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The Post Legislative Scrutiny of FoISA

**- Improving access to information rights
in Scotland by examining international practice**

22nd June 2017

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About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation in Scotland. CFoIS is independent of government and relies on donations and income generated through training. For more information on our work go to <https://www.cfoi.org.uk/scotland/>

Recent work has included: making a submission to the Independent Commission on Parliamentary Reform (March 2017), drafting a briefing on the SSI 'Time for Compliance regulations' and circulating to all political parties at the Scottish Parliament (Oct 2016), making a submission to the UN on the Universal Periodic Review (UPR) of Scotland's compliance with international human rights law (October 2016) and producing an 'Agenda for Action for MSPs' following the Scottish Parliament elections (May 2016). The voluntary commitment is constant including speaking at meetings, delivering training and organising meetings eg at Strathclyde University to mark International Right to Know day on 28th September 2016.

Thank You

CFoIS would like to record its thanks to UNISON Scotland for funding our project on access to information and which has enabled this report to be researched and written.

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Foreword by Dave Watson, UNISON Scotland

UNISON Scotland is pleased to support the work of the Campaign for Freedom of Information in Scotland as we share the objective of ensuring that the public sector in Scotland and the investment of the public pound in services, is subject to independent scrutiny through transparency and accountability.

Freedom of Information is an essential part of a thriving and effective democracy. Scotland needs to move from the ambition of support for open government, to putting the legislative and practical measures in place to strengthen it.

UNISON's interest in FoI includes our campaigns function and as the union that represents most FoI staff in public bodies. We have long made the case for extending the scope of FoI to all those who receive the public pound. There has been some progress on this, but not as much as we would wish.

Our feedback from FoI staff in public bodies shows that they are struggling to cope with the demand for information at a time of staffing cuts, particularly in administrative functions. There are also capacity issues in the departments which should provide the information. Staff also identify resistance from senior management and poor awareness of FoI amongst some senior colleagues.

As a campaigning union, we are finding increasingly poor compliance based on our own experience of making FoI requests. Some public bodies simply do not respond and others use delaying tactics. Examples include daft points of clarification or references to online documents that don't actually include the information we asked for. Others deliberately avoid the question, by answering a question we haven't asked. We often have to go back several times before we get a proper answer. This can also include poor knowledge of their obligations, poor, seemingly unthinking, use of exemptions that they can and should be challenged on, and what frequently can seem like insufficient consideration of the public interest test and the value of transparency.

In these challenging political times, there has never been a greater need for open government and transparency of information. This is a field that Scotland could be a world leader, in vision and practice. This research shows we have much to do, but there is a willingness across civil society to make the journey.

Dave Watson
Scottish Organiser (Bargaining and Campaigns)
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1. Introduction

Since 2015, the Campaign for Freedom of Information in Scotland (CFoIS) has called for an inquiry into the operation of the Freedom of Information (Scotland) Act 2002 (FoISA) as we are concerned that it has become weaker in practice and has failed to keep up with international best practice. Therefore, CFoIS welcomes the unanimous vote at the Scottish Parliament on 21st June 2017 to:

*condemn the Scottish Government's poor performance in responding to freedom of information requests; calls for an independent inquiry into the way that it deals with these, and agrees to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002, and welcomes commitments by the Scottish Government to adopt a policy of pro-actively publishing all material released under FOI to ensure that it is as widely available as possible.*¹

12 years after FoISA, and the Environmental Information (Scotland) Regulations (EIR(S)s), became effective it is now appropriate to consider specific reforms. This publication focuses on informing the post legislative scrutiny of FoISA and sets out what additional measures are required to ensure the right is robust and effective in enabling people to get the information they want when they need it.

CFoIS is concerned that the debate has become somewhat insular as energies are focussed on ensuring Scottish Government ministers keep promises, eg on extending FoISA to Registered Social Landlords (RSLs), and identifying new or existing bodies delivering public services or services of a public nature that should be covered by FoISA as well as the EIR(S)s. Inspiration can come from how other countries have chosen to deliver the right to access information, and we need to know about best practice from supra national bodies eg at the United Nations. Why does this matter? Scotland has a duty under the Scotland Act 1998 to comply with European and international human rights law. For example, Article 19 of the UN's International Covenant on Civil and Political Rights (ICCPR) delivers the right to access information and there is much detail about how that should be practically delivered in each country.

The concept of 'Fol' (freedom of information) operates in parallel with the separate but related 'open data agenda'. Whilst relevant and useful, we should not merge the two: one is about an individual enforceable right and one is about government policy controlling the flow, content and timing of published information. The former empowers people to receive information and the latter permits people to see what is disclosed. Therefore, they are quite different concepts.

The UK has received credit for its culture and practice of openness including being joint first with 90/100 in the 'Open Company Data Index' which exists because "Company registers should be public, as they are the public record of artificial entities given legal personality by the state for the benefit of society. In a free and open society, this important information should be free to use and reuse for all, without charge and without restrictive license conditions."² Good development but the public still need to have Fol rights to decide what they want to see and when they want to see it.

¹ See Scottish Parliament Official Report

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11021&i=100720>

² See website at <http://registries.opencorporates.com/>

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In undertaking this small project, CFoIS provides a few examples of international practice. We have very limited resources, making this report deliberately selective, but we hope it will inform your participation in the FoISA review.

2. Background

The right to access information is made up of various parts: the 'right holder' applies to the 'duty bearer' (organisations) for information; the rights holder is empowered as there is a duty on organisations to answer the request and to provide it; handing over information can only be refused under certain specific circumstances; and there is an independent review process to ensure the law is followed fairly. This global model is interpreted in different ways by over 112 countries around the world.

When the Scottish Parliament was established in 1999, it was underpinned by the principles of 'openness, transparency and accountability'³. However, it took another three years before those principles were incorporated in law, although the Freedom of Information (Scotland) Act 2002 (FoISA) only became effective on 1st January 2005. At the same time, the Environmental Information (Scotland) Regulations 2004 (EIR(S)s) became operational although a framework had been in place since the 1990s. In contrast, other countries have operated an FoI regime for many years eg Sweden is credited with passing the first access to information law in 1766.⁴

In Scotland, we chose a particular legal framework: specific organisations must be named in the legislation to be covered and specific categories of organisation need to be listed. This approach contrasts with a more generic approach taken by the UK Human Rights Act 1998 that 'all public bodies and those delivering services of a public nature' have a duty to comply with the European Convention on Human Rights (ECHR). Another distinctive feature was that there is no legal duty on the organisations listed, to pro-actively publish information.

