

Freedom of Information (Scotland) Bill

Friends of the Earth Scotland's Written Evidence

Introduction

Friends of the Earth Scotland welcomes the opportunity to submit evidence on the Freedom of Information Bill for Scotland. We welcome the Freedom of Information Bill and see its introduction as a clear commitment to the creation of the 'culture of openness' which Jim Wallace called for in 'An Open Scotland'. Access to accurate information is crucial to the proper functioning of a democracy, and Friends of the Earth has always championed the rights of communities and individuals to have access to information on their environment and on proposals and plans which affect them.

We now urge the Justice 1 Committee to tackle the remaining major weaknesses within the legislation and introduce a strong, practical and effective Freedom of Information Act.

Summary

The following is a summary of Friends of the Earth Scotland's major concerns about the Freedom of Information Bill as it is proposed. We elaborate on these points in the following sections.

- The excessive cost clause allows public bodies to ignore requests if they deem them to have originated from an organised campaign;
- Requests over a set amount (£500 being the proposed figure) could be automatically ignored regardless of the legitimacy of the request;
- Requests need not receive a response if they are made in person or over the phone;
- Environmental information is covered by the Environmental Information Regulations not the Bill. The Bill also fails to include a power to implement Article 5 of the Aarhus Convention;
- The exemption for 'information intended for future publication' does not include a provision to automatically release information that is not published after the allowed 12 weeks delay;
- The exemption on policy advice could be used to prevent the release of statistical information during the formulation of policy;
- The period in which members of the public can seek review of a decision is only 20 working days after which the public lose any right of appeal. This should be increased to 40 working days;
- The exemption for commercial-confidence is too vague and therefore open to misuse.
- There are no plans to provide bodies with additional resources to meet the cost of extra requests under the new system or for staff training;
- The Bill does not include strong enough sanctions against bodies who repeatedly make it difficult to access information or comply with the legislation.

Environmental Information and the Aarhus Convention

The current proposals entail a twin-track system where environmental information continues to be governed by the Environmental Information Regulations, stemming from European law, and almost all other information held by Scottish public bodies would be governed by the proposed FoI system.

The EU Directive on Access to Environmental Information is likely to be revised soon. It is also the declared intention of the UK to ratify the 1998 UN Economic Commission for Europe Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) soon. These developments would continue to see environmental information rights running ahead of those for other types of information.

New Environmental Information Regulations are being developed to accommodate these changes, and the Scottish Executive's stated intention is to introduce these at the same time as the new FoI regime. Clearly the ideal situation would be to introduce an FoI regime which is so good that it complies with the EU Directive and the Aarhus Convention, for both environmental and non-environmental information. This not being the case, however, all efforts should be made to ensure that new EIRs are introduced at the same time as the FoI Act. We are also very much in favour of the proposal that the new EIRs be regulated by the FoI Commissioner. In order to prevent public confusion and the prolonging of a two-tier system, we would also like to see provisions within the Bill to cover environmental information, making the Commissioner responsible for this area and harmonising the timescales between environmental information and other information, in the case of a delay in the EIRs introduction.

The Aarhus Convention will also require states to produce emissions' inventories, like that operate by the EPA in the USA and that under development by the Environment Agency in England and Wales. This should be moved along rapidly by incorporating an obligation on SEPA in the FoI Bill. To do this the FoI Bill must incorporate Article 5 of the Convention, the article relating to the 'Collection and Dissemination of Environmental Information'. At present the Bill only mentions Articles 3, 4 and 9. We are concerned that any pollution register which is introduced in Scotland will not be comprehensive and detailed enough to comply with the requirements laid out in the Aarhus Convention without this power.¹

Areas of concern

Friends of the Earth does not believe that the current proposals go far enough in some areas. There are a number of specific improvements which would make the proposed system more open, flexible and user-friendly:

Part 1 - Right to Information

- the new regime will only recognise requests for information if they are received in written form. **We believe that requests in person and by phone should also be covered.** This provision already exists in the Scottish Executive Code of Practice on Access to Information and without it certain sections of society, notably the disabled, may be disadvantaged. We do not believe that this extension of the system would be complex or expensive to implement (Section 8(1)).

¹ Dr Sylvia Jackson MSP currently has a motion on pollution inventories and a debate on this subject is expected soon.

