

**Scottish Consumer Council
Campaign for Freedom of Information in Scotland**

The draft Freedom of Information Bill – the consumer perspective

A seminar held at the Scottish Consumer Council, 30 March 2001

Programme

- 1 Chairman's Introduction:
Graeme Millar, Chairman Scottish Consumer Council

- 2 An overview of the draft Bill:
David Goldberg, Campaign for Freedom of Information in Scotland

- 3 The implications for consumers:
Sarah O'Neill, Legal Officer, Scottish Consumer Council

- 4 Questions/discussion

- 5 Structured discussion on the implications of the draft bill for users and providers of information

1 Chairman's Introduction

In his introduction, the chairman broadly welcomed the draft Bill in that it appears to go further than the United Kingdom Freedom of Information Act 2000.

This seminar would provide a useful opportunity for delegates to discuss areas of interest to them in formulating their responses to the consultation on the draft legislation, due by 25 May 2001.

2 An Overview of the Draft Bill

David Goldberg provided a critical review of the draft Freedom of Information (Scotland) Bill in the context of international freedom of information regimes.

The context

The draft Bill indicated a swing in concepts and approaches – a constitutional shift. However, it contained nothing about internal guidance and rules and, therefore, was not as good as the current Code of Practice on Access to Scottish Executive Information. It would be useful if that approach was followed in the proposed codes of practice (COP) outlined in the Bill.

He provided examples of where access to information could be critical, including:

- Overcrowding in trains – is there a legal limit on standing and, if so, what is it?
- What was the true financial picture behind the decision to close the Govanhill swimming pools?
- Information relating to hospitals.
- What was in the correspondence that passed between the Lord Advocate and the local procurator fiscal over the decision to prosecute people who refused to pay the Skye Bridge tolls?
- The Scottish police super computer – who will own it, how will people get access to it, will the owners/managers be named in the schedule to the Bill, or will this require an order?
- The Frank Roy MP correspondence about the Carfin visit, which raises the question of access to information held by elected representatives.

The Scottish FoI Act is expected to be passed in the first half of 2002, with a phased implementation starting in 2003 and the whole Act taking three to five years to come into force. Why such a long lead in when many of the bodies covered are already moving that way?

Structure

He then outlined the structure of the Bill. In doing so, he looked in particular at the absence of a purpose clause and the arguments for this; the ministerial veto; absolute and class exemptions; and reporting.

On reporting, it was good that ministers are required to report on progress during the phasing in period and that the information commissioner is required to report back annually (at least) to the Scottish Parliament. But this reporting should also include all the bodies covered by the Act.

Issues

On the issues raised by the draft Bill, he looked at:

- Institutional coverage (S 3 and S 5)
- The public interest test (S 2)
- Exemptions (Ss 25, 26, 29, 32, 33, 35 and 36)
- Charges and time limits (various)
- The Scottish Information Commissioner (Ss 41, 44 and 47)

In its institutional coverage, there was no generic definition of Scottish public authorities. These have to be listed in the schedule and, therefore, there were going to be omissions. The scope would in effect be whom Scottish Ministers determine should be covered.

As regards 'designated bodies' (S 5), designation is permissive (may) and Scottish Ministers may consult potential bodies for inclusion. This was too discretionary. He noted that the consultation states that further discussion would take place on the bodies to be included in the schedule – the current list being neither definitive nor final.

On the public interest test, the wording of S 2(1)(b) favours non-disclosure, where the issue is finely balanced. He had concerns over this phraseology. The way the section is worded seems to contradict the Minister's assertion that there is a presumption in favour of openness. He also had concerns about the meaning of the phrase 'the public interest in maintaining the exemption' (S 2(1)(b)).

3 Freedom of Information: the Consumer Perspective

Sarah O'Neill outlined the main provisions of the draft Bill vis-à-vis how and why consumers would use the Act.

Why do consumers need a right of access to information?

