

FREEDOM OF INFORMATION

This paper has been prepared for the Public Audit and Post Legislative Scrutiny Committee to assist in its post legislative scrutiny of the Freedom of Information (Scotland) Act 2002.

The first part of the paper provides information on how freedom of information operates in Scotland and considers a number of related topics.

The second part provides information on how freedom of information (FOI) operates in other countries and seeks to set out some key issues which are common across FOI regimes.

A [previous SPICe briefing](#) produced for the Committee considered the recent developments of FOI in Scotland and summarised the views on FOI which had been raised at a committee roundtable event. The comparative section of this paper may be helpful in seeing how other countries tackle some of the concerns raised at the roundtable event.

FREEDOM OF INFORMATION IN SCOTLAND

The Freedom of Information (Scotland) Act 2002 (FOISA) came into force on 1 January 2005. The Scottish Information Commissioner is responsible for enforcing and promoting FOISA.

Under FOISA a person who requests information from a public authority (PA) in Scotland is entitled to be given the information, subject to some conditions and exemptions. FOISA gives a right of access to recorded information. That is, information which is stored in some way.

In the April 2017 report '[Proactive Publications: time for a rethink?](#)' the Scottish Information Commissioner stated:

“Crucially, PAs must have regard to the public interest in allowing access to the information they publish, particularly in relation to: provision of services, costs of services, facts or analysis that inform decisions (of importance to the public) and decisions and their reasons.”

Section 23 of FOISA places a duty on authorities to publish some information under a publication scheme. This means that authorities are under a legal obligation to publish the classes of information that they make routinely available; to tell the public how to access the information published, and to say whether information is free of charge or available on payment. Scottish public authorities do this by producing a 'Guide to Information'.

Model publication scheme

FOISA allows the development of a model publication scheme which can be adopted by authorities under publication duties. The Scottish Information Commissioner's [Model Publication Scheme](#) (MPS) was approved on 1 November 2018.

The MPS is a pre-approved framework, produced by the Scottish Information Commissioner, through which PAs publish the information they hold. By using the MPS, PAs commit to publishing, as a minimum, the specified types of information under nine classes as set out in their 'Guide to Information'. The nine classes of information are:

- About the authority
- How we deliver our functions and services
- How we take decisions and what we have decided
- What we spend and how we spend it
- How we manage our human, physical and information resources
- How we procure goods and services from external providers
- How we are performing
- Our commercial publications
- Our open data

Adoption of the MPS also means that PAs commit to ensuring that the information they publish meets six accessibility principles which are:

- Availability and formats
- Exempt information
- Copyright and re-use
- Charges
- Advice and assistance
- Duration for which information is available through the MPS (current plus 2 years)

PAs are required to maintain and review their schemes periodically. If a PA is not using an approved scheme, or is not following good practice, the Information Commissioner can refuse or revoke approval for a publications scheme; issue practice recommendations and take enforcement action.

Record management

Record management was an issue raised in the [Scottish Information Commissioner's Intervention Report: Scottish Government](#) published in June 2018 and in [questions to the Minister for Parliamentary Business following the Ministerial Statement](#) made on the report on 13 June 2018. Stakeholders also raised the issue at the Committee roundtable on 22 March 2018.

The [Public Records \(Scotland\) Act 2011](#) sets out the requirements on certain PAs in relation to record management.

The Act requires that the Keeper of the Records of Scotland (the Keeper) develop and publish statutory guidance in the form of the [Model Records Management Plan](#) to assist PAs in developing their own records management plans.

PAs are under a duty through the 2011 Act to produce and submit a records management plan for agreement by the Keeper. Once agreed, PAs must implement their plans and keep them under review.

In 2018 the Keeper also announced a [review of the Model Plan](#) and guidance issued to help PAs to comply with the 2011 Act. A stakeholder forum of information specialists was

convened to carry out the review. The consultation phase ended in April 2019 and the new [Model Plan](#) was published on 26 June 2019. The Keeper's webpage indicates that the revised, co-produced Model Plan better reflects the needs and wishes of stakeholders and will help authorities develop and implement more robust records management arrangements under the Act.

