

Title

An evaluation of the United Kingdom and Scottish Freedom of Information regimes:
comparative law and real-world practice

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Introduction

The executive veto of a judicial decision by the UK attorney general, namely, Dominic Grieve, to block the disclosure of letters written by Prince Charles to politicians was a blow to freedom of information (FOI). For nine years, the government resisted the FOI request from the *Guardian* for 27 pieces of correspondence between the heir to the throne and the ministers of seven government departments. In *R (Evans) v HM Attorney General* [2014] EWCA Civ 254 the court ruled that Grieve's executive overrule was unlawful. The government is set to appeal. But the use of a veto, in any event, and the ongoing saga is all in quite remarkable contrast to the operational practicalities of the FOI law in Scotland; and there are far more distinct differences between the home nation regimes still further.

Scotland finds itself so often in receipt of praise for having a stronger freedom of information regime. Media narration of high profile refusal notices south of the border, disclosures and, of course, any ensuing scandal which follows have been, perhaps, key to this all-too-common view. Are the overtures made to Scottish FOI otherwise justified? How the legislative differences play out on the ground is unknown: the consequences, if any, unheard. The Scottish provisions do, in actual fact, legislate for far stronger information rights for the applicant but there is, put plainly, a distinct paucity in any research which concerns comparative law and practice.

This article offers such a comparative evaluation of the home nation FOI Acts - namely, the Freedom of Information Act 2000 (FOIA 2000) and the Freedom of Information (Scotland) Act 2002 (FOISA 2002) - to provide a fundamental overview and an investigation of the diverging trajectory in operational practicality. The analysis of the statutes is complemented by case law, a nod to contemporaneous events and official information which, in all the circumstances, suggests that UK back-peddling and reverse-engineering is weakening FOIA 2000 while FOISA 2002, to the contrary, maintains stronger information rights for the applicant.

Technical similarities and a shared platform

There are some important affinities between the regimes which, at times, distinguish the home nation Acts from their international counterparts. There is also something of a special relationship between FOIA 2000 and FOISA 2002 which determines under which regime a request for information is to be considered; this seems an appropriate place to start a comparative evaluation.

FOIA 2000 provides a right of access to information held by public authorities. At s 1 the right to know is established by placing two related obligations on public authorities: First,

when an applicant requests information a public authority has a duty to write to the applicant saying whether it holds the information. This is known as the duty to confirm or deny. And second, if the authority does hold the information it must communicate it to the applicant. FOISA 2002 provides a single right: to be provided the information.¹ This difference, one of many, is largely aesthetic with no disparity to real-world practice. Differences, with little consequence, such as the general right, of course run throughout the parallel statutes; while the Acts are two different beasts they are, at least, of the same pedigree.

FOISA 2002, following a lengthy consultation period (1999-2001), followed on from the UK FOIA which had received Royal Assent in 2000. Coalition meant that the composition of Scotland's first post-devolution government involved internal balances of ministerial portfolios; the Liberal Democrat control of Justice afforded the party influence over freedom of information. The statutes, by agreement from the legislative centres and contrary to the original timetabling, both came into force on New Year's Day, January 2005. The UK, in turn giving way to Scotland, joined a world of FOI subscribers as something of a Johnny-come-lately: decades after its US cousin (1966) and commonwealth partners New Zealand (1982), Australia (1982) and Canada (1983).

FOISA 2002 provides any person who requests information from a 'Scottish public authority' which holds it a right, subject to conditions, to be provided with the information by the authority. FOIA 2000 applies to public authorities of the other home nations as well as to UK-wide public authorities, regardless of whether or not they operate in Scotland. Information held by 'UK public authorities' operating only from Scotland, such as the Northern Lighthouse Board, as well as cross-border authorities, such as the BBC, are subject to FOIA 2000. Any public authority, to which freedom of information legislation applies, is subject to only one regime. It is irrespective of whether that information relates to reserved or devolved matters. Furthermore, FOIA 2000 provides that information supplied by a Minister of the Crown or by a department of the UK Government and held 'in confidence' is not, for the purposes of the Scottish Act, held by the receiving Scottish public authority.² In effect, the information belongs to the UK and is not to be regulated, for the purposes of FOI, by the Scottish regime. The information instead falls under the provisions of the harsher FOIA 2000 tests for disclosure and the jurisdiction of England and Wales.³ There is no corresponding provision for information provided by the Scottish Ministers, for example, which is provided to their UK counterparts. To this extent the Scottish regime is on a loose lead and can be reined in on where certain information is disseminated from south of the border or to information which is otherwise produced in Scotland but perceived to be distinctly British. One could argue that the harmony of the parallel regimes relies upon FOIA 2000 taking a position of the parent or guardian to its Scottish counterpart. It is the dominant piece of legislation.

The greatest affinity is where both regimes extend the right to know to 'any person'; in this respect the Acts are universal and non-discriminatory of citizenship.⁴ This is not the norm in respect of the international experience: the USA, New Zealand and the newcomers such as Malta, Israel and Jamaica, to name but a few, contain citizenship or residency requirements. Both Scotland and the UK adopted the revered Swedish model of right to know universalism. It is undoubtedly beneficial to international policy makers, the global third sector, researchers and academics employing FOI. Consider, for one, historians accessing the National Archives. However, UK Minister of State for Justice, namely, Simon Hughes, earlier this year indicated that a consultation will be undertaken to review the applicant eligibility rules with a view to imposing restrictions in FOIA 2000.⁵

¹ FOISA 2002, s 1(1).

² FOIA 2000, s 3(2)(a)(ii).

³ See (eg) *Scottish Decision 036/2009*.

⁴ FOIA 2000, s 1(1) and FOISA 2002, s 1(1).

