

**PE1512/A**

Our Ref: INV46799

Your Ref PE01512

Mr David Stewart  
Convener  
Public Petitions Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

15 April 2014

Dear Mr Stewart

**Public Petition PE01512 (Freedom of Information (Scotland) Act 2002**

I understand that the Committee will be considering the above petition on Tuesday 22 April. I hope that the Committee finds this letter a positive contribution to aiding their consideration of the petition.

The petition calls for amendments to the Freedom of Information (Scotland) Act 2002 (FOISA) which would:

- (i) Impose a requirement on public authorities to provide full and accurate information in all responses to information requests.
- (ii) Extend my powers to enable me to investigate complaints under this new provision
- (iii) Introduce monetary penalties where such breaches are found.

It is my view that the proposed changes are not needed. I also think that they would not be workable in practice. I am fully supportive of the intentions behind the petition but as I have set out in the short briefing paper enclosed, I am of the view that adequate safeguards already exist for holding public bodies to account in relation to providing accurate information.

Regrettably, I think the petition may have come about as a result of a misunderstanding of the current provisions in FOISA.

The background to Mr Chisholm's petition is, I think, related to problems he was encountering with access to information from a local authority. He was concerned that the authority provided him with only some of the information it held in scope of his request. Although the authority disclosed additional information to him, he was dissatisfied with the outcome and contacted my office for advice. My staff explained his rights of review and appeal under FOISA. Mr Chisholm wanted us to investigate whether the information he had received was "accurate". He was very much focussed on accuracy, but in terms of FOISA, his complaint was about whether he had received all the information held by the authority. Mr Chisholm did not follow our recommendation that he make an application to me for decision, which is unfortunate as it would have meant I could investigate the matter.

Local news coverage<sup>1</sup> in January reported that Mr Chisholm had significant concerns about the operation of FOISA and my powers to intervene. In response to that coverage, I wrote to Mr Chisholm to attempt to clear up (in some detail) what appeared to be a misunderstanding about the operation of the legislation. Had I received an appeal about his case, I am satisfied that I have the necessary powers to determine whether the authority had properly complied. In the event that my investigation highlighted a breach, I am also confident that my enforcement powers would have been adequate to resolve the matter.

Please do not hesitate to contact me if you would like to explore further any of the issues raised by the petition or discussed this submission.

Yours sincerely

**Rosemary Agnew**  
**Scottish Information Commissioner**

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<sup>1</sup> "Call for law change after SBC supplied 'bogus' information" Border Telegraph (22 January 2013) and Peebleshire News (24 January 2013).

## **Submission by Rosemary Agnew, Scottish Information Commissioner on Petition PE01512 (Freedom of Information (Scotland) Act 2002**

### **Why I consider the change is not needed**

1. The current provisions in FOISA already allow a requester to challenge the information disclosed by a Scottish public authority, although not quite in the way that the petition is suggesting.

### **Current general provisions**

2. In summary, FOISA (the Act) provides that a Scottish public authority must disclose *all* the recorded information it held when it received a request for that information. The Act also provides that if any of the information is exempt under any of the provisions in Part 2, it can be withheld and notice served on the requester explaining this. Any information disclosed is effectively made public and so available to anyone.
3. If the requester is dissatisfied with the way an authority dealt with the request, section 20 of FOISA gives a right to a review by the authority. If, after that review, the requester remains dissatisfied, FOISA gives the requester a right of appeal to the Scottish Information Commissioner (SIC). The SIC's investigation and decision is based on the outcome of the authority's review. In other words, on the final response of the authority, plus any handling issues raised by the requester.
4. The SIC is unable to investigate and make a decision, until the requester has sought a review by the authority, and either received a response or no response at all within 20 working days.
5. FOISA gives a right to the actual information held. The SIC can investigate and decide on whether the authority disclosed what it held, and if not, whether more should be disclosed, and/ or whether exemptions were properly applied.
6. It is important to remember that the information 'belongs' to the authority: the SIC's powers extend to access to that information, not content. There is a specific exception to this, section 65, which is covered below.
7. If the challenge from a requester was that the authority had disclosed what it held, but that the requester believed the content was inaccurate, then the SIC could not investigate. It would be a matter to raise directly with the authority. For example, if a requester asked for the minute of a meeting with a Council,

but that minute misrepresented what was said, FOISA gives the right to ask for the minute, but not the right to require that it was amended. The benefit of FOISA in this type of instance is that it enables the requester to challenge the accuracy with the owner of the information.

8. If the challenge was that the requester believed that they had been given incomplete information, or a version that had been updated, amended or changed (at or before the time of the request), the SIC could investigate this because the requester would not have been provided with all the information the authority held. For example consider the following scenario.
  - (i) A requester asks a council for the detail of legal fees it incurred in relation to court action.
  - (ii) The council gives the requester information about legal fees but the requester believes the figures are wrong and that the council holds more (i.e. the correct) information.
9. In this case, the SIC could investigate on the basis that potentially the council did not disclose (or properly withhold) all the information it held. If the council failed to comply with an SIC decision, it could be treated as contempt of court and the SIC has the powers to refer the matter to the Court of Session.

