



CFoIS

Promoting the Right to Information in Scotland

13th December 2019

Jenny Marra MSP,
Convener,
The Scottish Parliament,
Edinburgh,
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Dear Ms Marra,

Post Legislative Scrutiny of FoISA

The Campaign for Freedom of Information in Scotland (CFoIS) has read the written submissions and listened to the delivery of oral evidence as the Committee progresses the post legislative scrutiny of The Freedom of Information (Scotland) Act 2002 (FoISA) and thanks the Committee for its pertinent and probing questions about the practical operation of the law, the performance and culture within designated authorities and the experiences of requestors and campaigners. We wish the Committee well in its further evidence session with the Minister on 19th December and in writing and finalising its report to realise the original bold vision of elected politicians as well as separating what are organisationally induced problems from the solutions which exist in the legislation, and mapping where legal reform is required to update rights and ensure compliance.

In order to further assist the Committee in its work, and add to our oral evidence on 19th September 2019, we wish to make 12 points.

1. The process of post legislative scrutiny has proven to be illuminating with a number of designated public authorities and bodies representing some very senior public servants complaining about the duty to deliver on people's right to make an FoI request¹. The views are insightful on the duty to make rights happen. CFoIS urges the Committee to ensure the post legislative scrutiny results in operational and cultural changes as well as in the extension and strengthening of access to information rights in Scotland.
2. CFoIS wishes to place on record its appreciation of the hard work and expertise of staff who ensure the public's right to know is delivered by over 10,000 designated organisations across Scotland. CFoIS welcomes UNISON Scotland's further submission of December 2019 based on a survey of its members. The detail and analysis provide clear evidence of the resource and operational constraints faced by some staff and the culture in some organisations. CFoIS notes the Scottish Parliament declaring its support for human rights defenders in its Government sponsored debate to mark

¹ See Committee website at https://www.parliament.scot/S5_Public_Audit/General%20Documents/24_Solar_-_Solace.pdf

International Human Rights Day on 10th December 2019². CFoIS believes FoI staff are human rights defenders.

3. CFoIS calls for measures to ensure that FoI teams, however they are organised, are properly funded and that staff within specific departments have the time and understanding that it is part of their job to gather information in order to answer requests within a legal timeframe. Due to the impact of austerity organisations have less money to spend but cuts in publicly funded services prompts more FoI requests as people try to understand the motivation and information used to make decisions on cuts in and the reorganisation of public services. During such times the ability to cast a critical eye on the work of government and publicly funded agencies and services is vital to build public trust and prove an organisation's practical delivery on high level commitments on transparency and accountability.
4. According to the Scottish Information Commissioner's statistics for 2018/19, 64% of appeals were all or partially upheld. Savings could be made in the process if designated authorities got decisions right first time.³
5. Notwithstanding the potential need for legislative reform, CFoIS is disappointed that practical solutions to exercising FoI rights are insufficiently prioritised to combat the increasing complexity in the delivery of publicly funded services in Scotland. For example, the discussion about JIBs, CHCPs, local authorities and Health Boards could be routinely addressed by explicit information on the designated FoI page of all of their websites pointing to where the information is 'generally held' so requestors are informed before making an FoI request. However, there are still operational issues about where information is 'generally' held and where it is not held. The public have practical experience of receiving services and that will inform the questions asked and from whom. Those access to information requests may be difficult to answer due to the complexity introduced by the design and delivery of everyday services. That situation is not the fault of the requestor. It is a matter to be addressed and fixed by the designated body.
6. Issues of interpretation of FoISA remain including: the monitoring and enforceability of publication schemes despite clear duties to adopt and deliver them under Sections 23 and 24 of FoISA; under Section 6 of FoISA publicly owned companies are automatically designated but there has been no available list of them making the ability to make a Section 1 request challenging/impossible as the right is useless unless you know the name and the contact details to direct a recordable request; there is disagreement on the interpretation of publicly-owned companies under section 6(1) of FOISA as the Scottish Government's submission states there is a 'loophole in that a company that is wholly-owned by a combination of authorities does not fall within the definition, and so is not subject to FoISA'⁴ but the 'Explanatory Notes' which accompany FoISA state that 'for the purposes of section 3(1)(b), a company is a "publicly-owned company" if it is wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities listed in

² The debate appears at <https://www.scottishparliament.tv/meeting/debate-reaffirming-scotlands-support-for-human-rights-defenders-december-10-2019>

³ Annual Reports and Accounts 2018/2019 at <http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx>

⁴ Pg. 6 of the submission at Public Audit and Post Legislative Scrutiny Committee website at https://www.parliament.scot/S5_Public_Audit/General%20Documents/11_Scottish_Government.pdf

schedule 1...⁵ The matters are inter-related as through the Model Publication Scheme Guidance produced by the Commissioner, in November 2018, it is stated under Class 1 and 'about the authority' that there should be information listed on 'Subsidiary companies (wholly and part owned) and other significant financial interests' as well as 'Strategic agreements with other bodies'.

Therefore, information on publicly owned companies should already be available via the publication scheme. CFoIS awaits a decision on its appeal to the Scottish Information Commissioner on this matter.

