

PE1512/F

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Dear Mr Howlett

SCOTTISH PARLIAMENT PUBLIC PETITION PE1512 ON AMENDMENTS TO THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Thank you for your letter of 28 April in respect of a petition requesting amendment to the Freedom of Information (Scotland) Act 2002 (FOISA).

You ask for the opinion of the Scottish Government on two points:

- What is the Scottish Government's view on what the petition seeks and the discussions that took place at the meeting on 22 April?
- Is the Scottish Government planning to legislate in this area, or review or amend existing Freedom of Information legislation, in the foreseeable future?

The Scottish Government shares the view of the Scottish Information Commissioner in that the proposed changes are not needed and would, in practice, not be workable.

The Freedom of Information (Scotland) Act is about access to information held by Scottish public authorities – it is not of itself about ensuring information held - or provided - is accurate. However, it is through access to information that Scottish public authorities can be held to account - in effect what the petitioner, Mr Chisholm, has done in his case.

Background

Before discussing the terms of the petition, some background detail might assist.

FOISA requires information to be provided to an applicant in response to an information request, unless exemptions are applied to its release or unless other provisions of the legislation apply (for example the cost limit would be breached in locating, retrieving and

providing the information). The application of exemptions can be challenged by an applicant, ultimately with recourse to the Scottish Information Commissioner. In such circumstances a public authority would be required to justify the use of exemptions to the Commissioner who has the power to overturn the decision of the authority and require release of the information.

Indeed, in terms of the legislation, the Commissioner will investigate any application made to her for a decision where an applicant is dissatisfied with how a public authority has handled an information request.

In effect, Mr Chisholm appears to have truncated the formal FoI process. In immediately asking his Council to check their figures he was supplied with further information. However, he decided not to seek recourse to the Scottish Information Commissioner.

Had he done so, the Commissioner could have investigated how Mr Chisholm's information request had been handled and the allegation that he had been provided with incorrect information. For example, investigation would have included whether the initial request had been correctly interpreted with appropriate searches for relevant information carried out.

Terms of the petition

The essence of the petition is that public authorities should be required to provide full and accurate responses to information requests. While this sounds sensible, in practice it can be very difficult to check the accuracy of information and, as noted by the Commissioner, would make it very difficult in many cases for authorities to respond within 20 working days.

I would also stress that the petition is incorrect to suggest that the current legislation allows public bodies to deliberately provide false information. This is not the case and, as noted below, it would be a criminal offence for a body to deliberately alter the information they have to provide misleading information in response to a request. Public bodies have to provide the information they have at the time of the request. While it is good practice for them to note in the covering response letter if they know, for example, that some of the information is or is likely to be inaccurate/out of date, in many cases they may not be aware that some of the information is not correct.

If information were to be checked for accuracy once a request is received, and if changes are made at that point, this would result in information being provided not held at the time of the request and would seem to be counter intuitive in terms of holding an authority to account as it would in fact allow any earlier errors made to be covered up. Equally, at the end of an investigation, it would suggest the Commissioner could only require the disclosure of accurate information. At present, in the interests of openness and scrutiny, public authorities are obliged to provide all information falling within scope of a request – however accurate or inaccurate this might be.

This also raises issues about what information is held by public authorities and how to ensure its accuracy. Public authorities obtain information from a myriad of external sources – as well as developing material themselves. The requirement to provide accurate information would have significant repercussions. For example, public authorities would themselves presumably have to check the accuracy of information they receive from third parties.

Further, accuracy itself can be a matter of perception and subjectivity, particularly in the development of policy, projections/estimations of figures, and analysis of data. It is therefore open to question how a lot of information held by public authorities would be assessed for

accuracy. For example, if an authority is asked for all responses to a public consultation, clearly the requester wants to see the range of views provided. If the authority can only release accurate information, this suggests they either have to remove those comments they believe are incorrect or amend stakeholders' comments – both of which would be inappropriate and would not provide information on the range of views held on a topic. In addition, information can go out of date very quickly and is not necessarily updated – but is still held by the authority, potentially falling within scope of a request.

Enforcement powers

The petition also seeks to extend the powers of the Scottish Information Commissioner to enable her to investigate complaints alleging erroneous responses. Such a change would have significant implications for the Office of the Scottish Information Commissioner (OSIC) who would presumably require increased resources to ascertain the accuracy of information potentially falling within the scope of a request as well as investigating how an authority handled the actual request.

As noted above, in many cases, it may be difficult for OSIC to check whether or not the information held is accurate, particularly in cases where specialist, technical knowledge is required and/or in cases where information (such as on spending on something) can change on a daily basis so it may be hard to ascertain what was the accurate figure as at the date of request.

In addition, as the Scottish Information Commissioner herself noted, in some cases different people will have a different view on what is accurate (for example, whether minutes of a meeting are an accurate reflection of what was discussed or agreed) and in such cases it will often be almost impossible for the Commissioner to be fully certain whether or not they are accurate given she was not there at the time. The same would apply to cases where, for example, an external stakeholder says some work was carried out on a particular date – it may be extremely difficult for the Commissioner to establish later on whether the work was done on the specified date.

As the Scottish Information Commissioner has set out in evidence to the Committee, FOISA already contains enforcement powers which the Commissioner can use if necessary. These powers, set out at section 65 of FOISA, make it an offence to alter, deface, block, erase, destroy or conceal information held by an authority with the intention of preventing disclosure.

In the case referred to by the petitioner, there is no evidence that the Council sought to mislead or misinform Mr Chisholm by deliberately concealing information from him. This is a matter which could have been investigated - had the Commissioner been approached. However, as soon as the incompleteness of the response became apparent the Council sought to provide fuller information – apparently satisfying Mr Chisholm.

We note that the Commissioner is satisfied that she has sufficient powers both to determine whether an authority is complying with the legislation and also, in the event of a breach, in taking appropriate enforcement action. Simply because the Commissioner has not yet exercised enforcement action in terms of section 65 does not mean that her existing powers in this respect, as amended, are ineffective.

Amendment to FOISA

Therefore, in response to your second point, there are no plans to review or amend the existing Freedom of Information (Scotland) Act.

Indeed, FOISA has recently been amended with the Freedom of Information (Amendment) (Scotland) Act 2013 becoming law on 31 May 2013. The Amendment Act sought to strengthen the original legislation and included provisions relating to extension of coverage as well as in respect of ensuring the Commissioner's enforcement powers under section 65 were fully effective.

Conclusion

The Scottish Government considers that existing freedom of information legislation is robust, and is successfully overseen by an independent regulator with wide-ranging enforcement powers.

While understanding the intentions behind the petition, we consider that in effect it would be inoperable for both public bodies and the Scottish Information Commissioner.

I hope this response assists the Committee.

Yours sincerely

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Scottish Government Freedom of Information Unit