



Imperfect Information:

Experiences and Perceptions of the use of Freedom of Information
in the Scottish Voluntary Sector

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1. Executive Summary

- Funding and working relationships remain key, and highly sensitive, issues in terms of FOI uptake across the Scottish voluntary sector: if an organisation has a funding relationship with a public body they are often inhibited, and otherwise very careful, about whether and how they might exercise their rights under FOI.
- Some voluntary sector organisations would take comfort from their identity as FOI requesters not being disclosed to others in the public body outside of their designated FOI officers.
- There are groups across Scottish civil society that regularly use FOI to further their own organisational goals, and the interests of their members and clients. Many of these groups use FOI notwithstanding concerns about funding and working relationships.
- Knowledge, awareness and expertise in using FOI have been developing since the legislation has come into force. This development is uneven, and there remain groups who are unaware of their rights and how to practically exercise them.
- Third parties often act as intermediaries, or as sources of expertise, in facilitating the use of FOI on behalf of civil society groups. It is not clear whether this kind of brokerage of FOI is likely to persist over time, or whether it is a feature of a political culture learning how to engage with FOI.
- The perception of FOI use varies widely among respondents, in part reflecting experience (or lack of) in using FOI. Perceptions about when and how to use FOI are also related to organisation culture and whether groups have other official or informal means of accessing information.
- The introduction of FOI is credited by some respondents as strengthening informal methods of gaining information. It appears that FOI is part of a wider 'tool kit' of strategies for accessing information, and is not necessarily the first option voluntary sector groups exercise when seeking information from public bodies.
- Many respondents would welcome a quicker method of dealing with disputes around refusals and the issue of non-response. Several interviewees agreed that some sort of sanction for late responses might help address this issue.
- Coalition action could provide organisations concerned about damaging working and funding relationships via FOI activism with the opportunity to secure access to information that could assist in challenging or highlighting sector wide issues without jeopardising existing relationships and funding streams.
- Outsider groups often have less opportunity to secure information and tend to have to rely on official communication channels. Such groups are less likely to view FOI as aggressive or confrontational, particularly if they use it and find it a quick and effective method of obtaining information.

2. Introduction

The Freedom of Information (Scotland) Act 2002 came into effect on 1st January 2005, the same date as the wider UK legislation (Freedom of Information Act 2000 (FOIA)) also came into force. The introduction of FOI¹ in Scotland, and across the UK, is part of a wider global trend. In 1990 there were only a dozen FOI laws in operation, by 2011 this figure had risen to 85, and there are many more FOI laws currently progressing through legislatures around the world.² While the spread of FOI throughout the world is very evident, the efficacy of these laws and their successes in opening up government and promoting accountability and participation is less well understood.

The relatively recent introduction of FOI legislation to the public sector in the UK was heralded as part of a wider culture change in British governance, seeking to increase transparency and accountability surrounding previously opaque decision making and policy making. FOI was seen as central to democratic reforms to open up secretive bureaucratic structures and procedures. In the Scottish context, the introduction of FOI can be understood as a logical extension of the philosophy of devolution, which aims to bring decision making closer to the Scottish people, and to create a political culture characterised by openness and accountability. An integral part of this culture change, FOI has been regarded as a force for citizen empowerment, providing the public with a means with which to scrutinise and hold government to account.

The research reported here examines the use of FOI within the third sector in Scotland. One catalyst for the research was the seemingly low level of appeals to the Scottish Information Commissioner (the Commissioner) from the third sector. In 2007 the Commissioner found that 77% of the appeals to his office came from members of the public, while only 4% of appeals came from voluntary or campaign organisations.³ This figure subsequently declined in 2009 when only 2% of appeals to the Commissioner came from the third sector.⁴ This downward trend has been reversed in 2010, with 5% of appeals emanating from the Scottish voluntary sector: '2010 also saw a 62% increase in the number of enquiries received from the voluntary sector, from 50 in 2009 to 81 in 2010'.⁵

One of the aims of the research is to analyse whether the level of appeal statistics accurately reflects the use of FOI by the third sector. The research seeks to explore the extent to which voluntary and campaign groups in Scotland are making use of their rights under FOI legislation to access information from public authorities, and to identify and examine some of the factors which influence voluntary sector organisations' uptake of FOI. One of the primary incentives for the third sector to use FOI is that it offers a potentially powerful campaigning tool, and a means of gathering policy relevant information. How FOI rights are exercised across the diversity of the Scottish third sector, within the myriad relations between the third sector and Scottish public authorities, and in the context of other channels of communication and information exchange, is the focus of this report.⁶

1 Throughout this report the Freedom of Information Act Scotland shall be referred to generically as FOI. The Scottish Information Commissioner will be referred to simply as the Commissioner.

2 See Michener, G. (2011). 'The Promise of Freedom of Information Laws', *Journal of Democracy* 22:2 (April): 145-159; Ackerman, J. M. and Sandoval-Ballesteros, I. E. (2006) 'The Global Explosion of Freedom of Information Laws', *Administrative Law Review*, 58: 85-130; <https://www.privacyinternational.org/article/global-freedom-information-map>

3 Scottish Information Commissioner, Annual Report, 2007, p. 11 (28th July 2010).

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2566&sID=234>

4 Scottish Information Commissioner, Annual Report, 2009, p. 6 (28th July 2010).

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3616&sID=234>

5 Scottish Information Commissioner, Annual Report, 2010, p. 4 (4 April 2011)

<http://www.itspublicknowledge.info/home/SICReports/AnnualReports.asp>

6 This report is part of a wider ESRC funded CASE project partnership between the University of Strathclyde and the office of the Scottish Information Commissioner, examining the uptake of FOI within Scottish civil society. The support of the Economic and Social Research Council is gratefully acknowledged.

3. Background

The first stage of the research involved a nation-wide survey of third sector organisations, the results of which were published in a report in January 2010.⁷ Among the key findings of the first phase of the research were:

- Less than half of all respondents [43.7%] indicated that they were confident they would receive the information they asked for if they made an FOI request.
- Only 13.2% of all respondents are making regular information requests to public authorities.
- General awareness is high within the sector at 78.4% (this reflects general levels of public awareness).
- Almost half of all respondents [49.6%] stated that they would be discouraged from making a request because of a fear that it might harm working relations or funding relations or both.
- Almost all the organisations which responded were funded either wholly or in part by public authorities [83.5%].
- The higher the level of funding an organisation receives from a public authority, the more likely they are to believe that using FOI could harm relations between their organisation and the public authority.
- Concerns over jeopardising funding relations between their organisation and a public authority strongly predicts whether a respondent is likely to make an FOI request.
- 66.2% believe that FOI could be a useful resource for their organisation.
- Where respondents had made a request, 67.3% received all the information they sought, first time.
- Almost a quarter of those who had made a request [22.1%] did not mention FOI in their request(s) as they felt it might appear challenging or aggressive.
- 27.5% disagreed that public authorities treat all FOI requests equally, regardless of who is requesting the information.

