

Proactive Publication: time for a rethink?

How fit for purpose are the publication and dissemination duties set out in Scottish freedom of information legislation?

Scottish Information Commissioner



Scottish Information
Commissioner

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Introduction



When work started on this report, little did I know that it would be my last before (very sadly) leaving the post of Scottish Information Commissioner.

As I reflect back on the last five years, I can see that freedom of information in Scotland has come a long way, but I question whether, as currently formulated, it is sustainable or can take us far enough to enable us to become a truly transparent society.

In this report I review the current FOI publication regime and raise questions about how effective it is in a world that is very different to the one in which FOI law was originally drafted.

So why now?

I hold the view that since Scotland introduced the Freedom of Information (Scotland) Act 2002, it has put itself ahead of the international field. Our law is respected because of the enforcement powers it gives the Commissioner, and our publication scheme duties are seen as positive. This respect is reflected in the frequency with which we are approached to: host or visit countries putting in place FOI for the first time, and speak at both national and international events about FOI in Scotland.

Our regime is well established, operating in a mature democracy. While this is positive in many respects it also creates challenges: for example, I have seen some exciting use of technology in newer FOI regimes that don't have the challenges of legacy systems and the lack of consistency that has evolved in Scotland over the years.

I also hold the view that we are at risk of being left behind culturally: strong enforcement is essential and something we are good at, but the real rewards come from enforcement being the access to information back-stop in a transparent society, not its main driver. We will be a truly transparent society when the information we generate and hold is accessible without people having to ask for it, and where the need to enforce is rare.

Attitudes to information are also very different to when FOI was introduced to Scotland. As a society we expect to have information, quite literally, at our fingertips, in real time. Increasingly, access is online. We don't always download "documents" but for regular information are more likely to set up automatically generated updates, feeds and so on.

But accessibility is not the only thing that has changed significantly. Public services are delivered differently and the future direction is digital, customer-centred, services which bring new opportunities (and challenges).

Globally we are seeing the contribution that access to information approaches are having on supporting transparency, combatting corruption, enabling citizen participation and developing more democratic decision making. These are leading to questions about the information itself such as: privacy vs transparency, accuracy and truthfulness in a post-truth environment, trust and confidence.

The big questions that are getting to the cultural and political heart of the access to information debate include: is information accessible easily and consistently? is it the "right" information? is it accurate? where is the public interest? and does it build trust and transparency?

This report does not have the answers, but aims to promote discussion through raising some fundamental questions and issues.

A handwritten signature in black ink that reads "Rosemary Agnew".

Rosemary Agnew
Scottish Information Commissioner

Executive summary

Publication of information is important to building and maintaining trust and confidence in public services.

There are examples of good practice that demonstrate the benefits of proactive publication, particularly in relation to request volumes and public trust.

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FOI law as formulated has the consequence of diverting resources from the development of value adding dissemination of information, to trying to maintain statutory compliance with answering individual requests.

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The legislative framework that covers access to information extends beyond FOI and is increasingly complex to both use and administer, and needs simplification.

How the media accesses and uses information is important, but the relationship between the media and public authorities needs to be reviewed.

See pages 16-18



While proactive publication duties are effective, this is only to a point. It is doubtful they deliver the level of openness intended, or that as currently formulated they will ever do so in light of changing expectations and technological advances.

See page 16



Is it time for a radical re-think?

The changing face of public service delivery, particularly through initiatives such as the Open Government Partnership and the Scottish Government's Digital Strategy, provides an opportunity to embed access to information into service design and delivery, and drive culture change.

See page 18



FOI law gives insufficient weight to proactive publication (compared to the right to ask for and be given information) which is difficult to enforce and does not give a public right of complaint about what is (or isn't) published.

See page 5



It is doubtful that FOI in its current form is sustainable. We now know from the data collected since 2013 that request volumes are increasing year-on-year. This comes with an increasing cost that Scottish public authorities must meet if they are to be statutorily compliant.

See page 11



Proactive publication is an important part of open government, but by itself cannot deliver transparency in the widest sense.

