

## Post-Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002

### Response to the call for written views

By

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- [1] This is a formal submission to the Public Audit and Post-Legislative Scrutiny Committee of the Scottish Parliament in respect of its post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (“FOISA”).
- [2] I am a Scottish solicitor practising in the field of information law, which includes FOISA and the Environmental Information (Scotland) Regulations 2004 (“the Scottish EIRs”). I act principally for individuals who have made requests for information to Scottish public authorities; both on a privately paying basis and where funding is sought from the Scottish Legal Aid Board in respect of appeals. I am also the principal author of the ‘information law blog’ ([www.infolawblog.com](http://www.infolawblog.com)); which is run by the firm of solicitors that I am employed by and deals with all manner of information law matters, including freedom of information.
- [3] This submission is made in my capacity as a solicitor employed by Inksters and is drawn from my experience of FOISA as a practising solicitor. This submission does not represent or reflect the view of the Law Society of Scotland (and nor does it intend to). I confirm that I am content for this response to be published together with my name.
- [4] I apologise at the outset for the length of this submission, in particular that it is longer than suggested by the Committee; however, there are a number of issues that require a degree of explanation. I have tried to keep matters as concise as possible and would be happy to expand upon any of the matters set out below in more detail, either orally or in writing; should the Committee wish me to do so.

Question 1: In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?

- [5] I make no comment in respect of this question.

Question 2: Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.

- [6] I make no comment in respect of this question.

Question 3: Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?

[7] There have been well documented issues in recent years in respect of the handling of FOI requests by certain Scottish public authorities; most notably the Scottish Ministers. I do not propose commenting on these issues in any detail; except in relation to one issue that was raised by the Herald on the 25<sup>th</sup> May 2018<sup>1</sup> relating to the anonymisation of FOI requests as they are being dealt with internally. I looked at this issue in a blog post on the 'Information Law Blog'<sup>2</sup>, in particular whether it was in compliance with data protection law. I concluded that:

“In normal circumstances, public authorities should probably be removing personal data such as a requester’s name, place of work and job title (where included) from a request before sending it out to those who need to perform searches for information or those who, in accordance with the authority’s internal procedures, need to approve responses before they’re issued. Only where the identity of the requester is directly relevant to the response, such as where consideration is being given to refusing the request on the grounds that it is vexatious, should the identity of the requester be disclosed otherwise it may amount to a breach of data protection law.”

[8] I remain of the view set out in the above quote. It is not possible to know whether it is an issue that needs to be addressed more widely or whether it is confined to a single authority; however, it is a matter that should certainly be considered. I am of the view that in order to adequately address this matter, it would not be necessary to make changes to the legislative scheme. It appears that the matter could be adequately addressed within the code of practice issued by the Scottish Ministers under section 60 of FOISA.

[9] FOISA only gives access (subject to exemptions) to recorded information that exists at the time when the request for information is made to the Scottish public authority. There have been a great many complaints, particularly from journalists, about records of meetings etc. not being kept. This means there is no information available for consideration for disclosure under FOISA. I do not consider that this is an appropriate issue to tackle in terms of legislative reform of FOISA. FOISA is a legislative scheme which gives enforceable rights to access recorded information; it is not concerned with the making, creating or keeping of records (except to the limited extent provided for in Section 61). Such issues, if they are to be addressed, would be better considered in

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<sup>1</sup> <https://www.heraldscotland.com/news/16248266.call-made-to-anonymise-freedom-of-information-requests-amid-meddling-claims/>

<sup>2</sup> <http://infolawblog.com/personal-data-and-foi-to-anonymise-or-not-to-anonymise/>

the context of legislation governing the creating, making and keeping of records by Scottish public authorities.

[10] There is a code of practice on record keeping, made by the Scottish Ministers, under section 61 of FOISA. This code of practice is merely aspirational and the Commissioner has very limited powers in respect of that code – his powers being limited to the issuing a practice recommendation (having consulted the Keeper of the Records of Scotland). These are not enforceable by the Commissioner and could, quite lawfully, be ignored by a Scottish public authority (as the section 61 Code of Practice can also be, given its aspirational nature).

[11] Any legislative change to require records to be kept is inevitably going to be fairly detailed and technical. It would seem inappropriate to introduce such significant and substantial legislative reforms into FOISA, which has an entirely different focus. If Parliament were of the view that legislation is required to govern the making and keeping of records by Scottish public authorities then this would, in my view, be better tackled as a separate legislative project.

Question 4: Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

[12] Yes. There are a number of areas where the legislation could be strengthened or otherwise improved. In this submission I shall focus on three areas: (1) section 48; (2) appeals under section 56; and (3) section 74.

#### *Section 48*

[13] Section 48 specifies three circumstances where an application to the Commissioner under section 47(1) of FOISA is excluded. Those are where the request for information was made to a procurator fiscal, the Lord Advocate (to the extent that the information requested is held by him as head of the systems of criminal prosecution and investigation of deaths) and the Commissioner. In my view this section should either be repealed, or at least amended. For the purposes of this part of the response I will use “COPFS” to cover both the Lord Advocate and procurators fiscal.

