

Written evidence from the Campaign for Freedom of Information in Scotland (CFoIS) (COV0241)

About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to improve public access to official information, to secure a legal right to access information and to enforce that right. The initiative came from the Scottish Consumer Council. We believe in the right of people to find out about how they are governed and how their services are delivered.

CFoIS promotes the Right to Information (RTI) in Scotland and convenes the twice yearly Scottish Public Information Forum.

Introduction

CFoIS welcomes the opportunity to submit evidence to the Joint Committee on Human Rights Inquiry on 'The Government's response to COVID-19: human rights implications'. CFoIS addresses the three questions, posed by the Committee, concurrently.

Access to information rights are a matter for the UK and Scottish Government to reflect delivery of reserved and devolved functions: via the Freedom of Information (Scotland) Act 2002 (FoISA) and the Freedom of Information Act 2000.

CFoIS acknowledges the pro-active publication of information by Government on the incidence of the virus and measures to address its impact such as on the death rate in hospitals, care homes and the community as well as national and local testing. Pro-active publication is fundamental to Fol law as it avoids the need for people and organisations to make a specific Fol request. However not all information is available and in a format that people need so inevitably people will feel compelled to make an Fol request. The timing of publication is also key as is knowing about the advice on and the process of, gathering statistics/information.

Rights holders and duty bearers both have a role in the process of scrutiny and accountability. Proactive and reactive publication are a defence against 'fake news'.

Human Rights and Fol

The UK Government and the Scottish Parliament have a duty to protect human rights under Article 1 of the European Convention on Human Rights (ECHR) 'to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR'. In Scotland human rights are respected, protected and fulfilled through provisions in the Scotland Act 1998, the Human Rights Act 1998 (HRA) and through international law to which the UK is subject to periodic review e.g. by the UN.

The right to life is a fundamental human right protected by Article 2 of the ECHR. As a reported 45,501 people have died from COVID-19 in the UK¹ family members, the public, community organisations, NGOs, professional bodies, trade unions and academics must ask questions of the Government.

The right to receive and impart information is contained in Article 10 of the ECHR, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 21 of the UN Convention on the Rights of Persons with Disabilities (UNCPRD) and Article 13 of the UN Convention on the Rights of the Child (UNCRC). MPs have this right too and it enables them, and the public, to give effect to their right to take part in the conduct of public affairs as set out in Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR).

Article 10 of the ECHR has been ruled to give the right to information in order to form an opinion in cases relating to requests for information which are in the public interest which is established by: the purpose of the information request; the nature of the information sought; the particular role of the seeker of the information in “receiving and imparting” it to the public; and whether the information was ready and available. ⁱⁱ

Article 31 of the UNCPRD requires the Government ‘to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention’. Therefore, human rights law enables both the collection and the publication of information so that people can form an opinion and share their opinions. During the COVID-19 pandemic, access to data, opinion and information has assumed critical importance for the public as well as those desperately seeking to manage the health and social care response including identifying COVID-19 hotspots to organise local ‘Lockdowns’.

FoI enables scrutiny and accountability on policy, service design and delivery and the spend of the public pound on COVID-19 including procured contracts and the procurement processes. Therefore, FoI is essential in ensuring scrutiny and accountability of the Government’s COVID-19 response and to learn and plan better for further waves of the virus which protect all our rights under Article 2 of the ECHR.

COVID-19 Response by Government

CFoIS believes vibrant FoI laws will increase public trust at a time when it is in our collective interest to build support for public services as we work together to stay safe. In 2017 independent polling for the Scottish Information Commissioner revealed that 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.ⁱⁱⁱ Right to information laws allow people to ensure government officials make good decisions even at a time of national emergency. The need to maintain public trust in and enable scrutiny of, public services is critical in helping public services do better as well as holding the Government to account in real time and retrospectively.

The decision of the Scottish Parliament to weaken FoISA on 1st April 2020, impacted on the behaviour of duty bears and significantly impacted on people’s right to access information during the pandemic. This was a disproportionate and unreasonable response as it negatively impacted on the human right to form an opinion by receiving and imparting accurate, official information. Although the legal changes were reversed on 27th May 2020, it remains a significant matter of concern that this human right was so easily restricted. The Scottish Information

Commissioner (SIC) will be able to report on the application of the ‘public interest test’ to cases where responses to FoI requests have been delayed due to COVID-19 between 7th April to 26th May 2020^{iv}.

CFoIS recognises that the rights and duties within The Environmental Information (Scotland) Regulations 2004’ (EIR(S)s) remained throughout creating two tiers of information access rights.

No legal amendments were made to the UK FoI Act by Westminster. The UK ICO has stated that ‘We will continue to support transparency in public decision making but our regulation of freedom of information must be pragmatic and empathetic during the pandemic.’ On 17th July, the ICO reported that ‘Although we have maintained this approach, we now also want to see public authorities putting clear plans in place to get back on track with their freedom of information work.’^v

There is concern that the practice on FoI has significantly changed at a time when the public’s right to know is particularly critical. The Campaign for Freedom of Information has identified ‘a sharp drop in the Information Commissioner’s FOI enforcement action since the pandemic by an analysis of decision notices published in the two full months both before and after the lockdown:

- In January and February 2020, the ICO ordered public authorities to take substantive action in 32% of decisions (67 out of 212) published during this 2-month period.
- But only 5% of decision notices (6 out of 116) published in April and May 2020 after the lockdown required substantive action.[1] The lockdown started on March 23.

This suggests that the ICO has been holding back decisions that require public authorities to disclose withheld information or reconsider unjustified refusals. This is presumably to shield authorities from the pressure of having to comply with FOI requirements during the health emergency.^{vi}

In both jurisdictions, these developments amplify a pre-existing concern that, in some organisations, FoI rights and duties are seen to hamper the delivery of public services and are costly. Also, that FoI rights can be sacrificed when the duty bearers are listened to and the views of rights holders are neither sought nor listened to.

Impact

Equality groups have been disproportionately and negatively affected by COVID-19 including: disabled people who have died, had their care cut or reduced; increased infection rates in female carers and in BAME communities^{vii}. Therefore, in addition to the general population, equality groups will have been disproportionately affected by the temporary weakening of FoISA if they want to request official information to understand what happened and better prepare for the future.

Enforcement of Human Rights

FoI rights and duties are regulated and enforced by the UK ICO and the SIC. There is much to learn from this model and apply it to the equal enjoyment of human rights across the UK including:

- Free appeal processes for individuals, Third Sector organisations, trade unions etc
- Timescales for dealing with request and complaints
- Equality of access to rights
- Potential for regular Parliamentary Scrutiny

In Scotland there is a problem with enforcement of rights as the Scottish Human Rights Commission is specifically barred from undertaking casework^{viii} unlike the GB EHRC.

Conclusion

During a national emergency, there needs to be continuity and certainty in the practice and enjoyment of human rights. FoI is a tested and popular right to deliver scrutiny and accountability. For example in Scotland the public's use of FoI rights continues to grow and there is evidence that more requestors are dissatisfied with the responses they receive so they complain to the SIC: there were 83,963 reported requests for information in 2018/19, up 8.3% from 2017/18; appeals to the Commissioner rose by 0.7% in 2018/19. Individuals are more likely to make FoI requests as it is a matter of record that 'The closer their relationship with a public authority, the less likely a voluntary organisation/NGO/Third sector organisation will be to use FOI.'^{ix}

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ⁱ Daily Mail online 22nd July 2020 at <https://www.dailymail.co.uk/news/article-8548823/UK-announces-coronavirus-deaths-Wednesday.html>

ⁱⁱ For example, the Grand Chamber decision in the case of on Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) 8th November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30th January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435>

ⁱⁱⁱ Scottish Information Commissioner at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

^{iv} Paragraph 10(3), Schedule 4 Part 8 of the Coronavirus (Scotland) No 2 Act 2020

^v At <https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/> accessed 22nd July 2020

^{vi} At <https://www.cfoi.org.uk/2020/06/drop-in-ico-enforcement-action/> accessed 22nd July 2020.

^{vii} For example see <https://www.kingsfund.org.uk/blog/2020/04/ethnic-minority-deaths-covid-19>

^{viii} Section 6 of the Scottish Commission for Human Rights Act 2006 at

<https://www.legislation.gov.uk/asp/2006/16/contents>

^{ix} ESRC funded research 2008 – 2011, undertaken by Scottish Information Commissioner and Strathclyde University at

<http://www.itspublicknowledge.info/home/SICResources/voluntarysectorresearch.aspx>