The survey research identified a number of barriers to FOI uptake. These were often related to fears of harming funding and working relationships with public sector bodies.

The second part of the study has involved some 50 semi-structured, in-depth interviews with voluntary organisations throughout Scotland (some interviews with officials in public bodies and journalists were also undertaken in this phase of the research). Organisations were selected on the basis of their size, location, funding status, and their use or non-use of FOI. Some national umbrella organisations were included in the sample to get a sense of how FOI may be used by representative bodies on behalf of their members, and to sample opinion and experience on a sectoral as well as organisational level. This report is organised around some of the key themes that have emerged from the initial survey results and from the follow up qualitative phase of the research, which involved interviewing representatives from voluntary sector organisations, as well as analysing relevant documentation and media reporting. The groups covered here range from small grassroots and volunteer organisations, to medium-sized voluntary organisations with professional salaried staff, through to large national charities. The data includes interviews, as well as archival research on selected issues surrounding FOI requests and appeals. There are a few vignettes and case studies presented below. These have been chosen to illustrate a representative range of experiences and

⁷ See Spence, K. (2010) *Volunteering Information: The use of Freedom of Information laws by the Third Sector in Scotland - Survey Findings*, pp. 9-11. Approximately 6,783 voluntary organisations or individuals were reached directly by email and invited to take part in the survey within Scotland. A total of 705 responses were received from the third sector in Scotland giving a response rate of 10.4%. The sample was representative in terms of types of organisation, geographical location, organisation size, income etc.

perceptions of FOI, all of which are reflected in the wider interview and survey data. Participants and organisations featured in the case studies have been anonymised as appropriate.

FOI Requests: The Process

A person who is seeking information from one of the public authorities covered by FOI in Scotland will normally have to submit a written request to the authority holding the information for their FOI rights to be invoked. It is not necessary to explicitly mention FOI for an information request to enjoy rights under the FOI Act, however it appears that at times it is useful to remind the authority in question of their obligation to respond. The public authority has 20 working days to respond to the requester either by releasing the information or by giving a reason why they are not able to do so (for example because the information is covered by one of the exemptions in the Act, because the cost of providing the data is excessive, or because the information is not held by the authority).

If the requester is not satisfied with the public authority's response for any reason they are able to ask the authority to conduct an internal review. At this stage, the public authority has a further 20 working days in which to reply to the requester, again either producing the information requested or setting out why they cannot do so. If at this juncture the requester remains unhappy with the response they can then appeal to the Scottish Information Commissioner.⁸ The Commissioner will then investigate the appeal and will, in most cases, issue a decision notice stating whether the information should be released, either in full or in part.

⁸ How to Appeal (4 April 2011)
<http://www.itspublicknowledge.info/YourRights/YourRightsMainMenu/UnhappyWithResponse.asp>

4. Key Themes

Based on the quantitative and qualitative phases of this research the following section sketches some of the central issues that have emerged in relation to third sector uptake of FOI in Scotland. The research has captured opinion and experience from a representative sample of voluntary sector bodies in Scotland. As might be expected, experience, knowledge and orientation to FOI varies considerably across the sector. Nevertheless, there are some core themes that have emerged strongly from the research. The evidence presented below seeks to reflect the commonality of experience of FOI among voluntary sector organisations, as well as considering different experiences, strategies and policies in relation to using FOI. As such, this report reflects some of the current consensus and conventional wisdom in Scottish civil society regarding FOI, as well as elements of dissensus and differentiated experience of using (and not using) FOI.

4.1 Funding & Working Relationships

Previous survey results indicated that some organisations are wary of pursuing FOI requests in case this may jeopardise funding and / or working relations with the authority in question. Of those organisations that were refused a request under FOI almost half [47.4%] stated that these were the reasons they had decided not to seek a review.⁹ Concerns over damaging funding and working relationships also came out strongly in the qualitative fieldwork, and is clearly a highly sensitive topic for all parties concerned. The Director of one civil society organisation reported that some councils are quick to use the threat of retendering contracts held by a third sector organisation in order to prevent them from challenging the council. This threat was characterised as the 'ace up the sleeve' of local authorities which fund voluntary organisations.

Different imperatives are faced by third sector organisations which seek to remain independent whilst also striving to work in partnership with government. The tensions inherent in these relationships are managed differently across the voluntary sector, with organisations adopting strategies around FOI usage that veer between challenge and quiescence. One organisation engaged in such partnership working reported a cautious approach to making FOI requests, describing FOI as a 'big stick' to be used 'sparingly' and stressing that there are often other ways to gather information informally through established relationships. This may well be a significant aspect of the politics of information in Scotland, where some information is shared or released to organisations outwith formal FOI requests or appeals. In the latter case there is certainly evidence that authorities are prepared to negotiate with requesters to curtail or resolve information requests before they go to investigation by the Commissioner. On the other hand, some groups are keen to be seen to be independent from government and perceive challenging government and upholding the rights of their clients as a core part of their mission, regardless of whether this threatens relationships with government, financial or otherwise. Nevertheless, in an era of public sector retrenchment and cutbacks it is obvious that funding issues cast a long shadow over the Scottish voluntary sector and this is likely to colour the use of FOI, and indeed other mechanisms to hold central and local government to account. However, it is likely that there will be increased scrutiny of public sector spending, and non-spending, decisions in the coming years, and FOI may well be increasingly used by the public, charities and campaigning organisations to scrutinise and hold public authorities to account.

One organisation used FOI to gather information from local authorities for an extensive research report. Harming relationships with councils was not a key consideration as this group receives all of its funding from central government. Nonetheless, a policy officer working for the group admitted that they were not impervious to the funding context: 'If we do put local authorities' noses out of joint we don't really have to worry about them, we have to be a wee bit more circumspect with the Scottish Government.' This respondent also pointed out that although they had used FOI to access

⁹ Spence, K. op cit, p. 15

information, the motivation of the research had been to provide 'constructive criticism' rather than to '[score] points off local authorities'.

Many voluntary organisations operating in Scotland are located in a complex web of relationships with local authorities and public bodies. While this can facilitate information exchange, it can also influence how organisations orientate to FOI. Within this web there are also competing interests between the organisation, its members, clients or service users, and also the interests of the public authorities. For some organisations, keen to preserve their independence from the public sector, the impact of FOI requests on working and funding relationships is not as significant as it appears to be

A former manager for a national charity reported that they had tried to use FOI to access a local council's inspection criteria for a given service, and also to obtain information on whether inspections had been carried out. After unsuccessfully trying to access the information informally through contacts within the council, they submitted an FOI request. However, shortly afterwards the charity's director received an 'extremely angry' phone call from the council who were unhappy a request had been made. As a result, the director of the charity asked his staff to withdraw the FOI request, pointing out that some time before this incident the charity had gone from being entirely funded by voluntary donations to having a proportion of funding from government. Within his office, three full-time posts were funded by the local council. When staff protested to the charity's director that they were not adequately holding government to account on behalf of their clients, the director cautioned: "We have to be very careful...they give us our funding now."

for other groups who may have more clientelist relationships with public bodies. For the former, FOI has been reported as 'a good way of accessing information without having to cultivate relationships'.

