

Rosemary Agnew (Scottish Information Commissioner)

Bingham Centre – Speaking notes

28 September 2015

Introduction

1. Good evening. Thank you so much inviting me. I am not using PowerPoint this evening but don't worry about keeping up with facts and figures as much of the statistical content and the main points of my presentation are taken from my special report which is available to download. I am also happy for anyone to contact me after this evening.
2. When I took up office as the Scottish Information Commissioner, one of the things that interested me was why powers to extend FOI had not been used. At that point they had not been used at all in Scotland.
3. I decided to look into this to try to identify why powers had not been used and what the impact of that was. This culminated in a Special Report laid before the Scottish Parliament to coincide with the 10th anniversary of FOISA coming into force.
4. What I thought I would do this evening is share with you some of the findings of that report and the thoughts that sat behind them.

Law

5. A good place to start is with the law itself.
6. There are various ways an organisation comes subject to FOISA and the EIRs (Environmental Information (Scotland) Regulations 2004):

FOISA

7. Let start with FOISA. An organisation becomes subject by:
 - (i) Being named in schedule 1 to the Act
 - (ii) By being added to schedule 1 through an order made under section 4, or through another Act of the Scottish Parliament. Section 4 is used to add organisations that are public authorities, eg, the Office of the Scottish Charity Regulator was added through an order in 2008.
 - (iii) By being designated through an order made under section 5 of FOISA. Section 5 gives the Scottish Ministers the power to designation organisations which are not or cannot be included in schedule 1 and *either*
 - (a) Appear to the Ministers to exercise functions of a public nature, *or*
 - (b) Provide a public service, under contract and on behalf of a public authority.

EIRs

8. The same provisions apply to the EIRs, and in addition organisations can be covered if they are
 - (i) Any other Scottish public authority with mixed functions or no reserved functions, or
 - (ii) Any other person who is neither a public authority nor a public office holder, who is under the control of such a body, person, office-holder or publicly owned company. There is more detail about this in my special report. You may also be interested in my decisions 099/2015 and 118/2014 which determined that Dunbritton Housing Association was a Scottish public authority for the purposes of the EIRs.
9. Tonight, I will concentrate specifically on section 5 as that is the provision which can be used to actually extend FOISA.

10. Section 5 has been woefully underused, and I think it is important to understand just what that means for FOI.
 - (i) We have seen an erosion of the right to information, and
 - (ii) There has been no extension to create a right to information where there has never been a right.
11. When we talk about extension of FOI we often mean restoration of lost rights, rather than the creation of new. The main reason rights are lost, is through the changing landscape of public service provision, eg privately run prisons, stock transfer of social housing to housing associations. Right now a lot of the debate about extending FOI is not really about extension at all, but about catch-up.

Why have powers not been used

12. So why have these powers been so underused. We identified a number of factors. I want to cover some of them this evening. They sound quite obvious when you hear them. The failure to have rights follow change is a large part of it but there are other reasons, particularly in relation to wider extension.

Political will

13. The Scottish Parliament makes the ultimate decision about designation through the passing of legislation, but the responsibility to propose and draw up legislation designating new bodies lies with Ministers. They have the power to propose, are required to consult and are required to report use of section 5 powers.
14. What this means in practice is the decision to extend FOI through designation powers becomes a matter for the government of the day. The designation may be through a legislative route, but the drive is political. Ministers have to want to designate!

Public function

15. Section 5 refers to “Appear to the Ministers to exercise functions of a public nature”. We sought a senior Council opinion on this as there is no definition of what functions of a public nature means in FOISA, and if one looks to other legislation, definitions vary subtly but significantly. We came to a number of conclusions, but to paraphrase, for the purposes of FOISA, functions of a public nature are whatever Ministers decide they are.
16. This means that to exercise designation powers, Ministers must first decide whether functions are of a public nature. This presents a couple of issues: how do they decide and the focus should be on the function rather than the organisation delivering it.