- ❖ They can find out how government makes decisions that affect them
- ❖ They can judge how well government and regulators are carrying out their work
- ❖ When something goes wrong, they can find out what happened and why
- ❖ This helps them to make more informed decisions

Consumers don't trust government

- 90% of people in Scotland believe the government hides information from them as consumers (NCC research, 1999)
- 92% of people agree that the government should be more open about how it makes its decisions (CA research, 1999)
- BSE /pensions and mortgage mis-selling /rail safety

A right of access leads to a culture of openness

- increases public trust in government
- leads to more participative government

What will the draft FOI Bill mean for consumers?

The Theory

- ❖ A legal right of access to information
 - no need to establish 'need to know'
 - information of any age/ in any format
- ❖ Informed consumers are empowered consumers

The Reality – Key Questions

- ❖ Will consumers be aware they have this right of access to information?
- ❖ How will they know which regime applies – Scottish/UK/Data Protection regime?
- ❖ Will they make use of this right?
- ❖ Will they have confidence in the FOI regime?

Awareness

- ❖ If consumers are to exercise their right of access, they must know it exists
- ❖ Information Commissioner – key role
 - duty to produce public information on the operation of the Act in an appropriate form and manner (S 42)
 - Commissioner must be adequately resourced
- ❖ Need for a large-scale publicity and public education campaign
 - FOI logo? Public authorities with obligations under the FoI Act could/should display the logo
- ❖ Public authorities must also be proactive in raising awareness
 - Publication schemes (S 22)

How will consumers know which regime applies?

- ❖ Potential for confusion - Scottish/UK/Data Protection regimes – how will consumers know which Act applies?
- ❖ Need to ensure consumers not deterred from exercising their right of access
- ❖ Need for good relations between public authorities in each regime
 - Duty to provide advice and assistance (S 15)

Will consumers use their right of access to information?

Application and review procedures must be:

- ❖ accessible
- ❖ easy to use
- ❖ quick
- ❖ affordable
- ❖ fair

Accessible?

- ✓ Written and e-mail requests for information/review acceptable
- × But not phone calls or in person (S 8)
- ✓ Information provided in applicant's preferred format (S 11)
- ? But only where 'reasonably practicable' (S 11(3))

Easy to use?

- ✓ Duty on authorities to provide advice and assistance (S 15)
- × But only so far as is reasonable (S 15(2))
 - Need for designated FOI officer
- ✓ Commissioner has duty to promote good practice (S 42)
- ✓ Ministers must issue Code of Practice on provision of advice and assistance (S 59)
- × But authorities not obliged to adhere to code
- ✓ 20 day time limit for processing of requests for information (S 10)
 - ✓ – includes consideration of the public interest
 - ✓ – improves on UK Act
- ✓ 20 day time limit for review of refusal (S 20)
 - ✓ – improves on UK Act

Affordable?

- ✓ Information costing less than £100 to provide – free of charge (S 13, regulations)
- × But if it costs more than £100 to provide, authority has discretion to charge full marginal cost, up to £400 (regulations)
- × More than under UK Act
- × If authority estimates cost would exceed £500, no obligation to provide (S 12)

Fair?

- × Class exemptions (various sections)
 - × – No time limits
- ? ‘Vexatious’ requests can be refused (S 14, S 20) – not defined
- ? Repeated requests from same applicant can be refused (S 14)
 - unless ‘reasonable period of time’ between requests – not defined
- × 20 day time limit on applicant to request review (S 19)
 - ? – duty to provide advice and assistance? (S 15)
- × No civil right of action against authority (S 54)
- ✓ Independent information commissioner
 - ✓ – strong powers (S 48-50, S 52)
 - ✓ – has final say (except ministerial veto)
 - ✓ – decisions enforceable in court (S 52)
 - ✓ – direct access – not through MSP (S 46)

Will consumers have confidence in the FOI regime?

