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## **Freedom of information and ‘vexatious’ requests – the case of Scottish local government**

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### **ABSTRACT**

This paper investigates the cost and incidence of Freedom of Information (FOI) requests within councils in Scotland and in particular, the cost and incidence of requests which have been defined as ‘vexatious’ in order to investigate if the negative perceptions surrounding the cost and misuse of the legislation are justified. Additionally, the criteria and guidelines that councils are using to define ‘vexatious’ are also examined. The approach taken to the research in this study is a survey of the 32 councils in Scotland using freedom of information requests as the data collection method.

The findings from the survey revealed that none of the councils were keeping records of costs relating to FOI requests. However, 80% were keeping records of numbers of requests. One third of authorities that kept records of ‘vexatious’ requests had experienced such a request. However, the actual number of ‘vexatious’ requests received were extremely low, suggesting that the negative perception of the legislation as wasting taxpayers’ money through the submission of playful and vexatious queries to councils was misleading and inaccurate.

From a practical perspective, the findings highlight the difficulties in recording cost data and the general lack of record keeping within organisations, suggesting some national guidance and coordination on the issues may well help make councils more efficient. The increasing

numbers of request for information since the legislation came into force suggests that it has been successful in opening up councils to public scrutiny.

**Keywords:** freedom of information, vexatious requests, cost of freedom of information, exemptions.

## 1. Introduction

This aim of this paper is to investigate the cost and incidence of requests, and in particular ‘vexatious’ requests under the Freedom of Information (Scotland) Act, and additionally examine the application of the ‘vexatious’ definition.

Freedom of information (FOI) legislation exists within the United Kingdom as two distinct Acts, the Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOISA). The FOIA covers public bodies within England, Wales and Northern Ireland and UK government departments operating in Scotland, while the FOISA covers the remaining public bodies in Scotland. The Acts allow access to information held by public bodies with the objectives of promoting transparency and openness within government, increasing accountability and the quality of decision making and improving public trust, understanding and participation. (Hazell et al, 2011, p8).

The Freedom of Information legislation in the UK presents an interesting area for research, particularly as it is a relatively new legislation. Already it has allowed the disclosure of much information, some of which is high profile and has resulted in major controversies such as details of MP’s expenses and the imminent release of papers relating to the police handling of the Hillsborough Disaster where 96 soccer fans lost their lives. Although introduced by his government, Tony Blair has openly spoken of his dislike for the Act and this has also been the attitude of several other politicians. (BBC, 2010).

Since implementation, there has been much discussion over the cost of administering the legislation with one study indicating that the cost of FOI across the UK was £35 million per year (Frontier Economics, 2006) and that ‘vexatious FOI requests consumed a disproportionate amount of resources’ (Worthy, 2008, p105). This study supported one of several attempts by government to limit the legislation citing its financial impact as a key issue (Worthy, 2008). Other studies have also mentioned cost and increased workload as being a key concern of public bodies (Burt and Taylor, 2009).

In addition, the media has in part fuelled perceptions of the Act as being responsible for public bodies being ‘bombarded’ by ‘vexatious and frivolous requests’ (Harris, 2012). There has been interest in the

media on 'vexatious' requests with reports of unusual requests providing more interesting headlines than the more routine, but more frequent requests. This has arguably contributed to a negative perception amongst many, including the general public and those working with the legislation, that it is time consuming, expensive and used predominantly by those attempting to cause inconvenience.

The three key areas that this research will investigate are:

- How many FOI requests are organisations receiving and how much does it cost to deal with them?
- How many FOI requests are organisations receiving that are defined as 'vexatious' under the Freedom of Information (Scotland) Act 2002 and how much does it cost to deal with them?
- What criteria are organisations using to define requests as 'vexatious'?

## **2. Research context**

As discussed by Burt and Taylor there is a "dearth of scholarly research into the experiences of public bodies as they implement and deliver FOI within the UK" (Burt and Taylor, 2009, p182). The lack of formal research and academic literature on the subject has placed the reliance of many, particularly the general public, on anecdotal evidence and media reporting of the Acts which can be problematic and lead to misinformed perceptions of the use of the legislation in practice (Hazell et al, 2011).

Research undertaken in the period immediately following implementation of the Acts was mostly concerned with how organisations were dealing with administering the legislation, such as Holsen who provided a 'first pulse check' by surveying a small group of FOI practitioners attending a FOI Conference. The results of Holsen's study were generally positive with 'most practitioners reporting few significant problems with implementation' (Holsen, 2005, p.4). Another study, again undertaken in the first 6 months reported concerns raised by organisations regarding compliance with the Act (Amos and Holsen, 2005) and this was a problem that was later investigated by Ross and Whittaker. They found that although most authorities endeavoured to comply with the legislation, there was a significant minority who did not (Ross and Whittaker, 2007).

2007 research funded by the Information Commissioner (responsible for the UK Act) used telephone interviews with 522 FOI personnel across a range of public authorities in England, Wales and Northern Ireland and predominantly looked at the perceptions of the FOI practitioners in relation to the Act. The findings in 2007 were 'generally positive' with 80% of respondents saying that the act was a 'fairly or very good thing for their organisation' (Continental Research, 2007). However, the results also pointed to issues with the Act, such as the cost, increased demand on staff resources and 'wasting time on pointless requests from the public' (Continental Research, 2007, p8). This last point hints at a resentment in some organisations with the concept of transparency, despite the desire of the government in introducing that act that it, "radically change the relationship between the government and its citizens" (Independent, 1999).

The Scottish Information Commissioner has also commissioned several other research projects. One such study by Burt and Taylor provided an insight into how organisations were dealing with the legislation and raised some interesting points when they looked at the responses of organisations in Scotland to the FOI Scotland Act in terms of organisational change (Burt and Taylor, 2009). The research used a combination of telephone surveys and case studies. This study raised many issues relating to the management of information within organisations, as well as highlighting the difficulties in obtaining information regarding the volume of requests as requests can be difficult to distinguish and there is no statutory requirement for organisations to record them (Burt and Taylor, 2009). In addition, there was some evidence of possible resourcing issues with FOI, with one interviewee stating, 'people are too busy to find time for FOI' (Burt and Taylor, 2007, p190).

Much of the research indicates a 'lukewarm' response to the legislation by those involved in administering it, with organisations demonstrating variable compliance and concerns raised regarding the time and cost involved.