Fear

17. Fear of what being subject to FOI means in practice is understandable, but how well-founded is it really? Part of the challenge is the lack of data about the actual impact of FOI on resources. I want to offer some observations about burden in terms of cost and number of requests.
18. I will start with number of requests. In Scotland, schedule 1 bodies upload statistical information to my website and we publish it quarterly. We know that over the last two years, there have been over 60,000 information requests handled under FOISA or the eIRs annually. We know what exemptions have been applied, how many fees notices were issued and how often vexatious provisions were applied. Here is the surprise: fees are rarely charged and authorities do not make a lot of use of section 14, vexatious provisions.
19. But there is something even more fundamental than this to my mind, we still think of FOI as only being a cost and don't offset the benefits, and I am not sure we even know them, and more

to the point we always talk about cost of FOI as being something additional to our functions, the costs of FOI being attributed solely to information requests and not considered in the wider context. Costs can also be skewed as they reflect actual practice, rather than best practice and can vary because of the type of information held, efficiency of record keeping and retrieval systems and size of the organisation.

20. This is where the experience of the recently designated culture and leisure trusts has been really helpful. Most were good enough to respond to a survey we sent them. 63% of the trusts who responded said they had not experienced any increase in the volume of information requests. None of them reported a significant increase and well over half experienced no change in the type of information being asked for.
21. The feedback we received basically said there was little change to volumes. Before designation people asked for information: after designation they continued to in pretty much the same way.
22. 10 years of FOI, technology and expectations about being able to access information generally, suggest that as a society we do and will ask for information differently to how we did 15 years ago.
23. This then brings us on to cost. How sure are we that introducing FOI will really increase costs? Indications are that people ask for information anyway. Presumably we don't ignore people, so what *additional* cost does designation impose, and how is that offset against benefits. The appeal rate to me is very low, and the reality is many organisations are never subject of an appeal, the most expensive bit of the process. Responses may have to be more comprehensive, but even that is not always the case if advice and assistance

powers are used well, and authorities actively engage with requesters.

24. What about that troublesome requester who keeps asking for the same information but in a different way. Yes, and authority might keep ending up at appeal, but at least there is a definitive end point. Not being subject to FOI might not make the costs any less, just different – for example you might find yourself subject to investigation by an ombudsman if the requester makes a complaint about the authority's service.
25. We also found that preparing well for designation can mitigate costs to an extent.
26. The last point I would make about cost is that age old, it is an excuse for journalists to embark on fishing trips. Firstly, prove it! Secondly, if there really is an issue, then let's work together to try to address the specific issue, rather than lose all the positive benefits of FOI and transparency.

A better approach?

27. So is there a better approach? We think so.
28. We think that for existing rights, there should be a more automatic approach. The rights should follow the function. Had that been the case in the past, 15,000 households in Scotland would not have lost their enforceable right to information.
29. For extension, our view is we need a more thorough and transparent way of making the decision that a function is of a public nature and that designation is, on balance in the public interest. Our suggestion to Ministers is that they take a factor based approach: assessment of a number of reasons or arguments for and against designation. It is the Ministers' prerogative to weight these factors as they see fit in the conditions prevailing at the time.

30. The factors we suggested included:
- (i) The extent to which the organisation under consideration is taking the place of a public authority. In other words a public authority would have to deliver them if the organisation did not exist
 - (ii) The extent to which public funds pay for the service or the extent to which the state is prepared to pay.
 - (iii) Whether the organisation is delivering functions defined and or controlled by statute, or the state
31. This sort of approach would enable more balanced and considered decision making, would enable Ministers to be more transparent about their decision-making, help Ministers identify appropriate consultees and lead to greater more constructive engagement.

So why bother?

32. I am sure you will hear many arguments why FOI should and should not be extended, but for me it comes down to being something worth doing as a vital element of civic engagement and a cornerstone of a healthier society. FOI is not the only contributor but it is an important one both for the safeguards it provides and for the message it sends about the attitudes of those who make decisions on our behalf.