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Current publication duties¹

The Freedom of Information (Scotland) Act 2002 (FOISA)

Under section 23 of FOISA, Scottish Public Authorities (PAs, Scottish PAs) must adopt and maintain a publication scheme which is approved by the Scottish Information Commissioner (the Commissioner, the SIC). PAs must publish information in accordance with their publication scheme, which must be reviewed from time-to-time.

A publication scheme must specify the classes of information published (or which it is intended to publish), the manner in which it is published and whether, and what charge, there is for the published information.

Crucially, PAs must have regard to the public interest in allowing access to the information they publish, particularly in relation to: provision of services, costs of services, facts or analysis that inform decisions (of importance to the public) and decisions and their reasons.

In deciding what to publish (or not), the general approach PAs should take is to start with presumption (or requirement) to disclose information as set out in FOI legislation, and then consider:

- whether there are any statutory prohibitions to publication (i.e. other laws which say certain information must not be disclosed, absolute exemptions in FOISA and so on) in which case they need to understand the implications of publication.
- whether there are any statutory requirements to publish certain information. For example, the Public Services Reform (Scotland) Act 2010 (PSRA)² requires PAs to (keep and) publish information about payments made of more than £25,000 and the total number of members/staff who are paid more than £150,000 in a financial year.

In other words, establish: what they have no choice but to publish, what they have no choice but to withhold, and where they have a true choice.

All Scottish PAs meet their publication scheme duties by adopting and operating the Commissioner's Model Publication Scheme (MPS)³. The MPS is a pre-approved framework within which PAs publish⁴ the information they hold. By adopting the MPS, authorities commit to:

- publishing, as a minimum, specified types of information under nine classes, through their own Guide to Information (GTI)
- ensuring all their published information meets six accessibility principles: availability and formats, reasons for not publishing exempt information, copyright and re-use, charges, advice and assistance, duration for which information is available through the MPS (current + 2 years)
- maintaining and reviewing their scheme periodically

If a PA does not have an approved scheme or, in her view is not following good practice as set out in her MPS guidance or the Scottish Ministers' Section 60 Code of Practice⁵, the Commissioner can:

- refuse or revoke approval for a publication scheme
- issue practice recommendations, and
- take enforcement action

MPS Classes of information	
1	About the authority
2	How we deliver our functions and services
3	How we take decisions and what we have decided
4	What we spend and how we spend it
5	How we manage our human, physical and information resources
6	How we procure goods and services from external providers
7	How we are performing
8	Our commercial publications
9	Our open data

¹ For more information about FOI law, visit <http://www.itspublicknowledge.info/Law/Legislation.aspx>

² <http://www.legislation.gov.uk/asp/2010/8>

³ More information about the Model Publication Scheme and how it operates is available at <http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx>

⁴ For the purposes of the MPS, to be "published", information must be (i) already produced and prepared and (ii) available to anyone to access easily without having to make a request for it.

⁵ <http://www.gov.scot/About/Information/FOI/Section60Code>

Environmental Information (Scotland) Regulations 2004 (EIRs)

Publication duties under the EIRs are similar, but not identical, to those under FOISA.

Under regulation 4 of the EIRs, every PA has a duty to *“... take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds [...] with a view to the active and systematic dissemination of that information [...] progressively available in electronic form.”*

Regulation 4 lists the type of information that should be disseminated (if held). This is wide-ranging and includes (this is not a complete list): texts of international treaties and conventions; policies, plans and programmes relating to the environment; reports on the state of the environment; data or summaries of data derived from monitoring activities with environmental impact (or likely impact); environmental impact risk assessments; and the facts and analysis PAs consider relevant and important in framing major environmental policy proposals.

PAs that adopt and operate the Commissioner's MPS will meet their EIRs dissemination duties.

A key publication difference between FOISA and the EIRs

Many might consider the way in which publication duties are expressed in FOISA and the EIRs to be the key difference. While it is certainly a major difference, I don't think it is the key one.

