



Submission of views on post-legislative scrutiny of FOISA

Submitted to the Public Audit and Post-Legislative Scrutiny Committee of the Scottish Parliament

08 May 2019

POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002

SUBMISSION FROM DAREN FITZHENRY, SCOTTISH INFORMATION COMMISSIONER

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

1. In the 14 years since the introduction of FOI law there has been an exponential increase in the quantity of information available to the public from Scottish public authorities. This increase has been driven by FOISA, both directly and by its underpinning and enabling of several important openness and transparency initiatives, including international programmes such as the Open Government Partnership and the Open Contracting Standard, and home-grown developments such as Digital Scotland and e-planning. In particular, FOISA's statutory entitlement to request and receive information, and its duty on public authorities to proactively publish information in which there is a public interest, have made a distinct and crucial contribution by focusing on the importance of ensuring that what is published is what the public actually wants to see, rather than information the public sector thinks the public should see. This, combined with technological advances in the internet and social media, has made that information more available to the public.
2. Scottish public authorities have also contributed to making FOISA a success by embracing the legislation and looking for opportunities to increase openness in their own practice, based on the experience of information requests. There are many examples of how the Scottish public sector has embraced transparency and openness since 2005, including:
 - (i) The Scottish Parliament decided to be as open as possible in response to requests for MSP expenses and to publish the requested information as a matter of routine through its publication scheme. Since then, all MSP expense claims have been available to search and view, with supporting receipts and as open data (allowing it to be analysed electronically more easily).
 - (ii) The Food Hygiene Information Scheme operated by Food Standards Scotland provides a searchable database of how well food businesses across Scotland have fared in food hygiene inspections.
 - (iii) Scottish Local Authorities' Trading Standards Services, with the support of Police Scotland and Citizens Advice, publish a searchable database of "trusted traders".

3. It is easy to take the availability of such information for granted, but such openness was not the norm prior to 2005 (when FOISA came into force) and it is not the norm elsewhere.
4. With the embedding of FOISA and its objectives in Scottish society, there has been a shift in public expectation about what information should be available. FOISA has empowered people to seek information on topics which matter to them, has enabled people to engage meaningfully with decision makers, and has provided a clear route via which to challenge non-disclosure.
5. The impact of this shift, and in particular the legally enforceable right of appeal, should not be underestimated. In 2017/18, 77,528 FOI requests¹ were made in Scotland, a figure which has been rising steadily over previous years: in just the first three quarters² of 2018/19, 60,298 requests were made. Of all requests made across Scotland in 2018/19, 560 were appealed to my office. We issued 223 decisions (64%³ of which were wholly or partially in favour of the applicant); we settled a further 125 cases to the satisfaction of both requester and authority. Over 2018/19, 75% of appeals made to my office were from members of the public.
6. This active use of the right to request information, combined with use of the right of a free appeal to an independent body is an important indicator of a well-functioning system.
7. FOISA's appeal route works well. If a requester remains unhappy with the authority's handling of a request after it has conducted an internal review, the requester can make an "application for decision", commonly known as an "appeal", to my office. After a full investigation, I can issue a decision notice which can be challenged, on a point of law only, by either party in the Court of Session.
8. In the judicial context, the role of the Commissioner has been recognised as that of a specialist tribunal⁴, whose decisions and performance of delicate balancing exercises under the legislation should be accorded "*a considerable degree of deference*"⁵.
9. The appeal process is comparatively quick and produces greater certainty for requesters and authorities when compared to the tribunal system (where a Commissioner's decisions can be challenged, on a point of fact or law, to a tribunal, whose judgment is then appealable to a higher court). Such is the appeal process under the UK Freedom of Information Act 2000 (FOIA). Additional layers of appeal tribunals create more complexity in the system, an extra layer of cost, and it takes longer for the requester and authority to get to the final outcome. Particularly where the significance or value of information requested under FOI can diminish over time, it is important that requesters are able to access information to which they are entitled without undue delay, even if the authority appeals the decision.
10. These disadvantages of the UK system were recognised by the Independent Commission on FOI (the Burns Commission) in its 2016 report⁶ into FOIA. The report actually recommended

¹ These figures cover requests made under both FOISA and the Environmental Information (Scotland) Regulations 2004.