International experience and practice teaches us that Scotland's new legal framework had to be underpinned by a culture of openness to be successful. The culture needed to move away from the need for 'official secrecy' to creating a more open, transparent and accountable system across public services to enforce the public's right to know. CFOIS recognises that a culture of openness is proven in a variety of ways but perhaps most importantly is the pro-active publication of information by organisations so there is no need for people to make a formal request for information. CFIOS remains uncertain how much new information was made available as a result of FoISA. Despite the initial and the current standard publication scheme, organisations may continue to publish the same information rather than embarking on publishing all the categories listed by the Office of the Scottish Information Commissioner (OSIC) as well as identifying what information the public want, via surveys or analysing disclosure logs, and then systematically publishing it in accessible ways.

From experience, we know people find the process of making an information request legalistic, time consuming as well as tricky as they are not sure how to frame the written⁵ request to get the information they want. From practice, we know that public authorities can take a very legalistic approach to answering a request, appearing unduly pedantic on seeking clarification and appearing to rush requesters as they have internal targets to meet about response times. So, exercising the right can be very problematic.

³ Report of the Scottish Consultative Steering Group.

⁴ For more information go to the website about Peter Forsskal <http://www.peterforsskal.com/>

⁵ FoISA states that the request must be 'recordable'.

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How Scotland's 10,000 public bodies choose to interpret the law and deliver access to information rights in practice, is a factor in the equal enjoyment of FoI rights. Understanding the FoI landscape is crucial to determining the nature of reform.

3. Implementing global standards on access to information

Context

International human rights law and various regional mechanisms define access to information as a human right as well as a tool to exercise and enjoy other human rights such as the right to respect for private and family life, the right to protest and the right to join a trade union. Evaluating access to information rights solely through FoISA is, therefore, a mistake.

Human rights are both a devolved and a reserved matter and are framed by:

- The Human Rights Act 1998 eg Section 6 those delivering public services and those of a public nature should comply with the European Convention on Human Rights (ECHR) and that includes local authorities, government departments and organisations such as Audit Scotland. Some organisations are a mix of public and private eg Registered Social Landlords (RSLs) which are a mix of housing associations and council providers. In a 2009 case⁶, the court provided guidance on whether an act of a housing association is public or private including: whether the housing association is publicly funded, is exercising statutory powers, is taking the place of central government or local authorities and whether the association is providing a public service.
- The Scotland Act 1998: Section 57 requires Scottish Government Ministers to positively comply with the ECHR; Section 29 requires MSPs to pass legislation which is ECHR compliant.

In addition, the Scottish Government has made explicit commitments to human rights. In a speech on 9th December 2015 in advance of International Human Rights Day and to mark the second anniversary of the launch of Scotland's National Action Plan on Human Rights, the First Minister Nicola Sturgeon said:

“Human rights are central to our concept of inclusive growth – the concept we have put at the heart of our strategy of building a stronger economy and a fairer society ... the protections offered by the HRA and the ECHR should represent a floor rather than a ceiling. We should be looking to go further... In fact, the key challenge for progressive governments ... is finding ways to embed those responsibilities across different areas of policy. That's what Scotland's National Action Plan does.”

The Scottish Parliament has passed a variety of legislation given domestic effect to international human rights including:

- Setting up Scotland's Commissioner for Children and Young People to have specific functions in respect of the UN Convention on the Rights of the Child
- Setting up the Scottish Human Rights Commission to have functions in relation to international treaties which have been ratified by the UK eg ICCPR.

In 2016, the Scottish Parliament established for the first time an 'Equalities and Human Rights Committee', which affords an opportunity to focus solely on the delivery of human rights across devolved matters.

International Human Right to Access Information

⁶ London and Quadrant Trust V Weaver [2009] EWCA Civ 587

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Freedom of opinion and freedom of expression are inextricably linked with accessing information. A person or organisation needs to access independent and true information and analysis in order to form an opinion. In the current climate with major concerns expressed about skewing opinion and voting behaviour due to fake news, the provenance of information is more important than ever. Voters, the public generally and NGOs will be concerned that they can access information which is accurate and up to date to evidence their opinions and comments and challenge decision making.

The UN Declaration of Human Rights and Fundamental Freedoms was adopted by the United Nations General Assembly in 1948 'as a common standard for all nations. It sets out, for the first time, fundamental human rights to be universally protected'. Article 19 states:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'⁷

This right was given further effect through the International Covenant on Civil and Political Rights (ICCPR) which was adopted by the UN in 1966 and came into force on 23rd March 1976. The UK has ratified the ICCPR meaning that all our laws and policies should comply. Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

The UN provides helpful commentary on how states such as the UK, and Scotland, should give effect to this right. The UN Human Rights' Committee's General Comment states:

- Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. (Para 3)
- The obligation to respect freedoms of opinion and expression is binding on all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local ... and may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.⁸ The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression ...' (para 7)

⁷ See the UN website for full list of rights <http://www.un.org/en/universal-declaration-human-rights/index.html>

⁸ See communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

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- A right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. (Para 18)
- To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. ... Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests. (Para 19)⁹

The UK's compliance with the ICCPR is reviewed periodically by the UN Human Rights Committee and concerns and recommendations are contained in 'Concluding Observations'. The latest, published in July 2015, welcomed the 'adoption of Scotland's National Action Plan for Human Rights (SNAP) 2013-2017'¹⁰ but:

- Was concerned about the lack of a comprehensive mechanism for reviewing existing gaps and inconsistencies between the domestic human rights legal framework and the rights as set forth in the Covenant' (para 5)
- Recommended the UK should 'engage in consultation with stakeholders at all levels to identify ways to give greater effect to the Covenant' (para 5)
- Recommended the UK should 'introduce new awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity' (para 10)
- Recommended the UK should 'disseminate widely the Covenant, the text of its seventh periodic report and the present concluding observations, among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, and the general public.' (para 26)

There have been numerous conversations in Scotland about what the Scottish Parliament and Scottish Government 'do' with Concluding Observations from Treaty bodies. Amongst civil society there is general agreement that there should be at least three steps: a specific and public response from the Scottish Government to each Concluding Observation with a timeline for implementation; a debate in the Scottish Parliament; a Committee of Parliament to monitor implementation and impact.

UN Special Rapporteur on Freedom of Expression

In 1993 the UN appointed a Special Rapporteur on the 'Right to Freedom of Expression' to develop understanding and action on this specific human rights theme. The mandate has been repeatedly renewed most recently on 21st March 2017 when the UN Human Rights Council agreed a further period of three years.¹¹ The mandate is rooted in the understanding that human rights are inter-dependent and that access to information is a gateway to the enjoyment of all our rights:

⁹ See UN Human Rights Committee website for General Comment No 34, adopted in 2011
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f34&Lang=en

¹⁰ Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland pub 17th August 2015, Para 3

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en

¹¹ See the UN website at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

'Recognizing that the effective exercise of the right to freedom of opinion and expression, as enshrined in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, is essential for the enjoyment of other human rights and freedoms and constitutes a fundamental pillar for building a democratic society and strengthening democracy, bearing in mind that all human rights are universal, indivisible, interdependent and interrelated...'¹²

The mandate includes 'to make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations'.