⁵ HC Deb, 18 March 2014, cols 638-639.

Universalism leads us to the applicant blind principle adopted by both regimes. A disclosure under FOI, in any jurisdiction, constitutes a disclosure to the world at large. Both home nation Acts are designed to be applicant blind. In view of this, the UK Information Commissioner (IC) and Scottish Information Commissioner (SIC) cannot take into account the often unique position of an applicant in determining a disclosure. For example, in Scottish Decision 029/2008, the applicant, a mother, requested information contained in her deceased son's social work records. But as the mother, for the purposes of FOISA 2002, the applicant is in the same position as a person with no prior relationship with the son.⁶ The requester's private interests are not necessarily the same as the public interest. What may serve the private interests of the requester might, bearing in mind the probability for wider dissemination of a FOI disclosure, in actual fact, constitute a detriment to the public interest especially where the wider concerns for privacy and confidentiality are relevant. The requester is an applicant equal to any other person seeking a disclosure to the world.

It is, of course, at times inherently difficult in all the circumstances for a public authority to maintain the applicant blind approach. Scottish Decision 280/2013 concerned a request from an applicant interned by the Scottish Prison Service (SPS) for the 'Hall Regime Plan'. The applicant was told upon his request that the information 'was available from landing staff'.⁷ The applicant requested a review of the SPS decision as he was unable to locate a copy. In response to the request for review, the SPS notified the applicant that his request should have been processed in a formal manner in line with FOI law. The public authority enclosed a copy of the Hall Regime Plan and, in turn, re-established the applicant blind approach successfully. After all, not everyone has access to the prison hall or landing staff. In other words, the response was one which would have mirrored that in all but the recipient's name to any other applicant under FOISA 2002. The maintenance of the applicant blind position is echoed in the guidance of the UK IC:

'The public interest issues that come into play when a qualified exemption is engaged are about the effect of making the information public, not the effect of giving it to a particular requester.'⁸

The position has also been upheld in UK case law: Hilary Benn MP, Shadow Secretary of State for Communities and Local Government, wrote on 07 January 2013 to the IC alleging that the responses to his FOI requests from his counterpart, namely, Eric Pickles, were nothing short of systematic refusals.⁹ Non-compliance by Pickles' Department was said to be justified, among other reasons, because disclosure under FOI to a member of Her Majesty's Opposition entailed 'the prospect of political and media exposure [...] being more likely'.¹⁰ In other words, the adopted view was that requests should not be complied with where they had an identifiable and, in the view of the public authority, objectionable motive. The Independent's Whitehall editor commented at the time:

'Labour said it was "scandalous" that the Government was wasting public money on "desperately trying to avoid being transparent". But the Conservatives accused the party of going on a "glorified fishing expedition" and insisted that ministers always followed "high ethical standards" in dealing with requests for information.'¹¹

⁶ para 12.

⁷ para 2.

⁸ *ICO Guidance: The public interest test* at para 40.

⁹ *UK Decision Notice FS50482167* at para 9.

¹⁰ *Ibid* at para 40.

¹¹ Wright, O. (2013) 'Eric Pickles' officials "tried to suppress emails"', *The Independent*, 13 September, at p 6.

The IC, of course, ruled against Pickles and upheld the applicant blind approach which prevents, in most circumstances, discrimination against the identity of the applicant.¹² The saga demonstrates an active unwillingness in places to co-operate with FOI on the grounds of an applicant's identity and the perceived motivation. Where this happens, such a response is likely to be unlawful in both jurisdictions.

Both regimes are to be congratulated in ensuring equality of applicants. This is contrary to many other regimes. In the US, for example, in order to determine the fees associated with a request, the applicant is obliged to cite and conform to one of five 'requester categories': commercial, educational, non-commercial scientific, media or other.¹³ This, in effect, deprives the requester of an applicant blind position. While the applicant blind approach cannot always be maintained by the home nations - contemporaneous dealings between applicant and authority will make identity and perhaps even motivation known - the position is at least recognised as fundamental to the proper functioning of an inclusive and universal FOI regime and the responses, as such, reflect that, or should at least in practice.

Both Acts detail what constitutes a valid request for information. In Scotland a request is valid where it is in writing or in another form which, by reason of it having some permanency, is capable of being used for subsequent reference.¹⁴ As such, requests for information to Scottish public authorities recorded during telephone conversations or left on voicemail systems are valid requests and are subject to the provisions of FOISA 2002 - so long as, of course, the request meets the other validity requirements involving the depository of the applicant's name and correspondence. The UK provisions are far more restrictive and oblige a valid request for information to be a request which 'is in writing'.¹⁵ It seems fair to suggest that the Scottish legislation permits those with literacy difficulties to seek alternative means of submitting a request. Furthermore, and contrary to FOIA 2000, there is an explicit provision to disabled applicants where they might wish to express a preference for receiving information.¹⁶ A search of both Commissioners' statutory decisions shows that there is, as yet, no case law on this matter. However, the limits of the duty at s 11(1) of FOIA 2000 - where an applicant may request the information disclosure in 'another form acceptable' - should not prevent public authorities from any duty to make special arrangements in light of the Equality Act 2010.¹⁷ There is no doubt that a response, for example, in braille would not be provided to an applicant under either regime. The lack of an explicit provision in FOIA 2000 to the rights of the disabled will not detract from other statutory duties; the explicit inclusion in FOISA 2002 can be considered a safeguard to the theme of FOI universalism, ensuring a plurality of applicants are afforded an unequivocal right to seek, receive and disseminate information.

