

ACT NOW CONFERENCE

**Freedom of Information: One Year On...
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“FOI - a battle won? Damp Squib or Hot potato?”

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*FOIA [doesn't give] answers like a Finance Act stipulating rates of tax:
it [provides] new rules on how the citizen/state relationship is to be conducted
(C Hood, Transparency: the Word and the Doctrine, British Academy, 2006)*

Triumphalism...and Beyond Triumphalism

Between 1984 and the 2000s - we campaigners (including, I suspect, the Scottish Information Commissioner) asked ourselves endlessly, would we ever get an FOI law? Of course, way back then we meant a *UK* law: CFI started in 1984.

After the passage of the two laws, we asked ourselves a different question: would it be worth all the effort that had gone into getting them?

In the view of CFI(inS) the answer is "Yes".
It has been worth the effort. Broadly speaking, the law is working.

Put together, there have been thousands of disclosures in Scotland and in the UK. Many stories in newspapers have been based on such disclosures. I don't know why, but the Scottish press remains "better" than the press in England at citing the law as the tool which prised the information out.

- Information has been disclosed - and I'd argue would not have been without the law - on a host of topics and issues, for example:
- restaurant hygiene reports
- levels of payments by pop-stars to buy up carbon rights
- anti-English bias by police when recruiting
- the Executive spend of more than £12,000 on new widescreen sets for its buildings in Edinburgh, including a 50-inch plasma screen for its biggest office at Victoria Quay
- details of what the original estimated costs were for the replacement criminal history system database
- files documenting meetings between the Blood Transfusion Service (BTS), health boards and consultants which are being used by claimants who contracted hepatitis
- The cost of taxi trips - oh no not again- this time, claimed by city councillors in Edinburgh
- the number of instances where rapes are likely to have taken place but where cases have been dropped
- rates of police breathalysing drivers who are involved in an accident
- plans to change completely the way fingerprint evidence is analysed in Scotland
- the amount taxpayers could fork out over the Inverness Airport terminal building (almost six times the true cost of the £6.5million private finance deal which built the it)
- the names of all these individuals who had not taken part, to ask them why, in an audit of surgical mortality

For information revealed using the UK FOIA, I recommend you read Rob Evans' January 2nd article in the Guardian, "Revealed: from nuclear tip plans to Blair's 'barmy' Simpsons star turn: A brief guide to some of the official facts disclosed in the Freedom of Information Act's first year". In case you missed it, the Simpsons' reference is to the

paper's Downing Street released on Tony Blair's appearance on the Simpsons cartoon show in 2003. His former communications chief, Alastair Campbell, wrote that it was a "barmy" idea, but would show that Mr Blair would "seize any opportunity to promote Britain".

By the way, just in case you're thinking, well it would be the Guardian wouldn't it that's be using the law? as a matter of fact it's NOT just the trendy, liberal press that's using the saw - see Steve Woods' statistics published in his amazing, admirable FOI blog. [Note 3]

Keeping track of disclosures isn't that difficult. Virtually all Scottish press-based items can be got by the simple device of setting-up a Google daily alert, "freedom of information" + "Scotland". Of course, there are other sources of tracking what information has been released via the *disclosure logs* published by public authorities e.g., the Scottish Executive's 'Recent Disclosures' pages, including the just released information about information: regarding reviews of actions and decisions in relation to requests for information under the Freedom of Information (Scotland) Act 2002 received between 1 January 2005 and 16 January 2006 and Freedom of Information requests to the Scottish Executive that have been granted or partially granted between 1 January 2005 and 13 December 2005. [Note 4] Again, look at Steve Woods' blog, which links to authorities' disclosure logs as he becomes aware of them.

Whilst these statistics are useful, perhaps even more valuable - but less easily available - is, as Al Roberts has pointed out, the data contained within databases used by government departments to manage the inflow of FOI requests. Unfortunately, central departments -- operating at the direction of the Department of Constitutional Affairs -- have stonewalled on FOI requests to obtain such data. In fact, DCA has firmly resisted any effort by academics or public interest groups to learn how FOI has operated within central government over the last year [Note 9]

Incidentally I did a quick search on the Edinburgh Council's website - and couldn't find a disclosure log!

