation of bodies (under section 5 of FOISA) which appear to the Ministers to be carrying out functions of a public nature. When the FOI Bill was debated and passed in the Scottish Parliament, the presumption was that periodic designation would ensure that access to information kept pace with the change in delivery of public services, with the then Justice Minister saying “Provisions allow providers of services to the public to be added to the bill case by case, and I reassure the Parliament that this power will be exercised.”¹²

Designation was particularly expected where public services were being delivered through long term contractual partnerships between public authorities and the private sector. It is not always widely known that Scotland’s two privately run prisons – HMP Kilmarnock and HMP Addiewell – are outwith the scope of FOISA unlike, say, HMP Barlinnie or HMP Peterhead. Designation would also secure FOI rights where arm’s length organisations such as leisure trusts were created by local authorities to deliver services on their behalf.

The Policy Memorandum accompanying the Bill made it clear that “it is intended that this provision [section 5] will be used to bring within the scope of FOI private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts.”¹³ However successive Scottish governments have declined to make any such designation orders.

It was not until July 2010 that Scottish Ministers published a formal consultation indicating that they were minded to extend the coverage of FOISA to leisure, sport and cultural trusts and other such bodies established by local authorities as well as to private contractors which: run privately managed prisons and prison escort services; build and maintain schools; build and maintain hospitals; and build, manage and maintain trunk roads under PFI contracts. The Association of Chief Police Officers in Scotland, and the Glasgow Housing Association were also considered for designation. ➤

⁷ The Freedom of Information Act 5 U.S.C. 552, 4A (iv)(I)

⁸ The Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 SI 2004/3244

⁹ First Tier Tribunal EA/2011/0016 General Regulatory Chamber, Information Rights

¹⁰ FOISA Section 12(2)(b)

DESIGNATION OF ADDITIONAL PUBLIC BODIES (CONT'D)

In January 2011 the Government announced that none of these bodies would, after all, be designated saying that “any extension of legislation is not favoured by the majority of those bodies proposed for coverage at the present time.”¹⁴

As a consequence, it means that no additional bodies have been designated since FOISA came into force and this calls into question whether Scottish rights to information will keep pace with the change in delivery of public services, and whether those spending public funds can be held to account at an operational or local level.

There are two aspects to my concern over designation. The first is that designation is not necessarily about *extending* rights to information but *safeguarding* them. This is particularly true where services which were once supplied directly by public authorities covered by FOISA are now delivered by bodies which are not, such as: trusts established to deliver services on behalf of local authorities; those private contractors which provide health, educational and penal infrastructure and services to the public sector; and housing associations to which housing stock has been transferred from local authorities. Tenants, patients, parents, service users, voluntary organisations and indeed elected members lose the right to information when such a change in service delivery takes place.

It should be said that this need not necessarily be so. Not all authorities have re-organised their service provision in a way which removes the public right to know. Glasgow City Council, for example, has divested a range of services by establishing companies, including Cordia Care, which are limited by guarantee. The Council has ensured however that these remain publicly-owned companies by retaining sole ownership. As a result Glasgow City Council's companies remain subject to FOISA and the public right to information is safeguarded without the need for designation. Most authorities, however, have not chosen to adopt this approach, which is why designation is so important.

Real extension takes place only where Ministers believe that a body exercises functions of a public nature, and that designation has become appropriate because of a change to those functions, an increase in expenditure of public funds by the body, or a change in public expectation over access to information held by it.

My second concern is the view being expressed that other initiatives can improve access to information held by those bodies, so that designation is not necessary. However welcome efforts at greater transparency may be, none can provide the benefits of FOISA, namely a statutory right to information and in particular the right for a dissatisfied requester to appeal to the Commissioner. In some 60% of all my decisions I have found that authorities have failed, in full or in part, to deal properly with requests. There is no reason to believe that such failings will not occur in those bodies subject only to a voluntary code of practice, or some other provisions which excludes the statutory right of appeal.

This is also a particular area where Scotland's FOI regime is at risk of slipping behind other legislatures. The UK Government, for example, is actively considering the FOI designation of further bodies, including housing associations, and has just recently made its first designation order to extend FOIA¹⁵ to cover the Universities and Colleges Admissions Service (UCAS), the Association of Chief Police Officers (ACPO) and the Financial Ombudsman Service Ltd.

FOISA allows the Commissioner to propose to Ministers bodies which should be designated, and allows Ministers to designate by order following consultation with the bodies to which an order relates.

In my view a rolling review of designation should be instituted, and a programme of designation commenced, starting with those bodies already consulted. Scottish public opinion is strongly in favour of such a move.¹⁶

¹⁴ <http://www.scotland.gov.uk/News/Releases/2011/01/26154714>

¹⁵ The Freedom of Information Act 2000

¹⁶ Ipsos MORI Scottish Public Opinion Monitor Wave 10, November 2011

Percentage of survey respondents agreeing the following organisations should be designated:¹⁶

Leisure and cultural services trusts	88%
PPP contractors building/running schools	83%
PPP contractors building/running hospitals	83%
Housing associations	82%
Private Scottish prisons	73%

INFORMING THE FUTURE

To conclude, I set out in summary here a range of actions which would protect, strengthen and clarify Scotland's FOI law and safeguard the progress made towards greater openness and which may inform discussion on the Scottish Government's consultation on proposals for a Freedom of Information (Amendment) (Scotland) Bill and consideration of a transparency agenda.