Many of the organisations who participated in this research recognised the significance and value of maintaining working relationships, but some were equally cognizant of the fact that strained relations with individuals and organisations can often be transitory, and there is usually the opportunity to set aside or resolve differences on particular issues.

One of the groups examined launched a campaign directed towards a local authority around a service retendering process, the outcome of which would affect its client group. They reported relationships with the authority as being very difficult for a while. However the recognition the campaign gained nationally and in the media has meant that the local authority has now engaged in dialogue with the group and re-established working relations.

Another respondent commented on the significance of relationships between individuals within voluntary and public bodies: 'the relationships between voluntary sectors and councils ... gets complicated and a lot of people start taking things personally'. Another respondent admitted that the submission of an FOI request was seen as a 'spiky' thing to do and made relationships 'a bit testy for a few weeks'. How different organisations balance the risks of harming relations with public bodies against their own organisational interests varies quite

markedly across the sample, and depending on the issues and stakes involved.

One respondent summarised how sometimes difficult relationships can be mediated: 'At times you have to dig your heels in and say 'No.' The attitude I've tried to take with the council, and I think it's been pretty successful actually, is to say, 'Look, we don't agree ... and there is actually an independent arbiter, and I'll respect his decision.' This interviewee was aware that 'there were people in the council who were upset' by the organisation's approach and use of FOI. While the organisation is not funded by the council, they 'do want to have [a] working relationship with them.'

Attitudes towards FOI seem to be shaped by the stakes involved in particular issues, set in the context of wider working relations. One national campaigning organisation noted a risk-reward calculus in using FOI. 'There is a risk that public bodies react against people who use it a lot, and one of the things we do - because we are at the responsible end of the market - is try and develop good working relationships within public bodies.' For this organisation funding was not the critical issue, as much of their revenues are generated by membership subscriptions and donations. Nevertheless: 'an awful lot of our work depends on goodwill and good working relationships with government and one of the reasons we are quite successful at securing the outcomes we are looking for in campaigns is because what we ask of government is that our views are respected...if you become a serial FOI requester that respect would go down.'

Such financial independence is clearly not within the reach of all voluntary organisations in Scotland. According to some respondents ongoing or upcoming retendering conversations have dampened down any appetite to use FOI. One respondent whose service providing organisation is funded entirely by local authorities described this experience: 'We do have a voluntary sector wide climate [where] frequently we can be challenged with comments like, "Well, if you don't like [it], you know, we can always retender you". That language is not uncommon for us now.' How this dynamic plays out as public sector retrenchment intensifies over the coming years remains an open question.

One service-providing voluntary organisation that participated in this research does not use FOI due to concern that it would damage working and funding relationships. Nevertheless, this organisation could readily identify several ways that the organisation would like to use FOI, particularly with regard to tendering processes. There are examples of FOI use leading to contracts being lost in re-tendering processes in England.¹⁰ The decision by the Scottish Commissioner that Glasgow City Council should release the successful bid for an outreach service for the homeless in 2008 brought this issue to the attention of the Scottish service-providing voluntary sector. SCVO's Nancy Fancott describes the sector response as characteristically diverse: 'The perceived concern was around competition and confidentiality of information like that, which at the same time I guess our sector is uncomfortable with because we believe that we should be acting in collaborative ways, but the public sector tendering process forces us to compete...There was definitely a diversity of opinion on that decision. There was concern in some camps and support in others.'

Concerns were expressed during our research by interviewees from service-providing organisations about the quality of service that can be provided in an increasingly cost-cutting tendering environment. These respondents had identified FOI as a tool for revealing the risks to service provision caused by competitive tendering in an era of cut-backs. One interviewee predicted: 'we'll get contracts that are actually burdensome, and actually quite high-risk at times. But you have to go for the contract, because if you don't, well, you have to take the risk because by not having the services you're fully at risk, especially at the retendering stage.' There are also concerns that the third sector is treated differently from the private sector. The reactions to the Commissioner's decision on Glasgow City Council's homelessness service tender process reveal widespread concern about retendering across the sector. It is anticipated that groups may increasingly turn to FOI to ensure transparency around contracting and funding decisions, using FOI and the precedent set in the Glasgow City Council case as a means to force disclosure about sensitive spending decisions.

To avoid damaging relationships voluntary organisations may be using third parties to submit requests on their behalf. Responses to the quantitative survey in 2010 indicated that this was a tactic employed when they 'suspected the possibility of a backlash' to making requests. Although none of the groups interviewed had done so, some interviewees said they knew organisations which did so regularly, and one interviewee (in an independently funded organisation) is often approached by colleagues with requests and suggestions for FOI submissions. This interviewee said they would only

¹⁰ See Gitsham et al, 2005, p.22.

make the request if they were interested in the topic.¹¹

Some FOI officers working within public bodies held the view that this concern was understandable but was not borne out in reality. FOI staff are often separately located from the departments to which requests for information are sent to. This could, and may, mean two things in this context. Firstly, that FOI officers are not fully aware of the dynamics that exist in operational relationships between the public sector and the third sector, as FOI officers may be somewhat removed from the business areas of funding and working relationships. In some authorities the anonymity of requesters is maintained when passing on requests to other departments. The adoption of similar systems and protocols throughout Scottish public authorities could alleviate concerns which inhibit potential requesters from using FOI. Nevertheless, it is also clear that information about the requester does circulate beyond the FOI officers who receive the FOI submission in many cases, and until credible 'Chinese Walls' are in place it will likely remain the case that potential and actual FOI users will suspect that their identities will be circulated within the authority. Indeed, one respondent reported that they were phoned by a councillor to challenge why they had made so many FOI requests. From the conversation that ensued, it was clear that his identity as an FOI user was known within the local authority: 'I actually had a councillor who was quite threatening. Phoned me up and said, "Everybody keeps saying, 'He's put in another two FOI requests.'"' Our interviews revealed that there is a perception amongst many voluntary sector respondents, also supported by anecdotal reports, that the identity of FOI requesters can be circulated amongst public officials and elected representatives. How common such practices are remains unclear.

4.2 Expertise & Knowledge

One of the key factors affecting uptake of FOI appears to be related to knowledge of the rights granted by the legislation, and acquired expertise in using FOI effectively to secure relevant information. This kind of knowledge and expertise is practical and somewhat technical (e.g. in respect of knowing what kinds of exemptions exist and how best to phrase information requests). Of the respondents who regularly use FOI, it is common that their expertise and know-how has developed through 'learning-by-doing'. Research undertaken in England by the National Council for Voluntary Organisations (NCVO) and Ashridge Centre for Business and Society indicates that familiarity with the FOIA drives use.¹² The interviews conducted for this report support that finding; suggesting that using FOI is a determining factor in further use, as this leads on to identifying where FOI can be useful as a tool for other research or campaigning.