- ❖ Need for culture of openness
 - A purpose clause should establish a general statutory right of access, with a presumption that all information will be disclosed unless it can be clearly shown that there is a greater public interest in keeping it secret
- ❖ Executive and parliament must lead by example
- ❖ Public authorities must embrace both letter and spirit of legislation
- ❖ Commissioner must be strong and independent

4 Questions/discussion

The first two sessions were followed by a general open session:

- Jon Harris, COSLA, raised the ethical framework. For example, access to correspondence was not just about elected members but also non-elected officials.
- David Goldberg, CFoIinS, asked why there was a resistance to a purpose clause. What was the problem?
- Sarah O'Neill, SCC, felt there should be a purpose clause and this should make clear a statutory right of access unless it was otherwise shown.
- Sally Daw, SFHA, asked why adherence to the code of practice was discretionary.
 - Keith Connal, SE FoI Unit – it is not discretionary but linked to S 15 on compliance with the COP, which also brings a duty to advise and assist.
- Carole Ewart, CFoIinS, felt there should be a duty to follow the COP, rather than rely on the Information Commissioner to find against the information holder.
- Graeme Millar, SCC, asked whether there would be a common fee structure in local authorities for processing requests.
- David Goldberg, CFoIinS, wondered how the current processing figures were arrived at. They appeared to be based on £20 per hour, but is that a valid assumption? The key question will be how accessible and well organised the classification systems are.
- Lynne MacMillan, Public Concern at Work Scotland, had concerns that the upper limit to charging would lead to abuse, ie, to responses that processing a request would cost more than £500, so that access was denied.
- Graeme Millar, SCC, had concerns that the charging proposals would allow organisations to pay excessive fees that individuals could not afford.
- Carole Ewart, CFoIinS, raised the question of archiving – how consistent was this across public authorities? There needs to be clarity about what costs can be passed on to consumers to avoid discrimination.
- George Paterson, Food Standards Agency, asked how regulations and COPs fit together. Most COPs have no statutory basis.
 - Keith Connal, SE FoI Unit – there are structural reasons for what was included in the Bill, regulations and COPs.
- George Paterson, Food Standards Agency, asked what is information – records, Post-it notes?
 - Keith Connal, SE FoI Unit – information recorded in any form. There was no specification about the medium.
 - David Goldberg, CFoIinS pointed out, however, that in Part 7, S 62(2), information is defined as including 'unrecorded information'.
- Anna Bradley, NCC, asked if there was an intermediate stage between the statute and COP that could make adherence to the COP a statutory requirement.
- Keith Connal, SE FoI Unit, quoted S 42 (1) (a) and (b) – is this strong enough? The COPs are not there just for people to pay lip service to.
- Graeme Millar, SCC, asked why there was no provision for complaints to be made by telephone, and whether the designated FoI officers would be senior enough to be effective.

5 Structured discussion

Graeme Millar, SCC – why can I not get information over the phone?

Keith Connal, SE FoI Unit – much thought has gone into gatekeeper clauses. For example, the Irish FoI Act requires the enquirer to quote the Act. However, although the Scottish draft Bill excludes a telephone request, public authorities are free to follow up access requests over the phone. The advantage of a written request was that there was then a clear record of it. Any necessary clarification could be done over the phone. It was something that could go into a COP

Carole Ewart, CFoInS – that depends on the attitudes of public authorities and their archiving. Do public authorities really know what they have? If the executive knows it has 12 miles of files, then does it not know what is contained in them?

Pat Dawson, Scottish Association of Health Councils, raised the subject of institutional coverage:

- The health service has created four new quangos in the past 12 months. How can the schedule keep up? How about increasing the level of definition of bodies included?
- Ss 31 and 32 – what does ‘but only in respect of information relating to the provision of those services’ mean?

The interface between the Data Protection Act and FoI – registers are incomplete because of the requirement for consent.

She was also concerned about the exemption of health records of deceased persons for 100 years. What about research?

Martyn Evans, SCC – a difficulty with a generic description of a public body is that it would bring in institutions in Scotland that are covered by the UK FoI Act. What is covered, and who is covered needs to be more visible.

David Goldberg, CFoInS, queried whether S 64 could be used explicitly not to trigger the rights and duties that flow from a formal request.

The interface between FoI and other statutes, such as those on data protection and human rights, have become more complex.

Martyn Evans, SCC, asked if the Campaign for Freedom of Information in Scotland would support a single UK FoI Act.

David Goldberg – why not? It would make life simpler but was not realistic.