Alternative mediums of correspondence afforded in the digital environment also present themselves as relevant to the question over the validity of a request in either regime. For example, the SIC warned against those public authorities which might question the eligibility of FOI requests submitted through Facebook or Twitter.¹⁸ On this issue the IC concurs:

¹² Grounds for discarding the applicant blind approach would be in justifying any reliance on the exemption for repeated or vexatious requests or where there, as a consequence of disclosure, may be a health and safety concern to the true applicant.

¹³ *US Office of Management and Budget: The statutory FOIA fee guidelines.*

¹⁴ FOISA 2002, s 8(1)(a).

¹⁵ FOIA 2000, s 8(1)(a).

¹⁶ FOISA, s 11.

¹⁷ UK Decision Notice FS50388585 at para 18.

¹⁸ Agnew, R. (2013) *Response during Q&A. 'Burdens or Benefits: New developments in information rights, communication and compliance'*. Scottish Centre for FOI, University of Dundee. 04 October.

'They [requests submitted via Twitter] can be valid requests in freedom of information terms and authorities that have Twitter accounts should plan for the possibility of receiving them.'¹⁹

So long as the other requirements of validity are met then FOI on both sides of the border adopts a position of technological neutrality; but furthermore in Scotland, a submission need not necessarily be in writing or, to that extent, even typed.

Both Acts provide a right to information. And the definition of what constitutes 'information' has, during the evolution of case law, been opined by the courts of both home nations. Information is defined at s 84 of FOIA 2000 subject to s 51(8) and s 75(2): information means 'information recorded in any form'. Until late this has generally been understood to mean that a request is for the information as opposed to a right to the documents in which the information is contained. In other words, by all means, public authorities are permitted to provide the information in a format of their choosing, usually, for example, as an extraction from a specified document. In *Parliamentary Standards Authority (IPSA) v IC & Leapman* [2014] UKUT 33 (AAC) the applicant requested the receipts provided by MPs in support of expenses claims. IPSA provided the applicant transcripts of those receipts. The applicant maintained a right to the original receipts - the documents in which the information was recorded. The case presented very good merits for the receipts to be disclosed, especially in light of the forged expense claims exposed in light of that particular scandal. Knight, from 11KBW Chambers, commented:

'What if an MP has submitted faked receipts which IPSA have overlooked, but which on sight of the originals show the relevant logo or trademark to be slightly wrong thus revealing the deception? What if it is said that a document was purely private, but the original reveals it to have been printed on Council notepaper? That is surely what FOIA is for.'²⁰

Judge Williams accepted that a receipt will typically have 'visual content to be seen, rather than read, but which may also require to be understood for the recipient to have appreciated the whole of the experience'.²¹ Marks, logos, lay-out and other details were, in this case, intrinsic to the information as a whole. The relaying of the extracted text alone neglected other information inherent in a receipt. In order to comply with FOIA 2000, the *IPSA* ruling required the receipts themselves, therefore, to be disclosed by the public authority.

A Scottish judgement some years prior, in *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, would appear, at first glance, to be contrary to the UK position. MacRoberts, a firm of solicitors, wrote to Glasgow City Council asking for the disclosure of specific statutory notices and insisted upon receiving copies of the originals, as opposed to the information contained within the documents. The court was satisfied that it is implicit in the definition at s 73 of FOISA 2002 that a distinction is drawn between the record itself and the information which is recorded in it. In the *Glasgow* case FOISA 2002 was confirmed to provide a right of access to information, not documentation. However, it would be wrong to suggest, while both cases consider the right to 'information', that there is necessarily a disagreement at this stage over what might constitute 'information'. The court, in the *Glasgow* ruling, was concerned with the format of disclosure as opposed to the merits of whether other 'information' was at all embedded in a specified document. For all intent and purposes in the *Glasgow* case all information could be extracted without changing the very nature of

¹⁹ ICO Guidance: Can freedom of information requests be submitted using Twitter?

²⁰ Knight, C. (2014) 'Freedom of Information: But What is Information? The Upper Tribunal Opines', *Panopticon Blog*, 28 January, accessed: <http://www.panopticonblog.com/2014/01/28/freedom-of-information-but-what-is-information-the-upper-tribunal-opines/>

²¹ *Parliamentary Standards Authority (IPSA) v IC & Leapman* [2014] UKUT 33 (AAC) at 22.

the statutory notice or the reading experience. It would therefore be unwise to presume that receipts from, for example, MSPs for the purposes of expense claims could be lawfully withheld under FOISA 2002 in light of *Glasgow*. Unless the applicant has asked for the information to be provided in a digest or summary, under FOISA 2002 at s 11(2)(b), the information provided must, in all the circumstances, 'be a complete and accurate version of the information contained in the specified documents'.²² The *IPSA* ruling will no doubt be of future relevance to FOI litigation in Scotland.

Elsewhere in the international arena the understanding of what constitutes 'information' for the purposes of FOI can be very different from the home nations. Such a difference is not least apparent in India where the law provides a statutory right to the inspection of work, certified copies of original documents, and even a right to samples of material – eg concrete, glass or steel perhaps being used in a construction project - held by a public authority or otherwise under its influence or control.²³ The definition and understanding of what constitutes information in the UK and Scotland, in light of such distinctions elsewhere, are by no means out of kilter with one another.

However, the legislative similarities and the differences shared in this overview so far, which result in little or no practical consequence to an applicant, are not reflective of the true narrative. While it is to be acknowledged that the pedigree of the home nation FOI regimes can be quite contrast to those which are afforded to applicants elsewhere in the world, there are differences north and south of the border also. Such differences mark more than mere nuances between the regimes but a divergence in the trajectory of the rights afforded to the applicants and operational practicalities of FOIA 2000 and FOISA 2002 since enactment.