Several interviewees stated that they had not used FOI because they did not see how it might be used by their organisation. One campaigning group declined to be interviewed as the policy officer had not had 'a need to use freedom of information so far, as all requests for information had been answered [informally] by government departments, local authorities etc.'. Lack of knowledge is another inhibiting factor in usage, which again was identified in responses to the first phase findings with 39.7% of those surveyed indicating lack of knowledge and 27.7% indicating that they did not know how to make a request. As proposed in that report, guidance and training encourages use within the sector. One interviewee attended a workshop given by the Scottish Information Commissioner's staff and immediately identified FOI as a tool for an upcoming piece of research. Seeking assistance from the Commissioner's staff, she drafted requests which were sent to every local authority in Scotland.

'I attended that and decided I would use FOI following the workshop. I got a lot of good advice about how to frame the questions. Without that I don't think I would have known how to proceed. That was very, very helpful.'

¹¹ This is a similar position to that of many journalists using FOI who tend to pursue the issues and suggestions that are of interest to them.

¹² Gitsham M and Gribben C. (2006) Called to Account: The Impact of the Freedom of Information Act, *The Ashridge Journal*, 360°, pp 18-23

One journalist with considerable experience in using the Act commented on the experience of learning to use FOI as a tool. 'I would say it takes about 6 months to get up to speed with using it. But I don't think it's difficult at all. If you are vexed or exercised by a subject then it's very easy to craft a couple of questions and find an email address to send it to.' This respondent stressed the importance of knowing what you were looking for so specific questions can be asked. A local grassroots campaigning group that has used FOI (in this case in partnership with a political party) has experienced how imprecise requests can mean they are subsequently inundated with information. They referred to FOI as 'generating a cascade of PDFs and Word documents and stuff!' Identifying time as a 'major limiting factor' for campaigners with other things to do, this respondent confessed that 'our challenge at the moment is trying to wade through all this because our experience is that most of it, 99%, is standard guff.' The interviewee described the group's view that 'FOI in principle is really useful' but had not helped their campaigning to date. In discussing FOI use of the respondent recognised that people had different 'levels of sophistication' in respect of the FOI use and identified that inexperience is a key limiting factor to effectively using FOI as a campaign tool.

Some campaign groups will do research before using FOI, and have learned to be precise when framing their questions: 'we will have a plan, of which FOI is only one part and would not necessarily be the first thing we would do. A petition may come first, who is signing that will indicate the scale of the problem and locale.' This was also emphasised by a journalist who had encountered, as an early FOI user, the problem highlighted by the grassroots group above. 'I tended to put in lots of requests and go on fishing expeditions. A lot of the time it didn't produce anything. [Now] I don't like going in blind and asking for whole files. I like to be specific.... It wastes my time if I don't know what I'm after. It creates a massive paper chase.'

Both journalists and campaigners emphasise that recourse to FOI would not now be their first step in seeking information. One journalist observed: 'previously an FOI would be the first or second stage, where as now its the fifth or sixth. I'll go to someone first.' This may be indicative of the evolution of FOI-use in Scotland: with seasoned requesters moving away from speculative searching towards precise and targeted requesting. Journalists and campaigners, with links and sources across public bodies, are well placed to develop effective FOI strategies to fully utilise it as a transparency tool.

A similar point on recourse to FOI was made by those that do not use FOI regularly. The introduction of FOI is credited by some interviewees as strengthening informal methods of gaining information. These methods are discussed in greater detail in the next section of this report. One respondent explained 'I think probably because FOI is there, that information is made available to us. Above all, the thing that we find most useful about FOI is that it is there as a back-stop. So people know that if they don't tell us what we are asking [for], we can always refer to FOI.' These organisations do not seem to need to escalate information requests, which may reflect aspects of campaigning approaches and access also discussed later in the report.

Knowledge of how to use FOI seems to belong to individuals and can be weakly embedded within voluntary organisations. One campaigning NGO used FOI in the past, but as the employees 'specialising' in FOI have left their posts there is no-one with the experience and 'craft skills' currently using FOI on behalf of the group. Another interviewee's perception of FOI was that it is time consuming and burdensome, having used it once unsuccessfully. This attitude contrasts with the opinions of regular users who took part in this research, and research on FOI use in England and Wales¹³ which found that FOI can be an efficient and expeditious information gathering method when an individual knows how to use it effectively. This same interviewee added that their organisation had discussed asking a journalist that they approach with FOI ideas to provide training for the whole staff team on how to use the legislation.

Other than distancing the organisation from a request, this research found that using third party

13 Gitsham M and Gribben C. (2006), p.21

expertise was often preferred, as respondents often felt they did not have the specialist skills to use FOI. Based on the interviews conducted for this stage of the research, journalists - particularly those with a specialist interest - and MSPs offices were identified by several organisations as those they would turn to with a potential FOI request. Experienced journalists or MSPs with dedicated researchers are approached because they are versed in using FOI and may share an interest in the subject. One national NGO said of a journalist they collaborate with on FOI requests: '[they] know how to use it in practice'. A small local group who participated in the research received assistance from a political party which made FOI requests regarding their campaign and then shared the responses with them. Time was also cited as a factor in this approach, with dedicated researchers and journalists often being able to use FOI as part of their working remit, whereas other tasks may take precedence for civil society groups with limited resources.

Two campaigning groups interviewed, both regular users of FOI, show a high level of expertise, developed through sustained use, trial and error. This is reinforced by interviews with FOI officers within public bodies who report a general improvement in the wording of requests from people who use the FOI Act regularly, as well as an increase in the sophistication of some requests since the Act has bedded in. This can challenge the capacity of public bodies FOI teams: 'the complexities of some requests is getting really, really difficult. I've noticed in the last couple of months I've been getting complex requests and they take a long time.' This appears to pose particular difficulties in the context of FOI and public authority administrative rationality¹⁴ but may ultimately assist in breaking down barriers between departments and bring some uniformity to how they record and store information through highlighting the incompatibility and gaps in information retention and sharing between departments within the same public body.

One group who use the Act routinely explained: 'we have got much better at how we ask the questions. We are not scared to ask seven questions in one FOI, as opposed to asking one and hoping for the best. Some people will only answer the question asked, others will mention future plans etc, so we need to make sure we specify everything we want.'

This organisation has shown a creative approach to using FOI as a tool. An example of this involved a speculative request which was sent to all local authorities in Scotland, which used fictional case studies to help determine and compare the financial support available to disabled people across the country. This tactic was adopted after routine attempts were made to obtain this information through straightforward FOI requests. However the variation and permutations of support entitlement between different local authority areas made it unworkable for the organisation to then directly compare the local authorities' financial support. The second round of requests therefore presented the authority with a selection of case studies, and asked them to provide information on the financial support package that the individuals described in each case study would receive if they lived in the local authority area. The organisation enlisted the help of a sympathetic MSP: 'the info we had [from the original FOI requests] was valid but too complicated'. The headed paper of the MSPs office was thought to make a response more likely. While one local authority refused to calculate the requested information the NGO nevertheless had a 'piece of work that highlighted in real terms what the issue was.' This became a useful resource for future outreach, communications and campaigning work.