The Keeper produces an [annual report on the 2011 Act](#). [The 2018 report](#) marked five years since the commencement of the Act in 2013. The report confirmed that all PAs listed on the original Act have now been invited to submit a plan.

In different FOI regimes, there has been seen to be a link between effective record management and FOI. The [Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000, for example](#), stated that:

"Freedom of information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative."

Duty to document

Under FOISA there is no duty to document. The legislation focuses on the provision of information that is held by public authorities.

[In evidence to the Committee on 10 January 2019](#), the Scottish Information Commissioner stated that:

"in a number of decisions, we have drawn attention to the fact that information that we expected to be there was not there...we looked again at our various documents and policies, and we found reference in our section 61 code of practice to creation of records. However, that code of practice – which...sets out best practice and is not a legal duty, refers to authorities having procedures to decide what information they should keep, and the term 'keep' is interpreted very widely to include the creation of information. It means that authorities should consider a number of factors in determining what information should be created."

He later stated that *"not recording information frustrates the right of access to information later."*

The Campaign for Freedom of Information in Scotland launched a ['Get it minuted'](#) campaign in 2018 with a report ['Minute Taking'](#). The report highlighted the lack of duty under FOI to make a record and noted that:

"It used to be 'business as usual' to routinely produce agendas and take minutes of meetings. Why have we moved away from this practice...the purpose is clear – to deliver transparency and accountability and evidence the trail of how decisions were arrived at, acted upon and by whom."

The [Civil Service Code](#) sets out a duty to "keep accurate official records and handle information as openly as possible within the legal framework".

Environmental Information (Scotland) Regulations 2004 and proactive publication

The publication duties under Environmental Information (Scotland) Regulations 2004 (EIRs) are similar to those under FOISA. They are not, however, identical.

Regulation 4 of the EIRs places every PA under a duty to “take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds [...] with a view to the active and systematic dissemination of that information [...] progressively available in electronic form.”

In the Scottish Information Commissioner’s 2017 report ‘[Proactive Publications: time for a rethink?](#)’ the difference between FOI and EIRs is made clear. It states:

“FOISA opens at section 1 with the right to request information. It is not until section 23 that the requirement to publish proactively is set out. In contrast, regulation 4 of the EIRs first sets out the presumption and requirement for active dissemination...the implication of this difference is more than just legislative; it gives a very clear indication of expectation and intention.”

In [evidence to the Committee on 10 January 2019](#), the Scottish Information Commissioner said that:

“Ipsos MORI polling shows that 77% of people are more likely to trust an authority that publishes more information. There are many benefits to proactive publication.”

The Commissioner also highlighted the different approaches which are taken to whether there should be a general duty to publish documents, stating that:

“New Zealand has a very wide duty in that respect, with the problem there being that it is difficult to enforce, while other countries have more specific lists of information that must be published.”

HOW CAN FOI BE MEASURED? THE GLOBAL RIGHT TO INFORMATION RATING

The [global right to information \(RTI\)](#) rating is a measure of the strength of the legal framework for the right to access information held by PAs. The rating system was launched in 2011 and is run by [Access Info Europe](#) and the [Centre for Law and Democracy](#). The rating is based on 61 indicators which fall into 7 categories: right of access, scope, requesting procedure, exceptions and refusals, appeals, sanctions and protections, and promotional measures.

It should be noted that the rating deals exclusively with the strength of the legal framework surrounding FOI and is not an indication of how the law works in practice. Nevertheless, it is a means to enable direct comparison between the statutory basis of FOI globally.

Out of 123 countries given an RTI rating, the UK is number 43 scoring 100 points. Afghanistan is number 1 scoring 139 points. Denmark is number 103 scoring 64 points and New Zealand sits at place 51 scoring 94 points. FOISA is not captured in the RTI index, rather the UK’s FOIA is rated.

NORDIC COMPARITORS

Most of the Nordic countries have a strong history of FOI and of open government.

