

Note of LINK Freedom of Information and the Environment Seminar

17 September 2015, Quaker Meeting House, Edinburgh

Attending: Lloyd Austin (RSPB, convenor of Governance TF, chair of meeting), Craig Macadam (Buglife), Tess Jones (BSCG), John McTague (SWT), Helen Todd (LINK Chair, Ramblers), Alexa Morrison (RSPB), Sheila George (RSPB), Charles Nathan (RSPB), Jonathan Wordsworth (Archaeology Scotland), Sue Hamilton (Planning Democracy), Ann Coleman (PD), Sarah Dolman (Whale & Dolphin Conservation), Paul Mutch (Scottish Information Commissioner), Sarah Hutchison (Head of Policy and Information, SIC), Kevin Dunion (Centre for FOI, Dundee University), Phoebe Cochrane (LINK Sustainable Economics Officer), Andy Myles (LINK Advocacy Officer), Alice Walsh (Development Officer).

Lloyd welcomed everybody and outlined the aim of the day - to make all feel more confident getting the information needed from public bodies to do their jobs. Sarah H and Paul would give the basics on FoI, the Aarhus Convention and Environmental Information Regulations (Scotland), outlining rights and processes. Please see presentation materials and links to further information.

FOI: For NGOs, FoI law represents an opportunity, supporting policy work, gives access to research, supports campaigning, and helps give advice to wider memberships. Video shown on how one community organisation, the C Diff Justice Group, used FoI as part of its successful campaigning activity.

Rights to get information from all public bodies should be made in writing, it applies only to information that is recorded by authorities, of all types of recording cover. If the info is not recorded the PB is not obliged to give out the information. When requests are not responded to in full and on time, and the norm now is that they are, this should be challenged. Some requests are refused for specific or legal reasons. Refusal on grounds of cost, limit is £600 or 40 hours work needed to provide the info.

Exemption - can be a difficult concept. Relies to a degree on common sense, national security, commercial exemptions. Most have a public interest override.

If what you are asking for is not held, consider would other held information be as useful? Downside it is hard to know what the authority holds. There is a duty on them to help you, one that is exercised least often. Use that duty, it creates a push pull effect.

If too costly, think about narrowing scope of request, and see if it can be supplied more cheaply.

Is another authority likely to hold the information? For example, with a question on pollution on private water supplies, SEPA did not hold it but Scottish Water had it in easily providable form.

Duty to assist, they have to say which exemption they are applying and why. Helps you to appeal and ask what can be supplied for your needs that does not invoke the exemption. Worth pushing on this.

If unhappy with how the request is handled you have a right to ask for a review. Gives the PB a chance to reconsider, may be escalated up hierarchy, and if still unhappy, there is right of appeal.

EIA regulations are separate from FoI, sit alongside, basis in EU law which predates, and because of FoI have risen in prominence as awareness grows. Date back to Aarhus in 1998, the EIR Directive in 2003, Scottish Regulations in 2004, and FOI law in 2005. Drafters sought for compatibility, equivalent rights in both regimes. Some cases where this was not possible. There are areas where it

is important for a request to be dealt with under EIA rather than FoI - stronger and broader cases in EIA mostly. Keep that in mind.

More public bodies are covered by EIA, more within its scope and includes those that exercise functions of a public nature, that get substantial funding from public sector, all these should be covered. The Commissioners Office will make the judgement if asked. It looks at the extent of the function under the control of a public parent body. Fuzzy as short record yet on precedent (includes positive decisions on Solway Shellfish Mgt Association, Housing Associations). Needs to be explored more, would like more cases.

Q. If a voluntary org is providing services under contract to a local Authority, would that be covered?

A. Not necessarily, would go beyond funding, consider ability to direct operations by the PB. Other factors come into play and is decided case by case.

Energy companies? Providing a public service? Make the case! There are fairly complex legal issues they have to look at, keen to receive more requests to clarify law. Making the FoI request enables precedents to be set.

Ministry of Defence. WDC interested in environmental information wrt whale strandings. Yes, strong case for MoD being within scope of EIR. This raised interaction between reserved issues and Scottish jurisdiction.