FOISA opens at section 1 with the right to request information. It is not until section 23 that the requirement to publish proactively is set out. In contrast, regulation 4 of the EIRs first sets out the presumption and requirement for active dissemination. The duty to make environmental information available on request follows this in regulation 5.

The implication of this difference is more than just legislative; it gives a very clear indication of expectation and intention. Under FOISA, the emphasis is on PAs providing information when asked for it, whereas the EIRs have a different starting point. Under the EIRs the presumption is that information will be published, effectively available on demand by those looking for it: asking comes second.

“ The EIRs have a different starting point... ”

How is proactive publication monitored and enforced?

Summary

If a PA:

- does not have an approved publication scheme, and refuses to adopt one
- fails to maintain and review its publication scheme or
- does not make information available in line with its publication scheme

I will engage with the PA and provide support to enable them to achieve compliance. If necessary I will assess the PA's practice. If the PA refuses to engage, or does not take action to achieve compliance, I will give the PA a notice that it has failed to comply with a provision of Part 1 of FOISA and enforce that notice as required. This can include referring the failure to comply to the Court of Session. My general approach to publication scheme interventions is set out in my Intervention Procedures⁶.

Appendix 1 contains a more detailed summary of my powers.

My resources to monitor publication schemes are limited.

The ways in which I monitor are:

- periodic monitoring via "Mystery Shopping" research (introduced in 2015)
- requiring new Scottish PAs to adopt the MPS, and notify me that they have done so (we also provide training and support as they do this)
- noting failings identified during investigation of applications to me. For example, if a PA states information is otherwise accessible through its publication scheme, I will check to ensure that is the case
- following-up on issues raised by stakeholders

Mystery Shopping

The purpose of Mystery Shopping is to assess both PAs' performance and that of the Model Publication Scheme itself. My aim is to improve access to information, not to simply check that the MPS is being complied with.

The general approach is:

- a web-based audit of guides to information of a selection 70 PAs of various sizes across the public sector
- follow-up telephone or email contact with a sample (over half) of the 70 authorities

Assessing the following:

- accessibility of each PA's Guide to Information (GTI)
- accessibility of specific categories of information: in 2015/16 these were procurement and expenditure, and in 2016/17 decision making, open data and re-use of information (if an authority was covered)

- follow-up contact assessed PAs' provision of advice and assistance

Assessment was against three of the six MPS principles:

- availability and formats
- advice and assistance
- duration

⁶ Interventions Procedures are available at <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?ID=8962&sID=105>

How effective is the MPS in practice?

Guide to information and advice and assistance

My guidance to public authorities states:

"The Guide to Information must be published on your authority's website and it must be possible to find it through a simple search of the website. You must test whether it actually comes up in the search results for e.g. "Guide to Information", or "Publication Scheme".

The findings in both exercises were similar⁷

2015/16	2016/17
94% of PAs made their GTI available online	94% of PAs made their GTI available online
The GTI was rated as easy to access for 80% of PAs (who made it available online)	The GTI was rated as easy to access for 67% of PAs (who made it available online)
Terminology used in the links can have a significant impact on ease of access. Direct links (in 74% of cases) which used terminology likely to be familiar to members of the public (such as "Freedom of Information") were found to be most effective, although the frequent placement of these links in the footer of a webpage may affect their visibility	80% of PAs provided a direct link from their homepages to their GTIs
Use of drop-down menus, often under more oblique terms such as "corporate" or "about", were found to impair access	Terminology used impacts on the accessibility. Using familiar terminology such as "Freedom of Information" or "Guide to Information/Publication Scheme" and avoiding the use of oblique terminology to sign-post improves accessibility
93% of authorities offered GTIs in alternative formats	91% of authorities offered GTIs in alternative formats
93% offered contact details for advice and assistance. The quality of advice was variable	93% offered contact details for advice and assistance. The quality of advice was variable, dependent on knowledge of staff

⁷ The complete data from the two exercises can be accessed at www.itspublicknowledge.info/research

How is proactive publication monitored and enforced?

continued

Availability of specific information (availability, not quality)

Decision-making:

- 91% of PAs provided one or more of minutes of meetings, agendas, strategies and plans online.
- only 54% provided all three
- in 38% of cases it was hard to find this information, although it was online. Where the public were directed to the home/search page or A-Z of services, accessibility decreased.
- most of the information (where available) was up to date

Procurement:

- 41% provided procurement policy and tendered contracts information online. Most educational institutions provided this information, while relatively few culture and leisure trusts, publicly owned companies and NDPBs did so
- procurement information was rated as easy to access for most authorities providing this information online (34 of 47, 72%), although this equates to only half of all authorities
- around two thirds of authorities made their procurement policy and/or procurement procedures available online, but this fell to less than half of authorities providing information on tendered contracts. Some sites gave access to an up-to-date list of tendered contracts with detail such as contract value and supplier name. A minority of authorities met their requirements to make this information available via links to the Public Contracts Scotland website

Expenditure:

- 46% provided all three types of expenditure information online (spending over £25k, remuneration £150k+ and overseas travel and hospitality). Most NHS and NDPB authorities provided this information, while relatively few culture and leisure trusts, publicly owned companies and local government authorities did so
- expenditure information was rated as easy to access for most authorities providing the information online, although this only equates to around half of all authorities

- availability varied dependent on the specific type of expenditure: more than two thirds provided information on employees with remuneration of £150,000 or more, but little more than half on spending of £25,000 or more in relation to travel, hospitality, consultant and PR expenses
- there was some difficulty in accessing information on specific items of expenditure, beyond the small number of authorities providing a direct link from their GTI. This was most difficult where authorities did not provide a specific link to expenditure, or where this link navigated only to a page of annual accounts or reports. Use of terms unlikely to be familiar to members of the public (such as "Public Service Reform" or "PSRA") added to this

Open Data (added as a new class in May 2016 to support the Scottish Government's Open Data Strategy⁸):

- 79% are not publishing open data through their GTIs
- for the 21% who are publishing it, it is easy to access

Re-use Regulations:

- many of the Scottish PAs covered by FOISA are also covered by the Re-use of Public Sector Information Regulations 2015. Those that are, have a statutory duty to publish specific information about re-use of their information, and I would expect this type of "statutory" information to be included in the GTI and made available

of the 33 PAs subject to the regulations:

- 32 made their GTIs available online
- 32 used the standard text from the MPS to refer to copyright or re-use
- very few made specific reference to the regulations, with only a small number of them referring to having a policy

Conclusions

The majority of Scottish PAs make their Guides to Information available and appear to try to comply with the MPS. However, PAs' knowledge about the MPS when responding to enquiries ranged from failing to respond at all to a full response within a day. This suggests that the MPS is seen as a way of ticking a box that shows the PA is complying with FOISA, rather than an opportunity to use the framework to promote and enable the dissemination of information.

This is supported by the range of practice, the majority of it poor, in relation to making specific classes of information available. Even where there is a statutory duty to publish certain information (e.g. expenditure over £25,000), performance was poorer than expected (resulting in me taking intervention and/ or enforcement action).

“ ...performance was
poorer than expected... ”

Why publish information at all?

Changing expectations

As a society, our expectations about what we can access, and how, have changed dramatically since FOISA was enacted and implemented.

- more of us expect to be able to access information not only online, but online while on the go
- we routinely share more information through social media
- we expect access to be instant, especially if it is routine
- we don't always want to have to write or email to ask for things, especially from PAs
- increasingly we expect to be able to manipulate or use information

“ Our expectations have changed dramatically... ”

Ipsos MORI omnibus poll, March 2017



56% of the public would prefer to access information about a Scottish PA's service provision or decision-making through their website



29% would prefer to contact the authority by telephone or email

Increasing demand and public sector economic pressures

We know from the data submitted by PAs that the number of information requests is rising year-on-year⁹.

Information requests to Scottish public authorities by year

53,878	6,618	Total 60,496
2013/14		
59,541	7,196	Total 66,737
2014/15		
60,564	7,589	Total 68,153
2015/16		
62,000+	8,000+	Total 70,000+
2016/17 (projected)		

■ FOI requests ■ EIRS requests

Significantly, the number of PAs that receive more than 1,000 requests has increased year-on-year.