² At the time of writing, full data for Q4 has not yet been provided to my office by all public authorities. This will be published at <http://stats.itspublicknowledge.info/> on 23 May 2019.

³ Originally stated as 65%, corrected 4 June 2019.

⁴ *Beggs v Scottish Information Commissioner* [2014] CSIH 10, at para 7

⁵ *Beggs v Scottish Information Commissioner* [2016] CSIH 23, at para 19

⁶ Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf

removing the right to appeal to the First Tier Tribunal. The Burns Commission found that in the vast majority of appeals (87% in 2014) it was the requester who appealed, and 79% of those were dismissed or withdrawn, leading it to conclude that a considerable amount of resources and judicial time was taken up with “unmeritorious appeals”. When giving evidence to the Burns Commission, the UK Information Commissioner’s Office (ICO) pointed to the Scottish system as offering an example of how FOIA appeals could become more efficient.

11. One of the principles of FOI law is that it provides a universal benefit with a presumption in favour of disclosure of public information. Indeed, as early as 1999, in *An Open Scotland*, the government consultation on the proposal to have freedom of information laws in Scotland, the then Deputy First Minister said “At the heart of our proposals is a presumption of openness and a belief that better government is born of better scrutiny”. Examples of FOI use from recent weeks include:
 - (i) the number of people waiting for longer than the NHS guidelines for hip operations⁷,
 - (ii) the scale of local authority job cuts over the last decade (up to 20% in some areas)⁸,
 - (iii) how many large goods vehicles run by Scottish councils have been fitted with the advanced braking system recommended after the Glasgow bin lorry tragedy⁹, and
 - (iv) the number of people who died while homeless in Scotland¹⁰.
12. FOI also brings significant benefits to the public authorities which comply with it:
 - (i) The public’s right to know is an important **prevention** measure, providing an additional check of fraud, corruption and maladministration. Put simply, people are less likely to misbehave if they think information about their activities will be made public. Information requests often aim to expose conduct issues, as well as examining the quality of decision-making.
 - (ii) FOI is an opportunity for authorities to build public trust by demonstrating good **performance** by sharing information about their plans and services, allowing comparison with the performance of other authorities and being open to scrutiny. Though this can at times feel challenging, it often helps identify new opportunities and avenues for improvement.
 - (iii) An open organisational culture supports knowledgeable, informed **people** who can deliver better services for those they serve.
 - (iv) Finally, FOI supports authorities to work in **partnership** with communities because they develop relationships based on trust. Research we commissioned from Ipsos MORI in 2017 found that 77% of respondents would be more likely to trust an authority that publishes a lot of information about its work. When authorities volunteer as much

⁷ McArdle, H. (2019) ‘Hip replacement delays on NHS Scotland mean one in three patients now waiting too long’, *The Herald*, 26 March. Available at: <https://www.heraldscotland.com/news/17526062.hip-replacement-delays-on-nhs-scotland-mean-one-in-three-patients-now-waiting-too-long/>

⁸ Ross, C. (2019), ‘North councils have axed almost 5,000 full time jobs during spending squeeze’, *The Press & Journal*, 22 April. Available at: <https://www.pressandjournal.co.uk/fp/news/highlands/1728670/north-councils-have-axed-almost-5000-full-time-jobs-during-spending-squeeze/>

⁹ Mann, J. (2019) ‘Councils fail to heed advice on safety brakes given after Glasgow bin lorry tragedy’, *The Sunday National*, 10 March. Available at: <https://www.thenational.scot/news/17489357.councils-fail-to-heed-advice-on-safety-brakes-after-glasgow-bin-lorry-tragedy/>

¹⁰ Williams, M (2019) ‘Desperate plea to end the ‘scandal’ of Scotland’s dead homeless’, *The Herald*, 11 March. Available at: <https://www.heraldscotland.com/news/17493240.desperate-plea-to-end-the-scandal-of-scotlands-dead-homeless/>

information as possible, explaining why some of it is redacted, there is strong evidence that the public is much more accepting.

