

SUPPLEMENTARY EVIDENCE TO PAPLS

East Lothian council:

Further to our oral evidence about one colleague's experience with East Lothian council, we have further evidence about its handling and attitude to FoI requests.

The East Lothian Courier (article attached) reported on 19 September 2019 that the council had acknowledged it was failing to meet its statutory duties on FoI requests.

A council report (attached) confirms the Scottish Information Commissioner intervened with the council in October 2018. It had failed to meet the 20 day deadline in 65% of FoISA requests and 79% of EIRs. Special measures had to be put in place.

That report confirms too its own failings increased its costs: "*The increase in requests for review can mainly be attributed to the deterioration in the Council's compliance with statutory timescales.*" [par 3.6]

We have since heard of a further case involving East Lothian which raises fresh questions about whether the council is abusing the FoI system, which is a universal right and should uphold equality of access. An applicant sought information from the council about modes of travel by its officials: he was told the council would treat that under the EIRs and would charge him for every element of its search for information, which is an automatic barrier to universal access to information about public authorities.

This relates to the evidence at your hearing of 3 October where Kevin Dunion mentioned the Aarhus convention which required timely and equal access to public authority policies.

timely and equal access to decision-making by public authorities] Dunion 09.43
<https://www.scottishparliament.tv/meeting/public-audit-and-post-legislative-scrutiny-committee-october-3-2019>

Complaints about the burden for public authorities:

Journalists are often told by press officers in public authorities that a media request has to be treated as an FoI request. We think this challenges the contention from SOLAS and others that councils carry an unfair and costly burden due to the increasing number of FoI requests.

This happened recently when The Ferret sent questions about common good spending to Aberdeen and Highland councils: those authorities insisted on treating that as an FoI request while others did not, triggering a more expensive and drawn-out process.

The Ferret had another recent case where NHS National Services Scotland insisted on treating a question about their response to the declaration of a climate emergency as an FoI request, when 29 other public bodies did not do so.

Story here: <https://theferret.scot/climate-emergency-public-sector-response-scotland/>

The US government's contracts database:

As discussed during our evidence session, the US government has a number of publically accessible and searchable databases giving details of procurement contracts.

Those include: the Federal Procurement Data System, which allows searches of government contracts: <https://www.fpds.gov/fpdsng/cms/index.php/en/> and USA Spending: <https://www.usaspending.gov/#/> which is a searchable database which is very broad in scope and scale.

These databases are very contemporary, are searchable via a large number of identifiers, and cover domestic and foreign contracts, including by place name, purchasing department, country and so on.

The Scottish government has an extremely brief and non-searchable list which offers only very basic headline information on a spreadsheet, which is also nine months out of date and only covers contracts with a value above £25,000:

<https://www.gov.scot/collections/government-spend-over-gbp25000-monthly-reports/>

Extending the scope of FoISA and EIRs to other bodies:

The committee asked about extending the ambit of Scotland's freedom of information regulations to bodies which spend significant amounts of public money or have a significant involvement in the public sphere.

We would include Forth Ports and Peel Ports, which are privately-held bodies that control or own assets of significant public importance including transport infrastructure, such as the ferry ports used by CalMac, or commercial ports at Leith, Grangemouth, Dundee, Rosyth or elsewhere.

Forth Ports has the power to set and enforce bylaws in the Firth of Forth under Part VI of the Forth Ports Authority Order 1969. Other infrastructure companies that operate ports and harbours are likely to have similar legal powers. There may be other private organisations that have the ability to make or enforce rules that have statutory force.

Alongside COSLA and the Improvement Authority, which we listed in evidence to the committee as bodies which are publicly funded and act for public authorities but are presently excluded from FoISA, we would also add the Scottish Cities Alliance. It is run by seven local authorities and the Scottish government and boasts of a "pitch book" of public asset, infrastructure, commercial and housing investments worth £7.5bn for private or institutional investors to take up.