Timescale. If it needs to be extended for a PB to comply, the PB should write to tell you why.

EIR requests can be oral though best to have an audit trail, eg follow up email to a conversation, useful if seeking help later from commissioners. No upper cost limit, can't be refused on that basis but they can charge the full amount it costs them to supply the info. There are some restrictions, have to be reasonable and proportionate. PB will issue you with a fees notice before going ahead, no surprise costs to enquirer. Also opportunity to narrow scope of request. For the most part PBs do not charge.

Public interest test, under FoI only some cases are subject, all are under EIRS, for added traction.

Environmental information definition is wide, applies to the state of elements of the environment - land, soil, air, landscape, info on windfarms, water quality, air quality, wildlife, biodiversity, GMOs, anything that relates to the state of these elements, also emissions, discharges, waste, noise, radiation etc.

Covers legislation, plans and policies, eg recycling, a council policy for handling compensation fell within scope, pandas to Scotland, comms around the diplomatic issues were in scope of EIRS. Also applies to the historic environment.

Score cards used by judges assessing development of plans of eg Queensferry crossing brought into scope. Covers human health, cultural sites and built structures. Contamination in food change, impact of toxic land on health, cleanliness of hospital wards.

Appeal route – if FoI used instead of EIRS there can be grounds for appeal.

Ask for the info, covers most cases.

Ask again, PB has a further 20 days to reconsider, usually seen afresh by a senior.

Appeal to FoI office. Certainly worthwhile as results show. 64% decisions last year were in favour of the requester in some way, of around 500 last year.

Environmental appeals are growing year on year. It should be higher, may be issue of awareness in

PBs, needing redirection to EIRs instead of FoI. See it growing, stronger public appetite for env info, planning issues, fracking, salmon fishing, school estates, etc.

Tips for success: Build relationships, not a substitute for good working relations which will usually speed up process. Not always a need to mention the law when asking first time, can remind in follow up that you have rights.

Who do you build the relationship with? Partly is about having effective working relations with PBs. Most NGOs have relationships, this is about maintaining them. Avoids the confrontational approach from the PBs which is what the FOIC is trying to address. Can appear to be heavy guns. On other hand if you want the same info from numerous PBs can be helpful to cite regs to keep playing field level.

Check if information is already available, will increasingly be the case (check websites).

Recorded info. Framing the request to seek recorded info helps the PB to supply the info.

Specific is quicker, less likely that costs spiral, or exemptions cited. Eg provide a time period, keep copies for appeal. Offer to provide clarification at end of request, saves time. Make sure the PB understands what you are looking for (eg avoid jargon). Phone beforehand to ask them to help you frame your request. Commissioners' office can also help with framing. Have right to get electronically, easier to receive and analyse. Setting out the public interest case can help frame their consideration.

Refer to the Act, not always obliged to, depends on your relationships, diplomacy etc.

Resources on Commission website, all decisions are published.

Clarifications?

Issue of reduction in PBs keeping minutes of meetings. Is this happening more because of FoI? Can be. A case 2 years ago where a regulator was destroying records. Out of jurisdiction in terms of what they ought to hold. Referred it to Auditor General who took action. Challenge them about why they are not recording it, ask for records around it, if not minutes of it. Useful to take that story to another case.

Civil servants don't want letters after meetings clarifying what was agreed, which LINK publishes on its website. It's a case of different interpretations of what the minister has said. We note what they did say. Nothing to stop us carrying on even if they don't like it. Sarah has yet to see the chilling effect in practice. Heard of it, not seen it.

Sarah D was pleased to hear that submitting a request was not interpreted as antagonistic, and that informal request was part of the formal process. It was noted there were some issues with verbal requests being promised a report by friendly officials, and waiting up to 18 months with no result. Advice to put these requests in writing, keep an audit trail, keep things friendly, on the record.

If not clear, eg lack of minutes, use appeals. Recent case a different term to 'minutes' was used in the request as there was no document labelled as such. Notes of other sort were kept which did the job.