The current post holder, David Kaye, has produced a number of sectoral reports eg 'Freedom of expression and the private sector in the digital age' as well as thematic reports eg in a report to the UN Human Rights Council he addresses contemporary challenges to freedom of expression.¹³ The report offers many observations relevant to Scotland including a recognition of the value the Internet offers for freedom of expression and importance of the pro-active publication of information:

- 'While the threats to freedom of expression worldwide are severe, there remain important efforts to sustain a commitment to article 19. In the wake of the attacks in Paris in January 2015, dozens of the highest leaders of States gathered for a public demonstration that was, nominally, to support the right to freedom of expression and oppose terrorism. The moment proved to be as much theatre as commitment to law and policy, ... still, one may point to concrete examples that deserve to be emulated. Importantly, many (if not most) Governments proclaim in their Constitutions the right everyone enjoys to freedom of expression.' (para 50)
- 'Some Governments have adopted strong policies and regulations to promote freedom of expression. In 2016, Norway launched an effort to place freedom of expression at the centre of its human rights policy...' (para 53)
- 'Several Governments have coordinated their efforts to expand Internet freedom through the Freedom Online Coalition and promote access to information through the Open Government Partnership. Several countries have adopted strong laws on the right to information and whistle-blower protection.' (para 53)
- 'Civil society organizations and initiatives also remain vibrant and critical to expanding or strengthening freedom of expression norms...' (para 54)

The UN Special Rapporteur's report also make many recommendations:

- 'I encourage States to implement regular public oversight of laws that implicate freedom of expression to ensure that they meet the tests of legality, legitimacy and necessity. Where possible, States should not only adopt legal frameworks but also implement training, particularly among independent oversight bodies, of the principles of freedom of expression...'

¹² Resolution of the UN Human Rights Council 16/4 available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G17/071/20/PDF/G1707120.pdf?OpenElement>

¹³ 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' to the UN General Assembly, distributed 6th September 2016
http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373

- Support or establish regional or sub regional monitoring. Several regions have developed or are developing independent approaches to supporting freedom of expression. The Inter-American Commission on Human Rights, the African Commission on Human and People's Rights and the Organization for Security and Cooperation in Europe have established monitoring mechanisms on the basis of norms that are consistent with the international and regional standards.
- Support independent media and civic space... those with the means — such as private donors and foundations — should make a special effort to support independent media and to foster strong scrutiny of media conglomerations that squeeze out the less well-financed outlets;
- 'State leadership. One of the most disappointing aspects of the current situation for freedom of expression is that many States with strong histories of support for freedom of expression — in law and in their societies — have considered measures liable to abuse in their own countries or to misuse when applied elsewhere... I strongly urge all States to consider that attacks on security on the Internet pose long-term threats not only to freedom of expression but also to national security and public order itself.' (para 57)

Scotland's ambition to deliver its international human rights obligations can only be realised if there is a mechanism to identify, adapt and implement recommendations from international experts. Currently there is no system in place to make that happen.

Regional Human Rights Mechanisms - the right to access information Europe

In its briefing 'Human Rights and The Public's Right to Know' CFoIS sought to generate a better understanding about the role of human rights in assisting people to access information. For example, a broad range of bodies are covered by the Human Rights Act (HRA) including housing associations (RSLs), which are not currently covered by FoISA. A number of cases were listed which has been ruled on by the European Court of Human Rights (ECtHR) which defined the extent of the right to access information:

Társaság a Szabadságjogokért (the Hungarian Civil Liberties Union) v. Hungary 2009 – The European Court of Human Rights ruled there had been a violation of Article 10 of the ECHR, and concluded that obstacles to hinder access to information of public interest might discourage the media and other public interest organisations from pursuing their vital role as "public watchdogs".

The publication also cited cases where accessing information was fundamental to enjoying other rights such as 'the right to respect for private and family life'.

Guerra and Others v. Italy (application no. 14967/89) - The applicants had waited, right up until the production of fertilisers ceased in 1994, "for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory." The ECtHR held that Italy did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8, due to the unavailability of information that would allow them to make an informed opinion.

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CFoIS sought to generate wider debate and understanding in Scotland of these issues. In 2015, it published '30:10' to celebrate 30 years of CFOIS and the 10th anniversary of implementation of FOISA.¹⁴ In that publication, Aidan O'Neill QC wrote a chapter 'Freedom of Information as a Fundamental Right' and evidenced his analysis detailing numerous cases.

More recently the Grand Chamber ruled on *MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY*¹⁵ on 8th November 2016 and there is now a growing consensus that this case will have an impact in Scotland. Like *Társaság a Szabadságjogokért* (the Hungarian Civil Liberties Union) v. Hungary 2009 the case highlighted the importance of NGOs, Bloggers and journalists in informing the public on issues of public interest. Therefore, their access to information rights are in effect 'elevated' because of their ability to ask questions of public interest and to widely cascade the answers and analysis. In reaching its decision the court reflected on a variety of matters including interpretation of Article 19 of the ICCPR.

However, this decision sits uncomfortably with Article 14 of the ECHR which obliges the rights within the ECHR to be equally enjoyed. This ruling contradicts the FoISA principle in Scotland that public authorities should adopt an 'applicant blind' approach to FoI requests. This judgement, as in previous cases, impacts on the work of the Office of the Scottish Information Commissioner as it is set up under FoISA which is a law that should be ECHR compliant and as it delivers a service of a public nature it is covered by Section 6 of the Human Rights Act 1998 and must comply with the ECHR and the jurisprudence of the ECtHR.