Sweden

Sweden has the world's oldest freedom of information laws in the Press Act of 1766. The 1766 Act abolished censorship of books and newspapers and required authorities to provide public access to all official records.

The 1766 Act, significantly amended since its original iteration, is one of the 'four fundamental laws' which govern [Sweden's constitution](#). The constitution states that all citizens have the right to freely seek information.

Under the Act, access to official documents is open to all citizens, as well as to companies and foreign citizens. The scope of the definition of document is wide and includes film clips, sound clips and pictures. A requestor does not have to give their name in requesting information and access to information is restricted only if it necessary in relation to:

- the security of the Realm or its relations with another state or an international organisation
 - the central fiscal, monetary or currency policy of the Realm
 - the inspection, control or other supervisory activities of a public authority
 - the interest of preventing or prosecuting crime
 - the economic interest of the public institutions
 - the protection of the personal or economic circumstances of private subjects
 - the preservation of animal or plant species.
- (Freedom of the Press Act, Chapter 2)

In the RTI Sweden scores 101 points and is ranked 40th out of the 123 countries. The long history of FOI in Sweden has led to it being considered as a country with generally open government.

The Constitution Unit based at University College London has, however, highlighted the work of Professor Kjell Östberg and Dr Fredrik Eriksson. Professor Östberg and Dr Eriksson argues that the long tradition of openness in government has led to politicians and civil servants avoiding committing themselves on paper, particularly in contentious and difficult decisions. The Constitution Unit has stated that:

“This has led to a situation where most of what is of the greatest public interest is possibly not written down and hence not available for scrutiny. This 'oral' culture of policy-making not only renders government unaccountable, but also may damage the historical record. One example of such a phenomenon is the Swedish debate on nuclear power. Although the discussion took place for a reasonably long period of time, there is a definite lack of documents concerning the subject in the Swedish archives. This same point was argued in 2003 by the Chief Auditor of Sweden at time, stating that the Swedish culture of document publicity has in fact diminished the possibility for a public scrutiny.”

Finland

The Act on the openness of Government activities was first passed in 1951. The constitution of Finland includes the right of access to information, stating:

“Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.”

This means that all documents whether created by a public authority, or delivered to an authority, are covered unless specifically excluded. Exemptions are possible on certain grounds in cases which relate to areas of national security; foreign affairs; criminal investigations; financial policy and personal privacy.

Requesters can remain anonymous and requests can be made over the phone, by email, in writing or in person.

The RTI index lists Finland as 31st out of the 123 countries it rates with a score of 105.

In addition to promoting openness, the Act also sets out as an objective 'good practice on information management in government'.

The [Decree on the Openness of Government Activities and on Good Practice in Information Management](#) provides additional guidance on issues relating to FOI and information management. Section 6 of the Decree relates to document registers, which are kept and open for public access. Section 6 reads:

"Information to be recorded in document registers

(1) Entries shall be made in the document register, in respect of matters given to or taken by the authority for consideration, on:

(1) who submitted the matter, the date on which the document arrived or, if the document has been prepared by the authority, the date on which it was prepared, and on the nature of the matter;

(2) interim measures that have been taken, such as proceedings as well as requests for clarification and comment as well as the related documents;

(3) final measures in the matter and the related documents.

(2) In planning and preparing the document register care shall be taken that the document register can be used effortlessly to provide information on the public notations made in it.

(3) Separate provisions and orders apply to the archive list and court diaries as well as other document registers."

Denmark

There is no constitutional basis for a right to access information in Denmark. In 1970 the Public Records Act gave the right of access to governmental information. The Access to Public Information Records Act 1985 repealed the Public Records Act.

The 1985 Act extends to all public bodies as well as some private companies in which the government has at least a 75% share. Under the Act, officials are also under a duty to write down information received orally which is of importance. The Act gives a right of access to paper, although not electronic, records.