## **2.1. Cost of Freedom of Information**

Many authors have commented on the difficulties in assigning a cost to FOI, such as Holsen, who described the 'precise cost of complying with FOI legislation' as 'virtually impossible to calculate'

(Holsen, 2007, p52). The Scottish Information Commissioner reinforced this when he stated ‘It is challenging if not impossible to measure the impact of FOI on Scottish authorities such as identifying the costs of responding to requests’ (Scottish Information Commissioner, 2012b, p5).

Several studies have looked into the cost of the FOI Act, such as those undertaken by Frontier Economics and the Scottish Government Corporate Research Team but without a statutory requirement for public bodies to record all FOI requests and other relevant information, these cost exercises can only be seen as estimates, however carefully they have been executed. There is also the danger that the estimates may be biased and influenced by the motivations of the parties conducting or commissioning the research. In the US, the Obama administration has recently made it a requirement for organisations there, to submit an annual FOI report detailing numbers of requests (Hazell and Worthy, 2010). A similar requirement here would allow more informed debate on the issue and facilitate decision making. Screene when discussing implementation of the Act and weaknesses within the legislation states that ‘the fact that the legislation does not stipulate that organisations have to monitor all requests to prove compliance could be highlighted as a decision that has undermined the Act’ (Screene, 2005, p41).

Nonetheless, cost is seen as an issue by many and there is also a concern that the government will continue to use the cost of FOI as a reason to limit the use and impact of the legislation. Worthy describes how Britain has faced ‘successive pushback attempts’ with the government trying to limit the Act. This has been seen in Ireland where three years after the FOI law was implemented, the fees were raised and this led to a 50% reduction in the number of requests (Worthy, 2008). Hazell and Worthy also discuss how ‘FOI laws can be launched with initial enthusiasm, but then undergo revisions to restrict the operation of the Act when politicians start to feel the pain, or simply suffer from bureaucratic neglect when starved of resources’ (Hazell and Worthy, 2010, p353).

The government arguably launched such an attempt when the Department of Constitutional Affairs commissioned the private research company Frontier Economics to look at the cost of administering the FOI legislation. The report found the cost of FOI to be £35 million per year (Smith, 2006),

highlighted the use of the legislation by journalists and the incidence of ‘requests that are not in the spirit of the Act’ describing them as a key issue. (Frontier Economics, 2006, p3).

The Frontier report recommended several measures such as changes to the way in which the cost of requests are calculated and a limit to the number of requests an individual could make. The reforms would have greatly reduced the scope and usage of the Act by allowing more requests to be refused by reason of excessive cost. The Freedom of Information campaigner, Heather Brooke, (amongst many others) at the time, campaigned against such changes to the Act which would limit the FOIA and raised many key issues regarding the cost of the legislation, counter arguing that it is the ‘cheapest, most egalitarian way of managing public bodies’ (Brooke, 2006) and that the cost estimate provided by Frontier Economics did not take into account savings due to the Act, such as reduced MP expense claims.

## **2.2. Vexatious Requests**

Several studies mention the term ‘vexatious requests’ but none actually address the issue in any detail or attempt to estimate the incidence. Worthy, who has written extensively on the legislation, does however, describe vexatious requests as ‘significant issues that need to be addressed’ (Worthy, 2008, p105) providing some evidence of a problem.

There is no definition for the term ‘vexatious’ in relation to the Freedom of Information (Scotland) legislation. However, the Scottish Information Commissioner provides a document which outlines guidance for public bodies on how to deal with such requests (Scottish Information Commissioner, 2012a).

The criteria within the guidelines that describe the Commissioner’s approach to application of the ‘vexatious’ definition are outlined below

*‘The Scottish Information Commissioner’s general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:*



- *it does not have a serious purpose or value; and/or*
- *it is designed to cause disruption or annoyance to the public authority; and/or*
- *it has the effect of harassing the public authority; and/or*
- *it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate’* (Scottish Information Commissioner, 2012a).

The subjective nature of the criteria creates a challenge for those involved in interpretation and application of the legislation, making it difficult for organisations to deal with such requests and raises issues with how they are managing these situations in practice.

Within the Scottish legislation, ‘vexatious’ requests fall into exemption category 14, allowing public bodies to refuse to disclose the information if such a definition is applied to the request. This places the responsibility of interpreting the exemptions with those administering the Act within public bodies. Even at an early stage, FOI practitioners identified this as a difficult area and this was highlighted in the Holsen study with respondents listing ‘handling repeated and vexatious requests’ (Holsen, 2005, p4) as a topic they would like guidance on.

The study by Burt and Taylor, which investigated organisational change within Scotland’s public bodies in response to the FOI legislation involved in depth interviews with FOI practitioners and the comments from one interviewee further highlight the problems of dealing with ‘vexatious’ requests: ‘Staff may seek legal advice on whether requests that are felt to be ‘vexatious’ can be designated ‘vexatious’ under the Act’ (Burt and Taylor, 2009, p190). This again draws attention to the difficulties experienced when using the ‘vexatious’ definition and furthermore the time it can take to deal with such a request. If the process of defining a request as ‘vexatious’ is time consuming and involves referral to other parties, such as a solicitor, it may be more efficient to answer the request and this may often be the situation in practice.

The Information Commissioner for the UK has called for authorities to use the ‘vexatious’ designation more frequently and has also discussed the possibility of extending the legislation to include ‘frivolous

requests' (Information Commissioner, 2012). The Scottish Information Commissioner does not appear to share this view.

The literature appears to highlight a number of key areas for investigation in relation to 'vexatious' requests, such as what is the real incidence of such requests and how are they being handled in practice, what difficulties are experienced by staff administering the legislation in relation to 'vexatious' requests and importantly how do they decide if a request is 'vexatious'?

### **2.3. Perceptions**

The literature reveals a number of conflicting perceptions of the Freedom of Information legislation amongst those involved in administering the legislation such as those working within public bodies, those utilising the legislation, such as the general public, journalists and those supporting the legislation such as the UK and Scottish Information Commissioner.