But, I admit it...I can be (overly) triumphalist about the FOISA/FOIA. To me, their passage represents one of the biggest constitutional revolutions in governance - maybe *the* biggest. Instead of you having to justify why you want information, the public authority has to justify why you can't exercise your legal right to have it.

Pressure points; Requests made and answers received, Tips to achieve openness

Of course, any informed assessment of the new information settlement must strike a balanced, cautionary note.

Maurice Frankel, Director of CFOI, waxes enthusiastically about the benefits brought about by the laws. In a recent *Press Gazette* article [Note 5], he notes that one of the most

significant points to bear in mind is that nearly all the disclosures have been made without charge - a point to which I shall return.

On the other hand, Frankel states that there are still public authorities whose responses are sometimes bureaucratic and slow; which invoke exemptions to maintain a grip on information; and which are “miserly” in consideration of the public interest in disclosure - even regarding innocuous material, lest a precedent be set for more contentious material. Authorities say that information relating to that subject is exempt and don’t distinguish between exempt and non-exempt documents.

Not all requests for certain categories of requests fare well

Requests about old, but technically “open”, police investigations tend to be turned down. Questions about the background to current Government decisions are often batted away with an excessively broad refusal. If you ask for information concerning legal policy advice or about technically open police investigations or the background to current Government decisions, you will likely be met with broad refusals.

Frankel suggests that a trick here is to refocus the question to side-step the exemption - and to discuss this with FOI Officers. Often such people are enthusiastic about foi, and use their positive attitude to persuade their less enthusiastic, often more senior, colleagues to agree with them. Because of those officers, authorities are operating in an increasingly positive way. Such positive tendencies should be played up in the press ...some newsworthy disclosures may still be contentious from the authority's perspective. A little credit in the press coverage may help reinforce the positive tendency.

Turning to the Commissioners’ performances, Frankel writes that, compared with the Information Commissioner, the Scottish Information Commissioner has made a “quicker start in attacking unreasonable use of exemptions”. The IC had been good at encouraging authorities in the run-up to the law coming into force but during 2005 his output has been “modest”. 80% of the decisions relate to “technical” points (delays; is the information held? procedural shortcomings). Given the backlog of appeals sitting in his in-tray, I don’t suppose Richard Thomas is looking forward very much to 14 March a 415pm when he is due to be the first witness before the House of Commons’ Constitutional Affairs Committee inquiry into ‘The operation of the Freedom of Information Act: one year on’.

Mind you, at least there is also a Parliamentary inquiry, unlike here in Scotland!

Delays and bottlenecks at Commissioner level (either) allow authorities to entrench mistaken or abusive understandings as to how exemptions apply. Bad practice left unchecked becomes the (bad) norm. Whilst progress is being made, e.g., on the unreasonable withholding of officials' names, Frankel argues that ‘legitimate FoI requests are being blocked on a multiplicity of other grounds. Action to address these is long overdue’.

SCFOI Plans

Briefly outlining CFIInS plans for 2006 and beyond -

Awareness raising and facilitation

CFIInS is planning an ambitious programme of awareness raising and facilitation in the use of the laws - FOISA and EIRs. These will build on the helpful sessions which Maurice Frankel presents - e.g., last summer.

We will work, initially at any rate, through community councils. We believe in people using the law as much as they want in an effective and informed manner. Our work is dedicated to this aim.

Responding to the Review

As part of our main remit, which is to lobby for the best FOI standards/laws, we are currently considering our comprehensive response to 'Freedom of Information (Scotland) Act 2002 - One year on: A consultation on the operation of the Act after one year in force', like everyone else. At this point in time, let me focus on just two aspects:

a) Timing and context

Just why was a review of the freedom of information "regime" thought to be desirable or necessary at this very early moment in the life of FOISA? Given that it was first announced by the Minister at a conference last October, it must have been under political consideration for some months before then. This implies that, a mere few months after FOISA comes into force, moves to review it were already afoot! At the December Holyrood conference the Minister said It's vital that FOI is not undermined by misuse which may actually inhibit the free flow of information the Act is designed to help.