Pronounced divergence between the home nation regimes

Both regimes contain provisions which allow a public authority to refuse to comply with a request for information where the cost of compliance is estimated to exceed a set limit. The set limit and the calculation of how an estimate of costs is achieved provides the first of the great distinctions in FOISA 2002 from its UK counterpart. Indeed those academics and practitioners familiar with FOIA 2000 alone might very well view the Scottish regime as somewhat alien in this respect, and others.

At s 12 of FOISA 2002 a Scottish public authority need not comply with a request for information if the authority estimates that the cost of compliance will exceed the amount set out in Reg 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (Scottish Fees Regulations). In Scotland, the public authority is entitled to charge for the direct and indirect costs incurred in 'locating, retrieving and providing information'.²⁴ The authority is not entitled to charge for any costs incurred in determining whether it actually holds the information.²⁵ In other words, the search to substantiate if information is indeed held is free. And, furthermore, the authority is prohibited from charging for any costs incurred in determining whether the information should or should not be disclosed.

For the purposes of the FOIA 2000 cost exemption, at s 9, the appropriate rules are defined in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI No. 3244 (UK Fees Regulations). The activities which may be taken into account when dealing with a request for information are different from the Scottish regime: Reg 4(3) permits charging for determining whether the information is held; locating the information; retrieving the information; and extracting the information. The initial search, contrary to FOISA 2002, is chargeable. If it will take time, too long a time,

²² *SIC Briefing Series: Guidance on validity of requests* at p 4 para 4.1.

²³ Right to Information Act 2005, at s 2(f).

²⁴ Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004, Reg 3(1).

²⁵ *Ibid* at Reg 3(2)(a).

to determine whether the information is held, then there will be no statutory requirement to provide it under FOIA 2000; the cost exemption is engaged where the staff time required by any authority to make a 'held/not held' determination exceeds the prescribed amount. Conversely, public authorities in the UK with poor recordkeeping will be rewarded. One could go further: Why digitise or improve record management if in doing so would lead to an increase in compliance with FOI requests? FOI should encourage good recordkeeping practice and so the charging for the determination seems counterintuitive, to say the least.

In Scotland, where the projected costs do not exceed £100, no fee is to be payable.²⁶ Where the estimate exceeds £100 but does not exceed £600, the fee, if indeed asked of the applicant by the authority in any case, is not to exceed 10 per cent of the difference between the projected costs and £100.²⁷ The maximum cost, therefore, is £50 (10 per cent of (£600-£100)). The estimate of the cost of staff time in locating, retrieving or providing the information is capped at just £15 per hour per member of staff in Scotland.²⁸ On staff cost alone the regulations therefore permit at least 40 hours of dedicated time per request for the prescribed activities in responding to a request. However, the UK Fees Regulations indicate that staff time is to be charged at the flat rate of £25 per hour.²⁹ The appropriate limit is currently £600 for central government and £450 for all other UK public authorities.

There are two important issues to evaluate in the monetary limitations afforded: First, the UK regulations equate to 24 hours of dedicated time per request submitted to central government or 18 hours work for any other public authority. It is, therefore, 16 hours and 22 hours, respectively, less than what any Scottish public authority will dedicate to a submission under FOISA 2002. And second, a note on the wording of the respective regulations: The Scottish rate is not only lower but it is 'capped' as opposed to being a 'flat-rate'. In other words, the number of hours dedicated to the appropriate tasks associated with any FOI request might indeed even exceed that of 40 hours in Scotland where the authority utilises the assistance of a lower waged individual. In Scottish Decision 211/2012, the SIC was not convinced by the Government in Edinburgh that the task, as a whole, of responding to a request for the engagements of a special adviser justified the maximum hourly rate of £15 per hour.³⁰ In Decisions which have followed, the Scottish Government has altered the hourly rate in calculating the cost estimate. In Scottish Decision 055/2013 the Government's estimate for retrieving information relating to the knighthood of Sir Brian Souter was calculated on the civil service staff grade at A3. This was appropriate for the staff who would undertake the search on *Objective*³¹ at £9.50 per hour.³² Clearly, public service wages are of little, or no difference outside London at least, between the nations. But the cost limitations and their application present a barrier to the extent of work which will be dedicated to a response and the amount of information disclosable in so far as that which can be accomplished within the cost of staff time. The Scottish applicant is in a far more favourable position as a result.

There are also differences concerning the rules of aggregation relevant to a public authority's calculation of costs for the purposes of the cost exemption. In Scotland, multiple requests contained in the same piece of correspondence, from the same applicant, are read as self-standing submissions, as opposed to constituent parts of the same request. In Scottish Decision 055/2013 the applicant submitted ten separate letters to the Scottish Ministers requesting information regarding the knighthood awarded to Sir Brian Souter and the Ministers' involvement in the honours system. The

²⁶ Ibid at Reg 4(2).

²⁷ Ibid at Reg 4(3).

²⁸ Ibid at Reg 3(2)(b).

²⁹ Ibid at Reg 7(5).

³⁰ para 34.

³¹ *Objective* is the Scottish Government's electronic records and document management system.