Appeal and legal situation and bidding by the judgement – a PB has 42 days to supply, can be referred to Court of Session and a contempt order applied. Can be appealed if requester feels commission has not applied the law. They have a suite of powers, it is criminal offence for information to be destroyed once requested. Never yet had to enforce a decision. Have powers of entry and

inspection. Commissioners see that public authorities want to comply, Scotland was FOI ready, and the culture and mood is more pro than anti.

What is reasonable time frame for a PB to keep records before destruction? Under Public Records Scotland Act local authorities should set out plans for managing their records which requires them to have retention schedules, and their intentions should be published. Concerns should be raised first with the LA and then with Keeper of Records.

Example of a request refused, partly due to burden on LA, redacting personal info, though know this was not any major problem. Release of personal info is seen as going to the public domain. Not to say an organisation cannot share info with a body outwith the scope of the regs, in doing so they have to consider whether they are processing personal data properly. Refusal can be made if request is manifestly unreasonable, or vexatious. Consider is there a way to narrow scope of request, though it can be difficult to know that in advance. Sounds a good one to challenge.

Kevin's presentation built on earlier discussions, reflected on how we got here, and our experience. There has been a green light to us to use powers, why have eNGOs not?

Environment movement was at the forefront of getting these rights. Levels of pollution, species loss, some of the legislation is of its time. Acid rain, air pollution, transboundary pollution were drivers. It has been personal issue for him, was in Himalayas for Oxfam to look at environmental degradation caused by aid projects. This was an inspirational experience for him in terms of putting together environmental justice cases bringing people together to challenge government and the World Bank as aid donor. Great frustration was getting access to the info. When returned to UK, Maurice Frankel was heading a new campaign for FOI. 30 years later he is still there, trying to prevent it from being watered down. Others took it up and since moved on, MF stayed with it. The acquittal of Clive Ponting was pertinent, he clearly broke the Official Secrets Act but the jury was not prepared to convict him. Kevin joined FOES, got a funded post for an FOI campaigner in Scotland. Testing public sectors responses, recording often complete failure to respond, exposing the extent of environmental injustice. Not a panacea, secrecy was almost a default option. The language used by Jim Wallace at the time of FOI Act was to open out this culture of secrecy. Not only is environmental information an exception to that culture, it is the progenitor of it. The Alkali Act determined that no information should be published as it would stop polluters from cooperating, and giving the information in the first place, that culture prevailed for 130 years. Between 1920 and 1967 only 3 prosecutions were brought under this Act. That was challenged by EIRS and FOI Acts. Came to fore when Kevin became the first Information Commissioner, distinctions between EIR and FOI Act were stark. Bruce Sandison asked for name of fishfarm where fish had escaped. Diseases of the Fish Act meant the PB could not disclose any info provided to them by fishfarmers. If there is another piece of legislation which trumps FOI Act, it is paramount. Kevin was able to make a positive decision on the basis that this was an environmental issue, so ruled that it was environmental info, and as such was no prohibition for preventing disclosure in the public interest. Two points, strong rights from 2005, and stronger under EIRS, *could not do anything until someone challenged it*. Disclosure recently into shooting of seals by fishfarmers only come about by adversarial complaint. Not just to get info you want, to test the boundaries of the legislation. Yes, it is great that it goes beyond named PBs, but hopeless in other respects. In practice tortuous discussion about interpretation of Directive and to whom it applies. Eg railway as a monopoly and Network Rail as the body which provides and maintains it, when someone asks for info, argues it does not come under FOI and EIR regs. Judge sided with NR, not a public body performing a public function. He was wrong, because the Office of National Statistics reclassified NR as a public body, for financial reasons. Now the chairman is appointed by Gov and NR is subject to same rules as other PBs.

Do water companies have to comply? Scottish Water as a single entity is specifically mentioned, much to their chagrin. Request made to a number of water companies in England, went back and forward, sent up to EU Court of Justice to tease out what constitutes a public authority, as raised earlier. The Court of Justice looked closely. Subsequently a tribunal in England agreed, eg if companies can apply hose pipe bans, enter your property or issue bylaws, these are not the usual company powers, so are subject to the Regs. This would not have been possible without the dogged persistence of anglers, the most radical on FOI so far. eNGOs should consider pursuit in the interest of wider public benefit.

