



Scottish Information  
Commissioner

*it's public knowledge*

Kenneth Gibson MSP  
Convener  
Scottish Parliament Finance  
Committee  
The Scottish Parliament  
Edinburgh  
EH99 1SP

28 September 2012

Dear *Kenneth*,

***Freedom of Information (Amendment) (Scotland) Bill: Stage 1***  
**Supplementary submission to the Scottish Parliament Finance Committee**

Thank you for the recent opportunity to appear before the Finance Committee to provide evidence on the FOI Amendment Bill during its Stage 1 considerations. I was pleased to have participated in, and contributed to, the evidence session, and it was good to meet with you and other Committee members to discuss the Bill's proposals.

Following on from the evidence session on 12 September, I would like to take the further opportunity to raise two supplementary matters with the Committee:

1. Discussion of a possible amendment to section 5 of the Freedom of Information (Scotland) Act (2002) (FOISA), in order to support the more effective use of this provision, and
2. I believe it would be helpful to draw the Committee's attention to a significant recent decision of the Upper Tribunal (Administrative Appeals Chamber), which, in my view, is highly relevant to the Committee's own consideration of the proposals to create an absolute exemption in relation to section 41.

**Section 5 Amendment**

While it is acknowledged that, as currently drafted, section 5 bestows powers on Ministers to designate additional Scottish public bodies, it is of considerable concern that successive administrations have not exercised these powers to bring forward an order under section 5 of FOISA to designate additional public authorities. Assurances were provided to the Scottish Parliament in 2002 that this power would be exercised, and research by this office has shown that there is substantial public support for the protection of FOI rights through designation.

This month sees the tenth anniversary of the enactment of section 5, and the lack of action or clear, specified intention to take it, leads to a growing concern that the existing provisions may not be 'fit for purpose'.

Scottish Information Commissioner

Kinburn Castle, Doubledykes Road, St Andrews KY16 9DS

T: 01334 464610 F: 01334 464611 E: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) W: [itspublicknowledge.info](http://itspublicknowledge.info)

Against this background, I offered to make some suggestions for possible amendments to section 5 as currently drafted, in order to support its effective use in the future.

I appreciate fully the points made by Ms Sturgeon that FOISA is not the only mechanism by which access to information can be given, but to have a stronger section 5 would enhance and strengthen the suite of measures available, including provision in other legislation relating to e.g. procurement and contractual obligations.

My suggestions are as follows:

**a) *A requirement for routine review***

At present, FOISA places no obligation on the Scottish Ministers to review regularly the bodies covered, nor to actively consider whether any should be added (or removed). The legislation would be significantly enhanced by the addition of a requirement for regular review of designation under section 5 (and also under section 4).

I suggest that a requirement for a regular (e.g. annual) review of bodies covered in relation to both sections 4 and 5 of FOISA by Ministers would be appropriate.

While I appreciate that setting the frequency of such a review in primary legislation may be problematic, this could be addressed by amending the legislation to ensure that the frequency of review is set by order, allowing appropriate further amendments to be made through secondary legislation.

**b) *A requirement for wider consultation***

At present, section 5(5) of FOISA requires prior consultation by Scottish Ministers with those to whom any order will relate. The weakness in this is it means that the requirement applies only to those bodies that are likely to be affected by the order and brought within the scope of FOISA. It does not require consultation with those who have rights under FOISA, or other relevant third parties. It is the limited scope of such consultation that contributed to the Scottish Government's conclusions in January 2011 that extension should not be taken forward at that time because it was "*not favoured by the majority of those bodies proposed for coverage*<sup>1</sup>".

As noted in the evidence to the Committee, the limited nature of such a consultation overlooks a fundamental key constituent – the users of public services who may have their information rights curtailed as a result of changes in the delivery of public services.

As a result, I suggest that an appropriate amendment to section 5(5) would be to build in a requirement for wider consultation that goes beyond those to whom an order would relate.