## **Section 65**

10. Section 65 of FOISA makes it a criminal offence to “...*alter, deface, block, erase, destroy or conceal*...” information intentionally, so that it does not have to be disclosed. If the SIC was satisfied that an authority had intentionally given incorrect information out (by altering etc. what it held), she could refer the matter to the police.

## **Why the SIC has concerns about the workability of the proposal**

11. What the petition is asking for is not, in my view, in keeping with the aims of FOISA. FOISA aims to give people a right to information, which in turn enables them to challenge and hold to account the actions of public bodies in Scotland. It is not of itself the challenge, but an enabler.
12. This proposal is fundamentally different in that it seeks to make FOISA the mechanism to challenge in a way that is far more reaching than any existing FOI regime we know of.

13. FOISA gives the right to recorded information. This proposal would require the consideration of unrecorded information. For example:
  - (i) A request is made for the minutes of a meeting that took place a couple of years ago. It would be reasonable for the authority to assume that they were accurate because they were approved in some way. They could simply to disclose the minutes without further work as they might under current provisions, or they might decide that their procedures should be that the content of the whole minute must be confirmed in some way before disclosure.
  - (ii) However, if the request was for the minutes of a meeting and the requester believed the minute was incorrect (say, someone who attended the meeting wasn't mentioned or someone was noted as having said something when it was in fact another person), the authority would need to confirm the accuracy of the minutes before responding to the request. Potentially, the public authority would have to communicate with those at the meeting to ensure that the minute was correct before disclosing it, thus relying on people's memories (i.e. information not held in as recorded format).
  - (iii) If the requester remained dissatisfied, the authority would have to go through the whole process again at review.
  - (iv) If the requester then appealed to the SIC, the SIC would have to first investigate whether the information was accurate (i.e. communicate with those at the meeting). Only when this had been completed could she then go on to consider, as now, whether the information was properly disclosed/ withheld, and the request properly handled.
  
14. There are a number of workability issues this example gives rise to. These are a few to give you a flavour of our concerns.
  - (i) To what extent would an authority be expected to go to, to confirm the accuracy of information before disclosing it? Committee reports and minutes might reasonably be assumed to be accurate, but this would not be true of all documents so how much work would it be reasonable to expect?
  - (ii) An authority might never be able to confirm, even beyond reasonable doubt, the 100% accuracy of information, especially if it was old, the people concerned had moved on or it was an informal note/ communication.
  - (iii) How would an authority be able to confirm the accuracy of information that was professional opinion or advice, especially if it held several documents about the same subject? Would they be expected to disclose

all of it, or would they have to confirm which was accurate (and wouldn't that be a matter of judgement itself)?

- (iv) In many cases, a requester would not know that information was inaccurate until it was received. In the majority of cases, the requester would have to see the information to be able to challenge its accuracy. This would be the case, irrespective of the checks the authority had carried out before disclosing information or whether it had been appealed to the SIC.
  - (v) There may be issues for public authorities in keeping information up to date. There's an expectation that this will be done to a certain extent where the information is personal data, but this proposal would cover *all* other information held by public authorities.
  - (vi) Are public authorities resourced to confirm accuracy, and/ or have in place the requisite records management procedures that would be needed to evidence when and what changes had been made?
  - (vii) The challenges that face authorities and requesters would also face the SIC. The proposal would change the way the SIC worked, by effectively requiring two investigations. The initial focus would have to be on reaching a conclusion about accuracy, something that might ultimately come down to opinion or judgement based on probability. This would mean that potentially, subsequent decisions about the applicability of FOISA, would be in relation to something that was a matter of opinion, rather than information that was actually held.
  - (viii) The SIC is not resourced to carry out such two-stage investigations. Investigating the accuracy of information will potentially take considerably more resource per case, than the SIC currently has.
  - (ix) The ethos of FOISA is for provision of information promptly. The proposals would almost certainly add to timescales. It is also highly likely that many requests simply could not be responded to within the statutory 20 working days. Both would weaken FOI provision in Scotland.
  - (x) Section 65 would be unworkable. If an authority altered information to make it accurate before issuing it, would it have to declare it had done this, disclose the inaccurate information to be able to demonstrate why changes were made, and what if the SIC's investigation concluded that it had been right in the first place?
15. The proposal to give the SIC the powers to impose fines, is ultimately a matter for Parliament. The impact on the SIC would be one of resources and ensuring any punitive measures were proportionate, fair and open. In drafting legislation, the framework and extent of the SIC's powers would have to be clearly set out, including whether it was a fine on the authority or on an individual.

**For further information about this submission, please contact:**

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