

FOI in Scotland — how is it doing?

Ben Worthy, Lecturer in Politics at Birkbeck College UCL, blogger and author of 'The Politics of Freedom of Information: How and Why Governments Pass Laws That Threaten Their Power' published by Manchester University Press, discusses the ups and downs of FOI in Scotland

Chapter 1 of Ben Worthy's new book 'The Politics of Freedom of Information: How and why governments pass laws that threaten their power' is available here: www.pdpjournals.com/docs/887839

Being a bit of an FOI nerd, recently I asked myself how many FOI laws are in operation in the UK in 2019. Currently, by my count there are four: the Freedom of Information Act 2000 ('FOIA'), the Freedom of Information Scotland Act 2002 ('FOISA'), the Freedom of Information (Jersey) Law 2011 and the Isle of Man Freedom of Information Act 2015.

One of those laws, FOISA, is currently enjoying an MOT of sorts. As happened in the UK in 2015, the Scottish Parliament is examining how well FOISA is functioning.

The Scottish law, which was actually passed slightly ahead of the UK's, is broadly similar in scope to FOIA. There are some differences however. For example, with regard to the 'harm test', Scottish authorities must prove 'substantial harm' rather than harm (though previous Scottish Information Commissioner Kevin Dunion once said he wasn't convinced this makes much practical difference). FOISA provides for one level of appeal system before the courts rather than the two under FOIA. FOISA does not exclude the Monarch and the heir from the law as does FOIA.

Like FOIA, FOISA covers plenty of bodies. The law applies only in respect of devolved matters, but extends to more than 10,000 public authorities from the Scottish Parliament, local government and educational institutions to the Police and the NHS. The Act was also extended to leisure trusts in 2014, private prisons and grant aided and special schools in 2016 and registered social landlords (2019 and ongoing), though there is some concern that not all the new bodies are fully compliant.

So how has FOISA worked so far?

Requests and responses

There are some pretty healthy request numbers in Scotland, with 77,528 made in 2018. In terms of whether information is forthcoming, around 75% of all requests made in Scotland, or 3 in every 4 requests, are fully or partially released. By way of comparison, just under 50% of FOI requests to UK central government in 2018

were fully or partially released, a trend that is causing concern.

Other positive signs are that public bodies in Scotland appear mostly compliant and supportive.

As with the UK and other FOI laws, Scottish FOISA use is very local, with most requests going to local bodies: just under 50,000 of 77,000 requests went to local bodies of some kind. The real value of FOI, as one Scottish Information Commissioner put it, is to be found in the pages of local newspapers. This of course has consequences for cash strapped councils.

Publication schemes

Research into FOIA found that publication schemes had been neglected because they had been superseded by search engines. (This is another way of saying users don't consult publication schemes, preferring to ask Google what they are looking for.)

Although Scotland also uses publication schemes, a mystery shop exercise in Scotland found that whilst the vast majority of authorities publish some information, there is unevenness in terms of how much and what areas were covered. This has prompted fears that proactive disclosure is motivated by a 'box ticking' mentality rather than whole-hearted commitment.

Public support

FOISA enjoys strong public support. In a 2017 survey, 85% of respondents had heard of the Act. More importantly 94% agreed ('strongly' or 'tend to') that it is important for the public to be able to access information, and 77% would be more likely to trust an authority that publishes a lot of information about its work.

Problems

So far so good. But are there any problems?

In 2019, MSP Alex Neil claimed FOISA was 'abused by a handful of people' and that 'less than 50% of FOI

requests made in 2017/18 came from individual members of the public'.

The MSP describes a general trend across Europe: although the public are normally the largest group of potential FOI users by number, they are often not the majority of FOI users. It is not known who is using the law in Scotland. Probably, as with regimes across Europe, they comprise a mixture of members of the public, businesses, NGOs and journalists, some of whom attract more attention than others.

One clear problem that has emerged is uneven (in terms of the demographic) use of the law. In Scotland, again reflecting trends elsewhere, there is a significant difference across gender, with males being twice as likely as females to have made a request. Surveys found two areas of concern amongst young and old having little awareness of their rights.

A larger problem, readers will not be surprised to learn, is dipping enthusiasm from those at the top. FOISA

has been at the centre of complaints about possible special treatment of requests by certain groups, particularly journalists. In 2018, a report by the Scottish Information Commissioner concluded that the government had sought to create a 'two-tier' system delaying journalists or politically sensitive requests. Though the system didn't change what was eventually disclosed, there was a 'noticeable difference in time taken' and exemptions were 'pushed to their limit'. The report concluded that this was not only against the spirit of FOI legislation but impacted on the trust between the Scottish government and users.

Overall then, the weather seems slightly better up north. But we see the same growing pains as there are elsewhere-local pressure, lack of enthusiasm and some skulduggery at the top.

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