³² para 65.

ten letters contained 35 separate information requests. Each request constitutes a different request for the purposes of FOISA 2002 and, as such, each of the 35 requests assumed its own cost limit. Similarly, in Decision 161/2012 where the applicant asked the SPS for information relating to the procurement of a laptop facility and any correspondence relating to the implementation of a policy for prisoner access to such a facility, this required the need for two distinct cost estimates to be undertaken by the authority. Aggregation of any one person's requests is not systematic; indeed, it is quite to the contrary:

'In a small number of cases, the Commissioner has found that multiple requests made in the same letter or email are so interconnected that the requests should be treated as one for the purpose of determining whether the cost of complying with the request exceeds £600.'³³

It is in these 'small number' in which requests, in practice, are ever aggregated. In Scottish Decision 134/2012, the Commissioner was satisfied that the applicants six requests, for minutes of meetings held by the Scottish Criminal Cases Review Commission, could be considered as one because separating the information required to address and calculate the six requests was a contrived affair. The SIC said:

'Essentially, on any reasonable interpretation, the information requested is such that the identification and location of what is required to address each point cannot realistically be separated out into discrete tasks [...].'³⁴

Aggregation is, however, systematic at the coal face of the UK FOI regime due to lax rules governing the practice. At s 12(4) of FOIA 2000 a public authority can aggregate the cost of complying with two or more requests subject to the conditions at Reg 5 of the UK Fees Regulations: providing the requests come from the same individual within a 60 working day period and concern similar information. In UK Decision FS50503796, the applicant's requests for information held by the Commissioner of the Metropolitan Police Service - which concerned surveillance operations - were aggregated and upheld as exempt at s 12 of FOIA 2000 by the IC on appeal. What seems troubling, in this case and others, is the test for lawful aggregation. The requests, in FS50503796, sought information regarding the number of surveillance operations undertaken, details relating to staff commitment and the number of persons under surveillance. The information requested was not held as an aggregate record. The information was not indistinguishable from one request to the next, as the Scottish regime would have understood. The UK test for aggregation merely depended upon a test of 'similarity, to any extent'.³⁵ It is based on mere thematic judgement making aggregation of any one person's requests systematic. Aggregation in Scotland, to the contrary, depends upon whether separating the information required to address and calculate the interconnected would be 'a wholly artificial exercise'.³⁶ The test for aggregation is more than a little inconsistent between the home nation regimes. The UK Fees Rules, in comparative terms, present an impediment to the rights of applicants under FOIA 2000.

FOI regimes the world-over employ set times for any public authority to handle a request for information; but some regimes employ far less ambiguous rules than others. Scottish public authorities have a statutory duty to respond within 20 working days (or 30 if transferred to the Keeper of Records).³⁷ At s 73 of FOISA 2002 a 'working day' is defined as any day other than a Saturday, Sunday, Christmas Day or a day which otherwise constitutes a bank holiday in Scotland. The deadline for response under FOIA 2000 is, however, far less clear, allowing a public authority more time, 'such time as is

³³ *SIC Briefing Series: Fees and Excessive Cost of Compliance* at page 6

³⁴ para 14.

³⁵ *UK Decision Notice FS50508195* at para 16.

³⁶ *Scottish Decision 1312/2012* at para 14.

³⁷ FOISA 2002, s 10.

reasonable in the circumstances,' where the authority has not reached a conclusion to the public interest test in relation to the duty or confirm or deny or in relation to its application of a relevant exemption.³⁸ A response must, in any case, be given within 20 working days in compliance with s 10(1), however, that response could be a mere indication that no decision has yet been reached and an estimate of the date by which the authority expects that a decision will be reached.³⁹ And unlike other regimes, such as the US, there is no statutory entitlement whatsoever to the expedition of a request in the event of such delay. The UK regime has also lifted the time limits for certain public authorities in order to effectively suspend information requests which fall outside of the working season.⁴⁰ It appears incredibly difficult to see how ever the right to know can be effectively extinguished during, for example, the recess weeks of a scheduled public authority. While a suspension of FOI might be all very well for the tightening of the public purse, it is hard to justify removing the right of access while, at the same time, acknowledging it to be a fundamental human right.⁴¹ Applicants under FOISA 2002 are not impinged by such restrictions.

Scottish public authorities must respond within 20 working days following the date of receipt of the requirement for a review where the applicant, who is dissatisfied with the way in which the public authority has dealt with a request for information, seeks one.⁴² This is the first stage in the Scottish appeals process and provides the authority with an opportunity to re-consider the disclosure of information before an applicant approaches the SIC for a decision. FOIA 2000, to the contrary, offers no such statutory duty; a public authority has no obligation to undertake an internal review. This is incredibly disappointing when we consider institutions with some of the largest expenditure budgets - of course, those which in all the circumstances constitute UK public authorities and fall under FOIA 2000 - refuse to re-consider any refusal notice. The BBC, with an annual turnover of £5.09bn, £3.6bn from the license fee, having been plunged into a legitimacy crisis as a result of, among other things, a culture of secrecy, even today refuses to implement any internal review procedure. The applicant is instead directed to the UK IC should they wish to appeal a refusal. Where a UK public authority fails to offer an internal review, the complaints process, for the purposes of FOIA 2000, can be described as having been 'exhausted' at s 50(2) - although, in reality, it never commenced. This exhaustion provides the legal basis for the IC to proceed in making his own determination. But the IC can take months and in some instances - 23 in the session of 2012/13 - years to conclude a determination.⁴³ An approach to the IC, for many, is the first stage of the appeals process when requesting information under FOIA 2000.

The Campaign for Freedom of Information (CFOI) describes the UK regime as employing 'the most elaborate appeals processes of any in the world'.⁴⁴ An appeal involves the possibility of a non-obligatory review by the public authority of its decision first, then a determination by the IC. On a point of law an appeal can then be made to the Information Tribunal's lower, then upper tier, the High Court, the Court of Appeal and, in turn, to the Supreme Court where necessary. The time taken for a decision and the appeal mechanisms leaves an unfortunate assault course for the applicant under FOIA 2000 to manoeuvre, in which they could be participant to an overtly legalistic battle of years for a disclosure - or final refusal.

³⁸ FOIA 2000, s 17(2) and (3).

³⁹ FOIA 2000, s 17(2)(b).