I hope that FOI will be increasingly used to meet peoples' needs to understand and participate in decision making, in policy making and in development of services and less used for gossip and to promote self interest[Note 6]

According to the Consultation document, "misuse" means submitting an "irresponsible" request [Note 7].

Similar remarks were made South of the border at the end of 2005 by the Lord Chancellor. Just like the Minister for Parliamentary Business, the Lord Chancellor starts by saying that most of the requests have been made to unearth "key information" on matters "which have a real impact on people's lives".

Then comes the same switch in tone Inevitably a small minority have not been so responsible. Asking about the number of windows at the Department for Education and Skills, or the amount of money that departments spend on toilet paper, diverts energy from answering worthwhile requests. So we are looking now at the operation of the act in these kind of areas to ensure that its central purpose is being honoured [Note 8]

So, both governments are rolling out a novel concept: the “responsible, honourable request” and its obverse, the “irresponsible, dishonourable request”. This is despite the fact that *so called* irresponsible, dishonourable requests constitute only a fraction of total requests.

The very notion is question-begging, as it is trite to restate that the authority has no legal interest in the reason for the request (whether for information about toilet rolls or not). In any event, both laws already provide for refusal to deal with “vexatious” requests. Is the dishonourable request to be considered something different - not actually provided in law? And, of course, there is also a natural disquiet that the concept being introduced is only perceived and defined in the governments’ terms.

To quote Al Roberts again Government officials may claim that...many requests...are probably inconsequential. We should be wary about jumping to this conclusion based on anecdotal evidence, or on evidence drawn from the bureaucracy's rather partial view of the FOI process [Note 9]

Quite so.

So, let me repeat myself: if - and it’s a big if - there should be a review at all, any review should be being carried out, as in England, also by the Parliament in addition to government.

b) Charging

On the issue of fees, let me draw peoples’ attention to a recent opinion piece penned by Al Roberts, ‘An open dialogue on FOIA fee reform’ [Note 9].

Official concern about the cost of FOI should always be regarded with a certain degree of scepticism. In 2005, for example, [UK] central government spent £166 million on advertising -- a figure which elicited little concern from Whitehall. Advertising, like FOI, is a form of information dissemination -- but done on the government's terms, not the citizens’.”

He memorably describes advertising/pres releases etc as “controlled information flow” to be contrasted with information disclosed as a result of requests, which are “uncontrolled information flows”.

Guess which category attracts most concern, financial or otherwise?

In this debate over fees, the example of Ireland is always quoted. We all know that when application and other fees were introduced, the numbers of requests fell dramatically. One opposition critic said that the changes "rendered the whole concept of Freedom of Information almost useless".

Usefully, however, Roberts provides other comparative material - from Canada. He cites changes from two Provinces:

- Ontario - fees for FOI requests were raised in 1995. The changes included a new five dollar application fee; higher fees for processing complex requests; and a new twenty-five dollar fee for making complaints to the province's Information Commissioner. The changes resulted in a thirty-five percent decline in the number of FOI requests. Requests for personal information, especially affected by the new fee formula, dropped by almost half. Requests for sensitive policy and management information appeared to decline by almost seventy percent over three years and

- Nova Scotia, application fees were raised from five to twenty-five dollars in 2002, and a new twenty-five dollar fee was introduced for appeals to the province's independent review officer. The review officer, Darce Fardy, reported in 2003 that the number of requests dropped by almost one-third, while the number of appeals dropped by forty percent.

Whilst I'm confident that the outcome of the review will be reasonable and sensible, the bottom line is, as Roberts says,

Fees must be adjusted carefully because changes that appear inconsequential *can have an unexpectedly large impact on citizens' use of the law.*' (emphasis added)

End Thoughts

We all have quite enough to be getting on with as regards FoI! But, there are several draft and actual legal strands which complicate the picture even further.

