



# PE01512, Public Petitions Committee

## Further submission by Rosemary Agnew Scottish Information Commissioner

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1. Thank you for inviting me to make this further submission to the committee. I understand that you have asked for evidence of the operation of section 65 of the Freedom of Information (Scotland) Act 2002 (FOISA), specifically:
  - (i) information about the number of section 65 cases, and
  - (ii) the outcomes of those cases.

### About the provision

2. Section 65 of FOISA applies when:
  - (i) information has been requested from a Scottish public authority i.e., a request has been made for that information and it is held by the authority, and
  - (ii) the requester is entitled to be given the information (or any part of it).
3. Section 65 applies to the public authority and any person who is employed by, is an officer of or is under the direction of the authority (e.g. a contractor).
4. Section 65 makes it a **criminal** offence to intentionally alter, deface, block, erase, destroy or conceal a record (i.e. information) which is the subject of a request in order to prevent the information being disclosed following the receipt of the request.
5. Anyone found guilty of an offence would be subject to summary conviction and may be fined personally up to £5,000. Both of which are serious sanctions.
6. There is a similar provision in regulation 19 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) which provide access to environmental information.

### Arrangements for investigation and referral of offences

7. The Commissioner and Police Scotland are both responsible for investigating and, where appropriate, reporting allegations of section 65 offences to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution. Our memorandum of understanding with Police Scotland explains that we will investigate cases on a joint basis and that it will be Police Scotland which makes any referral to COPFS.
8. In practice, evidence of the commission of a section 65 offence is likely to come to attention as a result of either or both of the following:
  - (i) An allegation made directly to either Police Scotland or the Commissioner
  - (ii) Evidence uncovered during the Commissioner's investigation of an appeal made under section 47 of FOISA or the EIRs or the Commissioner's assessment of the practice of an authority.



## Number of section 65 cases

9. Since FOI law came into effect in January 2005, the Commissioner and Police Scotland have identified 10 cases where there was evidence that suggested a section 65 offence may have been committed.

## Outcome of section 65 cases

10. In none of the cases was it possible to raise criminal proceedings because of the restrictive timescales set out in FOISA and the EIRs (see below).
11. Following one particularly serious case, in which a police interview was conducted under caution and a referral was made to the Procurator Fiscal, the Commissioner made representations to the Scottish Ministers for a change in the primary legislation to address the timescales for proceedings.

## Timescale for proceedings

12. Before the passing of the Freedom of Information (Amendment) (Scotland) Act 2013, FOISA and the EIRs made provision for prosecutions to be raised within six months of the commission of the offence. In practice this was restrictive because the timescales for compliance with requests, reviews and appeals under FOISA and the EIRs mean that it might take up to 10 months before an appeal is made to the Commissioner and for a potential offence to come to light.
13. Following the Commissioner's representations, the timescale for prosecution was amended through the insertion into FOISA of section 65A *Time limit for proceedings*. This came into effect on 31 May 2013.
14. The new section 65A now means that the timescales for a section 65 (FOISA) offence is six months beginning with the *discovery* of the offence, rather than six months from *commission*. This amendment removes the timescale restriction which acted as a barrier to effective prosecution of such offences in the past.
15. A similar amendment was made to the EIRs.
16. No substantive allegations of section 65 cases have been made to, or have been discovered by the Commissioner since the amendment to the timescales.

## Relevance to PE01512

17. As the committee is aware, my office explained to Mr Chisholm that he had rights under FOI law to request a review from the authority and, if still dissatisfied, to make an appeal to the Commissioner. We also explained what matters the Commissioner could consider.
18. Mr Chisholm's dissatisfaction appeared to be with whether he had been provided with all of the information to which he was entitled. An appeal would have allowed me to investigate the matter, including whether there were any section 65 considerations.