Americas

The Inter American Commission for Human Rights went to the Inter-American Court of Human Rights to ensure that people in Chile could access a right to information. In a landmark case, *Claude-Reyes et al. v. Chile*,¹⁶ they complained that they "were not granted an effective judicial remedy to contest a violation of the right of access to information"; in addition, they "were not ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information."¹⁷ These rights were established in the American Convention on Human Rights. They had been denied access to information held by the Chilean Foreign Investment Committee and were refused access to Chilean justice to contest this decision."¹⁸

The Court ruled that Chile was responsible for the violation of Article 13 of the American Convention in relation to Articles 1(1) and 2, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola.¹⁹ This was the first time that a Court ruled, clearly, that access

¹⁴ Available at the CFoIS website <https://www.cfoi.org.uk/2015/01/3010-reflecting-and-protecting-freedom-of-information-rights/>

¹⁵ For further information on the decision issued on 8th November 2016 see

<http://www.ijrcenter.org/2016/11/15/ecthr-government-obligated-to-impart-information-beneficial-to-public/>

¹⁶ Inter-American Court of Human Rights, Case of *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006 http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf

¹⁷ Para 2 Ibid

¹⁸ Para 3 Ibid

¹⁹ Para 148 Ibid

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to information is a fundamental human right. The Inter-American Court of Human Rights has gone further than the ECtHR, however the case does show the direction of travel for some judges in court in establishing an equal right to access information.

Sustainable Development Goals (SDG)

Another layer of compliance with access to information rights is SDG 10 and the target is to 'Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements'. The indicator to assess compliance and impact is 16.10.02: 'Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information'.²⁰ Progress on Goal 16 has recently been reported and includes:

- Efforts are under way to make national and international institutions more effective, inclusive and transparent...
- A free press is closely linked to access to information and the protection of human rights, but the trend in this regard is discouraging. The number of journalists killed increased from 65 in 2010 to 114 in 2015, despite the fact that, by 2013, 90 States had adopted laws on freedom of and/or access to information.²¹

The trend on access to information rights is discouraging even in States that have adopted access to information laws. Therefore, the Freedom of Information Advocates Network (FOIANet), has designed a simple tool to help civil society conduct parallel assessments of the extent to which States have met SDG Indicator 16.10.02. The methodology provides a standardised tool to assess the extent to which States with Right to Information Laws (RTI) are implementing them properly. There are three key tests to measure implementation: assessment of the extent to which a State is proactively disclosing information, the extent to which institutional measures have been put in place to assist with implementation, and the extent to which requests for information are being responded to properly. CFoIS welcomes this global initiative from civil society and is actively seeking funds to carry out this parallel assessment in Scotland.

Impact in Scotland

All these important human rights developments should not operate in isolation from the work of the Scottish Parliament. Therefore, CFoIS sought to find out what systems are in place to give human rights up to date meaning in the business of the Scottish Parliament. We were keen to establish if the process was pro-active or reactive. It appears to sit firmly in the latter category.

In an FoI request to the Scottish Parliament in March 2017, CFOIS gained some useful insights into the process. In response to our question 'is there is a formal procedure which ensures (a) parliamentary staff, MSPs and their staff are updated on judgements of the European Court of Justice and the European Court of Human Rights and (b) how many times MSPs were provided with such information or briefings', we received the following information:

"there is no formal procedure whereby these issues are disseminated by the Parliament to the three groups highlighted, and this information is not held. However, Parliamentary

²⁰ See the UN's 'Sustainable Development Knowledge Platform' at <https://sustainabledevelopment.un.org/sdg16>

²¹ Ibid

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staff are actively encouraged to undertake continuous professional development training in their field (for example, health and safety or aspects of employment law). Such training will include updates on relevant issues which have recently emerged. Staff also have access to updates and training from their own professional bodies... Since no formal procedure exists, no MSPs received briefings or information under it and the information is not held.

The Parliament went on to explain that 'SPICe regularly provides individual MSPs and Committees on request with information and /or specific policy briefings on human rights issues, including the implications of European Court of Justice decisions and European Court of Human Rights decisions. Committees may also commission legal advice from OSSP as required to support their work in scrutinising legislation. SPICe also publishes briefings on Bills and other topics... Whether a particular briefing addresses human rights issues will depend on the context of the enquiry and the profile of human rights concerns in that area.

In response to our inquiry about the recent landmark cases at the ECtHR on Article 10, again the issue appears to be reactive. If an MSP finds out about the case then there may be a briefing. It is useful to note the Parliament advised:

- 'SPICe has not received any requests for a briefing on *MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY (Application no. 18030/11)*. No briefing has been produced and the information is therefore not held. As far as we can ascertain, both the Information Commissioner and the Scottish Information Commissioner have yet to produce briefings on the case.'
- '... no general guidance is provided by the Scottish Parliament to MSPs, their staff or to clerks on how the ECHR impacts on their role. Specific advice is provided, where required, on a case by case basis.'

In response to an FoI request, OSIC advised on 20th April that it had taken a number of specific steps:

- we closely followed the *Magyar* case and are alert to potential implications for our casework
- we commissioned Counsel's Opinion on *Magyar* in January (we expect to receive the draft before the end of the month, and the final version in May)
- we intend to publish guidance on the *Magyar*; our guidance will be informed by both Counsel's Opinion and decisions from the courts
- we have drawn the attention of the Court of Session to *Magyar* in a live appeal and hope that the Court will give some judicial guidance on the issues raised
- we have made the SPCB and the Scottish Ministers aware of the potential significance of *Magyar* for Scottish FOI law.

In response to our request for information on the process used by the Commissioner to acknowledge and implement judgements at the ECtHR which impact on her functions, we were advised that: 'Generally, as with any relevant case law or new legislation, we will aim to make sure that we comply and, where appropriate, issue guidance on it. We alert staff to relevant ECtHR judgements by way of an internal bulletin, All Staff Meetings and Team Meetings. However, we don't have any recorded process which answers this request.'

Conclusion

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This report seeks to contribute to informed debate on integrating information rights within the broader human rights agenda in Scotland, and the UK. The frameworks defined and ruled on at an international and European level must feature in the development of FoI law in Scotland. As human rights are both a reserved and devolved matter, the Scottish Parliament does have authority to legislate to ensure FoI rights comply with international human rights standards. However there appears to be no mechanism within the Parliament to ensure this 'review and update' process happens. CFoIS, as a civil society organisation, has a key role in undertaking SDG assessments, raising awareness of key human rights developments as well as ECHR cases and their likely impact in Scotland, People need to access information to form an opinion about how effective and relevant FoISA is. The role of OSIC is pivotal in alerting and cascading information across, the designated bodies and updating practice on respecting and protecting information access rights.

4. Benchmarking FoI Laws

Two NGOs, the Centre for Law and Democracy and Access Info Europe have developed a 'Global Right to Information Rating' (RTI) to comparatively assesses legal frameworks for the right to information, which have been adopted by individual countries. The RTI Rating is composed of 61 indicators and countries are scored 'depending on how well the legal framework delivers the Indicator, for a possible total of 150 points.'²² The indicators are divided into seven different categories: Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections, and Promotional Measures.