As discussed, both the Information Commissioner and the Scottish Information Commissioner, undertake regular research to investigate the level of public awareness of the legislation. The results of these studies, generally appeared to indicate a positive attitude from the general public to the legislation with the most recent survey by Ipsos MORI in November 2011 revealing that '77% of respondents disagreed with the suggestion that FOI is a waste of public money' and 89% 'agreed that it is important for the public to be able to access information held by public authorities' (Scottish Information Commissioner, 2011a).

However, there are some indications from the research undertaken with public authorities of a more negative perception with the findings of the research suggesting 'dutiful rather than enthusiastic compliance with the Act' (Ross and Whittaker, 2007, p58). This is reinforced in a study done by Holsen and involving FOI practitioners, which reported a positive attitude to FOI in only 51% of organisations (Holsen, 2005, p5). The Holsen study was however, undertaken only 6 months after implementation of the Act so initial 'teething problems' may have explained the negative perceptions reported. Further and more recent research undertaken by the ICO as part of their Annual Track of organisations does again provide evidence of some negative attitudes as it indicates that although overall 84% of

respondents agreed with the statement that the Freedom of Information Act ‘was needed’, 45% of respondents saw it as a ‘burden on their organisation’ (Information Commissioner, 2011). Another study looked at perceptions of the impact of the Act on public bodies, provides further evidence of negative perceptions with 25% of respondents citing ‘abuse of the Act’ as a problem (Burt and Taylor, 2007 p30).

The media has shown significant interest in the legislation and has arguably been responsible for influencing the general public’s perceptions of the Acts. The media interest in relation to FOI seems to derive from two main aspects: the use of FOI as a journalistic tool and the reporting of perceived misuse of the Act.

### **2.3.1. Journalistic Tool**

The literature is crowded with news articles originating from FOI requests and Holsen et al (2007) has commented on the valuable use of FOI as a journalistic tool, particularly for investigative journalism (Holsen et al, 2007, p13).

The FOI Act has allowed the disclosure of information which otherwise would not be in the public domain and has been at the centre of many controversies such as MPs expenses. However, along with the reporting of constructive and relevant issues has come the use of the FOI in generating what many would describe as ‘sensationalist’ stories designed simply to ‘grab’ headlines, but with possibly little substance. Closer investigation of the facts often reveals the information to be non-remarkable and arguably non ‘newsworthy’. An example is a recent report revealing how much the Metropolitan Police spent on phone calls to the speaking clock (Guardian, 2012a). Although the article was designed to ‘shock’ the general public, inspection of the facts, actually revealed the figures to be entirely reasonable.

### **2.3.2. Misuse of FOI**

Secondly, there are a number of media reports which highlight the incidence of people perceived to be misusing the legislation by making ‘unusual’ and ‘bizarre’ requests. One such report in the tabloid press described a request by a concerned citizen for information regarding his local council’s preparation for a possible ‘zombie attack’ (Sun, 2011a). Another report again in the tabloid press, titled ‘‘Bonkers’

monster requests hit the police' highlights the incidence of 'wacky' requests to a particular police force (Sun, 2011b). Articles like this are not uncommon particularly in the tabloid press and can contribute to negative perceptions of the legislation, creating the impression that public authorities are being overwhelmed by vexatious requests. This is further compounded by the fact that most of the general public will have had no personal experience of the Freedom of Information legislation and many will rely on the media as a primary source of information (Holsen et al, 2007).

Finally, there is considerable evidence in the literature of the negative attitudes of senior politicians towards the Freedom of Information legislation. Tony Blair, in his memoirs expressed his regret at implementing the legislation describing himself as a 'naïve, foolish, irresponsible nincompoop' (Guardian, 2012b). David Cameron also has a negative attitude to the legislation and is said to dislike the 'endless discovery process of responding to FOI requests' (The Guardian, 2012b). Outwardly the government are seen to support the legislation, but it is clear that there is an underlying negativity towards the legislation and the transparency that it allows. It can provide the opportunity for opposing parties to expose government practices and this proves unpopular to politicians in government. Gordon Brown pointed out that FOI legislation 'can be inconvenient, at times frustrating and indeed embarrassing for governments' (Worthy, 2008, p105). Brown did however support the Act and has been described as 'endorsing' the Act when he set up reviews to expand and reform the legislation (Hazell and Worthy, 2010).

The perceptions of the legislation by government are important and can be key to its success. Hazell and Worthy describe how experiences in Canada and Australia demonstrate how governmental antipathy of the legislation can result in inhibited performance of the FOI Act (Hazell and Worthy, 2010). This indicates how vulnerable the legislation is and demonstrates its dependence on strong governmental support. New Zealand is an example of a country where strong support from the Prime minister has allowed the FOI Act to thrive (Hazell and Worthy, 2010).

Hazell, Worthy and Glover suggest that the perceptions surrounding the Freedom of Information legislation follow the 'Pareto principle' where a small minority of requests 'define the way the

functioning of the act is perceived' (Hazell et al, 2012, p65). They suggest that 'Officials tend to remember the difficult or vexatious requests and forget the simple ones' (Hazell et al, 2012, p65).

### **3. Methodology**

The research method utilised for this study was a survey based approach using Freedom of Information (FOI) requests as the method of data collection. The aim of the study was to investigate the incidence and cost of FOI requests, the incidence and cost of 'vexatious' requests and the criteria used by public authorities to define 'vexatious'.

Researchers looking at Freedom of Information have used a variety of approaches including case studies, interviews, document analysis and surveys (Burt and Taylor, 2009; Holsen et al., 2007). Several researchers have successfully used Freedom of Information requests as part of their methodology, such as Ross and Whittaker (2007). The FOI request process was chosen for this study as it provided a well-defined way of approaching the research and was anticipated to provide a better success rate of survey returns in comparison with an ordinary postal survey, where there is no obligation for the authority to respond.

#### **3.1. Survey/Questionnaire**

In Scotland, there are more than 10,000 public authorities that fall under the Freedom of Information Scotland Act 2002, ranging from Scottish Parliament, local government and educational institutions to the Police and the NHS (Pedley, 2007). It would not be feasible to include them all in the study therefore the decision was taken to focus on local government, made up of 32 councils providing services for the entire country on a geographical basis. The 32 councils were selected as they are a well-defined group of organisations and would provide complete geographical coverage of the whole of Scotland allowing an overview of the situation both regionally and nationally. Also, the nature of local government means that they offer comprehensive services and serve the whole population, so it seemed an appropriate group of organisations to survey. The sample size was anticipated to provide enough data, while still being manageable in relation to the timescale of the project. However, there are limitations of selecting

such a group of organisations as it does not cover the whole range of public bodies and this should be borne in mind when looking at the results.

