

Centre for FOI
Wednesday 7 September 2011
Current Developments

Introduction

The theme of our presentation is how the FOI landscape has changed since our last round-up of news at the October seminar in 2010.

These are very much our personal reflections, based on our own work for the Commissioner. If you think we've left out any important developments, please feel free to raise them for discussion during the panel discussion.

I'm going to talk about:

- Relevant legislative change, both legislation in force and anticipated
- Some of the drivers for further development of FOI and transparency – both UK and internationally
- and Margaret will provide an overview of two important areas of new legal precedent.

Legislative change already in force

The Public Services Reform (Scotland) Act 2010 and the Scottish Parliamentary Commissions and Commissioners, etc. Act 2010 have impacted on the Scottish public sector landscape. Schedule 1 of FOISA has therefore been significantly amended. In the last year 11 authorities have been deleted from the list of authorities subject to FOISA and six new bodies added.

The new Public Records Scotland Bill passed through its Parliamentary stages at lightning speed and was given royal assent in April this year. This Act imposes new requirements on most of the Scottish public authorities subject to FOISA – those requirements, of course, are unsurprisingly similar to the guidance in the FOISA Section 61 Code of Practice, but the statutory requirement to produce a records management plan will undoubtedly change the environment in which FOI law operates. I'm glad Hugh is here to talk us through that.

The first set of provisions in the INSPIRE regulations came into force in December 2010 requiring Scottish authorities which hold spatial datasets to create the first layer of metadata for issues such as geographical information, transport and protected sites. The bodies concerned include the Scottish Government, councils, SEPA and SNH. The Scottish INSPIRE network will deliver inter-operable (or harmonised) spatial datasets which are available for viewing and discovery by the public, by December 2013.

Extension of FOISA

One of the most significant developments in terms of FOI in Scotland was the Scottish Government's announcement in January this year that it is not minded to extend the coverage of FOISA by way of a section 5 order for the time being. This announcement brought to an abrupt end the deliberations on this issue which have been ongoing since FOISA and the EIRs came into force.

We've been talking about extension at Centre seminars from the outset – the inaugural seminar coincided with the end of the initial Government discussion exercise on the subject. Lord Wallace of Tankerness, our first ever speaker, expressed disappointment that we had had to wait so long for the Government to formally consider extension, reflecting that he had had full expectations during the passage of the FOISA Bill in 2001, that extension through a section 5 order would happen sooner rather than later.

It was to be another year though before the Government gave its response to the feedback it had received, announcing in December 2009 that it planned to consult on whether coverage of FOISA should be extended to

- private sector contractors building hospitals and schools and running private prisons.
- Glasgow Housing Association and ACPOS
- Leisure services run as arms length organisations

And it was a further 7 months again before the consultation was issued, in July and closing in November 2010.

The Government's response to its consultation was, though, delivered mercifully quickly - in the run up to the Scottish elections. It concluded that while it remained fully committed to the principles of FOI, it was not persuaded that now would be the appropriate time to lay a section 5 order formally extending coverage to the bodies considered in the consultation. It would consider other non-legislative alternatives to improving openness and transparency and it would tidy up the FOI legislation before it considered the use of section 5 orders again.

The Government's statement on extension was also an announcement of its intention to bring forward an FOI Amendment Bill in the next Parliamentary session (that is, the session we're now in following the election). As we meet, the First Minister is announcing the Government's Legislative Programme for this session – and we'll of course be looking closely to see if the FOI Amendment Bill is in there.

Amendment Bill

The Government's stated aim for the Amendment Bill is to keep the focus of it narrow. The decision to introduce a Bill was triggered by two issues which needed to be resolved:

The first is the timescale for the falling away of exemptions for historical records. We don't have a 30 Year Rule in Scotland, but the effect of section 59 of FOISA is to provide a **30 year exemption** for certain types of information. The Government intends to reduce the lifespan of a number of exemptions from 30 years to 15 years. It has already radically changed its own arrangements with the National Records of Scotland so that Government records are open after 15 years, but an amending order under section 59 is needed to set this in statute.

The second issue is the timescale for summary prosecution under **Section 65 of FOISA**. Section 65 provides that once a request has been made to an authority, it is a criminal offence for the authority, its employees or contractors to alter or destroy the information with the intention of preventing disclosure. Any such offence must be prosecuted within six months of the time when the offence was committed. In practice it is very difficult to prosecute an alleged offence within that timeframe. So the Amendment Bill would extend the period for summary prosecution.

If these two were the only amendments, we could expect little change in our FOI regime. However, as the Government's announcement indicated, wider proposals for amendment may arise both from consultation and parliamentary process. And we might also expect that the Government itself may have developed further aspirations for the Bill.

So what else might we expect? Looking to both international experience of reviews of FOI law and picking up some current “mood music” about the purpose of FOI, we should probably anticipate calls from some quarters for tightening of the fees regime or relaxing of timescales for compliance. But we should also expect that there will be proposals for the strengthening of the regime – is anyone going to campaign for lowering of the fees, for shorter timescales or more emphasis on proactive publication? Perhaps you can tell us!

Wider environment

There are other current developments, from further afield, which are affecting our FOI landscape:

We’re seeing a raft of **open government initiatives** in UK. The UK Government has announced widespread proposals to increase the amount of public authority data available online – from crime maps and health outcomes, to road conditions. And information has to be released in re-usable electronic formats. Some of the information which is now to be available south of the border has actually been available in Scotland for some years – perhaps as a result of the UK initiatives we’ll invest more in telling people about what is available?

On the European front, Access Info Europe is a strong voice campaigning for access to EU information. It is currently locked in a legal battle with the Council of the European Union for **access to information about EU decision making**. As Access Info point out,

over 50% of national legislation originates from the European Union. If the campaign is successful, we will be able to see what the UK has proposed in legislative negotiations in Europe.

The US Government recently launched an **Open Government Partnership** which aims to encourage individual countries around the world to pledge to advance government openness. For example, adopting more and better FOI laws and undertaking transparency reforms in areas such as procurement, budgets and the environment. 55 countries attended the launch in July. 17 countries, including the UK, have since pledged to join the Open Government Partnership. It's hard to tell what the impact of this will be on us, but it's certainly something to watch.

So those are the obvious external developments which are likely to influence our FOI regime. Not all of the developments we see are driven by governments through statute, or by NGOs, however.

Internet and social media

I would like to conclude my part of this presentation with a short nod to the increasing impact of the **internet and social media** as drivers for change in the way our regime works. We're seeing more public data available online than ever before, ready and waiting for others to analyse – and there's evidence that people are doing just that. Press league tables and maps created from public data are on the increase. For example, on Monday the Daily Telegraph and yesterday the BBC

used online data to map the home addresses of the London rioters against the site of their alleged offences and against social deprivation data. From the maps, they drew conclusions about the rioters and their motivations. We can have every expectation that information published proactively and released under FOI will increasingly be used in such ways.

We're also noting an exponential increase in the volume of email requests as opposed to traditional letters. Whatdotheyknow.com is reporting that they now have a 14.6% share of the requests to UK central government departments. I don't think we yet have a similar picture for requests to the Scottish Government, but the [whatdotheyknow](http://Whatdotheyknow.com) requests are increasing.

Following responses to requests, we're seeing members of the public sharing released information and stories about failed requests rapidly via social media, particularly through twitter and personal blogs.

It's a safe bet to assume that electronic communications will be even more hot topics for FOI and therefore us all in the year ahead.