[14] There is no equivalent provision within the Freedom of Information Act 2000; the UK Information Commissioner can consider complaints under section 50 of that Act (the equivalent to section 47) in respect of requests made to the Crown Prosecution Service, the Public Prosecution Service for Northern Ireland and also her office. In the

case of her office that does, in effect, mean that the ICO may have to consider the same request three times: twice as a public authority and once as the statutory regulator. This may seem cumbersome and an inappropriate use of recourses; however, the inability of the Commissioner to consider applications under section 47(1) in respect of requests made to his office (and also to COPFS) has implications for requesters in terms of appeal rights.

[15] As there is no decision of the Commissioner, there is no right of appeal under section 56 and so the request, in effect, finishes at the conclusion of the internal review stage. The only option would be for the applicant to bring judicial review proceedings against COPFS or the Commissioner in respect of the decision letter issued at the conclusion of their review. However, in my view, this is not an adequate replacement for the more comprehensive review undertaken by the Commissioner's office when dealing with an application under section 47(1) of FOISA.

[16] There have, to my knowledge, been no petitions for judicial review lodged with the Court of Session against either COPFS or the Commissioner in respect of decisions made by them in response to a requirement for review. That may be because there is a lack of knowledge that such a route exists. For example, I was instructed by a requester in respect of a request that was made to the Commissioner (after the Commissioner had issued a decision letter in response to a requirement for review); in that case I identified that judicial review would be the only route for challenge; however, in that particular case, no judicial review proceedings were ever brought. At the time the requester instructed me, they were unaware that judicial review might be an option.

[17] Another difficulty created by the existence of section 48 is that it sometimes only results in the Scottish public authority having one opportunity to issue a substantive response to a request. This arises where a Scottish public authority has failed to respond to a request and a requirement for review has been lodged by the requester in respect of that failure. In those circumstances, the obligation upon the Scottish public authority is simply to make a decision in respect of the request. If the decision is to issue a refusal notice to the requester, there is no statutory right for the requester to challenge this. A Scottish public authority may in those circumstances accept a second requirement for review; however, this is outside of the statutory scheme and a requester cannot compel the Scottish public authority to do so. The consequence is, unless a person is successful in judicially reviewing the Scottish public authority concerned, a requester might be refused access to information that should have been released.

- [18] As the committee may be aware, where a Scottish public authority does not respond to a requirement for review within 20 working days; the requester can (within 6 months) make an application to the Commissioner under section 47(1). In response to such an application the Commissioner can issue an enforceable decision notice requiring a response be issued to the requester. Such an application is also excluded by virtue of section 48. I am not seeking to suggest that either COPFS or the Commissioner would ever not issue a decision letter in response to a requirement for review; but it is a weakness of FOISA that the possibility exists for such a situation to arise.
- [19] My preference would be to repeal section 48 in its entirety. This would bring FOISA into line with the UK Act and would also cure all of the defects set out in paragraphs [10] – [18] above. The Scottish Parliament may consider that such a step is not appropriate and as an alternative there are a number of modifications that I respectfully suggest should be made.
- [20] An application under section 47(1) should be permitted, as a minimum, where the complaint is that no response has been made to a requirement for review. This would enable the Commissioner to issue an enforceable decision notice requiring compliance where there has been a delay (for whatever reason) in issuing a response. If further applications to the Commissioner are to continue to be excluded, then, I would suggest that, as a minimum, a requester be entitled to make a further requirement for review where the first such requirement complained that no response had been issued in respect of the request for information.
- [21] If it was considered appropriate to continue to exclude the Commissioner from dealing with a section 47(1) application in respect of a request for information made to his office, then I would suggest looking at the appellate mechanisms. For example, it may be appropriate to amend the legislation so that a decision letter in response to a requirement for review is to be treated, for the purposes of section 56, as if it were a decision notice issued under section 49 of FOISA. This would be particularly important if the Parliament were to proceed with amending the appellate structure (as I discuss in paragraphs [26] – [31] below)
- [22] Section 48 also has implications for the Scottish EIRs. By virtue of Regulation 17 of the Scottish EIRs, Part 4 of FOISA applies, subject to modifications set out within Regulation 17. Section 48 falls within part 4 of FOISA and therefore is also applicable to information requests which are dealt with under the auspices of the Scottish EIRs.

[23] The Scottish EIRs implement Directive 2003/4/EC, which in turn implements the EU's obligations under the Convention on Access to Information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention"). The UK is an independent signatory of the Aarhus convention.

[24] Article 6 of Directive 2003/4/EC is in the following terms:

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

[25] I am doubtful as to whether section 48 meets the requirements of Article 6 of Directive 2003/4/EC. While, as noted in paragraph [15] above, it is possible for requesters to judicially review the internal review response (where such a response is made); the scope of judicial review is limited and does not, in my view, provide for the requisite level of review required by Article 6.

#### *Appeals under section 56*

[26] Section 56 of FOISA provides that appeals may be made, on a point of law, to the Court of Session. Such appeals are heard by a division of the Inner House and therefore the appeals are made directly to Scotland's highest civil court. I consider that this is inappropriate and that it should be amended.