The FOI request was constructed using guidance provided on the Scottish Information Commissioner's website (Scottish Information Commissioner, 2012c). The survey asked the participants to supply the following information:

- How many Freedom of Information requests have been received each year from 2005 to 2011?
- What has been the overall financial cost of answering these requests each year from 2005 to 2011?
- How many Freedom of Information requests have been received that were defined as 'vexatious' each year from 2005 to 2011?
- What has been the overall financial cost of dealing with 'vexatious requests' each year from 2005 to 2011?
- Could you provide details of the types of requests that have been designated as 'vexatious' and the reasons underlying these decisions.
- What criteria or guidelines do you use when deciding if a request is 'vexatious' or not? Could you supply copies of any guidelines or policy documentation relating to this?

The questions in the survey were purposely clear and unambiguous to avoid misinterpretation and in order to gain the required information. The rights of the general public to request information came into effect into 2005 so correspondingly a seven year time period from 2005 to 2011 was selected.

The website and contact details of the 32 councils in Scotland were obtained from the Direct Gov. website (Directgov, 2012). The authority websites were then investigated to determine their preferred procedure for submitting an FOI request. Where the council provided an FOI request form to be filled in, this procedure was followed. In all other cases the request was e-mailed to the appropriate e-mail address as defined by information again supplied on the relevant website. The results of the survey which were returned by e-mail were examined and coded. The information from each council was

recorded in a standard table format which was then transferred to excel spread sheets for further data analysis.

### **3.2. Data Analysis**

In order to examine the results it was necessary to convert the information contained within the FOISA e-mail responses and detailed documented appeals decisions into coded data which could be analysed more effectively. A table format was utilised to record the relevant information allowing a consistent approach.

The information provided by the survey was reasonably straightforward to categorise and code. Firstly the e-mails were examined and the detail of the responses were transferred onto a table to aid standardisation with space for the answers to the actual survey questions and additional space for further information the authorities may have provided. This included qualitative data, often explaining the rationale behind the authorities' actions and responses which was of key importance and highlighted several significant issues. Much of the other data was numerical making it straightforward to deal with and none of the authorities were able to supply accurate cost data which significantly reduced the volume of the data analysis. The information was then transferred to excel spread sheets for detailed data analysis. The data was analysed and the results presented in different display formats dependent on the information obtained.

### **3.3. Limitations**

The results of this study are limited by a number of factors. Firstly, despite the authorities being legally obliged to comply with the Freedom of Information legislation and answer the requests within 20 working days, not all councils did so and the response rate was 94%. Therefore, although it is a high response rate, the results cannot represent fully the situation within councils in Scotland. Secondly, the data received regarding cost information was limited as the councils did not record the necessary information.

Finally, the study focussed on a specific group of public sector organisations i.e. local government, which is just one of many types of organisations covered by the legislation and therefore again the results cannot be representative of all public bodies within Scotland.

## **4. Results**

27 out of the 32 councils surveyed responded within the 20 working day legal time limit for FOISA requests. A further three authorities all responded after the 20 day time limit, but within a further 10 working days. Two councils did not respond at all. This represents an overall response rate of 94%.

The responses from the councils to each question in the survey are presented below.

### **4.1. How many Freedom of Information requests have been received each year from 2005 to 2011?**

Out of the 30 councils who responded, all held records of some description relating to the numbers of FOISA requests. 24 councils provided data for all 7 years of the survey period, which represents 80%, with 19 of these authorities providing the information per calendar year and the remaining 5, per financial year. 6 councils could only provide data for part of the survey period and this represents 20%.

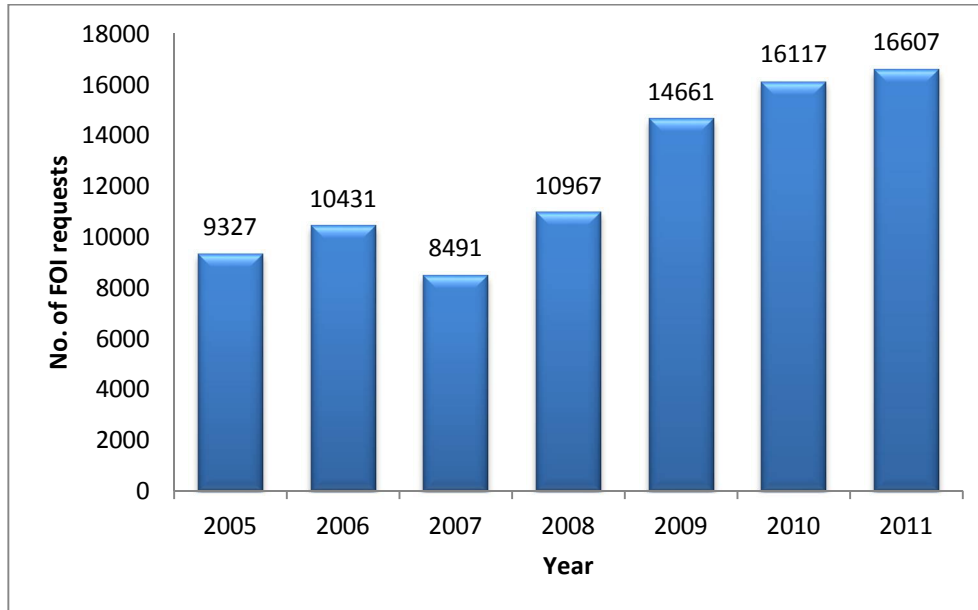
There were a variety of reasons cited why authorities could not provide information for all 7 years of the survey:

- Two councils commented that they had not started to record the numbers of FOI requests immediately after implementation of the legislation. One council began recording numbers of requests in April 2009, while another started to record the information in 2006, therefore only provided full data from 2007 onwards.
- One further council had difficulty providing figures as they had recently implemented a new logging and monitoring system in 2011. Although they started logging requests in 2006, records were held by each individual department until this time.
- Finally two authorities did not disclose a reason for their difficulties in providing the data and one council was simply unable to find some of the figures required.



