

Public Records (Scotland) Bill

The Commissioner's view



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Scottish Information Commissioner's written evidence to the Education, Lifelong Learning and Culture Committee on the Public Records (Scotland) Bill

I welcome this opportunity to submit my views to the Committee on the proposed new public records legislation for Scotland.

As the Committee will be aware, I have the statutory duty to ensure compliance by Scottish public authorities with the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA). As part of this, I am charged to promote the following of good practice by those authorities with the Code of Practice on Records Management.

The Freedom of Information (Scotland) Act 2002 (FOISA) imposes a requirement (at section 61) upon Scottish Ministers to issue such a Code of Practice:

"...providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for the authorities to follow in connection with the keeping, management and destruction of the authorities' records."

There is clear statutory recognition, therefore, that good records management is essential to the proper functioning of a freedom of information regime. In short, authorities must have adequate policies and plans for creating, storing, and disposing of, records. If not, it is often difficult for the authority to be sure of what information it holds, and it becomes onerous to locate and retrieve it when responding to a freedom of information request (in many of my investigations I have established that authorities held more information within the scope of a request than their initial searches suggested).

I am supportive then of measures which will improve records management as this is likely to improve efficiency in the handling of Fol requests and makes it more likely that the public will be given all relevant information in response.

At present I may assess whether a Scottish public authority is following good practice, and in the event that I find that an authority's practice falls short of the Code, I may issue a practice recommendation.

These functions bear a strong resemblance to the powers of the Keeper to carry out compliance reviews, make recommendations and issue warning notices for which the Bill provides.

I am mindful of the need to limit the regulatory burden on authorities and to avoid duplication of oversight. However I believe steps can be taken to ensure that in practice a sensible and proportionate approach is taken.

There is already in place a Memorandum of Understanding (MoU) between the Keeper and the Scottish Information Commissioner which provides for joint audits of records management arrangements of public



authorities. This is in recognition of the statutory obligation on the Commissioner to issue a practice recommendation only after consultation with the Keeper of the Records of Scotland.

In my view the MoU could be readily adapted so that such joint audits could result in joint recommendations by the Commissioner and the Keeper. Alternatively where records management failures have been evident in responses to freedom of information requests the Keeper could be requested by the Commissioner to use his powers of compliance review.

In relation to the specific provisions in the Bill, I would offer the following comments:

- (a) The schedule of bodies to which the new Bill will apply largely matches the schedule of Scottish public authorities in FOISA. This brings benefits, as authorities which are already subject to FOISA (and therefore by default should comply with the statutory guidance in the existing Code of Practice on Records Management), will also be subject to the Bill. The two schedules are not, however, the same. For example, the new Bill will not apply to authorities in receipt of funding by the Scottish Funding Council which are currently subject to FOISA, but the Bill will apply to courts which are not subject to FOISA.
- (b) The Committee should be aware that the authorities to which part 1 applies exclude certain bodies to which it might be expected that the provisions of the Bill would apply e.g. local authority trusts. So, for example, as drafted the Bill will apply to Culture and Sport Glasgow which provides leisure, library, sporting etc services and facilities on behalf of Glasgow City Council, but will not apply to Edinburgh Leisure which provides sporting and recreational facilities and services on behalf of City of Edinburgh Council.
- (c) I note the inclusion of a provision at section 2 of the Bill to allow Ministers to amend the schedule by statutory order. It will be important that where this power is used, in parallel, Ministers use similar powers under FOISA to amend the equivalent schedule in FOISA, to maintain the strong overlap between the two schedules.
- (d) I welcome the definition of “public record” in section 3. In my experience of working with FOI law, definitions of such key terms have proven particularly important.
- (e) The existing Code of Practice on Records Management states that authorities should have a records management policy. When approving publication schemes, I require public authorities subject to FOISA to publish these – so they should all already have such a policy in place. I agree that public authorities should be required to produce records management plans. I agree that in principle records management plans should have the Keeper’s approval, or that he should be able to withhold his approval.

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