

Centre for Freedom of Information Seminar.

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Reflected Glory? – Freedom of Information in Scotland

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If we are asked the question how good is freedom of information in Scotland, how would we answer? By that I mean on what basis would we answer? Would it be by comparison to some internationally recognised standards, or by comparison to freedom of information regimes in other countries which exhibit acknowledged examples of good practice? Would our judgement be determined by how far we gauge matters have progressed in comparison with the state of affairs in Scotland before the Freedom of Information Scotland Act came into effect in 2005? Or would we recall the expectations which that legislation gave rise to, to see whether the regime in practice is as good as its proponents hoped it would be? Or, to be frank, do we simply check that we are doing at least as well and preferably even better than the rest of the UK?

These are not mutually exclusive considerations and an assessment could be based on all of these, which might be clustered into three themes

FoI in Principle – how strong are the legislative provisions and associated regulations, and codes of practice?

FoI in Practice – is it being used by the public; complied with by authorities; enforced by Commissioner and Courts? Is information being made available which previously would not be disclosed?

FoI in Politics – how far has a culture of secrecy in authorities been displaced by one in favour of transparency; have the new rights withstood any adverse political reaction; have other public policy activities enhanced or diminished the right to receive information?

I have scope only briefly to consider each of these areas in this paper and it will become quickly apparent that there are obvious problems in coming to conclusions, and that we would benefit not only from systematic comparative research but also from better data recording and analysis in Scotland.

FoI in principle

Although there is no commonly accepted benchmark against which the quality of national FoI laws can be gauged, various efforts have been made to develop sets of indicators and to make comparative surveys of national laws.

From amongst these, the Special Rapporteur to the UN Commission on Human Rights recommended the principles developed by Article 19 – the International Centre against Censorship. These had been articulated by the time the Scottish draft legislation was being drawn up and debated, so they provide a good contemporary basis on which to gauge the quality of our FoI laws.

FOISA comes up to the mark so far as the requirement that requests for information should be processed rapidly and fairly and an independent review of any refusals should be available (Principle 5) and that individuals should not be deterred from making requests for information by excessive costs (Principle 6)

However, FOISA falls somewhat short other core features.

The first principle is that freedom of information should have the purpose of achieving maximum disclosure, by establishing a presumption that all information

held by public bodies should be subject to disclosure and that this presumption should be overcome only in very limited circumstances. FOISA extends to 10,000 public bodies and s1(1) gives anyone, anywhere, the right to be given information. In that respect the Scottish law gets off to a good start.

However, it is clear that FOISA places far more restrictions on disclosure than would be consistent with the principles. For instance, Principle 4 requires that exceptions should be clearly and narrowly drawn and subject to substantial harm and public interest tests. Some of the exemptions in FOISA meet this requirement, and, indeed, in Scotland satisfaction has been taken that where the harm test does apply, authorities have to demonstrate substantial prejudice to their own or others' interest, as compared to the UK legislation which has been held to be weaker because it requires a simple harm test. However, information can be withheld under the Scottish legislation without any regard to the substantial harm test where it involves, trade secrets, national security or investigations carried out by public authorities; while it can also be withheld without any regard to either the substantial harm or public interest tests if it involves confidential information; court records or personal information. Furthermore, any information - however insignificant - regarding the formulation of Scottish administration policy attracts an exemption, without regard to the harm from disclosure and is only disclosed if it is in the public interest to do so.

This was no oversight. The use of absolute exemptions or discarding the harm test was debated as the legislation went through Parliament, and disappointed many advocates of FoI. It was a deliberate domestic political decision, bringing FOISA largely in line with the UK FoI Act rather than with the provisions of the European legislation such as EU Directive 2003/4/EC. This has led to the anomalous situation of the Scottish Parliament then subsequently passing, in 2004, legislation regarding access to environmental information which does not contain the safeguards thought necessary for all other information, as almost all of the exceptions in the Environmental Information (Scotland) Regulations 2004

including those dealing with confidentiality, the course of justice, and national security are subject to the substantial prejudice and public interest tests.

A further example of where Scottish provision is not consistent with the principle of maximum disclosure is illustrated by principle 8, which requires that disclosure takes precedence over other laws restraining disclosure (as is the case with section 22 of India's Right to Information Act 2005). Instead, FOISA provides (at section 26) an absolute exemption for information if its disclosure is prohibited by or under an enactment. Although some of these prohibitions have been removed by review others remain. (This provides an example of where the provisions of FOISA and EIRs can lead to a different outcome. In one of my decisions (*Decision 182/2006 Mr Bruce Sandison and the Fisheries Research Services*), I came to the view that whilst information about salmon escapes from a fish farm was gathered under the Diseases of the Fish Act 1983, which contains at section 9 a prohibition against disclosure which would prevent release under FOISA, the EIRs do not allow for such prohibitions and I ruled therefore that the information should be disclosed.