Rather than naming individual bodies, or types of private organisation, we recommend the Scottish parliament amends the legislation so the tests for inclusion under FoISA and the EIRs allow the Scottish Information Commissioner to add any body to the list of bodies subject to the legislation where:

* The body is found to wield statutory powers in Scotland

* The body is substantially funded or controlled by other Scottish public bodies, even if there is no single controlling authority

Public bodies opting not to record information to avoid FoISA:

The Ferret has one recent provable case where the chief executive of Scottish Environmental Protection Agency opted not to produce a written report on fish farm pesticide usage and instead made a verbal report to avoid that information being retrieved under FoISA: <https://theferret.scot/pesticide-report-suppressed-foi-warning/>

There is a similar case where Highland council in 2018 admitted arranging face-to-face meetings to ensure they did not have to write down data from fish farm companies on sea lice infestations: <https://theferret.scot/planned-avoid-freedom-information-law-says-council/>

Severin Carrell
Rob Edwards
Ally Tibbitt
James McEnaney

22 October 2019

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Slow response to FOI requests

FREEDOM of Information responses by East Lothian Council fell so far behind that the Scottish Information Commissioner was forced to step in.

A report has revealed that during 2018 the local authority only managed to deal with one in three FOI requests within the 20 working days deadline, with 65 per cent of responses late.

It compared to only 12 per cent being late in 2017, despite there being fewer requests.

A meeting of the council's cabinet was told that the Commissioner, who is responsible for enforcing Scotland's Freedom of Information laws, intervened in respect of the "deterioration in the council's compliance with statutory timescales".

Kirstie MacNeill, the council's service manager, said that a range of measures were introduced to tackle the problems which had arisen.

She said staff training, additional resources and more active monitoring of the caseload, as well as chasing up service areas for responses, had led to a "noticeable turnaround", adding that all requests were currently being met within the 20-day time limit.

She said: "There is no denying 2018 was a difficult year for the council but it is clear these issues have been addressed."

The Commissioner withdrew intervention measures in July.

During 2018 the council received 1,250 FOI requests and responded to 413 of them on time.

REPORT TO: Cabinet

MEETING DATE: 10 September 2019

BY: Depute Chief Executive (Resources and People Services)

SUBJECT: Freedom of Information (Scotland) Act 2002 and Data Protection Act 1998/2018 – Compliance Statistics in 2018

1 PURPOSE

- 1.1 To report on the Council's compliance with the 20 working day timescale laid down by the Freedom of Information (Scotland) Act 2002 for the calendar year 2018 (i.e.: from 1 January 2018 to 31 December 2018).
- 1.2 To report on the Council's compliance with the 40 calendar day timescale laid down by the Data Protection Act 1998 and, with effect from 25 May 2018, the Council's compliance with the one month timescale laid down by the Data Protection Act 2018 for the calendar year 2018 (i.e.: from 1 January 2018 to 31 December 2018).

2 RECOMMENDATIONS

- 2.1 Cabinet is asked to note the report and for Members to provide feedback on the compliance statistics.

3 BACKGROUND

- 3.1 **Freedom of Information (Scotland) Act 2002** - During 2018, East Lothian Council operated in accordance with the statutory requirements, particularly:

Requests for information – to be answered within 20 working days

Requests for review – to be answered within 20 working days by a Chief Officer or an officer nominated by them.

If requesters remained dissatisfied after completing this process, then they had a legal right to appeal to the Scottish Information Commissioner.

3.2 Freedom of Information (FOI) statistics are recorded by People and Governance (previously Licensing, Administration and Democratic Services). Guidance on how to handle information requests, and requests for review, is published on the Council's intranet, accessible to all employees.

3.3 The total number of FOI requests in 2018 was 1,448. By way of comparison, 1,427 requests were received during the previous calendar year, 2017. An increase of 21. Overall, numbers of FOI requests have been increasing steadily since the Freedom of Information (Scotland) Act 2002 came into force.

This figure includes information requests processed under the Environmental Information (Scotland) Regulations 2004 (EIR). A split of the FOI and EIR requests is provided at 3.5 of this report.

3.4 The total number of requests for review received in 2018 was 87. By way of comparison, 19 review requests were received during the previous calendar year, 2017. An increase of 68.