¹⁴ Burt, E & Taylor J. (2007) The Freedom of Information (Scotland) Act 2002: New modes of information management in Scottish public bodies?

There has clearly been 'bedding in' of the Act in authorities and civil society, and expertise in submitting and handling requests is developing. Previous research¹⁵ has indicated that the Act was being treated by public bodies as a process, resulting in an overemphasis on the letter of the law rather than the spirit behind it. While we have certainly come across other evidence to support this finding it is also clear that there is some willingness to honour the spirit of the Act and acknowledgement of the benefits of public transparency. Scrutiny via FOI in some cases actually provides valuable information to public bodies themselves, and can lead to subsequent efficiencies. Reports produced as a result of FOI use by Inclusion Scotland and the Learning Disability Alliance Scotland¹⁶ for example, have helped to identify best practice and highlight shortcomings in the services provided by local authorities, while, in some cases, even identifying money saving opportunities for public bodies.

4.3 Efficacy of FOI as a campaigning tool

As a means of accessing information FOI is often not the first option for civil society groups. This varies depending on organisational culture, status and what the information is required for. Several organisations indicated that they began citing FOI legislation in written requests as 'a last resort' when other requests for information were unsuccessful. 'The first time we used it we did so because we had previously written to local authorities on a number of occasions without invoking FOI and got a patchy response.' This organisation now uses FOI as a first choice method of obtaining information as they find it quick and efficient due to the legal obligations that exercising these rights triggers within public bodies. However this group are careful to first undertake some research before placing a request so that they know what to ask for and how best to target their FOI submission.

Several organisations interviewed said they had started using FOI because they were not receiving information when it was requested informally. Later in this paper perceptions of FOI are discussed in more detail, but it is worth mentioning here that, without explicitly invoking the Act, several organisations were not receiving what they considered a sufficient response to their information requests. This indicates that within public bodies there may still be a lack of understanding of what qualifies as an FOI request.

Organisations and groups interviewed view freedom of information legislation as a tool that can be used in conjunction with other strategies in campaigning or research. Interestingly, FOI use is not only seen as a strategy to gain information, but part of a more complex politics of information, where FOI can be used as a signalling mechanism. In this context, the actual information requested under FOI is not as important as indicating to an authority

The case below illustrates how a small organisations use of FOI can lead to unexpected outcomes:

A small voluntary organisation involved in a planning process with a public authority first tried to access relevant technical information from the authority informally in meetings ... "Somebody would ask in a meeting, 'Could you tell us how you're calculating this?' And we weren't getting any answers, so that was [why we submitted] the bulk of [FOI requests].

The group was successful in accessing information, and used it to ensure their campaign was based on accurate and appropriate data. The group also used FOI to access a Project Initiation Document (PID) after learning from a contact that the final version of the PID had been significantly revised from the version previously discussed in meetings.

The organisation requested the PID using FOI, and subsequently found that the version being submitted to committee was indeed quite different from that which they had expected.

The interviewee recalls: "So I went along to the committee meeting and I just sat there and I said, "Are you going to give everybody the PID?". And he said, "No, I can't do it, it's a classified document". And I'm sitting with six copies of it, so I just distributed it, and I just said, "Well, actually, we were at the last meeting, and the meeting before that, and the meeting before that, and we agreed that we had a plan. If you read that, gents and ladies, you will see there are some differences here. What are your thoughts?" And...it was quite funny because they just went off like rockets!

¹⁵ Burt and Taylor 2007, op cit.

¹⁶ Inclusion Scotland (2008) *Homes for Life? – FOI research into accessible homes for disabled people in Scotland*, June. Learning Disability Alliance Scotland (2010) *Stuck*, http://www.ldascotland.org/index.php?option=com_content&view=article&id=220:neglected-and-stuck-in-scottish-care-homes&catid=30:older-families-charter&Itemid=44, December. (Last accessed August 2011)

that either the organisation is serious about an issue, or unhappy about a policy or course of action. When asked why a rejected FOI request was not pursued, one national organisation representative revealed: 'It was a way of shaking the tree. So if we didn't get the information they recognised that we were serious about wanting to play a part in the decision or the debate.'

FOI therefore sits alongside, and can inform, other communication and campaigning options, which can range from contact and information exchange through direct and indirect lobbying, letter writing, using elected representatives surgeries, or legal recourse to judicial review of decision making. Other tactics orientated to gaining public attention include Parliamentary Questions, generating press coverage and raising public awareness.

Within our sample there were differences of opinion regarding the efficacy of FOI as a tool: in part this seems to link to perceptions of FOI as well as the location of organisations in the matrix of networks and interactions that connect civil society to public bodies in Scotland. As quoted elsewhere in this paper one interviewee memorably described their organisation as being 'at the responsible end of the market', where information may be more readily shared between public authorities and voluntary bodies. This contrasts with the view of Learning Disability Alliance Scotland (LDAS), which regularly uses FOI. LDAS deliberately maintains a strategic distance from authorities so it can challenge public bodies without fear or favour when appropriate. According to LDAS their strategy is consciously and purposely different from other NGOs: 'there are lots of connections that give people the ear of politicians and mean they don't have to take the approach we take. We are taking an approach that helps individual people with learning disabilities raise their own voices.'

Such strategies are reciprocated by some public authorities, suggesting that the new openness of government in respect of information sharing and disclosure is enjoyed by trusted elements within the voluntary sector, but this does not always extend to smaller local groups. An interviewee from a local grassroots group, working as part of a loose coalition with national environmental organisations, contrasted the inability of their own group to get access to councillors with the national organisations' ability to do so: 'We've been trying to get in front of them [councillors], they won't meet with us, but they've met with all the big organisations. It's really interesting – they won't talk to the local community. There is a sense that the local folk are loose cannons.'

Well-established and politically active national NGOs have the capacity and interest to build relationships and reputations with political influentials. Such political capital is simply not available to small groups. In addition, in a country of Scotland's scale, the pool of people operating at a senior policy making level is relatively small across large voluntary organisations, public bodies and politics. Often, people will move between sectors, and the contacts and knowledge developed by such actors facilitates the flow of information between individuals (although not necessarily organisations). As one interviewee, in a senior position within a national voluntary organisation, explained: 'I've worked in this area for many years. I know a lot of key people in local authorities and in Scottish Government personally, and to whom I can go to directly for something. I've never found a difficulty.'