13. FOI is a key enabler for wider government policy and open government agendas. In particular, FOI is an enabler for the Scottish Government's National Outcomes and for Scotland's meeting of the UN Sustainable Development Goals. Indeed, target 16.10 of the UN Sustainable Development Goals is itself an enabling goal, to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements. Indicator 16.10.2 makes specific reference to the adoption and implementation of constitutional, statutory and/or policy guarantees for public access to information.
14. In terms of perceived negatives, there is, of course, a cost associated with complying with FOISA. Public authorities do have to provide resource to respond to requests, proactively publish information and provide advice and assistance to requesters. However, this must be balanced against the benefits that FOI brings, a number of which have been set out above. And on this point I agree with the then Deputy First Minister's statement in 2013 "...my position is clear. The costs that arise from FOI are outweighed by the increase in transparency and accountability to the citizen that result"¹¹. In addition to this, authorities can themselves do a great deal to reduce the volume and impact of requests by adopting a more open culture and publishing information that they know the public is interested in.
15. Occasionally we hear the view that certain types of FOI requests are less worthy than others. For example, at the Committee's oral evidence session on 10 January 2019, there was mention of "abuses" of the FOI system. FOISA recognises that there are a very small number of requests with which authorities should not be required to comply. However, this is already provided for in the current legislation.
16. Section 12 of FOISA provides that an authority is not obliged to comply with a request if the cost of complying with it would exceed an amount set by the Scottish Ministers in regulations. That limit is currently set at £600, and the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) also provide rules about what can and cannot be charged for, and the hourly rate which the authority can use when calculating the cost of complying with the request. The £600 limit (which is linked to the hourly rate provided for in the Fees Regulations) strikes the right balance between ensuring authorities do not have to spend inordinate amounts of time complying with FOI requests, and not preventing requesters from accessing information. As these limits are set by secondary legislation, there is already a route via which the limits can be reviewed, without the need for change to the primary legislation.
17. Section 14(1) of FOISA provides that authorities do not have to comply with a request that is vexatious. It is for the authority to determine whether to apply this provision and it is my role, if the requester is unhappy, to determine whether the authority was entitled to apply it. It is not within my powers to require an authority to apply this provision. Neither should it be: the impact that a request would have on the authority cannot be known to me in the absence of submissions, and it is right that the authority should make the decisions about its own request-handling, subject, of course, to the right of appeal to my office.
18. The provision for vexatious requests places the onus on authorities to justify their reliance on it. It focuses on the impact the request has on the authority, although the motivations of the

¹¹ Nicola Sturgeon, 11th Annual Holyrood Freedom of Information Conference, December 2013

requester can be relevant, e.g. if the request lacks any serious purpose of value, this can be a relevant consideration.

19. I would challenge the suggestion that some requests, despite not being vexatious are, by virtue of their subject matter, unworthy requests. To allow authorities to refuse a request on the basis that it is not sufficiently serious would be a major retrograde step, allowing authorities to go back to a position of deciding what the public should see, rather than what they want to see. I am also aware of a number of examples which demonstrate why labelling requests as unworthy, based on face value, can be detrimental to the right to know, and serve to conceal serious issues.
20. A classic example of this is requests about cleaning rotas and the frequency with which spaces within a public building were cleaned. Through the campaigning work of the C-Diff Justice Group, we now know that this is an important contributory factor to the spread of hospital acquired infections, which can be fatal. Their FOI research supported their call for the Vale of Leven Hospital Public Inquiry¹².
21. Requests which might be viewed at first as trivial, inconsequential or frivolous may in fact concern matters of public interest. It is sometimes only by asking the “daft questions” that matters of true public importance are revealed.

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

22. As set out in the Policy Memorandum to FOISA, the objectives were:
 - (i) *to establish a legal right of access to information held by a broad range of Scottish public authorities*

The legal right of access to information held by Scottish public authorities within jurisdiction is well-established and working well. However, changes in the ways that public services are provided, and the increase in contracted out services affect the scope of FOISA. This does not necessarily require changes to the primary legislation (section 5 of FOISA allows for secondary legislation which extends FOI to additional organisations). In my response to question 4, I include a suggestion to strengthen the legislation in relation to contracted-out services.
 - (ii) *to balance this right with provisions protecting sensitive information*