#### 4.1.1. How many FOISA Requests are being received?

Figure 1 indicates the total number of FOISA requests received each year by 18 councils during the survey period.



**Figure 1 - Total FOI requests per year (18 councils in Scotland)**

The graph only includes those authorities that provided a full data set per calendar year. The authorities who provided a partial data set or provided the figures per financial year have not been included in this part of the study. Also 2 other authorities were also omitted as although they provided information for the survey period, the format was not suitable for inclusion. For example, one council provided the information in a chart format which did not present actual figures, just an approximation, and another council who had changed their system of recording part of the way through a year, provided fragmented information for parts of years which could not be easily manipulated.

Figure 1 indicates that with the exception of 2007, there has been an increase in the total number of FOISA requests experienced by councils in Scotland each year. However, it is important to remember that these figures only look at 18 of the 32 councils in Scotland.

## **4.2. What has been the overall financial cost of answering these requests each year from 2005 to 2011?**

The responses of the councils to this question provides information regarding the financial cost of answering FOISA requests but also the extent to which authorities are keeping records of costs.

### **4.2.1 Are councils recording cost information?**

Of the 30 councils that responded to the survey, none recorded cost information in relation to FOISA requests.

### **4.2.2. What is the financial cost of answering FOISA requests?**

26 councils (87%) did not provide any information while 4 (13%) attempted to provide an estimate of the cost. These estimates have been undertaken in different ways.

- The first council provided an estimate from a study they undertook in 2010. They estimated the average cost in staff time of responding to a request is approximately £200.
- The second council referred to a study done by University College London (UCL) when estimating the cost of responding to FOI requests which found the average cost of processing a request in Scotland by a council to be £189. Using this research they estimated the total cost to the public authority of responding to FOI requests to be £611,793.
- A further council also provided estimates for expenditure each year from 2007, however they did state that they do not hold cost information and did not describe how they calculated the estimates.
- Finally, one council, who completed a cost exercise in 2008, estimated the cost of FOI in 2007 to be £207,190. However, they did not hold any further cost data and again this was an approximate figure.

### **4.2.3. Other comments and observations:**

Although the survey did not specifically ask about the rationale behind the recording of cost information, several authorities provided reasons why they were unable to provide figures.

One authority described the cost data as ‘incredibly difficult to accurately record’, while another authority commented on the difficulties in assigning costs due to the fact that many staff are involved in answering FOI requests as an addition to their day to day duties.

This was further reinforced by another council who responded:

‘We don’t keep records of the cost of dealing with FOI requests. It is considered part of all staff responsibilities and any member of staff above a reasonable level will be expected to deal with requests within their area as part of their job’. Another authority stated ‘Unfortunately the council does not hold this information in the form you are looking for as the council does not have a dedicated FOI team but instead pulls information together through departmental information officers from across council departments if and when required’.

### **4.3. How many Freedom of Information requests have been received that were defined as ‘vexatious’ each year from 2005 to 2011?**

Again, the responses of the councils to this question provides information not only on the number of ‘vexatious’ requests received but also the extent to which the authority are keeping records of requests.

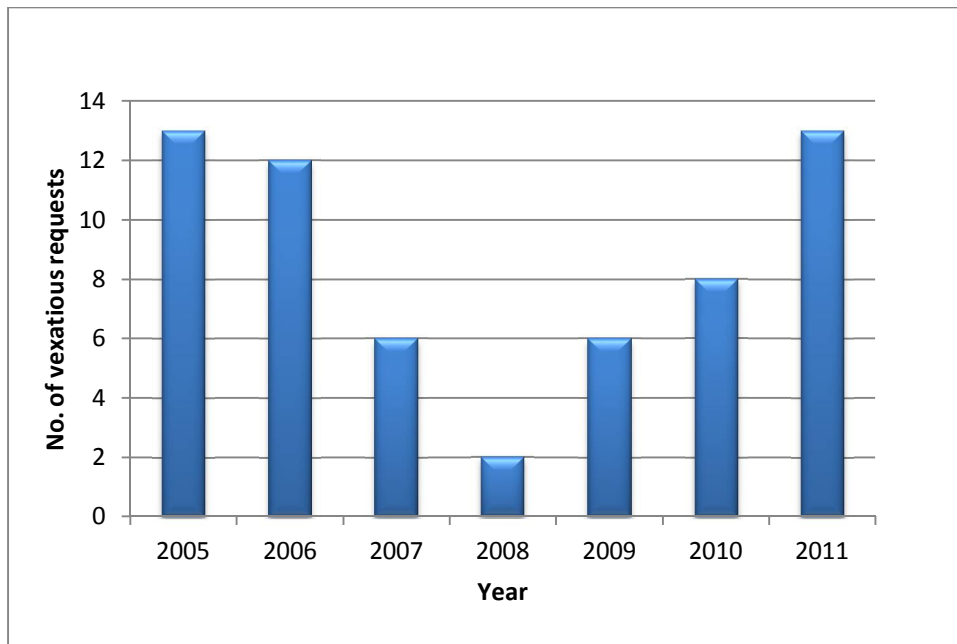
#### **4.3.1. How many councils are keeping records of vexatious requests?**

Of the 30 councils that responded to the survey, 27 kept records of ‘vexatious’ requests which represents 90%, while the remaining 3 authorities did not. However, 2 of these 3 councils were able to provide an estimate of the numbers. In one case this was as a result of the authority’s member of staff recalling requests over the 7 year period.

#### **4.3.2. How many authorities are experiencing ‘vexatious’ requests?**

Of the authorities that kept records of ‘vexatious’ requests, 9 authorities had applied exemption 14(1) and defined a request as ‘vexatious’, while 18 councils had not had a ‘vexatious’ request.

The numbers of ‘vexatious’ requests experienced over the 7 year survey period ranged from 0 (18 councils) to 15 (1 council).



**Figure 2 - The total Number of ‘Vexatious’ Requests Defined by Councils Per Year**

Figure 2 illustrates the total number of ‘vexatious’ requests defined by councils per year. These figures include the 27 councils that kept records of ‘vexatious’ requests. In four of the seven years the total number of vexatious requests did not even reach double figures, and the highest number recorded was 13. This suggests that the number of recorded vexatious requests are statistically insignificant.