Parliamentary Questions (PQs) are another commonly used method of obtaining information (this chimes with research on third sector FOI use in England). One interviewee remarked: 'even prior to FOI, I could say I'll ask an MSP or an MP to raise a question in Parliament and get it that way – effectively FOI.' Another NGO respondent contrasted their experiences of PQs with FOI: 'With PQs we know how to phrase them to get the information we are looking for. With FOI it is harder to do that, because you have to be really specific and you don't always know what you are looking for, so you have to really think about what you are asking for and if you don't know where that information is. A PQ is a better way of teasing out that information.'

In common with networking, PQs have their limitations. Just as a civil servant 'will only tell you as much as they want', a PQ may be answered with 'yes, we have talked about that', both of which don't help the voluntary organisation to advance their interest. FOI had been used at this juncture as a last resort. Although not always successful, with FOI there is recourse through the review and appeal process.

One group who participated in this research produced a report on the financial implications of merging two schools. The report challenged a local council's own analysis. The council called in an independent consultant to give advice on whether the council or the voluntary group's figures were accurate. The council's analysis was upheld by the independent consultant.

However, through FOI, the campaign group discovered that the independent consultant had worked on the original report produced by the council – in essence they had been contracted to provide advice on their own work. The group attended a meeting involving the council's Deputy Director of Education and the Leader of the Council, and after presenting the information gained by the FOI request, the plan to close the school was scrapped. As the group chairman recalls: 'That was the turning point. If we hadn't had that FOI document...That was the turning point of the whole thing. The bluster and bravado that had been put forward by the officials was winning in general right up until that point.'

Amongst the groups who participated in this qualitative research there were examples of FOI proving efficacious not only on specific cases, but for wider policy and procedural considerations both at local and national governmental levels. Below are some illustrative examples of this.

The successful use FOI by various voluntary organisations with a campaigning remit has been in evidence, with FOI used to facilitate scrutiny of public bodies. FOI has been effectively used to check if public authorities are fulfilling duties and to evidence the need for national level policy change. For scoping research ranging across all 32 local authorities in Scotland, FOI offers an efficient tool to collect comparative data to inform policy and advocacy work. Learning Disability Alliance Scotland (LDAS), Inclusion Scotland and Enable Scotland have all used the legislation in this way. Individuals within each organisation identified FOI as a means to request information on issues arising for their service users. Inclusion Scotland conducted research and compiled a report based on their findings on accessible housing for disabled people. Bill Scott, Acting Project Manager, does not think the research would have been possible without FOI

and saw it as more useful than any other available research method. The report produced as a result of this information gathering strategy highlighted gaps and failings across councils regarding housing provision for disabled people, as well as identifying good practice and strategies. The report was used to lobby government, and Inclusion Scotland held a parliamentary reception to raise political awareness. The issues raised were reflected in the guidelines the Scottish Housing Minister subsequently issued to local authorities.¹⁷ Inclusion Scotland was also invited to join the Housing Policy Advisory Group where the organisation can speak directly to ministers and other stakeholders to represent disabled people's housing needs. Partnership working has also come out of the research with two local authorities inviting Inclusion Scotland to represent disabled people as equal partners

¹⁷ Scottish Government (2009) Implementing the Housing (Scotland) Act 2006, Parts 1 and 2: Statutory Guidance for Local Authorities: Volume 6 Work to Meet the Needs of Disabled People. <http://scotland.gov.uk/Publications/2009/03/25154356/0> (last accessed August 2011)

in the process of developing new housing provision. The Inclusion Scotland report¹⁸ had been critical of some authorities, although Bill Scott points out it was constructive criticism which led directly to better representation and progress on social housing issues for disabled people.

Enable Scotland have also carried out a large research exercise asking all local authorities and universities about training for teachers and support for learning assistants for children with additional support needs. Given the scale of the research FOI was an effective method in terms of time and cost. Although still in draft, this report has already drawn political attention and will be used to lobby for improvements. Linda Noble, Children's Development Officer at Enable believes the organisations lobbying position is considerably strengthened by the firm evidence base that their research provides, and this data will inform Parliamentary Questions requesting response and action on the findings. Both these organisations received guidance and assistance when formulating FOI requests (in one case from the Campaign for FOI, and in the other from the Commissioner's staff).

The Learning Disability Alliance Scotland (LDAS) has used FOI for several campaigns. Ian Hood, LDAS co-ordinator, can see a use for the Act in most of the Alliance's campaigning work. In common with the organisations mentioned above, LDAS uses FOI to ask questions which, to a certain extent, the answers may already be known, although anecdotally. Ian Hood characterises LDAS's approach as follows:

'It is rare that we use information just as research, it is something we use to influence and direct campaigning. It allows us to check how effective things are and problems that need [to be] addressed.'

Examples of LDAS campaigns¹⁹ using FOI include the 'Stuck' campaign, which identified how many adults with learning disabilities are inappropriately placed in care homes for older people and the 'Changing Places Toilets' campaign, which highlighted the shortage of public toilets with changing facilities and mapped current availability. An issue highlighted in this campaign was that to retrofit a public toilet as a disabled changing facility costs £15,000, whereas to build in this functionality costs £3,000. As Ian Hood pointed out 'it saves money to do it as you go. In a sense we are helping [local authorities] do their job and save money.'

All these organisations recognise that FOI is an imperfect tool; not all authorities respond on time, some fail to respond, while others may seek to apply exemptions where other authorities are happy to provide the information. Responses can vary, even when questions are specified and detailed. The volume of data generated through such FOI requests can be difficult to manage, and by the time gaps or inconsistencies are identified it can be too late to go back to the authority without making a new FOI request. Nevertheless, each of these organisations have used FOI successfully, highlighting some serious public interest issues and influencing policy, or raising the profile of a cause at political level.

However, some organisations have had a less successful experience of FOI, often due to exemptions being applied.

Several organisations interviewed for this report have had FOI requests denied, partially answered or ignored completely and often had not pursued this through review and appeal. The reasons for this varied: for some there was a perception that pursuing the request was simply not worth the time and effort; for others, the moment when the information might be useful had simply passed; yet more respondents found other ways to secure the information they had requested outside of official FOI mechanisms.

Some civil society groups have sought appeals and their cases have been upheld. In a couple of cases

¹⁸ Freedom of Information research into accessible housing for disabled people in Scotland, <http://www.inclusionScotland.org/reports.asp> (last accessed April 2011)

¹⁹ For details of LDAS campaigning activity see <http://www.ldascotland.org/> (last accessed April 2011)

the information requested has been crucial to a single issue campaign or scrutiny matter, whereas it could be argued in other situations that the FOI information would not 'make or break' a campaign. There are, however, certainly indications from our research to suggest that exemptions which have perhaps been applied questionably are not being challenged because the case is not taken to appeal.