The RTI Rating is limited to measuring the legal framework so in countries there may be issues about the quality of implementation of the law, problems with asserting the right and with the culture of openness. However, as the NGOs point out 'a strong legal framework is an important pre-requisite to full implementation of the right to information.'

FoISA is not yet part of the RTI process although the UK law is. It is useful to note that younger laws tend to score better and 'Europe overall accounts for 11 of the bottom 20, primarily the older European laws which are more limited in scope and have weaker appeals mechanisms.' Conversely the German RTI law was passed in 2005 (effective from 2006) but it features in the bottom 10 countries. Despite the adoption of a Constitution upon reunification in 1990, FoI is not included as a right which possibly can be explained as the rights came from the 'Basic Law' adopted in 1949.²³

Top 10 - The winner of the latest RTI is Mexico with 136 points followed by: Serbia 135, Sri Lanka 131, Slovenia 129, India 128, Albania 127, Croatia 126, Liberia 124, El Salvador 122, Sierra Leone 122.

Bottom 10 - Austria is at the bottom with just 33 points followed by: Liechtenstein 39, Philippines 46, Tajikistan 49, Iran 50, Jordan 53, Germany 54, Kazakhstan 57, Taiwan 58, Dominican Republic 59

Although Mexico tops the RTI rating with 136 points out of a possible 150, its implementation has been condemned by a variety of NGOs. According to the most recent ranking of transparency in Mexico performed by Centro de Investigación y Docencia Económicas, the quality of freedom of information laws increased following passage in 2015 of Mexico's General Transparency Law, but effective access decreased. Its study analyses these differences as well as the effects of the 2015 General Transparency Law across Mexico. The results prove the necessity of monitoring the effective implementation of the recently improved laws.²⁴

Conclusion

²² See the Centre for Law and democracy website <http://www.rti-rating.org/methodology/>

²³ The Constitution of Germany (English version) is available at: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0054

²⁴ https://www.wilsoncenter.org/sites/default/files/transparency_in_mexico_an_overview_of_access_to_information

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Scotland should evaluate its access to information laws by examining these 61 indicators. However, Scotland will also need to consider the implementation of these laws to avoid pitfalls already identified.

5. Countries which embed the right in their constitution

When the UK Government announced plans to abolish the Human Rights Act 1998 and replace it with a 'Bill of Rights', there was concern that current human rights protections would be diminished. Instead of conversations about expanding our rights, strategies were crafted to defend what we have.

In parallel there has been some chat about Scotland developing its own Bill of Rights to explicitly demonstrate its support for international human rights standards and as a mechanism to expand the scope of human rights to include economic and social rights.

CFoIS believes we need to be ready to integrate the enforceable right to access information in a GB²⁵, UK or Scottish Bill of Rights and we have looked to what other countries have adopted. Countries embed the right in their constitution in a variety of ways and we have selected just a few examples given our small budget.

It should be noted that constitutional FoI rights can operate in addition to a range of specific laws so a constitutional right to access information in Scotland would not require the abolition of FoISA.

Australia

All Australian States and Territories have freedom of information laws covering their public sectors, which underpins national legislation that was passed in 1982. In addition, the State of Victoria adopted a 'Charter of Rights' in respect of its devolved functions to 'require public authorities, such as Victorian state and local government departments and agencies, and people delivering services on behalf of government, to act consistently with the human rights in the Charter.'²⁶ Article 15 covers the right to access information²⁷, and just as the ECHR, includes it within the heading 'Freedom of expression':

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether: orally or in writing or in print or by way of art or in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

²⁵ The Good Friday Agreement contains provisions for a Northern Ireland Bill of Rights, that has still not been delivered, which has implications for a UK wide Bill of Rights. For more information see Human Rights Consortium website <http://www.humanrightsconsortium.org/>

²⁶ For more information see website of the Victorian Equality and Human Rights Commission <http://www.humanrightscommission.vic.gov.au/the-charter>

²⁷ Charter of Human Rights and Responsibilities Act 2006, version incorporating amendments as at 1 July 2014
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/e84a08860d8fa942ca25761700261a63/7379cff5e33da38dca257d0700051af8!OpenDocument&Highlight=0,Act

- (a) to respect the rights and reputation of other persons; or
- (b) for the protection of national security, public order, public health or public morality.

Spain

The Spanish Constitution was passed by Parliament in October 1978, ratified by a referendum of the Spanish people in December 1978 and sanctioned by the King on 27th December 1978. The Constitution embeds the right to access information to ensure government is transparent and accountable in many ways:

- Section 9(3) of the Constitution guarantees “the accountability of public authorities, and the prohibition of arbitrary action of public authorities”.
- Article 10 (2) makes the connection with international human rights law “Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements ratified by Spain.” Article 19 of the Universal Declaration and Article 19 of the ICCPR, which Spain has ratified, include the right to access information.
- Section 20 establishes the right to information (Article 20.1.d) and freedom of expression (20.1.a). It recognises and protects the right to ‘freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms’.
- Section 48 ‘The public authorities shall promote conditions for the free and effective participation of young people in political, social, economic and cultural development.’²⁸

Supplementing the ‘right’ in the Constitution is Spain’s Transparency Law which came into force on 10th December 2014. However, the Spanish Government does not accept that the right to access information is a fundamental right and that has led to a campaign, endorsed by 50 of Spain’s constitutional experts. The NGO Access Info has pointed out ‘that recognising the right of access to information as a fundamental right has clear consequences in practice due to its deterrent and preventative effect on corruption. Likewise, the right has a direct impact on essential democratic rights and principles such as participating in decision-making processes, the right to free and independent press, and accountability of public institutions.’²⁹

South Africa

The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. It has since been amended 17 times. Access to information is understood to be a right as well as a tool to engage other rights:

Article 16. Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes -
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and

²⁸ The Constitution is available at

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf

²⁹ See the Access Info website <https://www.access-info.org/uncategorized/27066>

(d) academic freedom and freedom of scientific research.

Article 32 - The Access to information

(1) Everyone has the right of access to -

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.³⁰

South Africa delivered national legislation in the Promotion of Access to Information Act 2000 (PAIA). There is a clear purpose to PAIA, which was 'to actively promote a society in which the people of South Africa have meaningful access to information which enables them to fully exercise and protect their rights' and foster a culture of transparency and accountability. Crucially the PAIA gives the requester a right to lodge a request to the information officer of a public or private body.

