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Designing an Effective Oversight Body

There is no ‘one size fits all’ model of Freedom of Information enforcement. We are all aware of the distinctions and nuances between the roles of Commissioners and Ombudsmen, often reflecting the political cultures which determine whether enforcement is based upon persuasive recommendations or enforceable decisions.

When the Freedom of Information (Scotland) Act 2002 was being developed the legislators looked at the experience of other countries such as New Zealand, Ireland and Canada. Now that we have a fully functioning freedom of information regime, in turn we receive requests for advice and assistance from other countries. I am aware therefore of the appeals system in Jamaica which consists of a panel of three individuals coming to a decision on an appeal or that proposed in Malawi which would have a multi member representative panel with civil servants, voluntary organisations and the media represented on it.

In Scotland it’s fair to say that we have adopted a “strong” enforcement model by choosing to have a Commissioner who is able to determine whether or not authorities must disclose information and whose decisions can be appealed only to the higher courts. As a Commissioner I have a range of powers to assist me in my investigations and enforcing my decisions. If an authority does not co-operate with my investigations I can issue an Information Notice under which they must provide me with the information necessary, which could be the original documents in dispute, or copies of internal emails

but also information which is known to the authority even if it is not written down. If I find an authority has destroyed information to frustrate a Freedom of Information request then I have put in place procedures with the police which mean that the Fraud Squad will work with me on an investigation to determine if a criminal offence under the Freedom of Information (Scotland) Act has taken place. (If an authority is found guilty of such an offence they (and that includes individual officers), are liable to fines of up to £5000.) Once I have issued a decision requiring the release of information then I can enforce such a decision by giving notice to the courts if an authority has not complied and again they may be liable to the same sanctions as would apply for contempt of Court.

Of course just because these powers are available it does not necessarily mean that they need to be or will be used. This is a matter often left to the judgement of the Commissioner. Furthermore there are many aspects of the work on which the legislation is silent and it is not clear what Parliament intended the Commissioner to do: for example the Scottish Act says nothing about publishing decisions. We know that in some jurisdictions for example Canada publication of Commissioners decisions do not take place; in others like Queensland full details are made available. I have chosen, even though not required, to publish my decisions in full, identifying the applicant and the authority. I could have chosen differently and initially some doubted whether authorities should be 'named and shamed' or that applicants should not have the right to privacy when making their appeals- but now it is accepted.

In practice it seems to me that the effective nature of an oversight regime is formed by a combination of the powers available in law and the inclinations of the Commissioner (or equivalent). I want to look therefore at what in practice it has been like working within the scope and limitations of my legislation and what political expectations and cultures can do in terms of bringing pressure to bear either to take a soft or hard approach to enforcement.

Notwithstanding the powers available to me, it has been suggested on many occasions - largely by those in public authorities -that the expectation is that the powers will not be normally fully exercised. The arguments are put as follows.

1. The Commissioner should hold his powers in reserve and for example issue formal Decision Notices, Information Notices or practice recommendations only as a last resort. It is argued that these should be seen as a “nuclear” option and the *possibility* of the formal exercise of his powers should be sufficient to secure cooperation from authorities.
2. Preference should be given to settle disputes between the authority and the applicant through an informal process with the intention of avoiding the need for an informal decision.
3. The Commissioner should avoid ‘naming and shaming’ authorities either in his media work, his submissions to the Parliament or within notice of his decisions.
4. Where a formal decision is necessary then an advance draft of this should be provided to the public authority forewarning them of what the Commissioner intends to say. The merits of this are that the authority may act upon the draft recommendations without need for a formal decision, and at least there is also the possibility for the authority correcting any errors of facts. There is the added advantage of being able to alert in particular elected representatives such as Ministers of the likely outcome.
5. Finally it is suggested that if a heavy handed enforcement approach is used then there is the possibility of a lack of cooperation from the authority who may adopt an entirely formal relationship with the Commissioner e.g. responding only when required to do so, at the limits of any time scales given. This may have the consequence of frustrating the Commissioner’s investigation through e.g. insisting that officials consult with trades union officials or be represented by lawyers when required to give statements.

Despite the blandishments and warnings, by and large I have not been attracted to these arguments. Firstly this is because some of the claimed benefits may come at a cost in terms of operational efficiency, or may entail some unfairness for the applicant (such as

sharing the draft with the authority but not the applicant.) Secondly I am mindful of the need to be -and seen to be- independent of authorities. Arrangements which may be perceived as being driven by a concern to avoid embarrassment to or criticism of authorities, to their embarrassment, may suggest too close or sympathetic a relationship. This has to be avoided, particularly given the third consideration which is whether such arrangements will hinder the change of culture by authorities in response to the new freedom of information laws.

In my view it was quite clear that in Scotland, the political intent behind freedom of information was to tackle a culture of secrecy prevalent within central government but also within public authorities generally. Over many years the effect of the Officials Secrets Act was to create a need to know culture which had been largely resistant to voluntary codes of openness - such as that applying to central government and local government in Scotland and even to European Directives such as that on Access to Environmental Information (which has been largely ineffectual despite being passed into law in Scotland in 1992) - because of the weak or non existent enforcement regime which attaches to these.

The Freedom of Information (Scotland) Act was a hard won piece of progressive legislation. It was scrutinised and toughened up in Parliament, and the power of an independent Commissioner to determine whether authorities (including central government and Parliament) had appropriately withheld information, and to conclude what was in the public interest was repeatedly cited as a safeguard against politicians and officials simply using the exemptions as a reason for continued secrecy. In my view, then, it was not appropriate for me as a Commissioner to be equipped with powers and then decline to use them if this was to be the detriment of any applicant or the public interest. That is not to say that on every occasion or for any conceivable reason that the formal powers are used; - there is no benefit in being officious or disproportionate. However it is crucial that there is public confidence in an independent decision maker. I am not - and must not be perceived as being - naturally more sympathetic to public authorities than applicants, sharing their views as to the worthiness of the applications being made to them or the irritation they feel regarding a frequent applicant. Nor am I a mediator: whilst mediation may be helpful in securing for an applicant with information

which might otherwise be withheld, essentially at this early stage in the freedom of information life cycle in Scotland I uphold the rights of people. To that end I have adopted an approach which is not just even handed but seeks to instil a view that the Act is founded upon the premise that information will be released unless there is a good legal reason not to do so and secondly that an applicant is entitled to a decision by me when they make an appeal as provided for by our Freedom of Information Act.

Accordingly when the Act came into effect I did not take the view that there was a honeymoon period by which the authorities would be allowed to be ignorant of the requirements of the Act – there was ample warning of the legislation coming into effect and training courses and materials had been developed and circulated to authorities. I did not take the view that the demands of the legislation be quietly ignored or relaxed. For example in Scotland an authority must respond to a request within 20 working days and there is no scope for extension (as there is in England) to consider public interest matters. As a result authorities in Scotland do strenuously attempt to meet the deadlines and in the vast majority of cases they do supply the information or a reason for withholding within the 20 working days. If they don't this is always addressed within the decision notice and if it was the case that an authority was systematically failing to meet the deadlines this would become the basis of issuing a practice recommendation to the authority. So far I have had no reason to do so.

Secondly I have issued over five hundred formal decisions (although I should point out that hundreds of appeals have also been informally settled or voluntarily withdrawn after the involvement of my staff). The decision is an opportunity for the authority's and the applicant's cases in submission to me to be summarised and presented fairly, for my consideration of the legislation and of the information withheld (so far as far as this is possible) to be set out in detail and then for my conclusions and requirements to be clearly identified. This provides clarity both to the applicant and to the authority and also provides an accumulation of precedent. In a country where Freedom of Information is new and the interpretation of the legislation is of interest then I think the decision notices, which are published on my website, are an important tool and it is part of my responsibility for disseminating information to authorities and to the public about the FoI Act.

I think the decision notices also satisfy the need for demonstrable independence and fairness. Even where applicants don't get the information they want they regularly contact my officers to thank us for the consideration we have given and the reasons for our decision being set out in full.

There is a particular interest in the arguments made for withholding information. Decision notices are an important medium for addressing and where necessary rebutting these. We will all be aware that in coming to our decisions that submissions are made by authorities which seek to interpret the legislation or even circumscribe the Commissioner's scope for decision making. In Scotland strenuous efforts have been made by central government officials to argue that the intention of the legislation was that certain classes of documents should be automatically exempt and only released if there was overwhelming public interest to do so. In particular this claim is applied to advice given to Ministers but also more generally to the internal deliberations of civil servants. I have taken the view that this class based approach is not consistent with the legislation and have often ordered disclosure. Two such decisions were appealed to the Court of Session, (our Court of Appeal), and the Government lost, with the Court agreeing that what mattered was the content of the information, (not just whether it could be classed as advice or exchange of views,) and whether or not substantial harm would come about from the release of this information.

Arguments made in support of a broad exemption owe much to seeking to maintain the value, and even the pre-eminence of old ways of working, which are being challenged by freedom of information. Some of those values are embedded in the legislation such as the notion of collective Cabinet responsibility which requires that even where policies have been hotly contested a united front must be maintained by Ministers in public – so that information which might reveal splits can be exempted under our legislation. Others are conventions which FoI threatens to dilute – giving an insight into the nature and content of the views, advice and even identity of officials when the norm has been to allow them to anonymously work behind the scenes. What those in authority seek to do is to continue business as usual, so far as possible, within the framework of the new legislation. In that respect the Freedom of Information Act was perhaps expected to

simply formalise the existing code of practice on access to official information. But this thinking has been criticised by campaigners who pressed for freedom of information legislation saying that the effect would be no more than a Reason for Secrecy Act, by which the authority would still continue to withhold information as it always did but only now requiring formally to say why it was doing so in the expectation that its broad brush view of exemptions would be accepted by a Commissioner.

Does taking a robust line mean therefore that there are to be no concerns over the loss of cooperation or that it is never appropriate to speak informally to an authority or seek to settle a dispute between the authority and the applicant other than by formal decision. That is not what I am saying, and I know that in many mature regimes informal settlement of appeals is now the norm. I recognise too that It is often in the interest of the applicant, in the interest of the investigation progressing and in the interests of a fully informed decision to have goods lines of communications with authorities and there is no doubt that my investigating officers have built up a good relationship with specialist counterparts in public authorities. In that respect we can understand what genuinely gives rise to concern -for example specifically how commercial interests may be harmed by the release of information or how individuals privacy or safety may be compromised. But we must be mindful that applicants must have confidence that such discussions are not meant to assist the authority in finding a way to withhold information.

The biggest justification for independent enforcement is whether more information is released as a result than would otherwise have happened especially if this results in a consequent general acceptance that similar information should be released or even published. In Scotland certainly we can point to many key cases where not only has specific information been released but the culture and future response of the authority has been altered as a result. Often such release has been required in spite of strenuous arguments about the likely prospect of harm from my decision. I have required the surgical mortality rates of every surgeon in Scotland to be published despite arguments that this might discourage clinicians from high risk procedures. This was probably the first time such comprehensive release had happened anywhere in the world but it is now soon to become routine in the rest of the UK and as I understand from a recent US Supreme Court decision may also happen there. We have also caused statistics on

registered sex offenders to be published, and the police are now preparing to routinely publish these at the local level, despite fears that this would give rise to vigilante attacks or cause offenders to evade monitoring by the police. Finally we have dismissed the view that entire contracts between public authorities and contractors can be regarded as confidential and have ordered the release of a contract lasting for 30 years and costing £1.3 billion pounds to operate the Royal Infirmary of Edinburgh. This has immediately prompted other health boards to release details of their contracts.

This is not about naming and shaming, it is not about exercising indiscriminate power or simply challenging authority. It about recognising that the decisions in themselves in terms of the release of certain information are important and the reasons for those decisions and the prominence given to them in the media are also part of the change of culture which freedom of information laws in Scotland and I am sure in many countries were meant to bring about.

Of course what the Act was intended to do and what the political response is to the Act in effect may be different matter depending on whether there has been a change of heart or a change of Government. So far in Scotland we have been fortunate that, no matter the irritation sometimes felt by those in authorities about how the information has been used, no impediments have been put in the way of the new rights. However we are all aware of amendments to legislation elsewhere exempting whole categories of documents; or of new fee charges which have the effect of discouraging applications

In conclusion, being effective in the oversight of freedom of information laws requires us to be aware of the political culture of our own countries and the strengths and fragility of our legislation, which may be vulnerable to repeal, amendment or withdrawal of cooperation. It is in the exercise of our judgement that we become effective but I am sure we all do so guided by the core principles of independence, transparency and respect for the rights of the citizen.