

The Campaign for Freedom of Information in Scotland

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Response to the Finance Committee's Inquiry into Accountability and Governance

Introduction

The Campaign for Freedom of Information is a NGO working to improve public access to official information and to ensure that the Freedom of Information Acts are implemented effectively. The Campaign was set-up in 1984, played a leading role in securing the passage of FOI legislation and is recognised as a leading independent authority in the field. We provide training both for public authorities implementing the Acts and for users of the legislation. The Campaign has two members of staff in its London office and its Glasgow office is run by three volunteer Co-conveners. The Campaign's director is Maurice Frankel.

The Campaign welcomes the Finance Committee's Inquiry and would make the following contribution.

Context of Inquiry

This Inquiry takes place at a time of constitutional change which has led to detailed discussions and the implementation of new systems which exist independently of elected government:

- The Human Rights Act 1998 gives individuals the opportunity to argue for their Convention rights in the Scottish and UK courts and tribunals and allows judges to adjudicate directly on Convention issues.
- Duties on public authorities, under Section 6 of the Act, which makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right."
- The establishment of the Scottish Parliament under the Scotland Act 1998 to make government 'open, accessible and accountable' (Consultative Steering Group Principles).
- Duties on the devolved Parliament to respect human rights under section 29(2) of the Scotland Act, which permits the Parliament only to pass legislation which is compatible with the European Convention on Human Rights.

- Duties on the devolved Government to respect human rights with Section 57(2) of the Scotland Act providing that a member of the Scottish Executive can only act in a way which is compatible with Convention rights (although there are exceptions relating to the Lord Advocate).
- The forthcoming Commission for Equality and Human Rights (CEHR) for Great Britain will assume the responsibilities of the existing statutory equality bodies such as the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality. The CEHR will also have a new role of promoting human rights in relation to reserved issues.
- The Scottish Commissioner for Human Rights Bill, which has yet to be debated at Stage 1, would establish a Scottish Commissioner for Human Rights to promote awareness, understanding and respect for human rights e.g. in the public sector.
- The introduction of the Freedom of Information (Scotland) Act, which gives people the right to access information held by a public authority, enforced by the Scottish Information Commissioner.

In this new constitutional climate, it is inevitable that there will be a growth in the number of independent, regulatory and investigatory bodies and the associated costs. The Campaign is however clear that the right to access information is a key tool in delivering the broader human rights agenda, which is that rights should become an everyday part of law and public services.

It is therefore essential that the independence of the Scottish Information Commissioner is preserved. We believe that it is too early to change what appear to be rigorous checks and balances, just one year after the legislation was effected.

Overlap in Remits and Responsibilities

The Finance Committee Inquiry seeks to establish if there are overlaps in the responsibilities of the various Commissioners. We are not aware of any overlap between the functions of the Scottish Information Commissioner and any other Scottish regulatory authority.

The Scottish Information Commissioner (SIC) and the UK Information Commissioner have parallel responsibilities. These reflect the substantial changes in public rights to information, which took effect on January 1 2005. On this date five important new rights to information came into force:

- The Freedom of Information Act 2000
- The Freedom of Information (Scotland) Act 2002
- The Environmental Information Regulations 2004
- The Environmental Information (Scotland) Regulations 2004
- Amendments to the Data Protection Act 1998

Of these laws:

- The Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations apply to Scottish public authorities and are enforced by the Scottish Information Commissioner.

- The FOI Act 2000 and Environmental Information Regulations (EIRs) apply to public authorities in England, Wales and Northern Ireland; to UK government departments and to cross-border bodies. This legislation is enforced by the UK Information Commissioner.
- The Data Protection Act applies to the whole of the UK including Scotland. This is enforced by the UK Information Commissioner.

The separation of remits and responsibilities according to distinctive legislation and regulations is an inevitable consequence of devolved government. Although there are parallel sets of FOI laws and Environmental Information Regulations for Scotland and the UK any given public authority is subject *either* to the Scottish legislation *or* to the UK legislation, but not to both.

The UK Commissioner has an office at 28 Thistle Street in Edinburgh, which handles Data Protection issues relating to Scottish bodies and complaints about cross border bodies under the UK FOI Act. The Scottish and UK Information Commissioners have a Memorandum of Understanding, which aims to avoid unnecessary duplication of work and ensure that complainants are directed to the appropriate office.

The Scottish Information Commissioner

By the beginning of March 2006, the Scottish Information Commissioner had issued over 120 decision notices in response to complaints. New decisions continue to emerge every week demonstrating how the exemptions, public interest test and procedural requirements of the legislation should be applied.

The Campaign's analysis of the decisions to March 2006 indicates that on almost 60 per cent of the occasions on which the Commissioner considered the validity of an authority's claim that information was subject to an exemption, the claim had been overturned.

According to the Commissioner's 2005 annual report, 17 per cent of all FOI complaints to the Commissioner during 2005 were about authorities which had failed to respond to requests at all. For requests for environmental information the failure-to-respond rate rose to 27 per cent.

These statistics suggest that many public authorities are adopting an unnecessarily restrictive approach to the legislation or are unaware of their responsibilities under it. In these circumstances, high levels of complaints to the Commissioner can be expected.