#### **4.4. What has been the overall financial cost of dealing with ‘vexatious requests’ each year from 2005 to 2011?**

Again, the responses of the councils to this question provides information regarding the financial cost of answering ‘vexatious’ FOISA requests but also the extent to which authorities are keeping records of costs.

##### **4.4.1. Are councils recording cost information in relation to ‘vexatious’ requests?**

Of the 30 councils that responded to the survey, the 9 authorities that had experienced ‘vexatious’ requests did not keep records of the cost of responding to them.

It is unclear if the remaining 21 councils had any intention of recording cost data on ‘vexatious’ requests as they had not defined any requests as ‘vexatious’ and therefore had no reason to hold such data. However, the fact that no councils routinely recorded any cost information on FOISA requests makes

it unlikely that any of these organisations would hold such data if they had in fact experienced such a request.

#### **4.5. Could you provide details of the types of requests that have been designated as ‘vexatious’ and the reasons for their designation.**

Of the 9 councils that had recorded ‘vexatious’ requests, 2 could not provide any detail on the ‘vexatious’ definition and the reasons for the application of exemption 14(1). However, 7 councils provided some information which ranged from the subject of the request to the reasons underlying the ‘vexatious’ definition (named councils A to G).

Council A provided considerable information and cited the following reasons for the ‘vexatious’ definitions:

- Repeat request;
- Information already provided;
- Harassment of authority;
- No serious purpose/value;
- Manifestly unreasonable/disproportionate;
- Continuing series of overlapping requests;
- Request relating to grievance going back over 20 years, already investigated at length.

For several of the requests a number of these reasons were given for the ‘vexatious’ definition.

Council B provided information relating to the subject of the five ‘vexatious’ requests that they had received from two requesters. One related to a land dispute and the other to council tax. The council commented that they ‘had responded to a number of very similar requests and reluctantly reached the view that the continued requests were vexatious and repeated and subsequently refused to respond’.

A further council (C) received two ‘vexatious’ requests over the seven year period and again provided information on the subject of these. The first request related to car parking and the second to the appointment of a council employee.

Council D defined 15 requests as ‘vexatious’ over the seven year period and stated that the requests related to three main categories: social work, social work staffing and penalty charge notice information. The reason they gave for the definition was that they were ‘repeated requests for the same information’.

Another council (council E) defined 8 requests over the seven year period. They provided comprehensive information regarding the requests. The first six requests were received from the same individual and requested information regarding the council and external bodies. The reason for the ‘vexatious’ definition was that the requests collectively were felt to be intended to disrupt the work of the council rather than to obtain information. The council’s next ‘vexatious’ request in 2006 related to communications mentioning a specified named person and was defined as ‘vexatious’ as it was manifestly unreasonable and disproportionate. There was no information provided for their last vexatious request in 2007 as the paperwork had been misplaced.

The next council that responded (council F) experienced four vexatious requests over the seven year period. They no longer hold information on the details of the first case from 2006. The remaining three requests in 2011 were defined ‘vexatious’ as in two instances the information had been provided already and in the third case, there had been an intimation that the requester was deliberately creating requests to cause a burden to the council.

Finally, council G experienced five vexatious requests over the seven year period. The reasons cited by the council were that they ‘were masking personal attacks against members of staff’.

Table 1 indicates the type of information provided by the councils.

Council	Subject of Request	Reasons for ‘vexatious’ definition
<b>Council A</b>	Not stated	<ul style="list-style-type: none"> <li>• Repeat request,</li> <li>• Information already provided,</li> <li>• Harassment of authority,</li> <li>• No serious purpose/value,</li> <li>• Manifestly unreasonable/disproportionate</li> <li>• Continuing series of overlapping requests,</li> <li>• Request relating to grievance going back over 20 years, already investigated at length.</li> </ul>

Council	Subject of Request	Reasons for 'vexatious' definition
<b>Council B</b>	<ul style="list-style-type: none"> <li>• Land dispute</li> <li>• Council tax</li> </ul>	<ul style="list-style-type: none"> <li>• A continuous series of very similar requests.</li> </ul>
<b>Council C</b>	<ul style="list-style-type: none"> <li>• Car parking</li> <li>• Appointment of council employee</li> </ul>	<ul style="list-style-type: none"> <li>• Not stated.</li> </ul>
<b>Council D</b>	<ul style="list-style-type: none"> <li>• Social work,</li> <li>• Social work staffing</li> <li>• Penalty charge notices</li> </ul>	<ul style="list-style-type: none"> <li>• Repeated requests for the same information.</li> </ul>
<b>Council E</b>	<ul style="list-style-type: none"> <li>• Council</li> <li>• External bodies</li> <li>• Communications with council</li> </ul>	<ul style="list-style-type: none"> <li>• Requests collectively intended to disrupt the work of the council rather than to obtain information.</li> <li>• Manifestly unreasonable/disproportionate.</li> </ul>
<b>Council F</b>	<ul style="list-style-type: none"> <li>• Not stated</li> </ul>	<ul style="list-style-type: none"> <li>• Information provided already.</li> <li>• The requester was deliberately creating requests to cause a burden to the council.</li> </ul>
<b>Council G</b>	<ul style="list-style-type: none"> <li>• Not stated</li> </ul>	<ul style="list-style-type: none"> <li>• The requests were masking personal attacks against members of staff.</li> </ul>

**Table 1 Details of 'Vexatious' Requests Received by Councils**

#### **4.6. What criteria or guidelines do you use when deciding if a request is 'vexatious' or not? Could you supply copies of any guidelines or policy documentation relating to this?**

##### **4.6.1. How many councils have their own guidelines?**

Of the 30 councils that responded, six (20%) had their own guidelines, 21 did not, two authorities answered with not applicable and one authority did not answer the question.

##### **4.6.2. How many councils use the Scottish Information Commissioner's guidelines?**

Of the 30 councils that responded to the survey, 23 stated that they use the Scottish Information Commissioner's guidelines which represents 77%. 18 of these authorities also provided a link to this guidance on the Scottish Information Commissioner's website.

However, four of the councils made no mention of the Scottish Information Commissioner's guidelines and this represents 13%.

Additionally, two councils mentioned that they also refer to the 'decisions' section of the Scottish Information Commissioner's website and two referred to the actual legislation itself.

Finally, one council specifically pointed out that it does not use any guidelines and two councils answered not applicable to the question.