7. CFoIS is disappointed that after 15 years of operation so little emphasis has been placed on the pro-active publication of information over successive years, the use of comprehensive disclosure logs and reflective learning on what kinds of information the public wants and therefore should be pro-actively published. The purpose of FoISA is to increase transparency and accountability and that is realised through the right to make an information request, responding to the request as well as pro-active publication. All parts need to work!
8. The formal intervention by the Scottish Information Commissioner into the Scottish Government's compliance with FoISA has diverted its resources to a single offender at a time when there are huge challenges in the delivery of FoISA as well as the new designation of RSLs. CFoIS also believes the intervention sets a very poor example to the other 10,000 + organisations covered by FoISA some of which may no longer regard formal intervention by the Commissioner as problematic or causing reputational damage - you can spin the story to make it sound like a positive. It is a very worrying development that the basics of compliance are now prompting formal interventions such as failing to meet the 20-working day timeline despite the plethora of good practice and computer software which exists in Scotland to manage the duty efficiently. CFoIS urges reform of FoISA so that there are 'consequences' which offer a real deterrent to poor practice such as fines and which should impact negatively on the organisations' performance in other areas such as meeting 'Best Value' obligations. It is important that the Commissioner's office have the capacity and the funding to equally serve requestors, assist designated bodies, adjudicate on appeals, develop best practice modules and guides and assist newly designated bodies to deliver FoISA obligations.
9. CFoIS urges the Committee to reject any weakening of FoISA rights such as extending response times and making it even more difficult to make an FoI request. Single examples appear to be repeatedly used to MSPs to justify wholesale restrictions on the right and that is unfair. Restricting rights with the effect of reducing transparency and accountability in publicly funded services sits badly with public opinion in Scotland. According to independent polling 77% would be more likely to trust an authority that publishes a lot of information about its work and there is strong public agreement on the type of information which should be made available by public authorities: how public authorities spend their money (94%), reasons for the decisions public authorities make (90%), how public authorities deliver their services and functions (94%), contracts with other organisations (84%) and data and

⁵ Para 32 at http://www.legislation.gov.uk/asp/2002/13/pdfs/aspen_20020013_en.pdf

statistics about their performance (93%).⁶ The rights of people, and the practice of government are not static, so individuals, organisations, journalists and community groups want to find out how publicly funded services are performing now and be able to influence how they act in the future.

Therefore, accessing information in order to form an opinion is a key tool in delivering individual and community empowerment. Confining FoISA to a matter of 'communications' or 'legal compliance' betrays the purpose of the legislation which is transparency and accountability and empowering people and communities. Access to information is a right and should not be treated as an unaffordable privilege.

10. CFoIS wonders if the Minister is able to answer questions about the formal intervention process such as on the enforcement of rules defining which 'recorded information' is considered to be 'held' by the Scottish Government including WhatsApp messages about government business if it is on the personal handheld devices of Ministers and civil servants.
11. Clearly individual MSPs have been able to draw on their experience of using FoISA when crafting questions and pursuing points to explain the gap between statements on how FoISA operates on a daily basis and the experience of requestors which is often challenging and requires determination to sustain involvement in the process. We also welcome questioning on the practical delivery of the duty under FoISA to be 'applicant blind' when people or organisations make a recordable request under Section 1 of FoISA.
12. Since FoISA was passed by the Scottish Parliament there have been rapid and extensive advances in access to information rights globally. Also, there is a bank of publications and reports on domestic application of FoISA and how it can be improved such as from CFoIS as well as the Scottish Information Commissioner eg on reducing significantly the number of exemptions. CFoIS commends an international as well as a domestic outlook on how to sharpen rights and define responsibilities to ensure Scotland is a rights respecting country. Accessing information to form an opinion is a fundamental human right and is a gateway to enjoy other rights such as the right to respect for family life under Articles 10, 14 and 8 of the European Convention on Human Rights. Compliance with the ECHR, and delivered through the Human Rights Act 1998, are requirements under Sections 29 and 57 of the Scotland Act.

The process of post legislative scrutiny of FoISA has confirmed there is plenty of evidence and informed commentary that law, culture and practice need to change in Scotland so that our right keeps pace with how information is gathered and processed as well as accommodating changes in how public services are delivered. CFoIS urges the Committee to be bold in its recommendations on the reform of FoISA to return our law to the status of an exemplar.

Due to funding from UNISON Scotland CFoIS is pleased to report that it is currently working on a line by line reform of FoISA which will be launched on the 15th Anniversary of the FoISA being enacted. We hope this work, informed by our research, practice and experience will encourage and inform debate in Scotland on the extension and accessibility of FoISA.

⁶ Commissioner's polling 2017.

Finally, CFoIS commends the Scottish Public Information Forum (SPIF) to the Committee. SPIF is a unique model that engages rights holders, duty bearers, government, the Scottish Information Commissioner and the public around a table twice a year to discuss, equally, the practical enjoyment of access to information rights in Scotland. Learning from each other helps improve understanding and practice across and within sectors. After being overlooked for 7 years, in May 2017 SPIF was reconvened by CFoIS, supported by an initial grant from UNISON Scotland, and it has continued through the support of third sector organisations which host it with Unite the union hosting the meeting in March 2020 and the Wheatley Group in September 2020. Despite receiving no funding, CFoIS continues to organise SPIF in the public interest, to collaborate and be an asset in the development, delivery and continuous improvement of access to information rights in Scotland.

I would be happy to answer any further questions which the Committee may have or provide clarification on any point. I can also advise the Committee that CFoIS has submitted evidence to the Section 5 consultation recently undertaken by the Scottish Government in which we urged a significant increase in designations to retain the power and usefulness of FoI rights in Scotland. I look forward to reading the Committee's report in 2020 and note that will be 18 years after FoISA was first passed.

Yours sincerely,
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