Keith Connal, SE FoI Unit – with reference to that suggestion, the Scotland Act sets out the competence of the Scottish Parliament to legislate on Scottish public bodies. With reference to an earlier point, a reason for not requiring an applicant to cite the Act is that they should not or would not be expected to know which Act (UK or Scottish) the applications comes under.

Kirstie Shirra, FoES, welcomed that but – what about applicants understanding their rights if their request was rejected? Rights of review need spelling out.

George Paterson, FSA – it is important that an open philosophy is adopted.

Graeme Millar, SCC, agreed and added that an FoI officer has to have enough seniority to deal adequately with FoI requests.

Anna Bradley, NCC, felt that consumers should not be concerned about which Act applies. That should be for the information holder to deal with. There needs to be a connection

between the UK FoI Act, the Scottish FoI Act, the Information Commissioner and the Scottish Information Commissioner. She did not see that in the draft Bill.

Pat Dawson, SAHC, raised the issue of private suppliers/contractors to public authorities and access to information. Some private companies tie themselves into trusts that are inaccessible. Chris Hope, Business a.m., re. S 46, raised concerns about PPF/PPP and access to details of private contributions to public funding.

David Goldberg, CFoInS, raised the subjects of:

- Access officers – FoI officers could be regarded as an enemy within an organisation and, therefore, had to have enough authority. He gave examples from the USA and Canada.
- S 32 – it was too broadly drawn. Other jurisdictions refer to exemptions only where disclosing information would prejudice the outcome of a contractual negotiation or might harm someone else's competitive position.
- A 'sunset clause' – times change and harm decreases. Therefore, he had objections to continuing exemptions without a time limit.
- Refusal of access. There needs to be a reason given, rather than just that access has been refused. The danger is that authorities will just quote the relevant section, rather than saying why access has been refused.

Graeme Millar, SCC – NCC has done work on commercial confidentiality. SCC will circulate it to the people here today.

John Hanlon, EnergyWatch Scotland – when will the COPs be in place?

Keith Connal, SE FoI Unit – good question. He was not clear about the timetable for COPs. Draft COPs under the UK FoI Act are on the Lord Chancellor's and the Home Office websites. Their content indicates what the Scottish COPs might look like. Also, COPs don't require the Scottish Parliament's scrutiny, so should go through more quickly.

Carole Ewart, CFoInS – if someone could not afford an access request, could they ask their MSP to ask for it in the Scottish Parliament and, therefore, get it for free?

Keith Connal, SE FoI Unit – such a request could be refused on the grounds of disproportionate cost. So, there was no clear yes or no answer.

Graeme Millar, SCC – but below these limits, there was no reason why people should not be asked if they could afford, say £100.

It was agreed that they should be able to go through their MSP and get the information for free.

The chairman concluded the meeting and thanked all those who had contributed.

Attendance list

Ms Anna Bradley	National Consumer Council
Mr Keith Connal	Scottish Executive-FOI Unit
Ms Sally Daw	Scottish Federation of Housing Associations
Ms Patricia Dawson	Scottish Association of Health Councils
Mr Martyn Evans	Scottish Consumer Council
Ms Carole Ewart	Campaign for Freedom of Information in Scotland
Ms Natasha Gerson	STUC
Mr David Goldberg	Campaign for Freedom of Information in Scotland
Mr John Hanlon	EnergyWatch Scotland
Mr Jon Harris	COSLA
Mr Christopher Hope	Business AM
Mr Robbie Kent	Scottish Executive-FOI Unit
Ms Fiona Killen	Scottish Parliament Information Centre
Ms Lynne MacMillan	Public Concern at Work Scotland
Dr Derek Manson-Smith	Campaign for Freedom of Information Scotland
Mr Jim McNally	National Union of Journalists
Ms Rosemarie McIlwhan	Scottish Human Rights Centre
Mr Graeme Millar	Scottish Consumer Council
Ms Sarah O'Neill	Scottish Consumer Council
Mr George Paterson	Food Standards Agency Scotland
Mr Donald Reid	Scottish Civic Forum
Ms Hilary Robertson	NHS Confederation
Ms Kirstie Shirra	Friends of the Earth Scotland
Ms Alison Taylor	Scottish Parliament
Ms Moira Sinclair	Water Commissioner Scotland