⁴⁰ SI 2004 No.3364, SI 2009 No. 1369 and SI 2010 No. 2768.

⁴¹ See (eg) *International Covenant on Civil and Political Rights*, Art 19; *Universal Declaration of Human Rights*, Art 19; and, among others, the *European Convention on Human Rights*, Art 10.

⁴² FOISA 2002, s 20(1).

⁴³ ICO. (2013) *Information Commissioner's Annual Report and Financial Statements 2012/13* at p 23.

⁴⁴ CFOI. (2009). 'Press Release: Iraq veto decision "extremely retrograde"', 24 February, accessed: <http://www.cfoi.org.uk/foi240209pr.html>

Under the Scottish FOI regime, a mandatory internal review by a public authority is followed, where necessary, by an approach to the SIC for a decision. Where the SIC fails to reach a decision on an appeal after four months, or other reasonable period, the applicant is invited, should they so wish, to approach the Court of Session for a judicial review. The SIC is the final arbitrator. Scotland rejected the extra appellate tier for appeal. On a point of law an appeal against a decision from the SIC is instead made to Scotland's supreme civil court, namely, the Court of Session. This is equivalent to the UK High Court. An appeal can then be made to the Supreme Court in London where, of course, it has power to hear a case concerned with human rights issues under the European Convention on Human Rights. The Supreme Court serves as the final court of appeal in such matters; to date just one case has been considered here.⁴⁵ The Scottish system provides a distinctively less formal and far speedier appeal system.

The Scottish White Paper on Freedom of Information stressed the importance for the right of access to information to apply broadly with exemptions drawn 'as narrowly and precisely as possible'.⁴⁶ This is in contrast to the drafting of FOIA 2000. The White Paper, *An Open Scotland*, noted:

'Focussing on the **number** [WP emphasis] of exemptions in any given regime is not, however, particularly constructive or helpful. A regime with a small number of very broad, all-encompassing exemptions, would be significantly less open than one with a great number of exemptions where these are drawn tightly to protect specific categories of sensitive information.'⁴⁷

An Open Scotland included an annex of proposed exemptions which diverged from the UK limitations. First, the White Paper outlined that where information related to incomplete analysis, research or statistics which, upon premature disclosure, could be 'misleading or deprive the holder of priority of publication or commercial value,' there would exist a prejudice-based exemption.⁴⁸ In turn the inclusion of s 27(2) in FOISA 2002 allowed Scottish public authorities to withhold information if the information is obtained in the course of, or derived from, a programme of research.

In practice the exemption prevents a pre-emptive disclosure which would be to the commercial detriment of the author and university⁴⁹ whom, after all, may wish to translate the research into a commercial publication, patent or, in turn, even a spin-off. A search of the SIC's decisions by the author determines her office to have never needed to formally uphold the provision on appeal. There is no case law.

Universities subject to FOIA 2000 and not FOISA 2002, however, at present, systematically rely upon two exemptions in substitution of Scotland's research exemption, namely, by way of s 22(1) as the information would be intended for future publication and/or s 43(2) as it is likely to prejudice commercial interests.⁵⁰ The UK IC must be satisfied that, at the time of a request, it was the intention of the public authority to publish the requested information in its entirety in order to uphold section 22(1).⁵¹ But it is inherently difficult for a research academy to foresee the information, if any, destined for future publication during a project.

The need for a specific research exemption, previously identified in the Scottish White Paper, was recognised during the UK post-legislative scrutiny of FOIA 2000 in 2011.

⁴⁵ *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55, on appeal from [2012] CSIH 30.

⁴⁶ *An Open Scotland (WP)* at para 4.20.

⁴⁷ *Ibid* at para 4.21.

⁴⁸ *Ibid* at annex C.

⁴⁹ *SIC Exemption Briefing Series: Information intended for future publication* at p 3.

⁵⁰ See (eg) *UK Decision Notice FS50349323*.

⁵¹ *UK Decision Notice FS50121803* at para 61.

Responding to oral questions academics stated the UK exemptions used in substitution were not fit for purpose: principally, time limits for publication are peculiar to universities and the competitive characteristics to research are unique.⁵² The blanket approach was untenable:

'[T]here is a specific problem for ongoing research in universities which needs to be addressed by provisions on the lines of those operating in Scotland under the Freedom of Information (Scotland) Act 2002.'⁵³

The Westminster Intellectual Property Bill, at the time of writing awaiting consideration of amendments by the House of Lords, will achieve this task. The Bill will bring about a prejudice-based exemption for research data after s 22 of FOIA 2000, with a near-identical insertion to s 27(2) of FOISA 2002.⁵⁴

FOISA 2002 exemptions are tightly drawn and relate to specific types and categories of information. It is an example of where the UK regime has looked to Scotland's great number of exemptions which are drawn, very precisely, in rejection of the 'one size fits all' FOIA 2000 drafting. Despite this, heed should be taken to the omission of the test for 'substantial prejudice' drawn in the Scottish Act for mere 'prejudice' in the UK Act; major differences still present themselves in the reach and extent of transparency even where attempts are made to align the trajectories of the regimes.

If the public interest in disclosing the information is equal to or greater than the public interest in maintaining the exemption, then the information must be disclosed under FOISA 2002.⁵⁵ Likewise, if the public interest is equal on both sides of the interest test under FOIA 2000, then the information must be released.⁵⁶ The presumption, therefore, in both regimes is in favour of disclosure. However, the key is not the presumption, which is all very well, but the weighting exercise which determines when such a presumption can be made.