PAs receiving 1000+ requests per year

20
2013/14
29
2014/15
30
2015/16
32
2016/17 (projected)

While there has been an increase in the number of PAs made subject to FOI through designation, these have tended to be smaller PAs that have not collectively added significantly to request numbers.

Why publish information at all? continued

More research is needed to explain why demand is increasing in this way, but experience tells us that it is likely to be for a variety of reasons: uncertainty about the economy and the country, cuts in service provision, dissatisfaction with service standards, greater awareness of holding PAs to account, and increasing need for information to enable communication with PAs about these issues.

This is at a time when public sector resources are reducing, and ever greater demands are being placed upon PAs. Over the last five years, I have met and spoken to many public sector leaders and FOI practitioners and they are consistent in their feedback: the cost of responding to requests is rising through sheer volume, but the resources available to do so are falling.

Even those PAs which have worked hard to improve performance by reviewing FOI policy and practice, are saying the same. PAs have to make difficult decisions about where their resources go, and FOI is often not seen as high priority unless, as Commissioner, I intervene in relation to poor practice.

There is no single way that demand can be reduced, but proactive publication is a positive strategy than help reduce demand by:

- signposting requesters to information already published
- reducing the need for some requests altogether
- managing expectations about when information will become available
- helping requesters narrow what they are asking for



CEC property repairs

In 2011, corruption claims were made against City of Edinburgh Council officials working on property conservation. The Council received as many as 70 requests a day for related information and, by January 2012, more than 90 appeals had been made to the Commissioner.

Following discussion with the Commissioner, the Council decided to publish external audit reports it had commissioned into the scandal. The reports were heavily redacted to remove personal information and information relevant to ongoing police investigations.

In the week following the publication of the reports, the Council received no information requests about the issue. The Commissioner was also able to resolve the appeals.



Mortonhall

In 2013, City of Edinburgh Council announced it an independent investigation report into concerns about cremation practices for babies at Mortonhall Crematorium. It committed to publish the inquiry report. The report was duly published, with redactions for personal information.

The council received few, if any, requests for information about the issue.

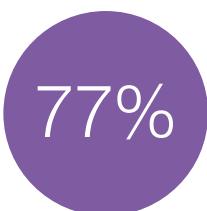
Trust and confidence

We often hear the truism that access to information helps build trust and confidence in public services. While we hear this, there is little evidence to back it up, so we thought we would ask people through the Ipsos MORI omnibus poll in March 2017.

This is what we learned: unsurprisingly, there is a relationship between publishing information and public trust:

- 77% of the public are more likely to trust an authority that publishes a lot of information about its work.
- there is strong public agreement that the following types of information should be published. These are the same types of information in which FOISA s23 says there is a public interest:
 - how PAs spend their money – 94%
 - reasons for the decisions PAs make – 90%
 - how services and functions are delivered – 94%
 - contracts with other organisations – 84%
 - data and statistics about performance – 93%

Publication can also enable PAs to reach a wider audience than simply responding to requests. Not only can this reduce costs, but it enables a consistent message to be disseminated in a single communication (or series of communications) as the following two case studies illustrate.



77% of people are more likely to trust an authority that publishes a lot of information about its work



GCC land sale to Celtic FC

In November 2016 Glasgow City Council published extensive details of a 2009 land deal with Celtic Football Club for its new training facility. There had been substantial speculation that the sale did not reflect the market value of the land, leading to more than 150 information requests, a costly complaint to the European Commission and an appeal to the Commissioner (the Commissioner decided in favour of the Council).

The Council recently anticipated further, new, requests by publishing information about the sale. The information confirmed the sale was not at market value, but at more than three times the Council's valuation.

In less than 24 hours of publication, the published information had been viewed more than 2,000 times.



