

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM SOLAR (THE SOCIETY OF LOCAL AUTHORITY LAWYERS AND ADMINISTRATOR IN SCOTLAND) and SOLACE SCOTLAND (THE SOCIETY OF LOCAL AUTHORITY CHIEF EXECUTIVES AND SENIOR MANAGERS)

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

The introduction of FOISA has created new legal opportunities for members of the public and organisations to seek information relevant to themselves, and to use that information to challenge decisions or inform responses. This has clearly made the public sector more transparent, although in the case of local authorities this is another step on a journey which commenced with the Local Government (Access to Information) Act 1985.

On the downside we think the resource implications for local authorities in complying with this legislation have been significantly underestimated. No additional resources were made available to implement this legislation so all the resources required to comply have had to be diverted from other front line services.

We are also concerned about what could be seen as misuse of the legislation by commercial sector actors, such as companies asking for staff contact details simply to send marketing emails or seeking commercial opportunities, both of which are irrelevant and pointless for public sector bodies subject to European procurement rules.

We are also conscious that authorities occasionally have to deal with highly disgruntled individuals who will pursue any avenue of complaint open to them regardless of the merits of their case, and FOI has created another such route for these individuals, some of whom use FOI as a weapon to punish local authorities for supposed misdeeds.

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

We think the policy intentions of FOISA have been met. While there are some improvements which could be made, we think these are minor and on the whole the legislation strikes an appropriate balance both in terms of the exemptions which exist and the time within which an authority must respond to a request and (other than as mentioned below in relation to timescales) we would not propose any significant changes to either of these.

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

As noted above, the resource implications of FOISA have not been adequately addressed (or indeed, addressed at all). This factor is compounded by the fees regulations which impose what is now an artificially low cap on the amount of staff time which can be charged for. The staff who routinely have to deal with FOI requests (and particularly the sensitive and/or high profile requests) typically cost authorities significantly more than £15 per hour to employ. This factor, combined with the £100/90% cost disregards, mean that the fees regulations are effectively pointless in practice. The only element of the fees regulations routinely applied by authorities is in relation to the £600 limit. It should be noted that this equates to 40 hours of staff time before a request can be rejected on cost grounds, which still represents a significant diversion of resources to something which may only be of interest to one individual. This is in contrast to the more flexible (and practical) charging regime under the Environmental Information (Scotland) Regulations 2004.

In terms of misuse of the legislation, we appreciate that from the perspective of some applicants they will genuinely believe they are victims of misconduct which they are seeking to expose, but a review of the current very high threshold for declaring a request to be vexatious would be welcome. We would also welcome consideration of Ministers making use of the provisions under section 12 of the Act to address the scenario where councils are on the receiving end of orchestrated campaigns of FOI requests for broadly the same material.

We have also noticed an increasing tendency for MSPs and their researchers to use FOI as a means of acquiring information from local authorities. We would hope that positive and trusting relationships between different parts of the public sector would make recourse to FOI by MSPs and their researchers unnecessary.

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

As noted above, a more flexible regime for dealing with vexatious requests would assist, as would regulations made under section 12, and a more realistic approach to fees and charging.

We also feel that it would be helpful for authorities to be able to extend the timescale for compliance under FOISA for particularly complex cases, as is currently the case under the EIRs (and also for subject access requests under GDPR). We do not think this provision would be abused as our experience is that the extension provisions under the EIRs are only used very rarely.

Lastly, particularly in the context of the integration of health and social care, we feel it would be helpful if authorities could transfer FOI requests in a similar manner to how we can transfer EIR requests. A health and social care partnership is, in reality, three separate entities and the feedback we have received from applicants is that they see the HSCP as a single entity and find it frustrating when they are told they need to submit a fresh application to another part of the partnership.

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

The Commissioner has continued a practice whereby if the investigation by his staff suggests that an applicant is unlikely to win an appeal, they are given the chance to withdraw the application. No decision notice is published in these circumstances. However this deprives the authority involved in the appeal the opportunity to see which parts of the submissions they made to the Commissioner were persuasive, and it deprives all other public authorities (and applicants) of the learning opportunity which a published decision notice provides. The practice also has the effect of skewing the published statistics by inflating the proportion of decisions in favour of applicants, as decisions which would have been in favour of the authority are closed off before a decision notice is published and therefore do not appear in these statistics.

The organisations who have submitted this response are at the forefront of turning the legislative ambitions for FOI into the reality of stakeholders actually receiving information (or the reason why they cannot have that information). We strongly support the retention of comprehensive freedom of information laws to support transparency and inclusiveness agendas. The comments made above are intended to make FOI work better for the majority of people using the legislation as intended by the Scottish Parliament.