- while the requirements for bodies to respond to requests for information and requests for reviews within 20 working days are strongly welcomed, **it would be unacceptable for the final Act to convey powers which allow these time limits to be extended** at a later date. These powers currently exist within the legislation and must be removed. (Sections 10(4) and 21(6))
- a Scottish public authority will not be obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as prescribed in the regulations, £500 being the suggested limit. **We believe there should be no cut-off point prescribed in the regulations rather every request should be considered on a case-by-case basis.** To combat excessive costs where requests cost more than a certain amount the request should be referred to the Commissioner to make a judgment and decide how much of the cost should be borne by the applicant (Section 12(1)).
- the new regime will also allow public bodies to ignore two or more requests if they perceive them to have come from an organised campaign and answering the requests would cost more than the prescribed threshold. **This proposal should be scrapped.** Firstly, it is open to abuse by public bodies who can wrongly interpret requests as originating from an organised campaign. Secondly, people have a democratic right to take part in an organised campaign and simply because they are doing so does not make their opinion or request count any less. Public bodies we have consulted do not believe this to be a significant problem. If excessive costs would be incurred as a result of a large number of people requesting the same information **the public authority involved should be under a duty to respond to the first of the requests then publish the information in an easily accessible form for the rest of the applicants (these people being notified of such action)** Genuine nuisance campaigns are dealt with under the ‘vexatious’ exemption (Section 12(2)).
- the draft FoI Bill limits the period within which applicants can ask for a review of a refusal for information to 20 working days. **This period of time should be lengthened to 40 days to aid the public.** It would be inappropriate for members of the public to have to respond within the same time limit as public bodies. Also members of the public lose any right of review after 20 working days while public bodies failing to adhere to this deadline suffer no consequences (*Section 20(5)*).

Part 2 - Exempt Information

- the exemptions for commercial confidence and information given under the confidentiality exemption are open to misuse. Although these are now better than those proposed in “An Open Scotland” they still leave room for misuse. **They need to be more fully defined to prevent information which has no commercial sensitivity being kept secret.** Detailed guidance will be necessary on which information can be withheld in relation to PFI and PPP projects, following Jack McConnell’s statement that public authorities should proceed on the assumption that PFI information will be made public. Similarly safeguards must be included to ensure that public bodies cannot simply transfer functions to trusts or other bodies which they set up to avoid their obligations under the FoI system. Further, we feel that having section 33(1)(a) as a class-based exemption is unnecessary. 33(1)(b), as a content-based exemption should be sufficient to protect a company’s trade secrets (Sections 33 and 36).

- the exemption for the Formulation of Scottish Administration policy represents a weakening of the provisions within the Code of Practice on Access to Scottish Executive Information which should not be permitted. **If this information is to be subject to an exemption it should be with the proviso that it is not a class-based exemption but rather a content-based exemption which is therefore subject to a test of substantial harm.** Ministers should also not be allowed to exercise the use of the veto with regard to this exemption as it relates to their own actions and communications (*Section 29(1)*).
- section 29(2) allows for the release of statistical information used to provide an informed background to policy decisions. **This provision, however, needs to be made more explicit to prevent statistical information from being withheld during policy formulation.** At present this section could be used to keep statistics secret. Again, we also feel that this should be a content, not a class, based exemption.
- information can be refused on the grounds that it will be published within 12 weeks. **This should include a requirement that if, after 12 weeks, the information is not published, it will automatically be sent to the person who requested it** (*Section 27*).

Part 7 - Miscellaneous and Supplemental

- as discussed above, the section on environmental information needs to include provisions on time scales and the Commissioner to revise the existing EIRs until such a time as new ones are implemented. Article 5 of the Aarhus Convention should also be included (*Section 62*).