This has been achieved by exemptions, particularly those in section 38 of FOISA, which deals with the interaction between FOI and data protection law.
 - (iii) *to establish a fully independent Scottish Information Commissioner to promote and enforce the Freedom of Information regime*

This has been achieved, but I suggest some amendments in my response to question 3 to support more proactive regulation.
 - (iv) *to encourage the proactive disclosure of information by Scottish public authorities through a requirement to maintain a publication scheme*

Significant inroads have been made in achieving this objective since 2005, but I question whether it is still working as well as it could, and make suggestions in response to question 4 to update and improve the publication duty.
 - (v) *to make provision for the application of the Freedom of Information regime to historical records*

¹² <https://vimeo.com/39398150>

The Freedom of Information (Amendment) (Scotland) Act 2013 made provision to reduce the timeframe after which certain information becomes a “historical record” (and therefore no longer subject to exemptions from disclosure). The subsequent Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 2013 (2013 No. 365) reduced the age of most historical records in Scotland from 20 years to 15. For certain exemptions, it takes longer for the information to become a “historical record”, e.g. information subject to a duty of confidentiality does not become a historical record until 30 years have passed. For certain other information, the exemptions can last in perpetuity (e.g. information relating to national security and defence).

This can be contrasted with the position in England and Wales where most records only become “historical records” after 20 years (following reform by Constitutional Reform and Governance Act 2010 which reduced the period from 30 years to 20 years).

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

23. Under section 43(1) of FOISA I have a duty to promote the following of good practice by authorities in relation to FOISA and the Codes of Practice¹³. Additionally, section 43(3) of FOISA provides that I may assess whether a Scottish public authority is following good practice.
24. This power to assess is the basis of my interventions, the policy and procedures for which are set out in my Enforcement Policy¹⁴, supported by an Investigations Handbook¹⁵ and Intervention Procedures¹⁶. In essence, an intervention is an own-initiative investigation into a public body’s FOI practice which I use as a proactive regulation tool to improve FOI practice and performance.
25. I operate four levels of interventions, depending on the nature and seriousness of the concern, from alerting an authority to an issue, through to a detailed examination of procedures, practice and culture. I may ask an authority to resolve a minor issue or I may require it to develop an action plan and monitor its implementation closely. Further, the learning points that arise from interventions are valuable not only to the authority with which I have intervened and its service users, but also to other authorities which may be operating in similar ways, but are not themselves subject to an intervention.
26. The decision on whether an intervention is required is based on intelligence gathered from appeals, enquiries, complaints and authorities’ own FOI statistics submissions. When considering any intervention, there is also an assessment of available resource within my office to carry out the intervention. Unfortunately, and particularly at times of high volumes of appeals, the requisite resources may not always be available, which means that I am not always able to intervene, even where there may be an appropriate case for doing so .
27. Intervention is a very effective regulation process to achieve sustainable practice improvement. Importantly, it involves sharing advice and examples of best practice to support

¹³ There are two Codes of Practice made under FOISA: (i) the Scottish Ministers’ Code of Practice on the discharge of functions by Scottish public authorities (the Section 60 Code), available at <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>, and (ii) the Scottish Ministers’ Code of Practice on Records Management by Scottish public authorities, available at <https://www.gov.scot/publications/code-of-practice-on-records-management/>

¹⁴ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=10406&SID=10516>

¹⁵ <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/InvestigationsHandbook.aspx>

¹⁶ <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Interventions.aspx>

the authority to make improvements that sit well within the structure and functions of their existing organisation. However, there are three areas where it could be strengthened:

- (i) The success of an intervention is heavily dependent on the quality of the assessment of existing authority practice. In most cases, I will ask the authority to provide evidence of current practice and the reasons behind it. As part of this process, an efficient way to gather information about culture and practice is by interviewing relevant employees. Unusually for a regulator, however, I have no power to compel witnesses to give evidence either in an intervention, or for the investigation of an appeal¹⁷. I consider such a provision would strengthen the quality of interventions and reduce the potential for inefficiencies. I expect that I would rarely need to rely on such a provision, but that its existence would help ensure co-operation.
- (ii) The second area for improvement relates to my enforcement powers. Under section 51 of FOISA, I can issue an enforcement notice to an authority which has failed to comply with a provision of Part 1 of the Act, requiring it to take steps to comply within a specified time. Breach of this notice can allow me to refer the matter to the Court of Session which may deal with the matter as a contempt of court. However, I have no such powers in relation to breaches of the Codes of Practice – the most I can do is make a recommendation and rely on the good faith of the authority to follow it, or issue a practice recommendation under section 44 of FOISA (there are no penalties for failing to follow such a recommendation). Extension of the scope of enforcement notices to include failures to comply with the Codes of Practice, either immediately, or after a practice recommendation has not been actioned, would provide additional “teeth” to help drive continued improvement in FOI performance.
- (iii) The third area concerns the focus on “assessment” in the current legislation. The development of interventions using the existing provisions has been a gradual one, but the value of interventions as an efficient and effective tool to improve the FOI performance of authorities for all requesters is proven. I would ask the Committee to consider raising the profile of interventions, creating a specific recognised process in the legislation, with additional resource to be able to carry out more of this important work.

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

Proactive publication code of practice

28. **Suggested improvement: Remove requirement for public authorities to adopt a publication scheme, and replace this with a simple statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication.**
29. As I set out in oral evidence to the Committee in January 2019, the proactive publication duty could be strengthened and updated. A new Code of Practice on Publication would ensure that the duty can remain up-to-date with fast-paced technological advances and increasing expectations of society that information will be quickly and easily accessible, often without having to make a request.
30. The current provisions for proactive publication (sections 23-24 of FOISA) are outdated. They require authorities to adopt and maintain a publication scheme. This is an outmoded way to

¹⁷ I ask that consideration be given to this suggestion for appeals under section 47 of FOISA, as well as interventions.

approach publication of information. The existing duty was drafted at a time when access to the internet within Scottish households was less common than today, and before the era of smartphones and internet access on-the-go. Public expectations about access to information have changed in the intervening years.

31. It is impossible to gauge how many individuals benefit from accessing information which is proactively published on authorities' websites. However, it is reasonable to expect that people will look for information online before considering making a request. These expectations about requester behaviour have been confirmed in a recent study¹⁸.
32. A greater focus on proactive publication in the primary legislation would benefit both requesters and authorities.
33. I suggest removing the requirement to adopt a publication scheme, and replacing it with a requirement on authorities to comply with an enforceable Code of Practice on Publication.
34. A Code of Practice would set certain requirements to ensure key principles apply to ensure some consistency across the public sector, e.g.:
 - what must be published (if held by the authority);
 - how the published information must be made available and searchable;
 - how long it should be available for.
35. The focus of the proactive publication duty should continue to be on the public interest as the distinct feature of our FOI law: authorities must publish the information they hold in which there is a public interest.
36. A Code would also enable future updates to be made without the need for change to the primary legislation. It therefore offers a flexible and future-proofed option to ensure the continuing maintenance of high standards of proactive publication by Scottish public authorities. Given the pace of technological change, this is an important consideration.
37. The Committee may also wish to consider who should prepare the new Code. My office, which has 14 years of experience of overseeing compliance with the publication duty, may be best placed to prepare, as well as to enforce, the Code, which could be subject to parliamentary approval, perhaps under the negative resolution procedure. This would be similar to the ICO preparation of statutory codes on data protection under the Data Protection Act 2018 (DPA) (e.g. the Data Sharing Code of Practice under section 121 DPA, and the Direct Marketing Code of Practice under section 122 DPA). Those codes are submitted to the Secretary of State who lays them before Parliament, which can choose to resolve not to approve the Code. A similar approach would also ensure that there are opportunities for the public to contribute through formal consultation.

Ministerial veto

38. **Suggested improvement: Remove the Ministerial veto in section 52 FOISA.**
39. Section 52 applies to a decision notice or enforcement notice which is "given to the Scottish Administration; and relates to a perceived failure, in respect of one or more requests for information, to comply with section 1(1)" of FOISA where certain exemptions apply. It provides

¹⁸ Dr Sean Whittaker, *Proactive Disclosure of Environmental Information in Scotland: Part 1*, Uncovering the Environment: The Use of Public Access to Environmental Information, 12 December 2018. Available at: <https://sites.dundee.ac.uk/envinfo/2018/12/12/proactive-disclosure-of-environmental-information-in-scotland-part-i/>

a power of veto to the First Minister which means that the decision notice or enforcement notice ceases to have effect.