1 ENSURE RIGHTS FOLLOW THE PUBLIC POUND

As the public sector landscape constantly evolves, we must ensure that FOI rights follow the public pound. Action to reform and improve our public sector should include the preservation of the public right to ask for and receive information about how decisions are being made, and how well public services and functions are being delivered at an operational level. In my view, designation of the bodies previously consulted upon should be given further consideration and a rolling programme of active review established so that designation can keep pace with changes in public service delivery, thereby safeguarding and extending the right to information.

2 AVOID CHARGES WHICH DETER OR EXCLUDE REQUESTERS

Scotland has sound charging provisions for FOISA. Where changes are made these should not be with the consequence – far less intention – of frustrating the intent of the legislation. Certain changes could prove to be regressive and socially excluding for those on low incomes. Charges which deter even the most basic requests are not consistent with our FOI regime, which is founded on the premise that every written request for recorded information is an FOI request. Statistics have shown that the public are aware of their rights and are making requests. The number of appeals to the Commissioner is rising steeply, and in the majority of cases those appeals have been justified in full or in part. The process of greater transparency would be hindered if people were prevented from being given information to which they were entitled, or deterred from asking for it, on the grounds of cost.

3 EMPOWER COMMISSIONER TO TAKE EVIDENCE UNDER OATH

The capacity of the Commissioner to conduct investigations and to secure unrecorded information would be assisted by powers similar to those enjoyed by Commissioners in other jurisdictions to seek affidavit evidence or conduct formal questioning under oath.

4 PERMIT COMMISSIONER DISCRETION OVER LATE SUBMISSIONS

The use of late exemptions by authorities delays decisions and can have the effect of delaying the disclosure of information if such exemptions are not found to be justified. Authorities have two opportunities to decide correctly which exemptions to apply before an appeal can be made to the Commissioner, and furthermore they often take the opportunity when invited to comment on an appeal to submit more. The Commissioner should have the discretion to decide whether to accept late exemptions. It may be necessary to do so where the privacy of an individual has to be protected but if the authority has simply overlooked or chosen not to apply an exemption, especially with little prospect of success, then it may be considered unwarranted to permit further delay in coming to a decision.

5 ALTER TIMESCALE FOR PROSECUTION UNDER s65

Preventing information from being disclosed by destroying, altering or concealing it after a request strikes at the heart of the right to know and public trust in an authority. The sanctions against this should be effective, which is why changes should be made to section 65 by stipulating a longer period within which proceedings should commence, such as within 6 months of the contravention coming to light or within 12 months of the contravention having occurred.



The purpose of the report is to draw attention to matters which Parliament may wish to take into account and to make recommendations.



6 CLARIFY STATUS OF ELECTRONIC COMMUNICATIONS

In recognition of the increasing use of electronic communications, clarify that an email address is a sufficient address for correspondence for receiving notices and that information can be made available in electronic format.

7 ALTER s73 TO EXCLUDE ENVIRONMENTAL INFORMATION

Authorities encounter difficulty with the relationship between the EIRs and FOISA. Practical measures could reduce the work involved in responding to a request under the EIRs, for example by amending the definition of "information" in section 73 of FOISA to expressly exclude environmental information. This would allow requests for environmental information to be dealt with solely under the EIRs instead of under both FOISA and the EIRs.

8 DO NOT RESET THE CLOCK WHEN CLARIFICATION REQUIRED

The risk of spurious use of the clarification provision as a way to delay dealing with an information request could be diminished by an amendment to section 10(1)(b) so that the 20 working day timescale for response does not reset after clarification is received, but instead stops whilst waiting for clarification and restarts once it has been received.

9 NEITHER CONFIRM NOR DENY PERSONAL DATA

Permit authorities to refuse to confirm or deny that they hold personal data by adding the exemptions within section 38 to the list of exemptions to which section 18 (further provisions as respects responses to requests) applies.

10 CLARIFY PUBLICATION SCHEME CHARGES

Clarify the publication schemes provision in section 23 by requiring authorities to specify the actual charge or the basis of the charge they impose for access to their published information (section 23(2)); and reword section 25(3) to clarify that any information made available in line with an approved publication scheme is exempt under section 25.

11 CLARIFY s27(1)(a) - WHEN INFORMATION IS NOT PUBLISHED

Information can be exempted if the authority intends to publish it within 12 weeks of a request under section 27(1)(a) (information intended for future publication). However in some cases the information is not published within the timescale (or at all). FOISA should specify what a public authority should do if the information is not published within the 12 weeks e.g. requiring the information to be provided to the requester.

Key highlights

91%

of survey respondents think FOI is important in holding public bodies to account for their spending decisions.

77%

of survey respondents disagreed with the suggestion that FOI is a waste of public money.¹

¹ Ipsos MORI Scottish Public Opinion Monitor Wave 10, November 2011

IN CONCLUSION

It has been a privilege to serve as the first Scottish Information Commissioner. I am proud of the role my office has played in establishing a strong FOI regime. However there are still issues to be addressed if the original intent of Parliament to transform the culture of public life and increase the public's right to know in Scotland is to be safeguarded and improved. It is my hope that this report will contribute to beneficial change.



Kevin Dunion
Scottish Information Commissioner



There are still issues to be addressed if the original intent of Parliament to transform the culture of public life and increase the public's right to know in Scotland is to be safeguarded and improved.