In circumstances where a weighting exercise is to be undertaken, the UK regime employs a harsher hurdle to achieve any disclosure. Refusal notices under FOIA 2000 need merely demonstrate grounds of prejudice, whereas in Scotland the authority must demonstrate substantial prejudice in order to withhold information. This is particularly peculiar where exemptions are identical to one another in either Act such as the proposed research exemption, or at section 28 of both FOIA 2000 and FOISA 2002: relations between the administrations of the United Kingdom. It is therefore foreseeable that information that is withheld under FOIA 2000 may be disclosed to the world under the equivalent FOISA 2002 provision where held by a Scottish public authority.⁵⁷

There are other examples too where the Scottish administration has looked south and has considered, at least, convergence in order to join up the regimes. The Constitutional Reform and Governance Act 2010 (CRAG), passed just before the 2010 UK general election, created a new absolute exemption in FOIA 2000 for correspondence with the Crown and other members of the royal family. By virtue of the amendment, section 37 of FOIA 2000 became absolute in respect of:

- communications with the Sovereign;
- communications with the heir or second in line to the Throne; and

⁵² Justice Committee. 1st Report: Post-legislative Scrutiny of the Freedom of Information Act – v II. Minutes of Evidence: Examination of Witnesses, HC 92-ii Q 103-108.

⁵³ para 243.

⁵⁴ Intellectual Property Bill HL 102 55/3, clause 20.

⁵⁵ *SIC Exemption Briefing Series: The Public Interest Test* at p 1.

⁵⁶ *ICO Guidance: Public Interest Test (PIT)* at p 22, para 54.

⁵⁷ *SIC Exemption Briefing Series: Relations within the United Kingdom* at p 9.

- communications with a person who has subsequently become heir to or second in line to the Throne.⁵⁸

The public interest test does not apply to the royal exemption and nor does it apply to the exclusion of the duty to confirm or deny whether that information is held. The Scottish Government, during extensive debate during the passage of the Freedom of Information (Amendment) (Scotland) Bill, appeared willing to follow suit:

'Scottish Ministers consider that it is appropriate to broadly mirror the amendments introduced by CRAG in the interests of a common approach throughout the UK to the treatment of information relating to Her Majesty.'⁵⁹

Despite early wavering, however, the Freedom of Information (Amendment) (Scotland) Act 2013 made no retraction of a public interest test to the synonymous royal exemption at s 41(a) of FOISA 2002. The exemption applies to information too that relates either to communications with the Queen, other members of the Royal Family or the Royal Household. While the exemptions contained within both regimes are classed based - which means that information falling within the description automatically engages the exemption regardless of whether there would be any harm in disclosure - FOISA 2002 requires the authority to consider the public interest test. The parallel regimes do not abide by any universal rule as to when a public interest test is relevant. In Scottish Decision 105/2007 a single minute item relating to her Majesty, which engaged the exemption at s 41(a) of FOISA 2002 - which would otherwise have rendered the information absolutely exempt under FOIA 2000 as amended by CRAG - was disclosed on appeal upon the SIC's assessment of the public interest test.⁶⁰ Further disclosures from within Scotland will follow where they would otherwise fail, or suffer delay, under the amended FOIA 2000. In Scotland the public interest test, where it is applicable to a synonymous exemption shared by both regimes, in any case, will always require a far higher barrier of harm to be demonstrated by an authority in order for that authority to lawfully withhold information from an applicant. The Scottish regime is, therefore, more disclosure prone.

An additional metric: political will

While there are synonymous exemptions which operate differently, there are also exemptions otherwise omitted in FOISA 2002 when compared to its home nation counterpart. One such lack of any corresponding provision in FOISA 2002 is the FOIA 2000 exemption for parliamentary privilege at s 34. It is an omission perhaps more reflective of a divergence in political culture at Holyrood. The Scotland Act 1998 does have a number of provisions designed to give protection to the Scottish Parliament so that it can conduct orderly business; but there is no concept of parliamentary privilege in relation to Holyrood or its members in the sense understood by Westminster. The lack of an exemption demonstrates a far deeper distinction: a belief that sovereignty is held in the public gallery rather than by Parliament itself or the Crown. The relationship between the state and the governed could be said therefore to have been expressed by the omission of privilege in FOISA 2002. Holyrood, for the purposes of FOISA 2002, is a public authority like any other scheduled; there are no explicit exemptions or even derogations for thematic information. The lack of privilege was undoubtedly a contributing factor to the differences in reaction to both parliamentarian expenses scandals where one authority, namely, Holyrood, undertook a reactionary transparency revolution while the other, at the House of Commons, cowered while members sought curtailment to the FOI law.

⁵⁸ CRAG, s 37(1)(a)-(ad).

⁵⁹ Scottish Government Consultation On Proposals for A Freedom Of Information (Amendment) (Scotland) Bill at Part C, para 23.

⁶⁰ para 157-161.

Freedom of information is an awkward fit in a country, Britain that is, which is considered to govern and conduct its affairs with a cloak of secrecy second-to-no-other among the advanced liberal democracies, particularly where this concerns the scheduling of the Houses of Parliament as public authorities for the purposes of FOIA 2000. FOI is something of an affront to the conventions of traditional constitutional governance, undermining, for one, parliamentary sovereignty and privilege. FOI challenges many of these traditions including the collective responsibility of ministers to Parliament and the tactical advantage to a government within the parliamentary environment of controlling the timing and circumstances of information disclosures. If either House decides that disclosure of information would infringe upon such privileges, it is, upon agreement of the Speaker of the House of Commons, or the Clerk of the Parliaments on behalf of the House of Lords, permitted an absolute exemption from disclosure. In practice the information which can trigger the exemption includes committee reports and drafts not otherwise published; memos submitted to committees; or correspondence between members, House officials, ministers and government officials, where the correspondence directly and specifically relates to House or committee proceedings.⁶¹