Both the States of Jersey and the Council of Europe are in the process of legislating on foi. As the FOIA is compared to FOISA (positively) it will be interesting to maybe compare both to what emerges in Jersey. And, it will be important to monitor the position of the UK if the Council of Europe's Steering Committee on Human Rights green-lights the drafting of the world's first treaty on the issue at its June 2006 meeting.

There are also the decisions of the Compliance Committee of the Aarhus Treaty (on environmental information) which is a review body above the Commissioner to bear in mind, and, much closer to home, the impending decisions and dicta as the Court of Session gets its teeth into foi for the first time from late 2006.

More significant though, in the short run, is the influence of the decisions of the Information Tribunal. Even though not formally part of the Scottish settlement, should we just ignore its decisions and reasoning? The Campaign has produced a useful paper on the first three decisions each of which "advances the case for greater openness." [Note 10]

In particular I am thinking of the decision concerning whether the Royal Mail did not "hold" the information because emails had been deleted, but which could be recovered using specialist techniques. How does the Tribunal's reasoning and decision square with the position of the SIC on the issue? And if it's not on all fours - should there be a change in Scotland?

Patrick Birkinshaw recently wrote

The trouble is that in [many cases] the decision on secrecy is the ultimately government's. Challenge in sensitive areas is difficult if not impossible. Or a problem results from indecision and failure by governments to act appropriately in relation to foi. [Note 11]

But, he concludes, "...at least we do have a FOIA. And I believe we are better for that." Sometimes just sometimes, I wonder - but, on balance, I do agree with him!

NOTES

[1] There's unfinished business in Scotland, see for England/Wales Statutory Instrument 2006 No. 88

The Local Government (Access to Information) (Variation) Order 2006. It makes changes to Part 5A (access to meetings and documents of certain authorities, committees and sub-committees) of, and Schedule 12A (access to information: exempt information) to, the Local Government Act 1972 ("the 1972 Act") both of which are concerned with access to meetings and documents of principal councils and certain committees and sub-committees of those councils.

[2] *Rare access - a report on problems of access to information*
Scottish Consumer Council Publisher: [Glasgow] [1982] ISBN: 0907067093

[3] <http://www.foia.blogspot>, Thursday January 26 2006
Daily Mail: 141; Daily Star: 14; Daily Telegraph: 105; Express: 122; FT: 86; Guardian: 198; Independent: 141; Independent on Sunday: 37; Mail on Sunday: 42; Mirror: 80
News of the World: 35; Observer: 44; People: 8; The Sun: 42 Sunday Express: 36; Sunday Mirror : 13; Sunday Telegraph: 26; Sunday Times: 130; The Times: 178 (taken from the full text index database Lexis Nexis) The figures showing an "averaging out" of interest in the National press with a fairly steady flow of stories appearing after the early peak and after the realities of using the Act have hit home. The figures for the individual papers show that all have shown some rest and it is not just confined to the "liberal media" we may have expected.

[4] <http://www.scotland.gov.uk/Topics/Government/FOI/Disclosures>

[5] http://www.pressgazette.co.uk/?t=article&l=too_much_freedom_to_block_foi_requests_is_hampering_progress

[6] <http://www.scotland.gov.uk/News/Releases/2005/10/03105649>;
<http://www.scotland.gov.uk/News/Releases/2005/12/12120142>

[7] Consultation document Para 12
<http://www.scotland.gov.uk/Resource/Doc/47121/0020707.pdf>

[8] <http://politics.guardian.co.uk/foi/story/0,9061,1675827,00.html>

[9] Al Roberts, 'An open dialogue on FOIA fee reform'
<http://www.ucl.ac.uk/constitution-unit/foidp/opinion-pieces/roberts-fees.html>

[10] <http://www.cfoi.org.uk/pdf/tribunalnote.pdf>

[11] P Birkinshaw, Amicus 62 (Nov-Dec 2005; Institute of Advanced Legal Studies)