Release of the Lockerbie Bomber, Al-Megrahi

In 2009 Abdelbaset Al-Megrahi, the Lockerbie bomber, was released from prison in Scotland on compassionate grounds. The decision to release him generated a great deal of media and political interest, both at home and in the USA.

Such a high profile issue would usually attract significant volumes of information requests and appeals. In this case, the Cabinet Secretary's announcement was accompanied by an extensive release of information. The release included information that would not usually be made available, including Mr Megrahi's application for release and certification of his terminal prognosis by three consultants.

The Commissioner received just three appeals.

Why publish information at all? continued

Open government and civic engagement

Globally there is increasing demand from civil society for access to information from governments to help fight corruption, empower citizens, increase citizen participation and strengthen governance. 75 countries (including the UK) are members of the Open Government Partnership¹⁰ (OGP) which provides an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens.

Access to information is a fundamental element of membership and of achieving public sector reform through National Action Plans. Without access to information when it is needed, citizens cannot participate effectively.

Membership of the OGP is at National level (for Scotland it is the UK), but there are fifteen “pioneers”, committed political and working level reformers and engaged and energetic partners in civil society, taking part to advance open government reform: Scotland is one of those pioneers and has published its own National Action Plan.

“ Scottish Government and Scottish Civil Society share the values of Open Government which aim to foster openness, transparency and citizen participation [...] Scotland’s first Open Government National Action Plan [...] has been developed jointly by the Scottish Government and the Scottish Civil Society Network with the Open Government Partnership¹¹. ”

¹⁰ <https://www.opengovpartnership.org/>

¹¹ Source: Scottish Government website <http://www.gov.scot/Publications/2016/12/2667>

Domestic political appetite

There is strong domestic political appetite for greater transparency, as demonstrated by the requirement to keep and publish information included in other legislation. For example:

- financial information required to be published under the Public Services Reform (Scotland) Act 2010
- Procurement Reform (Scotland) Act 2014, Public Contracts (Scotland) Regulations 2015 and Procurement (Scotland) Regulations 2016 contain specific access to information duties in relation to procurement as well as requiring some public authorities to publish Annual Procurement Strategies
- the Equality Act 2010 (as amended) and the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (updated in 2016) require Scottish PAs to publish a range of equality information, for example on equal pay

In each case, parliamentarians are identifying where the public interest lies in publication of specific types of information, supplementing the existing FOISA provisions.

Reliability

In a post-truth society it is imperative that the public have access to reliable, current, information, particularly about the decisions that are taken on behalf of citizens and communities.

One way the public sector can contribute positively to this is to make as much of its information accessible as possible. It is not just the information that is important in this context, it is also the fact that it has been made available by the PA itself so carries a level of trust and confidence, and can be challenged if there is doubt.

How the information is made available is also important. PAs use a range of media to communicate, from tweets to publication of reports. Being able to trace what a PA says back to the official source through its MPS and GTI gives an added level of confidence, especially as MPS practice is regulated through FOISA.



Procurement

The Commissioner's monitoring research in 2016-17 found that 41% of authorities assessed failed to meet the Model Publication Scheme requirements to publish procurement and contract information. Most of the authorities assessed were also subject to the publication duties set out in the Procurement Reform (Scotland) Act 2014, Public Contracts (Scotland) Regulations 2015 and Procurement (Scotland) Regulations 2016.

The findings informed a productive exchange with the Scottish Government about:

- updating procurement advice in the s60 Code of Practice, and
- aligning the Model Publication Scheme requirements with developing procurement good practice

Is all this enough?

“Probably not; not in the long run...”

Culture

While proactive publication duties enable the minimum in terms of publication, I doubt that they alone will engender the fundamental cultural shift that is needed to move Scotland that stellar step from publication because it is something we have to do, to openness and transparency because that is how we want to be.

FOI law focuses on making information available once it is produced. Transparency can only be achieved by including citizens (and others) in the production of the information in the first place, through participation in policy development, community decision-making and so on.

That is not to say everything should be made available all the time. There are still areas where it is important for PAs to have safe space to discuss and explore issues in private, particularly in the early stages of decision-making and sensitive areas such as national security, defence and crime.

