

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM : James McEnaney

I have also submitted evidence as part of the joint journalists' response, but wished to submit some further thoughts.

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

- I have only been using FOISA since 2015 so cannot comment on personal experience of any changes that have occurred between now and the period prior to the Act being implemented. I can say that, to my understanding, the introduction of FOISA has had a positive impact on Scotland by ensuring that there is some means to force public bodies into transparency if they will not get there by themselves. One negative that does exist is the use of avoidance tactics from public bodies, where information is not recorded in order to frustrate any forthcoming requests.

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

- See other responses

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

- In my experience a key problem is the role of Scottish Government ministers and special advisers in the handling of FOISA requests. Previous FOISA disclosures have shown clear examples of releases being deliberately delayed and the knowingly unlawful censorship of documents - [//jmccmedia.wordpress.com/2018/11/03/sensitive-scotgov-documents-cast-new-light-on-spads-foi-role/](http://jmccmedia.wordpress.com/2018/11/03/sensitive-scotgov-documents-cast-new-light-on-spads-foi-role/) .
- Examples include:
 - John Swinney's private office stating that the Depute First Minister "thinks it would be better to see if we could not release the material relating to Prince Charles or his PS." This was followed by a list of documents that "he'd prefer were not released."
 - Davie Hutchison successfully demanding the withholding of information despite being warned that "the response did not properly comply with FOISA" and that "if an appeal were received" the material would have to be released.
 - Liz Lloyd telling an official, who was planning to issue a FOISA review response two days later (which was already going to be a fortnight late the following: "I'm not committing to it going out on Friday at this point. It'll go when we've had the

chance to ensure it's got a proper handling plan." The response was finally issued, after an apparently unrecorded meeting of Special Advisers, a full week later than the official had originally proposed.

- When challenged on this in recent years, Special Advisers have often defended their role by insisting that ministers have to be aware of what is being released in their name. This is, of course, true, but it does not follow that said minister or their advisers need to or should be routinely involved in the FOISA process. Ministers have argued that they have to be involved because they are the ones mentioned in FOISA legislation, but even this does not mean that they need to be the ones making individual decisions, which of course they don't bother doing in cases that are not politically sensitive. The requirements imposed on the Scottish Ministers by FOISA should be exercised by impartial civil servants in all but the most extraordinary circumstances; it is the responsibility of the Scottish Ministers to ensure that the staffing, training, resources and, above all, culture are in place to allow that system to function.

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

- I believe it could be worth considering the introduction of a two-stage appeal system for FOISA requests. At present only one can be submitted, so if an agency fails to respond within 20 working days requesters must 'use up' their single appeal to demand a response (which does not need to be answered for another 20 days). If the agency has at this point incorrectly applied exemptions, requesters have no recourse but to go to the Scottish Information Commissioner. This is not only an inefficient use of resources, it also means that the requester will have to wait much longer to receive the information they have requested. A two-stage system could allow requesters to submit a 'deadline notice', to which agencies could be required to respond within 3 working days explaining the delay. When the response was eventually issued, requesters could then be given the right to go back to the agency specifically to challenge exemptions, misinterpretations and other mishandlings of the case.

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

- I have made a great deal of use of FOISA in the last four years, but I was very fortunate to be able to call on assistance from experienced journalists and analysts who helped me to under it all. I do not think anyone would argue that the average person on the street is likely to be able to explain how to exercise their 'right to know' about an issue of importance to them. I think work needs to be done to look at making all stages of the process more accessible.