One journalist is using the legislation to good effect, not testing the law for its own sake, using the information purposefully, has a relationship with PBs, and is prepared to pursue requests. Of 29 appeals made, 25 decisions were in his favour, so certainly worthwhile to appeal to commissioners. Kevin was surprised how few requests are made from established eNGOs. FOIC commissioned research from Strathclyde Univ. surveying a wide range of organisations. Some 'shy users' – reason of funding being a severe inhibitor. Belief that some may be seen as adversarial if persisting, whereas others may be looked upon more favourably in the next funding round. Kevin asked if we share these inhibitions. He could find few appeals, only 4 by LINK members, 3 from RSPB and one by Sustrans. Protect Wild Scotland, Animal Concern, Fish Legal, are non-LINK orgs using it.

Leaving all that aside what kind of info requests would we make if no comebacks, and are their alternatives way of using the legislation?

Discussion points:

Likely some of the journalist's requests were prompted by discussion with eNGOs.

Data protection wrt to Agri-Environment schemes: Government will not disclose information about where publicly funded activities are taking place, linked to personal financial data protection for farmers, making monitoring of environmental outcomes difficult. In response to one request the ruling from Europe was that mass processing of personal data is not acceptable. The big commercial farmer hiding behind the peasant. Data Protection law is fiendishly complex. Courts have made it clear that it is not clear. It's very European to hide financial info. Kevin considered this an admin issue, rather than a legal one. Information could be collected in a different way. Now you can get the aggregated information. LINK Agriculture TF is trying to find out where public funding is going and is it working for the reasons the grants are given

Network Rail; Ramblers was told asking for content of legal advice was not covered by FoI. PBs don't want to disclose legal advice. If it is a case of level crossings where 2 sets of legal advice are different, it can be taken to court. Andy, in previous post as a special advisor gave incidence of where the Lord Advocate advised that info could be given with certain redactions.

Recent dismissal of the Head of Planning of CNPA where there must have been solid grounds for doing so, and considering his decisions pre-dismissal, BSCG would like to get reasons for his dismissal. Kevin's view is that would be extremely unlikely, may argue there is a public interest in knowing, but greater public interest in that disciplinary action be allowed to take its course. Elsewhere there have been suspensions and dismissals of officials who may have entered into agreements with contractors, or taken bribes, and where local press have known about it for a long time, and could not get the info. Sarah agreed with this analysis. Could reframe the question to ask PB to look into the operation of the department more generally. City of Edinburgh Council released heavily redacted reports to give similar assurances following a dismissal.

Time lag is an issue, sometimes a planning proposal is approved before the info can impact on the decision making process. Good point, the purpose of the Directive is public participation in decision making. Have used that in past to challenge inadequacy of a consultation. Much more could be done. PBs can hold on to info even if readily available until last minute. If there are time issues, put it in the request, mention full title of the law, why you want it, closing date, put pressure on to speed it up.

Are there any records of how friendly that opportunity to participate has been to the public? If SEA has been ineffective, could argue that it was not public friendly. Groups like Planning Democracy are trying to persuade public officials to take account of input not just weigh responses.

If you were to make a request with the reason for it, and timeline, and then ask for the decision to be delayed until the info is released, is there a way to relate the info to the decision, to put them on notice that a decision made beforehand would be taken on shaky ground? Reasonable to say that if decision is to be taken within a deadline, that its provision is time critical. If after the date, there would be grounds for making a complaint to the commissioner, if the info was readily available in better time. Issues of withholding and delay, and orgs are not making enough of their muscle to get timely responses. Internationally, Governments are much quicker, 20 days is not the going rate.

Example of LA schools closure programme. Parents have a prepared list of quite detailed questions, publicly available to facilitate getting info out and providing it. Getting change in the legislation to change the law, has given them confidence and power. An LA planning to close a school would now want to comply with that list from the beginning of the process.