[27] Litigating in the Inner House of the Court of Session is extremely expensive. I am concerned that meritorious appeals may not be being made by requesters and public authorities (especially smaller authorities) because of this. Each party to an appeal will

incur court fees of in excess of £7,000 in respect of an appeal that results in a one day hearing on the Summar Roll (on the basis of the table of fees in force as of 1<sup>st</sup> April 2019). Those fees are only those due to the Scottish Courts and Tribunals Service; each party will also incur solicitors' fees and also fees for Counsel. Appeals cost each party tens of thousands of pounds with the possibility of facing expenses awards of a similar sum.

[28] Legal Aid is available for individuals who can meet the eligibility criteria, but my experience has been that obtaining a grant of legal aid from the Scottish Legal Aid Board for an appeal under section 56 of FOISA is often difficult. This is as a result of the often nebulous nature of the appeal and the inability of the applicant (as a consequence of the statutory scheme) to be able to say with any real certainty what the benefit to them will be.

[29] One of the tests that will often be applied by the Board in determining whether to grant legal aid is whether a privately paying person of modest means would undertake the litigation. It is difficult, but certainly not impossible, to say that a privately paying person of modest means would make an appeal given that: (1) a successful appeal does not guarantee that the information will ultimately be released (the Court can only reduce the Commissioner's decision and remit it to the Commissioner to retake) and (2) because of the often prohibitive cost of appeals to the Inner House of the Court of Session.

[30] The Committee may be aware that the appellate structure under the UK Act is rather different, with appeals going to the First-Tier Tribunal (on both issues of fact and law) and thereafter (with permission and on a point of law) to the Upper Tribunal, the Court of Appeal (possibly the Court of Session, but this has never occurred) and thereafter the Supreme Court. This appellate structure has been criticised as being too cumbersome by some; however, it has resulted in much more litigation under the UK Act.

[31] Not many appeals under the UK Act get beyond the First-Tier Tribunal and even fewer beyond the Upper Tribunal. While decisions of the First-Tier Tribunal do not constitute binding precedents (see, for example, the comments of Upper Tribunal Judge Jacobs in *LO v Information Commissioner* [2019] UKUT 34 (AAC) at paragraph 17); the decisions of the Upper Tribunal do and therefore the UK legislation has been subject to a much greater level of judicial scrutiny. Therefore, the scope and meaning of the law is being authoritatively determined. By contrast, this does not happen often in Scotland

and as such there is little judicial comment on the scope and meaning of the provisions in FOISA.

[32] There is a lot of overlap between the UK and Scottish Acts and it can therefore be appropriate for the Commissioner to take cognisance of decisions of the Upper Tribunal and English courts in respect of the UK Act; however, the Commissioner is not bound by such decisions (see *Beggs v Scottish Information Commissioner* 2018 CSIH 80; per Lord Brodie at paragraph 30). In my view, the appellate structure may be hampering the development of the law in this area and leaves the Commissioner in the difficult position of having to reach conclusions about the interpretation of the law, which are not binding, and with limited guidance from the courts.

[33] I respectfully suggest that the appellate structure is not fit for purpose and that it should be amended to, at the very least, allow for appeals on a point of law (as of right) to the Upper Tribunal for Scotland. Thereafter, there should be a right of appeal from the Upper Tribunal to the Court of Session (with the permission of the Upper Tribunal; which failing, the Court of Session) where the proposed appeal would raise some important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal. Finally, there should be a right of appeal to the Supreme Court in terms of section 40 of the Court of Session Act 1988, as amended.

[34] It is perhaps worth mentioning that in their publication “The Public’s Right to Know: Principles on Freedom of Information Legislation”<sup>3</sup>, Article 19 state:

*“Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.”*

This would suggest that the appeals process that applies to requests made under the Freedom of Information Act 2000 is the most appropriate.

[35] For a long time, section 56 has not complied with the requirements of Article 6 of Directive 2003/4/EC (see paragraph [21] above); however, the recent introduction of protective expenses orders by virtue of Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018 will go some way to assisting with compliance in this area; however, I do not consider that these changes go far

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<sup>3</sup> <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

enough. There may very well be protection against significant adverse awards of expenses in appeals against decisions of the Commissioner in respect of requests under the Scottish EIRs; prospective appellants still need to fund the cost of litigating in the Inner House of the Court of Session (although legal aid is available for those who meet the eligibility tests in the Legal Aid (Scotland) Act 1986 – however, protective expenses orders do not effect them as the provisions of section 18 of the Legal Aid (Scotland) Act 1986 provide a right to seek modification of expenses).

#### *Section 74*

[36] Section 74 provides that the Commissioner can only give a notice, including a decision notice, by delivering it or posting it. FOISA does not permit such notices to be transmitted electronically. Methods of communication have moved on significantly since 2002 and it therefore seems appropriate to consider whether FOISA should be amended so as to allow notices, including decision notices, to be given by transmitting them by electronic means. It seems proper to allow the Commissioner to give a notice electronically to an applicant where the application for a decision was itself received by electronic means; or otherwise where the requester had provided consent to have the decision notice given to them by electronic means.

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