#### **4.6.3. Other comments and observations:**

There were several comments accompanying the responses to the survey questions which provided a further insight into the handling and interpretation of the FOI legislation.

One authority when describing their approach to dealing with the 8 requests they defined as 'vexatious':

'All 8 share the feature that the vexatious notice was issued after a long and protracted correspondence with a persistent complainer and the service concerned felt there was nothing further to be said'.

Another authority when questioned on the use of guidelines in relation to 'vexatious' requests answered that they 'do not use guidelines and have no such document' and 'We consider each request on a case by case basis'.

## **5. Discussion**

The aim of this study was to answer three main research questions:

- How many FOI requests are organisations receiving and how much does it cost to deal with them?
- How many FOI requests are organisations receiving that are defined as 'vexatious' under the Freedom of Information (Scotland) Act 2002 and how much does it cost to deal with them?
- What criteria are organisations using to define requests as 'vexatious'?



The presentation of the findings above has considered the data in response to these research questions. The discussion that follows will consider the wider issues related to FOI and open government that the findings illuminate regarding Scottish local government.

### **5.1. Cost of FOI legislation**

The results from the survey of councils found that of the 30 authorities that responded to the survey, none kept records of costs associated with FOISA requests. While this is not a surprising result given that there is no requirement under the legislation to keep records of numbers of requests and costs, it was anticipated that perhaps a small number of ‘forward thinking’ authorities may have done so. However, the fact that four of the authorities (without prompting) attempted to provide an estimate of the costs indicated that they, at least, had considered this issue. It was also encouraging that two of the authorities had in previous years undertaken cost exercises regarding FOISA, however, this represents only 7% of the authorities.

The difficulties in assigning a cost to FOI has been highlighted in the literature and the results of the study support this. The Scottish Information Commissioner has also commented on the difficulties in investigating the cost and numbers of FOI requests, stating that ‘in reality, the number of people submitting FOI requests to Scottish authorities is not known’. (Scottish Information Commissioner, 2012b, p5).

Several of the councils indicated that often the task of answering FOI requests is absorbed into existing daily tasks of an employee or involved work between departments perhaps to collate information for a request, both of which would create difficulties in recording cost data. This supports evidence found in Burt and Taylor’s study which found that the workload relating to answering FOISA was very much an ‘add on’ and often hadn’t been properly integrated into job roles (Burt and Taylor, 2009). It would be reasonable to suggest that it would be in the organisation’s own interest to accurately record numbers and costs of requests, particularly if they are to object to the legislation, and thus it would be useful to see a more coordinated approach to this in councils throughout Scotland. It is impossible to view the

legislation as a cost burden if the costs are not being identified beyond the salaries of named individuals. This seems like a large oversight on the part of the sector.

In hindsight, the lack of any statutory duty to record cost data also seems like an oversight on the part of the policy makers, since it is being used as a potential measure of the performance of the effectiveness of the legislation. Some concrete recommendations on this from the Scottish Information Commissioner may well be useful at this point to aid councils.

## 5.2. 'Vexatious' requests

Only a third of the authorities that kept records of 'vexatious' requests had actually experienced such a request and the actual numbers received were also very small with the majority of the authorities receiving between 1 and 5 'vexatious' requests and only 2 authorities receiving more than 10 requests over the 7 year survey period. How can we account for such a statistically insignificant number being cited in criticism of the legislation as a major issue?

One issue which may partly explain the discrepancy between the perceptions of the general public and in particular the staff dealing with the legislation and the actual numbers of 'vexatious' requests, is that the nature of 'vexatious' requests and the effort required to deal with them, make them somewhat memorable. As discussed in the literature review, Hazell et al suggested that the perceptions of people regarding the FOI legislation follow the Pareto principle where a small number of requests are influential in forming the opinions and perceptions of the legislation (Hazell et al, 2012).

In the study of councils, 2 of the 3 authorities that did not keep records of numbers of 'vexatious' requests could actually recall from memory the approximate numbers they had received and provided an estimate of these. In one case, the FOI practitioner could even remember the details of the cases and the reasons underlying the 'vexatious' definition. This provides further evidence of the ability of these sorts of requests to be remembered and conceivably contribute to negative opinions and perceptions.

Another possible explanation for the perceptions people have regarding the FOISA and the fact that there appears to be very few 'vexatious' requests received is that perhaps more potentially 'vexatious'

requests are being received but that they are simply being answered rather than defined as ‘vexatious’. This would suggest that staff are using the ‘vexatious’ definition conservatively. If so this is to be welcomed and demonstrates an admirable commitment to open government and democratic engagement with citizens.

Evidence from the literature also provides some indications of councils’ approaches to ‘vexatious’ requests. When investigating the FOISA within Scotland’s public bodies and in particular the difficulties experienced by research participants when defining a request as ‘vexatious’ within their organisation, Burt and Taylor refer to a comment by one of the interviewees, ‘you have to go some distance before you can refuse to respond on grounds that it’s a vexatious request’ (Burt and Taylor, 2009, p190).

Regarding the cost of ‘vexatious’ requests, again the study found that none of the councils were recording cost information. Although this was not unexpected, it highlights the inability of councils to recognise that if they are to complain about the incidence and cost of dealing with the Freedom of Information Act, then it may be to their advantage to keep a record of the costs concerned in order to support their complaints.

### **5.3. Vexatious criteria**

The interpretation of the legislation and the application of the exemptions within the FOI Act essentially dictate what information will actually be disclosed to the requester. This is reinforced by Holsen when discussing exemptions as a central part of the legislation, essentially dictating which information will be disclosed (Holsen, 2007). Thus, the role of personnel within public authorities who are responding to FOI requests and the way in which they apply the legislation is critical to the release of information. When considering the application of exemption 14(1) vexatious requests the criteria that is used to decide whether a request is ‘vexatious’ or not is crucial.

When asked about the use of guidelines and criteria when dealing with potentially ‘vexatious’ requests, only 20% of the authorities in this study, had set up their own guidelines. However, encouragingly, 77% of the councils surveyed stated that they used the Scottish Information Commissioner’s guidelines when

deciding if a request was ‘vexatious’ or not. It was disappointing that not more of the authorities had formulated their own guidelines, but their awareness of the Commissioner’s guidance was a positive sign. However, the fact that four authorities made no mention of the SIC guidelines, two authorities answered ‘not applicable’ to the question and one authority specifically mentioned that they ‘do not use any guidelines’, suggests that some authorities are under-prepared should they receive a potentially ‘vexatious’ request. Again some national guidance regarding all of the above issues may well avoid such a postcode lottery in terms of approach.