However, there are issues with implementation. PAIA requires all private and public bodies to prepare a PAIA manual. In practice steps taken by the Department of Justice and Constitutional Development have exempted certain private companies from compiling a manual eg those with less than 50 employees, but the companies still have to comply with the rest of the Act. For an example of what is contained in a Manual see The Limpopo Department of Economic Development, Environment and Tourism (LEDET) manual which was published on 23rd March 2017³¹

Serbia

In the Constitution of Serbia, Article 51. Paragraph 2 states: "Everyone shall have the right to access information kept by state bodies and organizations with delegated public powers, in accordance with the law."³² This is an interesting way to cover bodies which are delivering public services. There is also a purpose clause which sets out the expectations of parliament for those holding information:

Article 1: "This Law regulates the rights to access information of public importance held by public authority bodies, with the purpose of the fulfilment and protection of the public interest to know and attain a free democratic order and an open society. In order to implement the right to access information of public importance, held by public authority bodies, a Commissioner for Information of Public Importance shall be established (hereinafter: Commissioner) by this Law, as an autonomous state body, independent in fulfilling its authority."

So What?

Embedding a right in the Constitution means it is more difficult for the government of the day to ignore or abolish the right. It has also led to some useful case decisions which can serve as a warning and a guide to government and public agencies on how to interpret access to information rights. Access to information laws, underpinned by

³⁰ The Constitution is available at <http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm>

³¹ Available on the SA Government website at <http://www.gov.za/documents/promotion-access-information-act-manual-limpopo-department-economic-development-2>

³² Link to constitution (English version)

http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php?change_lang=en

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democratic rights to participate in public affairs, provide a framework for courts to make decisions.

Currently there is an interesting case in Spain. In a case decision of May 2017, the Madrid High Court has ruled that the Spanish Government should provide Access Info Europe with a series of documents related to its participation in the Open Government Partnership (OGP). The Court found that for civil society to participate in decision making on open government policies, having full access to relevant information is essential. The Court made clear that given the nature of the Open Government Partnership, there was a particular imperative to be transparent. The Court stated that:

The Open Government Partnership (OGP), of which Spain forms a part, has the objective of ensuring the participation of civil society and citizenry in the development of public activities, which in turn makes it essential to have access to the relevant information in order to put forward opinions, proposals, and improvements in the planning of public policies and to know the criteria being taken into consideration in decision making, and, overall, to meet the goals of the OGP.

The Court underscored the democratic principles at stake in this case, noting that “*Here it’s relevant to apply the maxim ‘information is power’: it is the possibility of participation.*”

The background to the case is that Access Info Europe had made an information request which was refused by the Spanish Government, Spain’s Transparency Council ruled for disclosure, and then the Spanish Government went to Court to challenge that ruling. The Spanish Government has decided to appeal so this is a case to watch.³³

Conclusion

The selection of countries is somewhat arbitrary given CFoIS’ shortage of resources. However, what is clear is that inadequate domestic legislation on access to information rights can be addressed by the courts at a domestic and regional level via the Constitution. The jurisprudence is therefore essential to keeping rights sharp. If no one takes a case then the mechanism for change via the courts is redundant.

The examples also demonstrate the valuable role of NGOs and activists monitoring implementation of the law, in campaigning and in making FoI requests. The ruling of the ECtHR in *MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY* recognises the value of their role and gives their future work added power. A resourced and informed civil society is recognised by the UN as being a key way to protect rights within countries.³⁴

The examples also demonstrate the importance of active and powerful National Human Rights Institutions (NHRIs) in scrutinising legislation and in trying to assert and enforce rights. Scotland’s NHRI, the Scottish Human Rights Commission is specifically barred from undertaking any human rights casework so that ensures there is no possibility of advising or instructing cases to court. Amending the Scottish Commission for Human

³³ For more information see Access Info Europe website <https://www.access-info.org/frontpage/28674>

³⁴ See ‘Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned’ pub by OHCHR April 2016 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/073/52/PDF/G1607352.pdf?OpenElement>

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Rights Act 2006 by removing Section 6 'power to address claims of legal proceedings', would address this issue³⁵.

³⁵ Act is available at <http://www.legislation.gov.uk/asp/2006/16/contents>

6. Delivering FoI legal rights - examples from other countries

There are many ways to make a right more effective. Practice teaches us that reviewing the right must be a constant process in an environment of fast paced technological change and changes in how public services are delivered. For example, as society moves towards 'digital only' records, paper based concepts such as 'opening a new file' must be accommodated.

The following selection of examples may appear somewhat random but they are designed to illustrate the innovation and challenges which many countries face in renewing, refreshing and updating access to information rights. The process and the impact of the changes offer ideas for changing law and practice in Scotland.

Australia

Australia has adopted a multi-layer approach to making information available and delivering the right to access information. The Freedom of Information (FOI) Act was passed in 1982 and covers Ministers, all Departments of State except the 'Intelligence Service' as well as 'agencies'. This term does not fit exactly with our understanding in Scotland. Included are 'bodies established for a public purpose by or under an enactment or an Order in Council' and an 'unincorporated body (such as a board or committee) established under an enactment to assist or perform functions connected with a prescribed authority' is included in the prescribed authority/agency). Exclusions include 'incorporated companies or associations' but it does cover the National Broadband Network (NBN Co).³⁶

Usefully in 1994, the Senate agreed that all Australian Government departments and agencies produce an indexed list of their files every six months for tabling before parliament. The Senate Order was amended in 1998 and now requires departments to also list these files on their websites. Despite these accessible published lists, there remains a problem with public take up. We know from NGO and academic contacts that problems arise from:

- The requirement is not included in the pro-active publication section of the FOI Act, so 'passes even the very interested by'.
- The index is not linked to other published material for example in agency guidance about making an application.

There are also efforts to change culture and practice. For example, the Australian Government's Open Government Project (OGP) includes a commitment to ensure 'information access law, policy and practice fit for the 21st century.' Another is to make government information easier to find and more accessible.

Example – Department of the Prime Minister and Cabinet

The Senate Order requires that the list be 'indexed', so the files are arranged under the names of the current divisions and branches of the Department, and then by file number. The Department's lists do not include files whose titles would disclose the deliberations of Cabinet. The Senate Order permits some information in file titles to be deleted, such as:

- commercially confidential information
- identifiably personal information

³⁶ For more information

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- any security classified information which is disclosed in, or which could be established from, a file title.³⁷

Canada

Canada, has a requirement to publish description of "classes of records" although NGOs are concerned that governments are only doing the minimal to make them useful. The requirement to publish "a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution", is judged to be helpful because it describes what an organisation does. Added to the mix is the records management systems which are designed to make information easily retrievable and help requestors find info they want. The new electronic document and records management system being developed are also very comprehensive. Such detail enables people to think about what kinds of records may exist ie combine organisational description with class of record description.

The examples of Canada and Australia show the importance of listing official information to enable people to identify what they may wish to access. Such a practice also helps officials who can identify information that can help them do their job.