Principle 8 also makes it clear that the exemptions in FOI laws should be comprehensive and should not be extended by provisions in other legislation. Yet the Enterprise Act 2002 received Royal Assent in November 2002, after both the UK and Scottish FOI Acts had been passed, and as the Court of Session has determined, Part 9 of the Enterprise Act is a law prohibiting disclosure and takes precedence over FOISA.

In coming to a view, then, as to how good FOISA is, we have to lift our terms of reference from comparison with the UK FOIA, and look to international principles and to comparable legislative provision elsewhere.

We need also to be aware that the perceived quality of our legislation may suffer in such comparisons with the passage of time as FOI thinking and provision

develops. Periodic review will be required as early adopter countries such as New Zealand, Australia and the US have found.

FoI in Practice

A test of the effectiveness of FoI at least in the early years is how well the rights are used, and how this compares with other regimes and with prior expectations. However, one of the great unknowns as the new rights of freedom of information were being enacted in the UK was just how many requests would be made to public authorities and, in turn, how many applications would be made to the Commissioners who have the responsibility for enforcing the legislation.

No specific research had been done prior to FOISA coming into effect as to the anticipated volumes of requests or applications in Scotland. However, some research had been done by The Constitution Unit of the University College London to project how many requests to authorities in the UK might go to external review (i.e. application to the Commissioner). The study looked at a number of countries with already relatively mature freedom of information regimes and produced a range of forecasts. Broadly, the research suggested that applications to the Commissioner might start in year 1 in the range of 1250-4000 - rising to between 4000 – 9000 in year 5.

The research referred to these as UK figures. However, if a crude, population-based, figure of 10% of the UK projected totals is assumed for the number of applications being made to the SIC, this would lead to a projection in the range of 125 to 400 in year 1 rising to between 400 and 900 in year 5. In reality this is wide of the mark, both in terms of the starting figure and the assumption of a rising trend.

Whilst the volume of applications submitted to the UK ICO in 2005/6 were broadly in line with the UCL expectations for year 1, coming in at 2713, the

position in Scotland was in marked contrast. Adjusted for the period, 636 applications were made to the Scottish Information Commissioner in 2005/6. This is more than 50% greater than the highest estimate extrapolated from the UCL figures and more than five times the lowest estimate. Even setting aside the UCL projections and again crudely taking 10% of the actual number of applications made to the UK ICO this produces a figure of 271, still well below the actual figure of 636 applications received by the SIC.

It is not clear why the Scottish figures should be so much higher by comparison. The most obvious reasons which come to mind are

- a) that a significantly higher number of requests pro rata were being made to Scottish public authorities leading to a proportionately higher number of appeals.
- or
- b) that responses from Scottish public authorities gave cause for greater dissatisfaction to applicants leading to a disproportionately higher level of appeals.

However, establishing which, if either, of these is the case is highly problematic. Unlike some jurisdictions (e.g. Ireland), there is no obligation upon Scottish or UK public authorities to record or report the number of requests for information they have received. The reason for not requiring a count to be made was pragmatic. Applicants in the UK and Scotland (unlike Ireland) do not have to indicate that they are invoking the Freedom of Information Act when submitting a request, so almost any request in writing or by e-mail for recorded information held by an authority constitutes a request under the Acts whether applicants are aware of their rights or not. Technically this applies even to requests for routine information which would be provided without demur. As a consequence it was thought that a requirement to record such was unnecessary and burdensome.

Nevertheless, many authorities for their own purposes have attempted to keep track of the workload generated by the new legislation. However, the consequence is that such data on FoI volumes is patchy and highly susceptible to the vagaries of internal procedures. Some authorities count any request which requires a specific response. Others may count only what they regard as non-routine requests which have been referred to a central FoI specialist facility. The difference in volume of recorded FoI requests could be very substantial as a result.