There will also be information where public interest in publishing is not strong and we must ensure that we take a public interest approach that enables the greatest benefits to be realised; whether in reducing costs or building trust and confidence.

“ Transparency can only be achieved by including citizens in the production of information... ”

Legislation and enforceability

FOI law presumes disclosure, but in practice focuses more on withholding information than it does on disclosing it. While the intention has undoubtedly been a presumption of disclosure from the outset, the reality of its application is that there is greater emphasis on exemptions and provisions that prevent disclosure than on publication. This emphasis can apply both to responding to information requests and to PAs' decisions about what they publish.

One of the consequences of this is that effort and resources (understandably) go into meeting statutory duties to respond to requests (and have a publication scheme) at the expense of being able to invest in dissemination of information as a way of doing business. Put another way, PAs are so busy responding to requests to meet statutory duties, they often don't have the time or resource to develop a more open approach through publication.

This is not helped by the increasingly complex legislative and policy landscape when it comes to access to (and use of) public sector information. Simply understanding how duties and responsibilities relate to each other and what is required can be challenging. This applies not only to FOI law, but also how other rights-based legislation (such as equalities and human rights) interacts with FOI.

Add to this the need to balance privacy and openness in relation to personal data, and what is apparent is that it is not only the volume of FOI requests that is a challenge, but the frameworks within which they are considered and replied to.

Is it time for a more strategic review of access to information legislation (and policy) that creates a simpler framework to both administer and use, and where the emphasis is on active dissemination while still protecting the right to information as a back-stop?

A good place to start is to consider it as a transparency framework. To be successful it has to:

- enable easy access to information, quickly
- provide a regulatory mechanism to ensure access can be enforced equally in relation to active transparency (i.e. publication) and the right to information
- recognise that information (and data) are increasingly generated and held electronically

What gets published?

FOISA enables me to challenge PAs' practice in relation to the MPS, but that is limited.

Requesters who are refused information in response to a request have a right of appeal to me. Looked at another way, they have a public right to complain about how their information request is handled under FOI law. There is no equivalent public right of complaint if information is not published and someone thinks it should be.

Even where information is produced and/ or held by a PA, is not exempt, and falls within a class of information in the MPS, my ability to challenge is limited and relies on being able to demonstrate the PA is not following good practice.

Consistency and interpretation of information

The MPS is as closely aligned to FOISA, my decisions and court precedent as possible. But it is questionable whether this provides the level of consistency across the Scottish public sector that is needed.

To achieve transparency, information must be understandable, comparable and capable of being manipulated to enable comparison.

This requires more consistency in a number of broad aspects:

- like information needs to be more easily discoverable (i.e. easier to find). This requires more consistent referencing or naming of information, with effective signposting
- the technical standards to which information and data are both produced and shared need to be consistent and understood so that data can be compared more easily, especially through electronic means
- advice, guidance and data visualisation need to ensure that information can be understood and interpreted in a more consistent way
- the reporting of information essential to enable understanding and accountability needs to be more uniform. I am definitely not suggesting that everything should be reduced to documents or templates that run the risk of stifling communication, but I am suggesting a need for a more uniform approach to reporting important public sector information, e.g. in a similar way to how the Scottish Public Finance Manual sets out reporting the handling of public funds¹²

¹² <http://www.gov.scot/Topics/Government/Finance/spfm/Intro>

Is all this enough?

continued

Role of the media

The actions of the media in relation to FOI is a constant source of discussion, and generates extreme views about journalists' use of FOI, the costs of responding to requests and how information acquired is used.

There is media coverage most days that focuses on the outcome of information requests and how they are handled, or where FOI was used to obtain information to inform features and articles.

It is rare to find media coverage where all the information was openly accessible.

The media has long been seen as an essential element of a society committed to free speech. In a post-truth society it is increasingly important, both to citizens and public services, that the media is able to report effectively, using reliable, accessible information. The reality is that the media often report on areas that are in the public interest, so we need to ask ourselves how do we improve the relationship on both sides to enable more active publication of information that in turn will enable more effective handling of a smaller number of information requests?