This figure includes reviews processed under the Environmental Information (Scotland) Regulations 2004 (EIR). A split of the FOI and EIR reviews is provided at 3.6 of this report.

3.5 Since January 2013, the recording system used has distinguished between FOI requests and requests falling within the Environmental Information (Scotland) Regulations 2004 (EIR). The table below provides a breakdown of the response timescales for both FOI and EIR requests in 2018:

	FOI				EIR			
	2018		2017 (for comparison)		2018		2017 (for comparison)	
On time	413	35%	1,038	88%	39	21%	100	78%
Late	752	65%	148	12%	149	79%	28	22%
Cancelled/Withdrawn	23		17		3		2	
Suspended	23		45		5		1	
Invalid	39		45		2		3	
Ongoing	0		0				0	
TOTAL ACTIONED	1,250		1,293		198		134	

The Scottish Information Commissioner is responsible for enforcing Scotland's Freedom of Information laws. In October 2018 the Scottish Information Commissioner decided to intervene in respect of the deterioration in the Council's compliance with statutory timescales.

Special measures were put in place and we can report that performance has significantly improved as a result. In July 2019, the Scottish Information Commissioner notified the Council that his intervention would cease as there has been a significant improvement in performance achieved through delivery of the Council's own action plan. This included increased staff resource, more active monitoring of the caseload, chasing service areas for the information, FOI training and staff absence cover arrangements. There has been a noticeable turnaround as a result and currently all requests are being responded to within timescales. The compliance statistics for 2019 will demonstrate this improvement when reported in due course.

3.6 The table below provides a breakdown of the response timescales for FOI and EIR requests for review in 2018:

	FOI				EIR			
	2018		2017 (for comparison)		2018		2017 (for comparison)	
On time: Within 20 Working Days	46	69%	14	82%	15	75%	0	0%
Late	21	31%	3	18%	5	25%	1	100%
Upheld	9		10		2		0	
Partially Upheld	0		2		0		0	
Overtuned	56		4		18		1	
Additional Info Provided	1		1		0		0	
Invalid	1		1		0		0	
Still Outstanding	0		0		0		0	
Total Actioned	67		18		20		1	

The increase in requests for review can mainly be attributed to the deterioration in the Council's compliance with statutory timescales. If an applicant contacted the Council to chase up a late response, the Council was obliged to treat it as a request for review.

3.7 The top three categories of enquirer in 2018 were:

- 1) General Public (44%)
- 2) Commercial Organisations (24%)
- 3) Journalists (14%)

3.8 **Data Protection Act 1998** – until 24 May 2018, East Lothian Council operates in accordance with the statutory requirements, particularly:

Requests for personal information ("Subject Access Requests") – to be answered within 40 calendar days

Data Protection Act 2018 (GDPR) – with effect from 25 May 2018, East Lothian Council operates in accordance with the statutory requirements, particularly:

Requests for personal information (“Subject Access Requests”) – to be answered within one month

- 3.9 Data Protection (DP) statistics are recorded by People and Governance (previously Licensing, Administration and Democratic Services). Guidance on how to handle requests for personal information (“Subject Access Requests”) is published on the Council’s intranet, accessible to all employees.
- 3.10 The total number of DP “Subject Access Requests” received in 2018 was 79. By way of comparison, 85 requests were received during the previous calendar year, 2017.

	2018		2017 (for comparison)	
Completed on time (within 40 calendar days)	8	58%	42	79%
Completed on time (within one month)	27			
Late	25	42%	11	21%
Suspended	19		32	
Withdrawn	0		0	
Ongoing	0		0	
Total Actioned	79		85	

4 POLICY IMPLICATIONS

- 4.1 None.

5 INTEGRATED IMPACT ASSESSMENT

- 5.1 The subject of this report does not affect the wellbeing of the community or have a significant impact on equality, the environment or economy.

6 RESOURCE IMPLICATIONS

- 6.1 Financial - None
- 6.2 Personnel - None
- 6.3 Other – None

7 BACKGROUND PAPERS

- 7.1 None

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