For instance, UK central government reports record that over 38,000 requests were received in year 1, falling to just short of 33,000 in year 3. By contrast, the Scottish Ministers reported that they had received 1800 requests, falling to 779 in year 3. Scottish Ministers make the point that these are non-routine requests where “staff have required assistance in handling the request under the terms of the act and it is therefore been notified to the FoI Unit.” The Scottish figures are unlikely to count many of the types of requests which are recorded in the UK central government totals, and Scottish Ministers indicated in their Report on 2007 that they intended to change the basis of their recording to cover any requests other than those which are received regularly and are easily dealt with, and to publish these figures quarterly. However this has not yet been done and the FOI Annual Report for 2008 is still to be published.

The consequence of this variation is readily seen when trying to draw conclusions from these figures. For instance, it may be thought that as only 1% of recorded requests to UK central government are appealed, then requesters are largely content. If the same formula was applied to Scotland then it might suggest an alarming rate of dissatisfaction as approximately 5% of 1492 cases, which were recorded and analysed in 2005 by central government, were appealed to me. Yet, given the differences north and south of the border as to what is recorded as an FOI request, it would be misguided to conclude that dissatisfaction was 5 times greater in Scotland than for the UK as a whole.

Whatever the reason, the fact remains that the number of applications to the Scottish Commissioner was markedly greater than prior expectations and higher pro rata than received by the UK Commissioner.

This outcome has been followed by another which is also against all expectations. Despite (or because of) the very high starting point, the volume of applications to the Scottish Commissioner has progressively *fallen* in subsequent years rather than increasing as international experience seemed to suggest to the researchers at the UCL. The fall in Scotland was more consistent and marked than that experienced by the UK Commissioner. Whilst the UK figures have remained broadly stable with only a very small decline over a three year period, in Scotland appeals to the Commissioner have fallen by one -third.

This trend seems to be now well established as shown by the following table of applications to the Scottish Information Commissioner by calendar year:

Year	Applications
2005	550
2006	512
2007	482
2008	367

Again, it is not at all clear why this divergence north and south of the border should be taking place. It may be an indicator that the number of requests being made to authorities have fallen commensurately, as indicated by the Scottish Government figures above, although it is easy to find reports to Council committees and police authorities showing that requests continue to rise for some of them. Alternatively – or at the same time – it simply may be that Scottish public authorities are now complying more fully with the legislation – or at least are complying to the satisfaction of applicants.

There are many other marked differences between the Scottish and rest of the UK experience. For example, over the period 2005/6 to 2007/8, 40% of all applications to the SIC resulted in a formal decision being issued. By marked contrast, the figures for the UK ICO show that only 13% of appeals were closed by decision.

What is clear is that the experience in Scotland of FoI in practice is in some respects markedly different from the rest of the UK, which suggests that differing conclusions should be arrived at as to how well the legislation is working in either jurisdiction. The problem is that the data is incomplete and what figures are available do not speak for themselves.

Where perhaps we would be on safer ground is to conclude that the volume and nature of information which has been disclosed as a result of FOI shows the legislation is working. There is not the space here to illustrate this in detail, but data on police informants, sex offenders statistics, surgical mortality rates, tendering and contractual documents, job evaluation software – all of these have been disclosed as a result of the appeal process, and clearly would not have been released without FOISA.

FoI in Politics

The final area to consider is the political context of FoI. FOISA has no purpose clause as exists in, say, the Swedish or New Zealand legislation. However, it is clear from statements made by Jim Wallace, the Deputy First Minister at the time, that the legislation was meant to be transformative of public life in Scotland. He said 'Effective openness leads to better scrutiny. Better scrutiny leads to better government ... We need to change the mind set of Scotland's public authorities from that of a culture of secrecy to a culture of openness.'

How well has FOISA contributed to that aim? Little work has been done on this area. Craigforth Research conducted opinion gathering surveys from Scottish public authorities in 2004 prior to the Act coming into effect to establish the state of readiness and attitudes towards the legislation. More recently, Dr Eleanor Burt of St Andrews University and Professor John Taylor of Glasgow Caledonian Business School conducted research of another sample of authorities. Their report *New Modes of Information Management in Scottish Public Authorities?* found that the prevailing attitude was one of compliance rather than wholehearted embrace. Some authorities clearly resented the use of the legislation by journalists and other persistent requesters, and questioned the resources required to service FoI generally. That study called for strong leadership in Scottish public authorities to embrace the spirit, as well as the letter, of FOISA, and for better exchange of good practice, identification of precedent in the Commissioner's decisions and better networking opportunities (which in part gave rise to the establishment of the Centre of FoI).

Yet it is important not to overlook the beneficial consequences which the study also teased out – with a majority of respondents saying that their authorities had become more open and three quarters saying that records management had improved.