Resources and Guidance

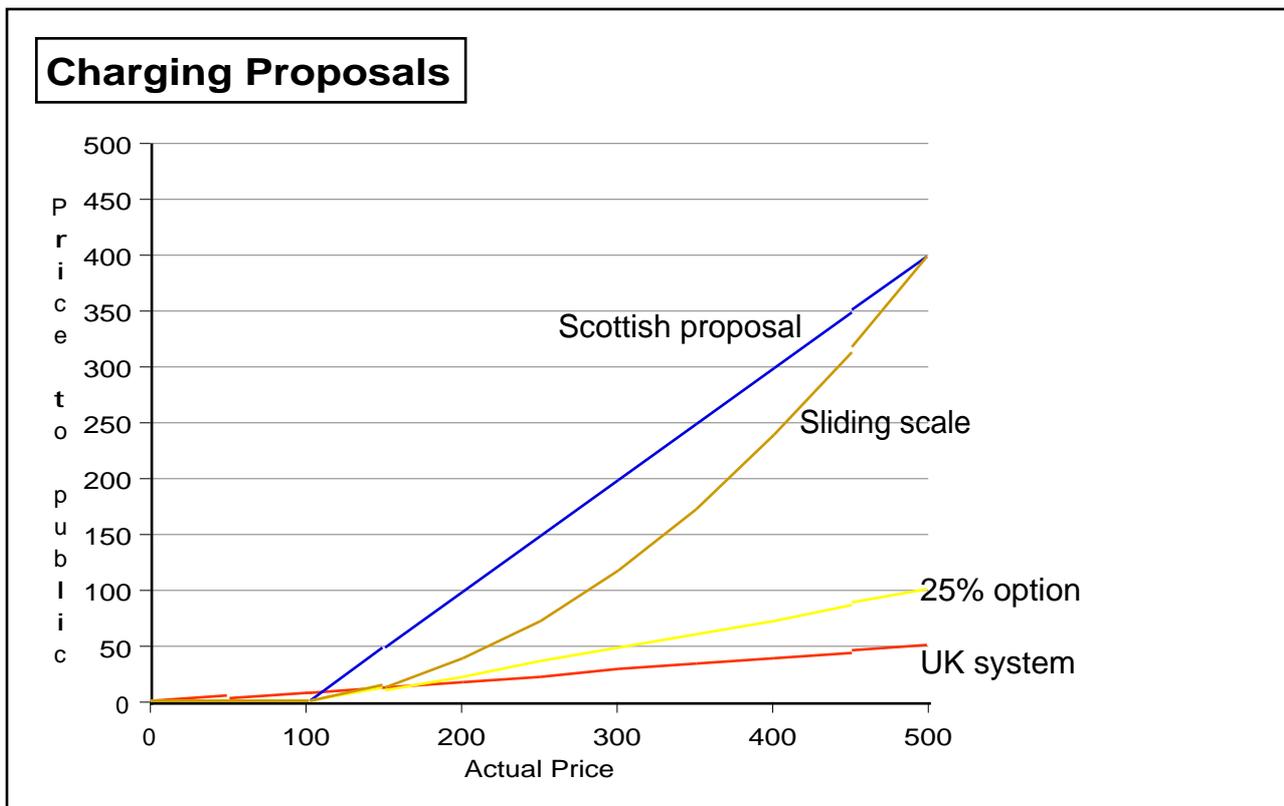
- the costs of dealing with extra requests under the new system are to be absorbed within existing resources, and although staff training and awareness programmes are mentioned there is no commitment from the Executive to fund these. Our experience is that the current system does not work well and that public bodies themselves do not always allocate enough of their resources to information provision. However, there will be bodies brought in by the Bill which have not previously been part of any information regime and consequently do not have any resources available to meet the cost of staff training, answering requests and installing information systems. In order to ensure that the provisions of the Freedom of Information Bill are implemented fully **there needs to be a review of all public bodies to establish which will require additional resources and the Scottish Executive needs to provide these resources, possibly through the SIC.**

Sanctions

- although we welcome the powers of the Commissioner to take a public body to court to force the release of information we believe that **there is a need for sanctions against bodies who repeatedly fail to give out information in an appropriate and timely fashion.** These need to be meaningful penalties for non-compliance, including significant fines.

Charging

- while charging is not on the face of the Bill we feel that the potential implications of any charging scheme are enormous and must be raised now. Charging could detrimentally affect equality of access under the Freedom of Information Bill. We welcome the charging proposal contained within the commentary on the draft Bill which prevented bodies from charging for information costing less than £100 to provide. **We are, however, strongly against the proposal that bodies would have the discretion to charge the full marginal costs of providing information costing between £100 and a maximum level set out in the regulations.** That proposal would set up a barrier to those on low incomes from participating in any new Freedom of Information regime. In its place we would rather see a system under which requests costing more than £100 would result in a set percentage of the cost being levied on the applicant. We recognise that this can not be as low as the 10% stated in the UK Act due to the first £100 being free but feel that a figure of 20-25% would not be unreasonable. Alternatively, a sliding scale could be introduced, whereby the higher the cost of meeting a request, the higher the percentage the applicant must pay.
- The following graph presents two alternative options to both the Scottish proposals and the UK charging regime. Both alternatives retain the Scottish proposal to make the first £100 free to the public. Beyond that level, option one would implement a set charge of, say, 25%. This would create a system more like the UK one. Option two is based on the sliding scale approach which would allow public bodies to recover almost all of their costs at the higher end of the scale. We would prefer the chosen charging system to resemble the set 20-25% option.



- as already stated we are also against the introduction of a maximum level of cost above which public bodies can refuse to supply information. We understand that SEPA too, amongst other bodies, is against the introduction of a maximum threshold. Under the current proposal of £500 it would only take 20 hours of work at a rate of £25 to reach this threshold. £25 is not even an especially high figure as FoES were recently quoted by a public body the rate of £50 per hour for labour costs.
Requests above a certain threshold should be referred to the Information Commissioner to decide where the balance of cost should lie. This should be subject to a form of means-testing again opening up the system to those on low-incomes with legitimate requests. Particularly in relation to environmental information, it is often the case that those living in low-income areas are those that need large amounts of information the most, for example when challenging a planning application.

In this document we have elaborated on Friends of the Earth Scotland's main concerns, however, we are supportive of a number of other changes focused on by other organisations, especially those with whom we form the Scottish Freedom of Information Strategy Group. We would echo UNISON's concerns, for example, regarding the coverage of the Bill and the entire Strategy Group's view that there should be no class-based exemptions.



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