With EIRS how should we use FOI requests to deliberately flush out where PBs are not collecting info? If a PB is not collecting info on eg carbon emissions? What is resented is if a PB is the only body out of many that responds and is skewered in the media, with released info only exposed. Needs a more nuanced message to press and public. Now got laws which expects info to be there, depends upon it being held in a usable format. Grounds for asking what info is being gathered and for what reasons.

Example of where an LA is not carrying out monitoring of effects eg on disabled housing service closures, orgs have used that in campaigning, similarly lack of responses or incorrect responses from an LA basing its decisions on inaccurate data. This can be exposed, there is precedent.

If requesting info where there is masses of info that needs to be collated, where is decision on proportionality going to be made. If this has been a long process over many years, and they refuse under burdens exemption, but that is proportionate? That is where relationship comes in, speak to the authority, get it in stages. If it is an issue of non-assistance the commissioner can broker a settlement to agree a programme for getting the info within a reasonable timescale. Nothing wrong with putting in numerous requests covering different timescales. Opportunities to involve the commissioners in dialogue to advise both sides.

Do LAs use FoI to find out about other LAs? Yes. Police constables association have used the legislation to get info from government. Councillors use it of their own council, also MSPs as quality of answer is usually better than that elicited by PQ.

Are PBs scared we will put commercial info into public domain? This is the exemption which people expected to be used most, but is the one upheld the least. PBs are not aware of what is already in the public domain, on companies websites. Commission would certainly challenge most arguments

on those grounds. Recent revelations from Perth & Kinross and Peter Andre pertain, silly case but illustrative.

Afternoon session – Chatham House rules – Andy Myles chaired.

How do we improve the flow of information from Government?

How can we better use the rights that we have to help us in our work?

Andy circulated 2 case studies, one from Scottish Raptor Persecution Scotland – which estates are being dealt with under wildlife crime legislation. Interesting case may require pursuit. Other case is Transport for London, map of tubes.

Scottish Parliament founding principles helped the culture in Scotland to start from more open basis.

Are there information gaps? Areas which would improve our work? FoES pursuing FOI wrt fracking, lots of commercial confidentiality. How to use FOI/EIRS to pursue our advocacy strategies. Fracking one area, are there others?

European protected species licences. A requirement for activities which impact on protected species. If you fulfil 3 criteria, it is granted. Do agencies talk to each other about how many to be given out? Is there a limit on numbers? Sarah D has asked them how they make their decisions, received no satisfactory replies. Not even seen a licence. Assume they are being distributed. We should ask for a list of them under FOI or EIRS – **Action: Andy**

Are licences still being given out under section 16 of Wildlife & Countryside Act? Yes, do release aggregated info, but reluctant to pin it geographically, as applicant can be deduced from it.

When a developer applies for EPS licence, it is usually for LEADER funded work. Several agencies are involved. Lots for bats, may be viewable on consents.

Politically we should be suggesting publishing proactively online rather than forcing people to ask for info, changing culture of secrecy.

When LAs do their local plans, they have their housing need numbers. How are these derived, told they are handed down from Government, same for all LAS and SESplan, numbers have doubled. No idea how numbers are justified, or who to ask. Have we asked councils? No. Info is difficult for ordinary people to interpret. A good case in point. Could ask for info and put it out there, may be others who can understand and interpret it. Schools network has done very fine granular work, destroyed the arguments as evidence was wrong. Also earlier of LAs planning for disabled places, took info back to Minister and reopened debate.

Marine example, of how Marine Scotland went about assessing impacts of offshore renewables, not been transparent about their methodologies, counter advice from SNH, on which they based consent to a developer. A hot issue.

Relationships: seems to be constant tension about not upsetting boat or asking difficult questions. MS clammed up as date loomed, so EIRS used. PQs considered unhelpful by MS staff they take up time, putting guilt trip on eNGOs for asking. Happens all the time and it's important that FOI commissioners are aware of this. NGOs are finding officials are leaning on relationships more than they are. When we drill down into why we don't ask FOI requests, a lot is down to relationships.