40. The power of veto given to the First Minister in section 52 is contrary to the fundamental principles of FOI. It provides a power to refuse to disclose information in certain circumstances. This power is given in addition to the right to appeal to the court, and can be used at any stage; after a decision notice is issued, or after an unsuccessful appeal to the Court of Session or beyond. It is an anomaly across the FOI regime, and one which does not serve the purposes or objectives of the legislation.
41. After 14 years of operation of FOISA, this provision has never been used and this suggests it serves no useful purpose. To remove this provision would strengthen our FOI law.

Appeals against COPFS and SIC

42. **Suggested improvement: Remove prohibitions in section 48 FOISA against appeals being made to the Commissioner against certain public authorities.**
43. Section 48 of FOISA states that no appeal may be made to the Commissioner in respect of the Commissioner, a procurator fiscal, or the Lord Advocate (to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigations of deaths in Scotland).
44. The Policy Memorandum which accompanied the FOI (Scotland) Bill indicated that it was considered incompetent to make the Lord Advocate subject to the enforcement powers of the Commissioner, because any decision taken by the Lord Advocate, as head of the systems of criminal prosecution and investigation of deaths in Scotland, is to be “taken by him independently of any other person” under section 48(5) of the Scotland Act 1998.
45. The effect is that while people are able to make FOI requests to the Lord Advocate or Crown Office and Procurator Fiscal Service (COPFS), their right is not legally enforceable in the same way as for requests to other authorities, with both appeals to the Commissioner and subsequent appeals to the Court of Session on a point of law being excluded.
46. Since 2012/13, my office has received between 4 and 10 appeals each year which have had to be excluded under section 48 of FOISA. There is no equivalent provision in FOIA relating to the Crown Prosecution Service (CPS). The ICO investigates and issues decisions in respect of the CPS. The ICO has found in favour of the applicant in a number of cases, generally relating to technical issues, such as failing to respond on time; refusal notices which do not comply with FOIA requirements; or excessive costs.
47. I cannot investigate similar concerns relating to prosecutors in Scotland. The only recourse available to requesters in Scotland is judicial review. Although some other enforcement powers are available (e.g. I can issue an enforcement notice if there is an unacceptably high level of failures to respond to requests), I cannot investigate a requester’s dissatisfaction with the way in which their request was handled. This creates a deficit in Scotland’s FOI laws when compared with the rest of the UK.
48. I do not consider that section 48 of the Scotland Act 1998 would necessarily preclude a right to make an appeal regarding the handling of an FOI request by the Lord Advocate. When making a decision about whether to release information under FOISA, it does not appear that the Lord Advocate is acting in any special capacity relating to prosecutions or the investigation of deaths in Scotland. Rather, he is carrying out his duties under FOISA in the same capacity as any other public authority.

49. Section 48 also prohibits appeals concerning the Commissioner and I suggest this is also unnecessary. Although at first it may seem strange for a regulator to regulate its own compliance with legislation, it is what happens elsewhere in the UK: the ICO investigates appeals about its own handling of requests. If my office were to do the same, requesters would have the right to appeal my decisions to the Court of Session on a point of law. Currently, that option does not exist for people who make requests to my office. If they are dissatisfied at the end of the review process, they can only resort to judicial review proceedings.