The interpretation of the legislation in relation to ‘vexatious’ requests can be difficult for FOI practitioners and there are a number of key issues underlying this. Firstly the term ‘vexatious’ has not been defined under the FOISA. The rationale behind this decision was that in law the term is ‘well established’ and it was decided to allow the Commissioner to interpret the term ‘in order that the interpretation might evolve over time in light of experience and precedent’ (Scottish Information Commissioner, 2012a).

The lack of a strict definition makes it difficult for FOI practitioners and those working within public authorities that are dealing with the legislation on a daily basis. Along with the commissioner, they also have to interpret the legislation and without the same experience and insight, this can lead to problems with application of the law. Admittedly, the requester has the right to appeal to the commissioner if their request is defined as ‘vexatious’ and refused and at this point the commissioner’s more considerable experience will interpret the legislation. However, not all requesters will appeal the decision meaning that in many cases the ‘vexatious’ definition may have been applied incorrectly and the information not disclosed. The appeals process can be lengthy and will not necessarily be pursued. An impartial observer may argue that this puts the council in an unfair position as the holder of the information, with the citizen at a disadvantage.

#### **5.4. Record keeping**

The results from the study have undoubtedly highlighted the need for public authorities to improve their record keeping in relation to FOISA requests.

There are some studies in the literature investigating how organisations are coping with the demands of the legislation and relating to record keeping within organisations such as Burt and Taylor (2009). However, these tend to look at how organisations are coping with the demands of the legislation with regard to record keeping and organisation of information and data within authorities rather than the record keeping of details of FOISA requests as such.

Screene's research which examines 'organisational, legislative and government weaknesses in preparing for the FOI Act', (Screene, 2005, p 34) highlights the fact that authorities do not need to provide evidence of their compliance with the Act as a weakness of the legislation (Screene, 2005).

Essentially, no one will know if organisations are complying with the legislation unless a complaint or appeal is submitted to the Commissioner. This again points to the need for a statutory requirement for record keeping of all FOI requests.

Burt and Taylor also discuss the need for a comprehensive records management system in responding to FOISA requests:

'Without a well-managed and effective information and records management system in place, supported by an organisation-wide ICT infrastructure, responding to complex information requests that span more than one department is made difficult' (Burt and Taylor, 2009, p186).

The fact that this study demonstrated that all councils in Scotland are to some extent keeping records of numbers of requests is encouraging and represents the first step to improved organisational record keeping. It is essential that these same organisations take the next step and start to record cost information alongside this, and yet again it would seem that some national guidance on this may be useful and aid councils in their efficiency.

## **6. Conclusions and Recommendations**

Despite the small scale of the study, a number of conclusions can be drawn from the results and several key issues have also been highlighted.

Firstly, investigation of the cost of FOISA proved difficult due to the inability of councils to record cost data. In fact, the results of the survey found that no councils in Scotland were recording cost data. However, the responses to the survey did highlight the difficulties experienced by organisations when attempting to record cost data. These included issues with the way in which FOISA requests were handled within organisations, often involving several members of staff and different departments. A key issue for local councils then would seem to be a coordinated approach to recording cost information. Since the FOI legislation is being painted by some politicians and media as costly and a waste of tax payers' money, more emphasis needs to be placed in ascertaining if this is indeed true or not.

The councils were, however, recording the numbers of FOISA requests received and this was an encouraging result. Although some authorities could not supply information for all years of the 7 year survey period, the majority could and information provided within the responses indicated signs of improvement of the systems used by councils to log and monitor requests. Examination of the numbers of requests experienced by councils, found that the number of FOISA requests was increasing each year, with the exception of 2007, suggesting the FOI legislation becoming more of a known tool for citizens. This is also an encouraging sign, as one of the purposes of FOI is to encourage participation in government from the citizenry. This statistic does indeed suggest that this is the case.

Investigation of the cost of 'vexatious' requests again was problematic as none of the councils were recording cost data. However, 90% of the authorities were recording numbers of 'vexatious' requests and of these only a third had defined a request as 'vexatious'. The numbers of 'vexatious' requests experienced by councils were very small and essentially insignificant when compared to the total number of FOISA requests overall indicating perhaps that the 'vexatious' definition is being used conservatively by authority staff or alternatively there simply are not many potentially 'vexatious' requests in the first place.

Examination of the use of the 'vexatious' definition within councils found that only six councils in Scotland had developed their own guidelines for dealing with 'vexatious' requests. Positively, three

quarters of councils used the Scottish Information Commissioner's guidelines when considering 'vexatious' requests. This highlights the need for public authorities to develop their own guidelines to be utilised alongside the Commissioner's guidance and to increase awareness amongst council staff of procedures for dealing with FOISA requests generally.

The need for a statutory requirement for organisations to keep records on FOISA requests and generally to improve their record keeping and organisational efficiency when dealing with FOISA requests has also been highlighted by the research as well as the crucial role of the Scottish Information Commissioner in interpreting and applying the legislation.

Overall, the study has found that the numbers of 'vexatious' requests received are generally extremely low (with consequently low cost) and their incidence does not support the negative perceptions that the general public and many working with the legislation have regarding their cost and misuse.

It is posited that the 'Pareto Principle' suggested by Hazell et al (2011) may indeed apply to the Freedom of Information legislation and its interpretation in the minds of elected officials and some media. In order to secure the success of the Freedom of Information Act, a culture change within organisations may be needed to reverse the negative perceptions surrounding the legislation and to allow the very people involved with interpretation and application of the legislation to support it positively.

## **6.1. Further Research**

Further research into the Freedom of Information (Scotland) Act is essential. The research presented here could be advanced by extending the survey to the remaining public authorities in order to provide an overview of the whole situation in Scotland. The study has also raised the important issue of efficient and appropriate record keeping within organisations. Further investigation of the cost of the FOISA will prove difficult unless public authorities begin to comprehensively and accurately record cost data and this does not appear to be a realistic possibility at the moment.

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