---

<sup>1</sup> See: [www.scotland.gov.uk/News/Releases/2011/01/26154714](http://www.scotland.gov.uk/News/Releases/2011/01/26154714)



**c) A requirement to consider the public interest**

Finally, I suggest that an additional appropriate amendment to section 5 would be the inclusion of a requirement for Scottish Ministers to have “regard to the public interest” when carrying out a review or considering an order under section 5(1).

Such a provision would mirror a current provision in section 23(3) of FOISA. This requires Scottish public authorities to have regard to the public interest when adopting or reviewing its publication scheme, in order to ensure that information which relates to e.g. the cost of services, the standards of services or the reasons for decisions is published.

The addition of an equivalent provision to section 5 would ensure that the public interest in access to information relating to the exercise of public functions or delivery of public services would be an essential key component to any future consideration by Ministers when assessing the need for an order under section 5.

Should the committee be minded to take any or all of these suggestions forward in its recommendations, I would be happy to either provide more information, or be consulted further on the precise wording of any provision.

**Recent Ruling of the Upper Tribunal**

The Upper Tribunal (Administrative Appeals Chamber) considers appeals against decisions of the Information Commissioner under the Westminster Freedom of Information Act (2000) (FOIA).

I would like to bring a recent, relevant ruling of the Upper Tribunal to the attention of the Committee which may assist it in its consideration of the proposals to create a new absolute exemption.

The ruling, *Evans v Information Commissioner* [2012] UKUT 313 (AAC), issued on 18 September, relates to requests for correspondence between Prince Charles and several UK government departments. The case concerned requests made prior to the creation of an absolute exemption under FOIA, so the Tribunal was required to consider the public interest test.

The requested information is described by the Tribunal as “*advocacy correspondence*”, which was “*seeking to advance the work of charities, or promote views*”. The Tribunal drew a distinction between correspondence of this nature and e.g. personal correspondence, or communications relating to the instruction of the heir to the throne in the business of government.

The Tribunal’s ruling required the disclosure of much of the withheld information, concluding that it will “*generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government.*” (Paragraph 4)

The ruling explores many areas relevant to the debate in Scotland in relation to the proposed amendment to section 2 of FOISA and the royal exemption. These areas include the need to ensure that certain information is protected, the nature and function of various constitutional conventions, and the consideration of the public interest in relation to "advocacy correspondence" of the type considered in this case.

The particular issue to which I would like to draw to the Committee's attention is a simple one - in making its decision, the Tribunal has clearly demonstrated that there are circumstances where it will be in the public interest for relevant information to be disclosed. This was set out by the Tribunal in its ruling when it stated that, in relation to advocacy correspondence:

*"...in general terms the balance is likely to be not only clearly but also strongly, and sometimes very strongly, in favour of disclosure."* (Paragraph 214)

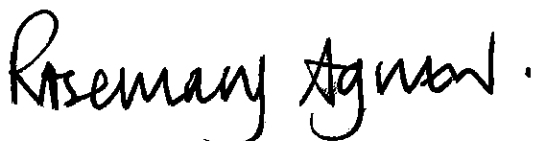
The Tribunal's ruling strongly supports the case for the retention of a public interest test in relation to section 41. The creation of a new absolute exemption which would set aside any equivalent strong public interest in disclosure would, in my view, be unnecessary, undesirable, and in conflict with the aims of Scotland's FOI law.

The full ruling from the Upper Tribunal is available on its website at:  
[www.judiciary.gov.uk/media/judgments/2012/evans-v-information-commissioner](http://www.judiciary.gov.uk/media/judgments/2012/evans-v-information-commissioner).

I hope that the above information is useful to the Committee in the preparation of its Stage 1 report.

If I or my staff can be of any further assistance in relation to this or any other matter, then please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, reading "Rosemary Agnew". The signature is fluid and cursive, with a large initial 'R' and 'A'.

**Rosemary Agnew**  
**Scottish Information Commissioner**