The need for up to date, high quality information to inform the design and delivery of public services in Scotland has never been greater. In May 2012, the Accounts Commission published a report "*Using cost information to improve performance: are you getting it right?*" which stressed the importance of quality and authoritative information in leading to better decision making. It urged officials and elected officers to gather and use better information. Understanding what your own organisation publishes as well as having access to lists of information from other bodies is one key way to access reliable information.

Germany

There is no constitutional right to access information in Germany. What is protected is freedom of expression and the right to information found in "generally accessible sources" (Article 5) [1]. Therefore, state documents are excluded. Instead there is the German Freedom of Information Act (Informationsfreiheitsgesetz, "IFG") which was passed by the Federal Government in June 2005, coming into force on 1 January 2006.

There are many interesting aspects which are worth noting:

- Applies "to other Federal bodies and institutions insofar as they discharge administrative tasks under public law. For the purposes of these provisions, a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law."
- Section 2 covers both documents and information.
- Section 7(3) "(3) Information may be furnished verbally, in writing or in electronic form. The authority is not obliged to verify that the contents of the information are correct"

Intriguing devices exist in some State laws to minimize cost eg the law requires agencies to set aside a room for people who have requested information and who wish

³⁷ For more information go to the website of the Cabinet Office at <https://www.dpmc.gov.au/who-we-are/accountability-and-reporting/departmental-indexed-files>

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to see it, accompanied by a staff member. However, shortages of staff and rooms creates practical difficulties.

Conclusion

An insular approach to FoI reform in Scotland narrows our expectations and is therefore counter-productive. By citing just a few examples of what happens in other countries, such as including the private sector in South Africa is key to evidencing that such changes can happen if elected politicians choose to make it happen. Some of the legal changes can be small and procedural such as a legal duty to provide requestors with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days. However, the impact on requestors and organisations can be significant.

Practice elsewhere also throws up issues: given the prevalence of fake news there has never been a greater need for official information with which to challenge it. However, in Germany there is no need to verify that the information is accurate before disclosure which raises the issues of why would the Federal Government be holding wrong information compounded by the potential harm in disclosing it. The device of FoI requests and pro-active disclosure of information could be used by a Government that wants to misinform the public. In Scotland, we presume that official information will be accurate and up to date and that is a cultural and operational practice that we should be proud of.

7. Conclusions, Recommendations and Next Steps

Enthusiasm and a vision for FoI are not enough: a sound knowledge of the law, the skills to comply and pro-actively deliver it, expertise in practical delivery and the right attitude of individuals underpinned by an organisational culture are all essential ingredients to make FoI rights robust.

Since 2015 CFoIS has called for an inquiry into the operation of FoISA as we are concerned about compliance with the existing law eg are all applicants treated the same, what are the avoidance practices which undermine FoI rights? So, we are delighted that the Scottish Parliament has unanimously agreed to a 'FoISA Review' and this report serves to highlight issues for consideration including:

- Delivery of an 'information rights' culture based on the ethos 'what can we publish' not 'what must we publish'.
- Promote the value and legitimacy of the right amongst officials ie accept people have the right to choose the detail of the information and the timescale for publication. Adding a 'purpose clause' to FoISA would help solve the problem.
- Keep promises made in 2002 and subsequently eg that all RSLs will be covered which is in keeping with human rights law, expand FoISA to include the private sector as in South Africa.
- Keep up with global developments. For example, people should have access to indexes of information held by organisations so that they know the types/categories of information held and how regularly it is updated. Staff within and across organisations will benefit from such lists too. By examining the list people can decide what information they want to access.
- Review access to information rights from a human rights perspective, including SDG 16, so that international and European obligations are delivered via Scots law.

Accessing information is a human right as well as a tool to secure other human rights. It is deserving of renewed care and attention by politicians and civil servants. Ensuring that the Scottish Information Commissioner has the power and the funding to ensure compliance is also key to making the right real.

Therefore, CFoIS recommends that:

1. The Scottish Parliament's post legislative review of FoISA should begin immediately and should adopt a remit which includes: investigation into the culture, law and practice of delivering access to information rights in Scotland; agree to secure a top 10 'RTI' rating for FoISA; draw on international best practice and agree proposals to make FoI rights more effective; set out the steps to comply with human rights law. In addition to information disclosers, the review should take evidence from those who use the right eg the National Union of Journalists and community groups eg tenant associations, trade unions and campaign groups.
2. The Commission on Parliamentary Reform's report should inform this Inquiry. For example, on the need to better integrate human rights into the work of the

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Parliament.³⁸ CFoIS published a response to its report, on 20th June 2017 which develops a number of points on openness and transparency. See Appendix 2.

3. The Scottish Public Information Forum (SPIF) should be funded and supported by the Scottish Parliament to fulfill its original remit to enable engagement between and with stakeholders. Until CFoIS convened a meeting in May 2017, SPIF had not met since 2010. Due to the level of interest and support, SPIF is now operational again.³⁹ SPIF can also be used as a sounding board for the recommendations which arise from the Inquiry.

Next Steps

If you and your organisation agree with the recommendations in this report please endorse our three calls for action by:

- Emailing us your support at cfoiscot@gmail.com
- Contacting your MSP to advise them of your support
- Raising the issues whenever you meet politicians.
- Discuss the issues raised in this report amongst your networks
- Consider donating to CFoIS to enable its work to influence and inform the Scottish Parliament Inquiry. For more details go to our website at <https://www.cfoi.org.uk/scotland/> or email us cfoiscot@gmail.com

³⁸ See recommendation 30, page 35 at <https://test123582.files.wordpress.com/2016/10/commissiononparliamentaryreformreport-june2017.pdf>

³⁹ The next meeting will take place on 28th September 2017 in Glasgow – see Minutes on CFoIS website <https://www.cfoi.org.uk/scotland/>

Appendix 1 CFoIS 2016 Manifesto and Agenda for Action for MSPs

1. Accept that the right to access information is a human right⁴⁰.
2. Restore the public's right to access information to at least its 2005 status eg restore FoI rights to 15,000 housing association tenants whose homes were owned by local authorities in 2005.⁴¹
3. Restore the operation of the Scottish Public Information Forum to enable effective engagement with stakeholders, and to maintain and develop an enforceable right to access information which meets the public's expectations.⁴²
4. Extend the right to access information to reflect changes in public service delivery in Scotland eg to voluntary organisations and RSLs.
5. Undertake an audit of all arms-length external organisations (ALEOs) and catalogue their functions, to enable informed decision making about the coverage and operation of FoISA.
6. Quickly extend the coverage of FoISA to all known ALEOs not already included, all public-sector organisations and others delivering services of a public nature.
7. Agree it is the function delivered that requires FoISA coverage. Adopting this principle will ensure consistency in the coverage of FoISA⁴³.
8. Maintain the principle that FoISA obligations apply equally to all organisations covered.
9. Reject any introduction of a new category of 'core' public organisations as a way of diluting the effectiveness of FoISA⁴⁴.
10. Review the operation of FoISA to ensure our enforceable right to access information remains effective in delivering open, transparent and accountable government and public services.