The picture is therefore mixed. There were some warning signs that Scottish authorities were using the provisions of the legislation to delay release of information to journalists, holding back for the maximum twenty working days that which could have been provided sooner. If widespread, this would indicate deliberate non-compliance. A decay in compliance is manifest when authorities flout the requirements to respond to requests, ignore statutory timescales; or wilfully cite exemptions without justification to delay release. Commissioners and Ombudsmen regularly criticise such practice. For example, the British Columbia Commissioner has issued a special report on chronic failings in the province describing “an unacceptable pattern of government-wide failure to respond to

access requests in as timely a fashion as it should”, reporting that only 71% of requests were answered in time. A further study showed that if personal information requests were removed from the picture then only around a half of general requests were met in time.

In Scotland, because of the paucity of data, we do not know what the response times are across authorities. But it is clear that where requests are not regarded as business as usual, delay does occur. The Scottish Government in its 2007 Annual Report notes that of the FoI requests it recorded only 61% were answered on time.

My Strategic and Operational Plans indicate that resources will be devoted to assessing general compliance by authorities, with 13 being selected for in depth assessment in 09/10.

(It is worth noting that some more recent legislation shows a determination to pre-empt compliance failure. India’s Right to Information Act makes officials individually responsible for responding timeously to requests and allows the Commissioners to impose fines of up to Rs25000 (c£350) in cases of delay . This power is being used. The Orissa State Commissioner, who visited my office earlier this week, details in his annual report the name and amount of fines levied on 54 officials. And the Central Information Commissioner similarly reports using these powers on officials in. e.g., the Passport Office, universities, the railways and the National Crimes Records Bureau.)

Governments have the option of avoiding the consequences of the legislation by amending it, as has been done for example in Ireland by way of the Freedom of Information (Amendment) Act 2003, which had the effect of reducing drastically the number of request and appeals The former Irish Information Commissioner Kevin Murphy is of the view that “ the main reason for bringing in the

amendments was to protect Ministerial decisions and more especially the process of making those decisions, from public scrutiny.”

So far in Scotland we have not seen any such measures. Consultation here and separately in the UK raised the possibility of changes to the fee regime and potentially a restriction on the number of request which an applicant could make, but no proposals to that effect were brought forward. In the UK, a Private Members Bill won House of Commons support to remove Parliament from the scope of FoIA but failed to find a sponsor in the House of Lords, but a more limited restriction was passed – The Freedom of Information (Parliament and National Assembly for Wales) Order 2008 – making it possible to withhold certain information regarding MP’s expenses. No comparable legislation has been introduced in the Scottish Parliament.

Instead, the focus of discussion is whether the scope of the freedom of information regime is wide enough. A decision is awaited as to whether Scottish Ministers will use their powers to designate bodies under FOISA which provide services previously delivered directly by government and local authorities, such as housing, leisure and recreation, prison management and health and education facilities. As Commissioner, I have made it clear that I favour designation which would have both a defensive and progressive effect. Defensive in seeking to protect a right to information which was lost when functions were transferred; and progressive by bringing significant public expenditure on certain services within the scope of FOISA for the first time. Designation of such bodies would be consistent with the Article 19 Principles discussed much earlier - which say that the definition of public body should focus on the type of service and not on formal designations, and so should encompass private bodies which carry out public functions, or those which hold information, the disclosure of which is likely to diminish the risk of harm to key public interests such as the environment and health.

This point was reinforced last year by the *Atlanta Declaration and plan of action for the advancement of the right of access to information*, issued by the Carter Center, which declared that 'The right of access to information also applies to non-state actors that: receive public funds or benefits (directly or indirectly); carry out public functions, including the provision of public services; and exploit public resources, including natural resources.'

Conclusion

If asked the question posed at the outset 'how good is Fol in Scotland' I would guess the general view would be that it is working reasonably well - authorities by and large are respecting their obligations, applicants are making use of their rights, a lot of information is being disclosed. Satisfaction would be expressed that, in principle and in practice, freedom of information in Scotland seems to be better than in the rest of the UK. There would be specific grumbles from authorities and users, but the direction of travel if any is to strengthen the access provisions.

That may well be true, but the purpose of this paper is to suggest that we need to systematically research performance in Scotland since FOISA came into effect, insightfully interpret performance outcomes which are not self-explanatory and also be aware of and take into account developments in the wider world when judging the strength of our legislation – which is precisely why we need a Centre for Freedom of Information.