Confidentiality and contracted-out services

50. **Suggested improvement: Consider whether a prohibition on relying on confidentiality clauses between public authorities and contractors providing public services on their behalf should be introduced.**
51. I would like to draw the Committee's attention to a provision in the Irish FOI Act 2014 relevant to the ongoing issue of public services being provided by private sector contractors which are not subject to FOI. Section 35(2) of the Irish FOI Act prevents public authorities and bodies providing services to them relying on confidentiality clauses in their contracts to prevent access to information held by the public authority. There are some exceptions, e.g. if the confidentiality agreement is needed to protect a third party's confidentiality.
52. This goes further than our Section 60 Code of Practice, which provides that authorities should make clear to anyone bidding for contracts that it will not implicitly accept such confidentiality clauses (para 8.4.4). While the Section 60 Code says that confidentiality clauses are not good practice, I do not have sufficient "teeth" to prevent them or limit their effect. If an authority does not comply with the Code in this respect, all I can do is issue a practice recommendation. The insertion of a provision in FOISA similar to the Irish Act provision would be stronger, in that it would prevent authorities relying on such clauses.
53. If information is public information, held by public authorities or relating to public services, then the public should be able to see it unless there is a very good reason why they should not. Where information was previously available from a public authority, but the contracting-out of the service has led to the information becoming unavailable, there is a loss of FOI rights. The Scottish Government has committed to consulting on extension of FOI to contractors providing services to the public sector. It is too early to know what the scope of that consultation will be (e.g. how contractors are defined, and whether this covers all private contractors providing public services, or only a selection of them), or what the outcome of the consultation will be.

5. Are there any other issues you would like to raise in connection with the operation of FOISA?

Technical amendments

54. There are a number of technical amendments which have been noted by my office over a number of years of applying the legislation, and which would remedy oversights and inconsistencies in the legislation. These are attached as an appendix.

Duty to document

55. The issue of whether there ought to be a duty to document particular information, or to minute particular meetings, has been raised with the Committee at previous evidence sessions.
56. I set out in my oral evidence to the Committee in January two crucial issues which I think should be clear in any discussion about the duty to document:

- (i) what the scope of any such duty would be, i.e. which organisations and what information would be covered, e.g. meetings with outside interests or the authority's decision-making; and
 - (ii) whether a duty to document should form part of FOI, or is more appropriately dealt with under records management legislation.
57. The Committee is also aware of my concern about the importance of appropriate regulation. A duty which cannot be enforced would not be a valuable right and it is important to ensure that amendments are consistent with the clarity and enforceability for which FOISA is known.
58. Where a duty to document does exist in other jurisdictions, those jurisdictions have different approaches to enforcement. Some do have it as part of their FOI law (and so enforcement is by the FOI regulator), e.g. Denmark, whereas for others it is part of the records management landscape, e.g. British Columbia.
59. There are certainly benefits to any duty to document being independently regulated (i.e. by a regulator which is not part of the government apparatus). Whatever legislation the Committee considers such a duty to reside in, there will necessarily be significant resource implications if it is to be regulated effectively.
60. I am happy to provide more detail on any of the points raised, either in writing or in oral evidence.

**Appendix to submission from Daren Fitzhenry, Scottish Information Commissioner:
Proposed technical amendments to Freedom of Information (Scotland) Act 2002 (FOISA)**

	Section no & title	Proposed change/ addition	Comment/ explanation
1.	2, Effect of exemptions	Add a provision similar to regulation 10(2)(b) of the Environmental Information (Scotland) Regulations 2004 (EIRs) that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure	<p>The Global Right to Information Rating¹⁹ provides ratings by which access to information laws can be measured and compared across jurisdictions.</p> <p>Indicator 3 is “[t]he legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information”.</p> <p>The drafting of section 1(1) of FOISA makes it clear that the default position is that information should be disclosed, but adding a requirement that exemptions should be interpreted in a restrictive way (as is currently contained in regulation 10(2)(b) of the EIRs) would give greater recognition to the presumption in favour of disclosure.</p>
2.	6, Publicly-owned companies	Extend section 6(1) to cover companies owned jointly by Scottish Ministers and other Scottish public authorities, with consequential amendments to section 6(2)	<p>At present, section 6 makes a company subject to FOISA if it is wholly owned (a) by the Scottish Ministers; <u>or</u> (b) by any other Scottish public authority...</p> <p>This definition cannot be interpreted to include companies which are owned jointly by the Scottish Ministers <u>and</u> another public authority, or other public authorities, meaning they are not subject to FOISA. This appears to have been an oversight.</p>
3.	53, Failure to comply with notice)	Amend section 53(1)(a) to make it clear that failure to comply with a decision in time can also be referred to the Court of Session	<p>Section 53 sets out that if an authority fails to comply with notices issued by the Commissioner, the Commissioner can certify in writing to the Court of Session that the authority has failed to comply. The Court may deal with the authority as if it were in contempt of court.</p> <p>All notices issued by the Commissioner (decision notices, information notices and enforcement notices) must specify the timeframe within which the public authority is to comply with them (sections 49(6)(c), 50(2)(b)(iii) and 51(1) respectively).</p> <p>However, whereas information notices and enforcement notices can be referred to the Court of Session if any aspect of the notice is not complied with (including the</p>

¹⁹ www.rti-rating.org/

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			<p>timescale for compliance as specified in the notice), decision notices can only be referred for failure to comply with the steps the Commissioner has required the authority to take. Decision notices cannot be referred for failure to comply with the timescales for compliance.</p> <p>In practice, this can result (and has in the past resulted) in the Commissioner spending public money on legal fees to commence the certification procedure, only for the authority to comply late, at which point the Commissioner can no longer pursue the matter.</p> <p>To avoid this happening in the future, the Commissioner should be able to certify to the court failures to comply with the timescales set in decision notices.</p>
4.	73, Interpretation	Amend definition of “information” to exclude environmental information as defined in the EIRs	<p>The definition of “information” in section 73 includes environmental information. Requests for environmental information must be responded to under the EIRs. With the current definition of “information” in section 73, if an authority receives a request for environmental information, it cannot deal with the request solely under the EIRs – it must first exempt the information under FOISA, and issue a refusal notice under section 16 before then going on to handle the request under the EIRs.</p> <p>Apart from being a laborious process, this is not user-friendly, as the requester receives a confusing communication, advising them that the information is being withheld from them, even if it is being disclosed in full under the EIRs.</p> <p>It should be possible for environmental information requests to be dealt with solely under the EIRs. Some consequential amendments would be needed: section 39(2) and (3) should be deleted (N.B. simply making section 39(1) an absolute exemption won’t be enough to prevent joint responses – a section 16 refusal notice would still have to be issued under FOISA).</p>
5.	74, Giving of notice	Amend wording to clarify that notice can be given by email	Section 74 requires that decision notices etc. must be sent by post, but we occasionally encounter difficulties obtaining a postal address. An express power to serve decision notices, etc. by

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			email would avoid this difficulty and ensure notices could be sent without the need to obtain a postal address.
6.	New exemption	Provide an exemption for information provided to the Commissioner under or for the purposes of FOISA	<p>Section 45 of FOISA provides that the Commissioner and his staff must not disclose any information which has been obtained by him under or for the purposes of FOISA if the information is not already in the public domain, unless the disclosure is made with lawful authority. This might include submissions or information the authority has withheld because it believes the information to be subject to an exemption from disclosure. Section 45 also provides that to knowingly or recklessly disclose such information is a criminal offence.</p> <p>It is clearly the intent of section 45 to prevent the disclosure of such information. However, there is no statutory prohibition against disclosure of this information. Section 26 of FOISA says that information is exempt if its disclosure by a Scottish public authority <i>otherwise than under this Act</i> is prohibited by or under an enactment, so does not allow a prohibition within FOISA to be treated as an exemption.</p> <p>In the event of receiving a request for such information, I have to rely on other exemptions, e.g. section 30(c) which relates to prejudice to the effective conduct of public affairs: given the provisions of section 45, it would clearly not be within the expectations of public authorities providing information and submissions to my office that these would be released into the public domain, and there is a very real likelihood that if authorities expected that I might disclose information they would not provide it in the first place. My investigation function is dependent on gathering evidence and submissions, so the impact would be to prejudice substantially the very function and purpose of determining appeals under FOISA.</p> <p>The absence of a statutory prohibition on disclosure which would allow me to rely on section 26 of FOISA is understood to have been due to a drafting omission. The (UK) Information Commissioner can rely on section 44(1)(a) of FOIA (the FOIA</p>

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			<p>equivalent of section 26) to withhold such information, because, although it is drafted in similar terms to section 26 (i.e. it also only applies to prohibitions on disclosure “<i>otherwise than under this Act</i>”), the prohibition itself is actually contained in another Act - the Data Protection Act 2018.</p> <p>Given the terms of section 45 of FOISA, it is clear that it was the intention of Parliament that such information should be prohibited from disclosure, and an exemption which specifically relates to information which has been obtained by the Commissioner under or for the purposes of FOISA should be created to remedy this oversight.</p>

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