Single issue campaigns such as the Scottish Rural Schools Network (SRSN) fight to save individual schools earmarked for closure, and Edinburgh ECAS's attempts to scrutinise Edinburgh Council's reduction in funding for the Edinburgh Disability Forum, have taken authorities to appeal, won and effected policy change. SRSN's campaigning and scrutiny of local authority decision making processes has helped frame the Schools (Consultation) (Scotland) Act 2010 which has a section on rural schools and community consultation as part of the process. ECAS have drawn the issue of transparency in decision making to the attention of the Equality and Human Rights Commission in the UK and also the Work and Pensions Committee at Westminster, which is looking at changing the law to compel councils to proactively publish information as they make decisions. Both these organisations faced a long struggle to win disclosure, but FOI provided them with the means to pursue their interests. While other organisations have raised the lack of sanctioning power of the Commissioner (with fines for late disclosure being mentioned by several interviewees as a welcome sanction), the effect of what has been achieved using FOI to date and some of the precedents set has not been lost on civil society groups actively campaigning in Scotland.

The Commissioner treats every appeal on a case-by-case basis. Evidence from our fieldwork suggests that as understanding of the FOI Act evolves and as precedents for appeals have been set, requesters have been able to learn from their own, and others, experiences. One seasoned FOI requester in Scotland observed: 'I check rulings before putting requests in. Throwing Commissioner's judgements at the body works I think, because they know what will happen if it goes to appeal.'

An FOI Officer from a national level body was compiling figures for their annual report when interviewed, and was able to say that statistically last year the number of appeals they were involved in was down by half that of the year before. Accounting for this was 'experience. It's been a culture change over the last six years. It takes time for these things to really fully bed in.'

4.4 Full Disclosure? Timing, Delays and Bargaining

The question of timely access to information is important to the efficacy of Scotland's FOI regime: if information is released after key decisions are taken they may well be difficult to reverse, and the capacity to effectively scrutinize and hold officials and elected representatives to account is undermined. The survey phase of this research picked up on this issue, though it did not initially appear as a major feature of Scottish third sector organisations experience of FOI.²⁰ Some respondents who had used FOI reported the length of time it eventually took to access information as an issue. The subsequent qualitative strand of the research suggests the question of timing and delay in the release of information might be a more widespread issue than first appeared. Several interviewees reported that despite using FOI successfully (to greater or lesser degrees), many have found that on occasion obtaining information under FOI can be a protracted and lengthy process. In one particular case a campaign group was able to access some of the information it requested quickly, but they also found that some of their FOI requests took more than a year to resolve. When group members were refused a number of FOI requests, they appealed to the Scottish Information Commissioner. All the appeals were upheld, however one respondent commented on finally receiving the information there was the sense of a pyrrhic victory: 'To be honest, the moment had passed. By this point we'd wound up the group'.

Another issue concerns the emergent use of delaying tactics employed by public authorities that do not wish information to be released. In one instance a group received over 22 apologies over a six-

²⁰ Spence 2010, op cit, p.15

month period from a council to whom they had applied for information: 'There's no question that they were stalling us. Absolutely none.' This is clearly problematic from the perspective of the voluntary organisation as information can have a currency, and substantial delays in accessing information can render it worthless to the recipient. This experience has convinced the organisation that there should be earlier sanctions against public authorities that do not comply with the Act: 'It would be better if there was some sort of immediate penalty for not supplying information in time'.

Some organisations identified an issue with the timescale for FOI requests and appeals in relation to planning decisions, public consultation processes and judicial reviews. Although it can be a successful means of securing disclosure, the FOI appeal process cannot halt decision-making processes in the manner that a judicial review can. For example, one organisation wanted to pursue a judicial review with a local authority, but due to the cost involved felt it necessary to obtain information through FOI before embarking on this course of action, to ensure they had a case. A judicial review must be lodged within three months of the decision in question and can cost £60,000. The FOI request was refused and went through review at the local authority, and thereafter appeal with the Commissioner. This process lasted around 15 months in total, exceeding the time limit on a judicial review. In this instance the time delay was problematic, but not insurmountable, as the issue did not concern an irreversible action. The organisation in question can see the benefit of FOI as setting a precedent on what information should be disclosed:

'I'm quite happy to play the long game and establish principles. This has set a precedent. The fact that they've had to release that document alters standing orders throughout Scotland, in terms of the relationship between officials and elected councillors...although I don't think the Information Commissioner has powers to do anything particular²¹ – but if they [local authorities] continually defy a precedent that has been set down by the Commissioner, I think that would be a strange way for a public body to behave.'

In this way, while the information may not become available in time to assist the campaign in question, the decision may influence future disclosure. However, this is not always the case and the application of exemptions can delay disclosure to the point where the information requested loses its salience or currency.

Another interviewee who had a request refused on grounds of commercial sensitivity felt that appealing to the Commissioner was pointless because the request regarded contracts that were to be awarded in the coming 6 months. The respondent subsequently secured the information from one of the bidders as it was published as part of the contracts award process. The respondent now accesses such information by subscribing to the government's procurement website. Reflecting on the disclosure aspect of this case the respondent commented: 'it's not commercially sensitive because I can get it. It's open to anyone to get, but the local authority can say that, so they can define what information can and can't go out.' This raises an important issue regarding the timely release of information. Tender bids are normally considered sensitive information during the evaluation of bids and prior to the award of contracts. Whether the detail of such tendering competitions is released after the award of contracts is a different matter.

²¹ The Scottish Information Commissioner does have powers to force the release of information and failure to comply with a Decision Notice issued by the Commissioner can lead to action for contempt of court.

This research suggests that the bedding in of FOI is uneven across the public sector. On one hand the processes of handling requests and the application of exemptions seems to generally have improved as authorities in the 'FOI generation' have found their feet. Nevertheless, it is the case that respondents believe exemptions are being used in some cases to play for time in situations where the currency of the information and the applicant's interest are time sensitive. Other features of the bedding in of the Act are discussed in the Changing Culture section.

The Scottish Rural Schools Network (SRSN) has used FOI since 2005. Chairman Sandy Longmuir thinks FOI may be increasingly ineffective as a tool. He cites an example of an early school closure prevention success for the group, which involved FOI requests that were answered timeously and in full. Later school campaigns have experienced long delays in receiving responses and new exemptions being applied, making it more difficult for SRSN to use FOI data to bolster their campaigning work.

The currency of the information may be an influencing factor on whether a request refusal, or, non-response, makes it to appeal. Research-based requests seem less likely, from the qualitative interviewing, to make it to appeal. The three organisations that had conducted research through FOI across local authorities in Scotland experienced variance in response timescales, quality of response, and in a couple of cases received no information from at least one local authority. Ian Hood explains the campaigners response to this situation: 'We have never gone to appeal. It's balance though- we don't get a response from [the council], we would have to wait a long time for the Commissioner to make them reply. It's not my job to worry about the FOI.' From the evidence collected as part of this research it appears likely that reviews and appeals may be the tip of the iceberg in terms of the volume of non-response or refusals of requests. There is a sense amongst respondents that a quicker method of dealing with disputes around refusals and the issue of non-response is desirable. Several interviewees agreed that some sort of sanction for late responses might help address this issue.