In 2012, the Access to Public Information Records Act was reformed to introduce an exemption to Ministers' diaries; material exchanged 'between Ministers and Members of Parliament involving legislation' and material which was exchanged between civil servants and Ministers in cases where Ministers were requesting advice. Section 24 states:

"The right of access does not include internal documents and information exchanged at a time when there is a concrete reason to believe that a minister has or will have a need for civil service advice and assistance between: 1) A ministry department and its subordinate authorities. 2) Various ministries."

The changes were heavily criticised but passed in spite of a public petition attracting 85,000 signatures. The law came into force on 1 January 2015 and by June section 24 had, according to Danish media reports, been used 360 times. The Danish Parliamentary Ombudsman has been critical of the change.

Denmark's RTI score is 64, meaning it is ranked 103 out of 123 countries.

In evidence to the Committee, the Scottish Information Commissioner cited a number of examples where different approaches are taken as to whether such issues are within the scope of FOI or are treated as record management issues. He stated that:

“in British Columbia, a recent enactment very much places the matter with the chief records officer, who may issue directions or guidance on information, including on creation of records, whereas in Denmark, it is seen as more of a freedom of information function.”

INTERNATIONAL EXAMPLES

New Zealand

The [Official Information Act 1982](#) is based on the principle that all official information should be made available, unless there are sound reasons for withholding it. There are exemptions set out in sections 6 and 9. Some of the exemptions relate specifically to Cabinet material and advice between Ministers and officials.

[The Local Government Official Information and Meetings Act 1987](#) gives a separate right of access to information held by local authorities.

New Zealand's RTI score is 94. The country ranks 51 out of 123 on the RTI index.

In September 2018, the Chief Ombudsman announced a self-initiated investigation of a number of government agencies to consider their information practices. The investigation identified improvements which could be made by PAs to discharge their duties under the 1982 Act more effectively. These included clearer messaging from senior leaders; improving online presence of official information, and clarifying the role of Ministers in responses under the Act.

MEXICO

There has been a constitutional right to information in Mexico since 1977. Article 6 of the constitution states that 'the state shall guarantee the right to information'.

The [Transparency and Access to Government Information Act 2002](#) article 2 reads:

“All government information to which this Law refers is public, and private persons will have access to this information as the Law stipulates.”

The FOI legislation in Mexico stands out for its strength. It has three innovative elements:

- Article 14 of the 2002 Act states explicitly that no exemptions apply to information required for the “investigation of grave violations of fundamental rights or crimes against humanity”. This is unique in global FOI legislation, and overrides any national security interest.

- Strong procedural guarantees with each government agency required to establish a liaison office to handle FOI requests. Requests have 20 working days to be answered. If they are not answered in this timeframe then they are deemed to be positive and the information must be handed over within 10 working days. This places the burden on the agency to respond and reduces refusals by no response. Columbia and Austria are the only countries with similar guarantees.
- The Federal Institute for Access to Information has powerful oversight acting as an administrative court responsible for reviewing negative responses in addition to its function as an ombudsman.

Mexico has an RTI score of 136 out of 150 and is ranked number 2 out of 123 countries. In spite of its strong FOI law, [a 2006 survey of FOI in 14 countries conducted by the Open Society Justice Innovation](#) concluded that:

“European countries are more responsive: Europe, where FOI laws have been more widespread and longstanding than elsewhere, saw a greater percentage of responses than did Latin American and African countries.”

In its June 2017 report [the post legislative scrutiny of FOISA – improving access to information rights in Scotland by examining international practice](#), the campaign for freedom of information in Scotland, pointed out that:

“although Mexico tops the RTI rating...its implementation has been condemned by a variety of NGOs...according to the most recent ranking of transparency in Mexico...the quality of freedom of information laws increased passage in 2015 of Mexico’s general transparency law, but effective access decreased.”

KEY THEMES

Scoring FOI on a legislative basis does not capture how the law works in practice. The legislative basis for FOI is only one way in which openness and transparency across government can be judged.

There are common challenges to implementing effective access to information even where FOI Acts exist, such as:

- setting up an infrastructure
- adequate resourcing
- record keeping
- what should be published proactively
- what should be documented

Sarah Atherton

SPICe Research, 28 April 2019 (revised 10 Sep 2019)

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot