

**Day 3 – Wednesday, 28 November 2007**  
**Parallel Sessions – Session 1A 11.00am-12.30pm**

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Position: Scottish Information Commissioner

Organisation: Office of the Scottish Information Commissioner, Scotland

Presentation Title: How Strongly Should Freedom of Information Rights be Enforced? – The Scottish Experience

How should freedom of information rights be upheld? Internationally a variety of regulatory regimes are evident. Commonly the options are to:

- a) go to court
- b) complain to an ombudsman who can make a recommendation
- c) appeal to a commissioner who can enforce a decision.

Sometimes it can be a variation or indeed a combination of these. In Jamaica, for instance, there is not a single commissioner but a panel. The draft Access to Information Bill for Malawi envisages a multi - member appeal panel which would initially recommend action by a public authority and only if this was not accepted could it enforce its findings.

Even where the legislation is specific about the powers of the appellate body it may avoid using them – many Commissioners conclude cases by informal settlement rather than by formal decision.

Legislation may be silent on other matters which impact on the manner of enforcement. It may be left to individual regulators to determine whether to:

- publish decisions
- identify appellants
- 'name and shame' authorities
- circulate draft decisions

This paper will look at the experience of Scotland. Since the Freedom of Information Act came into force in January 2005 the Commissioner has issued over 500 formal decisions, and has successfully defended those which have been appealed to Court. The approach taken can be characterised as 'strong' enforcement. From the outset authorities were warned there would be no settling-in period, and that they had to recognise freedom of information requests and respond to them within 20 days. The Commissioner's decisions are published in full, naming the public authority involved (as well as, in most cases, the appellant). The Commissioner has rejected demands from some authorities that they should have sight of draft decisions. He has used his power to issue Information Notices compelling authorities including central government to supply information to assist his investigations.

The benefits of this approach will be identified – the precedent setting value of formal reasoned decisions; the public confidence in the independence of the appellate body.

The potential disadvantages will also be considered – the possibility of loss of cooperation by authorities; the consequences in time and resource in producing appeal proof decisions; the inhibition in providing full reasons in published decisions.

The paper will suggest that the approach taken has to be mindful of the political and historic context of the freedom of information regime. In Scotland a long tradition of official secrecy had been resistant to modernising initiatives such as voluntary codes of practice on access to official information or European Directive on access to environmental information. Surveys showed that the public were sceptical about the likely effectiveness of the legislation with two-thirds believing that authorities would find a way around the Act and would not provide information they did not want to.'

The paper will conclude however that this is a dynamic process and the regulatory regime should adapt in the light of experience. In Scotland public confidence in the FOIA Act has grown markedly as a result of high profile disclosures. Authorities are complying with legislation and are also reacting to precedent in agreeing to release information in disputed cases, leading to a significant rise in the number of informally settled appeals.