The Commissioner in fact received a much greater volume of requests in the first year of the Act's operation than had been anticipated. We understand that the SIC estimated the likely volume of complaints made to him on the basis of an international study commissioned by the UK Information Commissioner from the Constitution Unit of University College London.¹ The actual volume of complaints received by the SIC substantially exceeded those predicted on the basis of this study. This suggested that he might receive between 125 and 300 complaints in 2005. In fact his office received 571 complaints, almost double the highest

¹ This showed the volume of complaints to FOI Commissioners or their equivalents in Australia, Canada, Ireland, New Zealand and the USA. See: Constitution Unit, *"Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations"*, 2004.

predicted level. (This contrasts with the volume of complaints received by the UK Information Commissioner, which were within the range predicted on the basis of this study.)

This probably reflects the relatively high levels of public awareness and use of the legislation in Scotland. The Commissioner's research suggests that in the year to November 2005 people's awareness of the legislation had increased by 64%.

Overseas experience suggests that the volume of FOI requests, and complaints to Commissioners, increases considerably for several years after implementation as public awareness of the legislation grows. The Constitution Unit study suggested that complaints were likely to *treble* over the first five years following the Act's implementation.

The success of the FOI legislation depends on the Commissioner having the resources to deal effectively with the complaints he receives. The volume of these complaints, and consequent demands on the SIC's budget, are largely caused by factors beyond his control. Section 49(1) of the Freedom of Information (Scotland) Act requires the Commissioner to make a decision on all valid complaints made to him under the Act, other than those which are frivolous, vexatious or abandoned. The volume of requests under the Act, and of complaints to the Commissioner, is likely to increase as the Act and the Commissioner's role become better known. These will partly depend on the extent to which public authorities fail to comply with their legal obligations under the Act. The number of appeals against the Commissioner's decisions to the Court of Session will also be relevant, as these are likely to be particularly time-consuming. The Commissioner is also required to promote compliance with the Act.

The process for setting and scrutinising the Commissioner's annual budget must take account of the fact that the Commissioner needs to a certain degree to 'look into a crystal ball' to anticipate the level of the work he will face. At this early stage, before trends have been established, this inevitably involves significant uncertainty.

Scottish Information Commissioner – Finance and Accountability

The Campaign believes that the current system for monitoring the financial affairs and holding the Commissioner to account for his work is adequate.

The Scottish Information Commissioner is appointed by Her Majesty on the nomination of the Scottish Parliament. The Commissioner can hold office "for such a period not exceeding five years as the Parliamentary Corporation, at the time of appointment, may determine" (section 42(3)). The Commissioner can be removed from office following a vote in Parliament supported by two thirds of 129 seats (section 42(4) (c)). The Commissioner may be reappointed for another term but only for a third term in 'special circumstances' (section 42(5)).

Accountability is a strong obligation under the Act. Schedule 2 provides that the Commissioner (or his designated accountable officer) is answerable to the Parliament for:

- The accounts
- Ensuring propriety and regularity in the finances of the Commissioner
- "Ensuring the resources of the Commissioner are used economically, efficiently and effectively" (Schedule 2, para 4(3))

The Commissioner must send a copy of the annual accounts to the Auditor General for Scotland for auditing (Schedule 2, para 5(2)).

The core issue is how to balance financial control with independence. That can be achieved by separating out the scrutiny functions within the Parliament. The Finance Committee should have a duty to ensure that the Commissioner accounts for expenditure as well as ensuring he is adequately resourced to perform his statutory duties. The efficiency and effectiveness of the functions can be determined by Audit Scotland.

Section 46(1) obliges the Commissioner “to lay annually before the Parliament a general report on the exercise of functions conferred on that officer under this Act.” Section 46(2) requires the Commissioner to “record the number of occasions, during the period covered by the report on which the Commissioner failed to reach a decision on applications under section 47(1) within the period of four months specified in section 49(3)(b).” Both the Corporate Body and the Commissioner will presumably monitor this situation carefully and if a problem is emerging, seek to ensure that remedial steps are taken promptly.

The Campaign believes that the presentation of the Annual Report to Parliament offers the appropriate opportunity for a thorough debate and we believe the Parliament should commit itself to an annual debate on the Commissioner’s report.

The Commissioner can also lay reports before Parliament as appropriate (section 46(3)). The Campaign would suggest that will only be possible if the Commissioner has the resources to deliver on that and his other diverse responsibilities, such as promoting the legislation.

Conclusion

The Campaign believes that the Scottish Information Commissioner is delivering across a range of statutory responsibilities. The Commissioner is also issuing reasoned judgements on a wide variety of cases and we note his work is being praised internationally.

The Campaign believes that in law and practice, there are clear lines of accountability of the Commissioner to the Corporate Body and to the Parliament. We believe they strike the right balance between efficiency and accountability whilst ensuring that the Commissioner is, and is perceived to be, independent.

As public use of the FOI legislation and awareness of the Commissioner’s role increases, the demands on the Commissioner’s budget are likely to increase and this is an inevitable consequence of the powers and duties which Parliament bestowed on him. This is likely to continue until we reach the point at which public authorities are properly complying with their obligations under the legislation and the number of people who appeal against decisions, is reduced.