⁴⁰ For more information see <https://www.cfoi.org.uk/scotland/>

⁴¹ More detailed analysis is provided in the OSIC Report 'FOI 10 years on: Are the right organisations covered?' available at file:///C:/Users/Agnes/AppData/Local/Microsoft/Windows/INetCache/IE/R0L7MN7K/Special_Report_10_Years_On.pdf

⁴² SPIF is included in the Scottish Government's Six FoI Principles

⁴³ The EIR does not operate the scheduled/list system and therefore there is already a "function" dimension in existence in Scotland.

⁴⁴ See 2015 consultation on the Scottish Government website <http://www.gov.scot/About/Information/FoI/Coverage>

Appendix 2 CFoIS Press Release dated 20th June 2017

Campaign Calls for Speedy Reform at the Scottish Parliament

The Campaign for Freedom of Information in Scotland (CFoIS) today welcomed the report of the Scottish Commission for Parliamentary Reform but urged prompt action to require the Parliament to become more open, accessible and accountable in line with its founding principles.

CFoIS submitted evidence to the Commission and made FoI requests to check out how the parliament is operating. CFoIS has drawn up five areas for targeted action following the Commission's report underpinned by the conclusion that the Freedom of Information (Scotland) Act 2002 (FoISA) requires reform to enable the public, NGOs, journalists and bloggers to find out how they are being governed and to effectively hold politicians to account.

- **Monitoring and Evaluating the Parliament** – In response to a CFoIS FoI request asking for a breakdown of how often individual committees have met in private since 1999, we were advised that comparative statistical information is not gathered. Instead we were directed to visit the National Library of Scotland for statistics before 2009 and examine online reports after that. Therefore, CFoIS agrees with the Commission's recommendation that 'More effective monitoring and evaluation of the work of the Parliament' is essential and we are perplexed that this culture and practice was allowed to develop.
- **Need for Post Legislative Scrutiny** - FoISA was passed in 2002 but its effectiveness has been diminished because it increasingly covers fewer bodies that are delivering public services or services of a public nature eg those which are delivered by the Third Sector in health and social care. Promises made in 2002, for example that housing associations would be covered, have still not been honoured with the latest prediction being April 2018 but the absence of a firm announcement is causing suspicion about yet further delays. Therefore, CFoIS welcomes the Commission's recommendation for 'An enhanced legislative scrutiny process with mandatory pre- and post-legislative scrutiny' so that legislation is regularly reviewed for impact and effectiveness.
- **Holding Government to account** - The Scottish Government must report on its use of Section 5 powers of FoISA on or before Tuesday 31st October 2017⁴⁵ and that report will include an indication of any intention to exercise the power to designate bodies for coverage in the future. The Scottish Government's report must result in concrete, progressive action. Additionally, the Scottish Parliament must have its own ideas about what categories or named bodies it believes should be added to FoISA eg RSLs and their 148 subsidiaries, all arms-length external organisations (ALEOs)⁴⁶, professional associations undertaking a regulatory function eg the Law Society of Scotland, a strategic function such as CoSLA, and many private companies delivering services of a public nature eg health and social care and road maintenance. Therefore CFoIS welcomes the Commission's recommendation for 'More flexibility and spontaneity in the business of the chamber, improving opportunities for participation in debates and increasing ministerial accountability.'

⁴⁵ Required by the Freedom of Information (Amendment) Scotland Act 2013 available at <http://www.legislation.gov.uk/asp/2013/2/2013-05-31>

⁴⁶ The Scottish Charity Regulator reported there are 68 ALEOs that are also charities. Some ALEOs are already covered voluntarily such as Glasgow Life, or via legislation such as 'Culture and Leisure Trusts'.

- **Stronger information access rights for MSPs** CFoIS believes that MSPs need to have access to better information to make informed decisions. For example, currently MSPs are not permitted to see the Scottish Parliament's full legal advice on the impact of Bills on the European Convention on Human Rights (ECHR) yet MSPs can only pass Bills which are ECHR compliant. Currently they receive only an edited version that confirms the Bill is compliant despite the subsequent parliamentary process often involving submissions from civil society organisations claiming ECHR issues have not been addressed. CFoIS knows from FoI requests that there is no routine system to update and brief MSPs on cases decided at the European Court of Human Rights that may impact on the business of the Scottish Parliament. This gap in information and the consequent silencing of debate is unhelpful. Therefore, CFoIS welcomes the Commission's proposal for 'An enhanced role for individual MSPs to influence, and contribute to, parliamentary business and encouraged to be parliamentarians first.' However, for this recommendation to be effective requires increased information rights for MSPs.
- **Shortage of money stifles effective engagement and creates conflicts of interest** – At a recent Scottish Public Information Forum meeting it was reported that there is some evidence that civil society organisations who receive the public pound through contracts or grant funding are discouraged from making FoI requests because 'don't bite the hand that feeds you'. CFoIS acknowledges that it is very important for the Parliament to engage with people however the Third Sector needs to be funded to be independent and to exercise their independent voice without fear of retribution from the public services that fund them. For the Commission's recommendations to be realised requires a variety of reforms for Scotland to 'become a leader in public engagement, experimenting with new ways to gather views and evidence and opening more opportunities for people to become involved, where they want and how they want', as well as the 'creation of a Committee Engagement Unit.'

Carole Ewart, Convener of the Campaign for Freedom of Information, said:

"The Commission makes important recommendations that need to be delivered soon. Fundamental to the reform are the updating of our information access rights so that MSPs, journalists, civil society organisation and the public in general can hold the Parliament to account. At a time when fake news has been exposed as skewing decisions and misleading people, there has never been a greater need for the publication of information so that better decisions are made about public spending, delivery of public services and crafting policy. Whether you are an MSP, a charity or a member of the public, you need to be able to access and rely on good quality information so that you can do your job, serve your community and participate in public affairs."

ENDs

Notes

1. CFoIS submitted evidence to the Commission, ref no: CPR095, available at <https://test123582.files.wordpress.com/2016/10/commissiononparliamentaryreformreport-june2017.pdf>
2. The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. CFoIS is independent of government and relies on donations

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and income generated through training. For more information on our work go to <https://www.cfoi.org.uk/scotland/>