

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM LAW SOCIETY OF SCOTLAND PRIVACY LAW SUB-COMMITTEE

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

FOISA has led to greater transparency in government. While the legislation may not have achieved all that was set out in the 1997 White Paper '*Your Right to Know*', FOISA has resulted the public and individuals in Scotland being better able to hold public bodies to account.

FOISA has significantly affected resources within the public sector and has placed a substantial burden, operationally and financially, on public bodies.

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

Broadly, FOISA has laid a framework for transparency, accountability and openness in public bodies, established a right of access to information held by public bodies and has developed a well-respected and effective regulator - the Scottish Information Commissioner. However, we have concerns that the policy intentions of FOISA are not always being met in terms of practical delivery – see further our response to question 3.

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

An individual's right of access to information under FOISA is key in ensuring transparency, accountability and openness in government.

We are aware issues sometimes arise in relation to compliance with the 20-working-day timescale provided for under s10(1). The record of decisions by the Scottish Information Commissioner demonstrates that there are instances in which public authorities fail to meet this 20-day deadline and indeed we note that some organisations have failed to reply on more than one occasion.

We are concerned that members of the public are being deprived of their legal rights to receive covered information on those occasions. The legislation as enacted does not impose any penalty on authorities which fail to comply which could suggest that some greater enforcement incentive or assistance is required if the objectives of the legislation are to be effectively delivered.

One option would be to amend the legislation to provide a monetary penalty regime similar to that of the Information Commissioner under the Data Protection Act 2018, where public bodies have intentionally disregarded their obligations or failed to establish processes and procedures to ensure that FOI requests can be dealt with appropriately. Similar provisions could be made for failure to comply with reviews under s.20 and 21.

Another measure which could help ensure processes are in place and timescales are complied with would be to introduce a requirement that public bodies account an FOI Officer with the necessary qualities to have a responsibility for freedom of information, including ensuring compliance with the legislation, and the principles and policy intentions of FOISA. At present, public bodies are merely encouraged to have a dedicated person. Creation of a specific post might also help to raise the profile of the FOI function and raise awareness within public bodies.

At the same time, we understand from anecdotal evidence that failure to comply with the deadline is often the result of a lack of resources. We therefore emphasise the importance of ensuring that the necessary resources and training are available to public bodies to ensure that they can comply with requests.

If it is felt that 20 working days is not a realistic timeframe for compliance in all cases, then Parliament should consider extending the deadline: we had suggested that 30 days might be a more appropriate deadline at the point the original FOISA was being considered. At the same time, we note that the draft legislation requires a response to be given “promptly” and 20 working days is therefore intended to be a maximum response time.

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

Consideration should be given as to how best to further influence the behaviour of public bodies to ensure that FOISA requests and reviews are responded to appropriately and within the statutory timescales.

Whether the role of the regulator should be expanded to provide for the possibility of the imposition of financial penalties to public bodies for serious and continued failures in compliance with FOISA should be weighed against the public interest of imposing financial penalties on such public bodies.

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

There is little promotion of FOISA to the public more generally and, in particular young persons across Scotland have little understanding of their rights under FOISA.

For the most part, the Scottish Information Commissioner remains the only body that continues to conduct educational campaigns regarding FOISA. It is somewhat understandable as public bodies have no incentive to promote rights under FOISA in the

current environment. In practical terms, if public bodies are not able to entirely comply with FOISA due to financial pressures and restraints, it is unlikely that they would take the steps to further burden their resources by promoting rights under FOISA, which would be likely to lead to further requests under FOISA and generate further pressure on already strained resources. Again we emphasise the importance of ensuring support for compliance in terms of resources and training.