The changing face of public services

The Scottish Government's strategic approach to public services articulated in its Digital Strategy recognises that a digital future for Scotland must be managed effectively if Scotland is to develop and deliver effective and affordable public services¹³.

From May 2018, Scottish PAs will be subject to the new General Data Protection Regulation, including "Privacy by Design"¹⁴. Development of the Digital Strategy provides a good opportunity to turn this on its head and aim for Transparency by Design, which both protects privacy of personal data and has built-in access to information both at a personal and public level.

The Digital Strategy provides an opportunity to embed information access into services as they are designed. This would be a significant step away from the current approach of publishing information a PA has chosen or been forced to produce, to one of actively involving service users in helping to define what is information is generated and how it can be accessed when needed (or appropriate). Critical to the success of this is "user-centred" development, using OGP approaches of civil society engagement in service design, production and delivery.

Conclusion

It is time for a re-think to bring access to information law and practice more into line with how we actually use and approach information as a society.

¹³ <http://www.gov.scot/Topics/Economy/digital>

¹⁴ <https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/>



“ It’s time for a rethink to bring access to information into line with how we use information as a society. ”

Rosemary Agnew
Scottish Information Commissioner

Appendix 1: Summary of SIC Publication Schemes Enforcement

Extract from the Scottish Information Commissioner's Enforcement Policy¹⁵

FOISA enables me to challenge PAs' practice in relation to the MPS, but that is limited.

Requesters who are refused information in response to a request have a right of appeal to me. Looked at another way, they have a public right to complain about how their information request is handled under FOI law. There is no equivalent public right of complaint if information is not published and someone thinks it should be.

Even where information is produced and/ or held by a PA, is not exempt, and falls within a class of information in the MPS, my ability to challenge is limited and relies on being able to demonstrate the PA is not following good practice.

The Authority	The SIC	Relevant sections
<p>An authority:</p> <p>1. does not have an approved publication scheme and refuses after discussion with the Commissioner to adopt a publication scheme or model publication scheme, or</p> <p>2. refuses to engage with the Commissioner about the lack of a scheme</p>	<p>The SIC:</p> <p>Will give the authority a notice that it has failed to comply with a provision of Part 1 of FOISA and enforce that notice as required.</p>	FOISA S23 S24 S51(1) S53(1)
<p>An authority:</p> <p>1. fails to review if needed an approved publication scheme, and/or</p> <p>2. modifies an approved publication scheme without seeking and obtaining SIC approval, and/or</p> <p>3. fails to keep its publication scheme up-to-date in line with changes to the model publication scheme or the Section 60/62 Code of Practice and/or</p> <p>4. fails to make information available in the manner stated in its publication scheme (including in the supporting guide to information) and/or</p> <p>5. refuses to engage with the SIC about its publication scheme</p>	<p>The SIC:</p> <p>Will revoke the approval.</p> <p>If the authority subsequently fails to put in place an approved publication scheme, the SIC will enforce as above.</p> <p>Will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>	FOISA S23(5) S24(3) S43(3) S51(1) S53(1)
<p>An authority refuses to provide information to the SIC required to determine (in relation to publication schemes):</p> <p>1. compliance with FOISA, or</p> <p>2. whether practice conforms with the Section 60/62 Code of Practice</p>	<p>The SIC will give the authority notice in writing (an information notice) requiring it to give the SIC information relating to compliance with FOISA, or with the Section 60/62 Code of Practice, as required.</p> <p>The SIC will only normally cancel an information notice if the information is provided to the SIC's satisfaction in advance of the deadline in the notice. In exceptional circumstances the SIC may cancel it for other reasons but it is a matter for the authority to set out the circumstances and why they are exceptional.</p> <p>Where an authority has failed to comply with an information notice, the SIC will certify in writing to the Court of Session that the authority has failed to comply.</p> <p>Will assess the authority's FOISA practice in relation to publication schemes where considered appropriate to the circumstances.</p>	FOISA S43(3) S50(1) S50(8) S53(1)

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