There is, in other parts, a distinct unwillingness in Scotland to rely upon other provisions of FOISA 2002, which are, in actual fact, shared with FOIA 2000. The UK government appetite for issuing ministerial vetoes, in effect overriding any statutory decision which compels the disclosure of information, is not shared by Edinburgh. The UK has exercised the power to veto a disclosure now on seven occasions. The sixth veto in *Evans* found the reliance, at s. 53 of FOIA 2000, to be, in that case, unlawful. The government is to appeal. The case itself has been amply covered in detail elsewhere. Scotland has never relied on its power to veto a disclosure at s 52 of FOISA 2002. It would seem a difficult provision to rely upon in any case: the veto only applies to the class-based exemptions; the information requested must meet a threshold of 'exceptional sensitivity'; and the First Minister himself must submit the veto to the SIC only after consultation with his ministers.⁶² New Zealand, which like Scotland requires collective cabinet responsibility for any executive override, has not relied upon it since 1987. And Australia has since abolished its veto altogether.⁶³ In a country, a small one at that, usually more familiar with coalition government and a distinct lack of ceremony in public service, it seems the veto in Scotland, bearing in mind the conditions of its use, might very well, at least, fall into a state of *desuetude*. The power and extent of the veto in the UK, meanwhile, is being fought for by the government in a feud with the press.

UK government reliance on the exemptions might reflect deeper distinctions in political culture north and south of the border. The spats between the UK IC and senior ministers, such as Gove and Pickles, are an all-too-common feature of UK FOI. And party colours too impact upon the scope, power and trajectory of the FOI regime. The UK appetite for privatising public services to third parties, for example, effectively reduces the scope of FOI and, in turn, removes the prospect of public scrutiny. Privatising prisons and some NHS services, to name but a few, in England and Wales, is contrary to the politics of Holyrood. The divisions of FOI will therefore continue to diverge between the nations as those organisations scheduled for the purposes of FOIA 2000 retire from designation; in Scotland they will remain. Furthermore, the designation of public authorities in Scotland, for the purposes of FOISA 2002, has, to the contrary, been readily expanding.⁶⁴ The IC is currently looking into the issue of transparency in the outsourcing of public sector contracts – it is a growing concern.⁶⁵ And the likes of Margaret Hodge, adversary to secrecy and chair of the Public Accounts Select

⁶¹ *ICO Guidance: Parliamentary privilege* at page 5.

⁶² FOISA 2002, s 52.

⁶³ Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009.

⁶⁴ See (eg) The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013.

⁶⁵ Wood, S. (2014) 'Ensuring transparency isn't the cost of outsourcing', *ICO News Blog*, 05 March, accessed: <http://iconewsblog.wordpress.com/2014/03/05/ensuring-transparency-isnt-the-cost-of-outsourcing-05032014/>

Committee, have spoken out for an end to the curtailment of transparency as a result of outsourcing, especially in the aftermath of the G4S and Serco scandal - although the UK government seems far less keen.⁶⁶

The spirit of the regime is perhaps stronger in Scotland where its drafting was influenced by Liberal Democrats, has been amended and strengthened by the autonomy-courageous SNP since 2007, all-the-time inside a stateless-nation much less appreciative of ceremony and tradition and where parliamentary sovereignty is not enshrined. The Scottish Government's six FOI principles underline the FOI regime as necessary for open democratic government. This cultural divergence has not been a concern of this article, not too any great extent at least, but these are considerations which are intrinsic to the evolution of FOI and the trajectories of the respective laws.

Conclusion

The overtures made to Scottish FOI appear to be justified - certainly, at least, in comparison to FOIA 2000. The rights afforded to applicants and the designated list of scheduled public authorities have been protected and expanded in FOISA 2002 since enactment. This evaluation highlighted in the course of its overview that universalism, the rules governing the cost exemption, the SIC's rulings on aggregation, the exemptions themselves, of course, and the weighting exercise as part of the public interest test, in all the circumstances, afford pronounced advantages to the applicant under FOISA 2002. The amendments which curtail the rights of the applicant under FOIA 2000 have been, broadly speaking, avoided in Scotland.

It is perhaps surprising that divergence has reached a point where a disclosure of synonymous information held by a Scottish public authority may be otherwise exempt should the same request have been considered under FOIA 2000 by a UK public authority. It can be said then that the Scottish regime does indeed offer far stronger information rights to applicants on the ground in real-world practice. The regime is one which is certainly, as a result, more disclosure prone than its UK counterpart.

An FOI disclosure to the author, in research for this article, revealed Scots civil servants expected convergence of the regimes in light of the conclusion to the UK post-legislative scrutiny of FOIA 2000. The divergence would cease, it was thought.⁶⁷ It has not. And it seems terribly unlikely there will be any convergence in the near-future in light of, among other reasons, current mutterings at Westminster.

The legislative differences might indeed very well only constitute one half of the story; it was the half presented in this article. The other side to the narrative is the disparity in the political culture between the parliamentary centres. The eagerness to reverse-engineer and scale back the rights to applicants under FOIA 2000 is only complemented by the ever-shrinking scope and shortening list of designated authorities in light of the privatisation in England and Wales of public services to third parties. The fault-lines between the nations are already present. Further divergence in the law and practice of freedom of information between the UK and Scotland seems now to be inevitable.

END

Word Count app: 8800

⁶⁶ Cameron, S. (2014) 'Why is outsourcing shrouded in secrecy?', *Daily Telegraph*, 08 January, accessed: <http://www.telegraph.co.uk/comment/10558912/Why-is-outsourcing-shrouded-in-secrecy.html>

⁶⁷ Disclosure by Scottish Government Freedom of Information Unit: 'FOI and FOISA key differences-1.docx'.