MS is a complicated case, took them to court, as part of court proceedings requested info, still prevaricated, which will put them in contempt of court if judge decides so. Procedures to be done, not finished yet.

Debate within LINK ongoing being robust. Sometimes partnerships can be wrong route to go, eg PAWS.

Carbon Bubble report and fossil fuel divestment. Ric Lander at FoES working on Fol. Phoebe will pursue with him. This is a follow up to be done on a systematic basis with all public authorities. Need someone to be on the case.

Agriculture, earlier point about getting info of efficacy of schemes.

Ramblers Scotland has same issue with land management contracts, where the footpaths were, even LAs didn't know. Data protection cited. One issue is data is not captured properly in the records.

EIRS: if info is held in e format it should be proactively available. Should be viewable on Inspire network. Not clear who is in the network. Argument for probing this.

Biodiversity Communications Committee; it is clear they do not want to produce any maps on land use. IACS – only thing public via Defra to identify who is getting subsidy above a threshold.

It is good that farmers are being paid to do positive things for the environment. We want to monitor the effect. The reason for not making it public is you can deduce how much the farmer has been paid, which is idiotic.

More to be done in gathering the info more intelligently. It is challengeable. Without consent mass data, if you get a grant it may be disclosed. Difficulty is that it is within a single database. The Countryside Premium Scheme had clause saying that the grant may be disclosed, but no info was forthcoming.

RS and level crossings, could ask Network Rail to justify their position, if police say there is no problem. Crime mapping is now commonplace across the UK, and it is part of police objectives to reassure public about their safety. Value in asking them.

Crime mapping on wildlife crime negligible but for RSPB.

Create a wedge, challenge it strategically, what you think you might get.

Any public money should be made public? Any grants from Scottish Enterprise is in the public domain. Personal data is protected by EU law. Different views within EU historically on personal data.

Clarification on cost of information, eg publicly funded research on pollution. PD told it would cost £7k for a copy of it. Cost recovery issue, could always have been challenged. Ask again. If PBs records are not held very effectively FOIC does not want the cost to be transferred to requester. Also cost of redacting, nothing commissioners can do, but not for something already published.

Having established there is info we need and not getting by simply asking, what next? PQs have their limitations, rules are not as tight, but can apply political pressure which FOI request does not.

Turning up at a meeting and asking, or picking up phone. Sometimes you get answer that there is no info. How to pursue? If you ask at a meeting or on phone, confirm in email, audit trail. People had different experiences of requests, eg being treated as if no request has been made, or being surprised to find there is some follow up, sometimes given off the record or on an unofficial basis.

Secrecy has been a factor wrt neonicotinoids by Defra.

Scotland: LL&TNPA and good practice on the Board – Nick Kempe investigations. Official minutes so scant as to be useless. Common issue and becoming more so. Cultural move away from written records. Eg journalist query into records on removing Income Tax Bill from government programme turned up one piece of paper. Chilling effect on minutes, key thing is do you get access to the papers which formed the basis of the decision. If you can access them you have intelligence. The purpose of minutes is to record the factors under consideration, important part of it, other side is to look for the facts and analysis behind a decision. If getting minutes that are meaningless, ask for something to make it meaningful for public. Needs to be essential info in terms of what was taken into account, or contributed to the decisions. LINK reps at stakeholder type meetings, are looking to see that these record their views, and finding that these are being omitted, enabling Government to include NGOs yet disregard the views by way of the record. May be others in the same position.

First Minister is committed to FOI, chilling effect, not a generalised thing, is specific, can default to culture of secrecy.

There is a duty to keep proper records; duties are extensive but not very fine grained. In early stages relying on 1922 Act. On chilling effect, the Scottish Parliament manages to make all its decisions under the microscope, debate is all there in the official reports, great, boring, world has not ended, we can chip away at it to change this culture.

Conclusions: Discussions were very useful, action goes back to Governance Group to take forward generic issues as much as able and there to advise members on their cases. Hope all feel enthused to continue the work. Thanks to Sarah, Paul and Kevin for their help and insights.

AW 26/9/15