An issue that emerged from a number of the case studies concerned whether FOI requests had prompted the release of sufficient and comprehensive information. This touches on a concern on the part of outside organisations that they may only obtain partial information in response to FOI requests.

During one campaign an organisation was leaked an email by a contact within the local authority. The email contained the strongly expressed views of a senior council official regarding recent press coverage of aspects of the campaign and council policy. Keen to access the email formally through FOI, the group contacted the council for the correspondence. Information was released but the specific email in question was absent.

The Chair of the campaign recalls: 'I went back and said, "Are you sure this is everything you've got?"

It can be difficult for civil society organizations to be sure that all the information that falls within the scope of an FOI request is actually disclosed. During one campaign an organisation was leaked an email by a contact within the local authority. The email contained the strongly expressed views of a senior council official regarding recent press coverage of aspects of the campaign and council policy. Keen to access the email formally through FOI, the group contacted the council for the correspondence. Information was released but the specific email in question was absent.

The Chair of the campaign recalls: 'I went back and said, "Are you sure this is everything you've got?" "Yeah, that's it. You've got everything we have". I then went back with the date, the time, the header and the recipient, and said, "Are you sure you don't have this email?" Sometime later, the email was found in a sent items folder.'

While the group was successful, it seems clear that it would not have accessed this email had it not been made aware of its existence through another route.

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Cases such as this reflect the suspicions that can arise amongst voluntary organisations engaged in the FOI process. While the onus is not on a requester to prove information exists before a public authority releases it, there remains a suspicion on the part of some civil society groups and other users of FOI that authorities may seek to inappropriately withhold damaging or sensitive information, or may narrowly interpret FOI requests or exploiting ambiguities in the wording of the request to avoid full disclosure.²²

Bargaining within the FOI process was highlighted by some organisations as a feature of the negotiation of disclosure. One organisation was asked to withdraw their FOIs which were then at the appeal stage, in exchange for securing part of the information they were requesting. From the FOI Officers' point of view this is not unusual and such bargaining is not seen as an attempt to withhold the most sensitive information: rather, it is indicative of the local authority’s internal process for dealing with FOI requests. In some cases there are very legitimate reasons for withholding information, for example, in cases where the information requested is rightly exempt. If a request concerns third party personal data, the authority would be in breach of the DPA if it was to release such information.

This type of bargaining is not always in the best interests of the requester, however. One respondent was asked to withdraw an FOI request and was assured that the information requested would be supplied outside of the formal FOI process. He subsequently withdrew the request, but the information was not provided despite assurances from senior officials within the public body. Indeed, several of the organisations interviewed who had difficult relationships with public bodies, and who had found themselves offered a compromise where they would secure some of the information they requested in return for ceasing appeals, expressed wariness of such offers given their previous experiences. One interviewee confessed to becoming ‘more and more sceptical’. It is also the case that, where an FOI request is withdrawn, the requester will lose their right to subsequently appeal the case, should they be unhappy with the eventual outcome.

4.5 Networks, Coalitions and Umbrellas

Scotland has a relatively large, established and active third sector. The umbrella organisation Scottish Council for Voluntary Organisations (SCVO) has over 1000 members and calculates that there are 45,000 voluntary organisations in Scotland, half of which are registered as charities.²³

Within the third sector, organisations often come together to form coalitions, both formal and informal, around specific campaigns where there is common ground. Umbrella organisations provide a link and forum for representation within sectors.

Indeed, the ‘Called to Account’ research in England indicated that many organisations (45% of those surveyed) would welcome opportunities to work in coalition to use FOI as a tool, and action of this nature is being taken internationally with co-ordinated requests made across Europe.²⁴ As far as this research could ascertain, coalitions have used FOI on specific issues that affect client groups, and some groups have cooperated as loose coalitions using FOI to obtain data which is of shared interest (e.g. environmental impact assessment data). Coalition action could provide organisations concerned

²² See also Brooke, H (2010) *The Silent State: Secrets, Surveillance and the Myth of British Democracy*, London: William Heinemann, and (2006) *Your Right to Know: A Citizen's Guide to the Freedom of Information Act*, London: Pluto Press.

²³ <http://www.scvo.org.uk/about-the-sector/sector-stats/> (last accessed May 2011)

²⁴ Gitsham et al, 2005, p. 25.

about damaging working and funding relationships via FOI activism with the opportunity to secure access to information that could assist in challenging or highlighting sector wide issues, while reducing concerns about the potential harm to existing relationships and funding streams.

A further benefit of coalition action is that it shares the FOI burden that several organisations mentioned as an inhibiting factor in their use of FOI. It also provides the opportunity for sharing expertise and learning from the experiences of coalition partners. Two national level NGOs indicated that they have made smaller local grassroots groups aware of their FOI rights when they have made contact for advice on how to proceed with a campaign. It is worth noting that neither of these NGOs are active FOI users themselves, generally using their network contacts to access information informally. Nevertheless, one local group that is acting in a loose coalition with national level NGOs on a large scale campaign has taken on FOI as a strand of their campaign: '...we have put in some requests and we have got some stuff back. I guess we could do with some information, some guidance on what our level of authority is and what we are entitled to.' The limitations of a coalition model are often related to the degree of shared organisational interests, which is evident in cases where larger NGOs do not necessarily share or prioritise local level concerns, and therefore limit the kinds of support and guidance they offer.

Many of our respondents acknowledge the importance of sharing FOI material and experiences. One campaigning group had been unable to obtain information through their own FOI requests but contacts in their network had managed to secure the information using FOI and shared it with them.

SCVO has provided training on FOI in the past which has not proved as popular as some other SCVO training courses (this may reflect organisational priorities and statutory obligations), such as those focusing on governance and management issues like Data Protection. This may also be shaped by the increased pressures facing service providing organisations and their day-to-day priorities. However, several of the organisations interviewed for this research indicated that they would welcome training on FOI, particularly targeted towards their remit. Indeed, the Scottish Information Commissioner's office is currently running an FOI workshop training programme for the voluntary sector, which will run through the remainder of 2011 and into 2012.

4.6 Perception Gaps

There is a perception in parts of Scottish civil society (and perhaps in the public sector too) that FOI can be an aggressive or confrontational approach to obtaining information. This may reflect the unique relationship between the two sectors. Individuals in voluntary organisations that interact routinely with officers in public bodies repeatedly spoke of anecdotal conversations in which officers noted that FOI was seen as 'a pain'. This view was to some extent borne out by interviews with FOI officers, when asked about how colleagues in other departments perceive and orientate to FOI. This often reflects a sense that the inconsistent and unpredictable nature of FOI requests can have considerable impact of workloads and other deadlines.

The interaction between voluntary organisations and public bodies working in partnership also creates an interesting dynamic, and there is a sense that the voluntary sector can be split into insider and outsider groups. The former are characterised by long term cooperation over time, with voluntary sector representatives serving on a range of public and quasi-public boards and committees, which brings them into contact with public authorities. When individuals sit on such committees or stakeholder groups they immediately enjoy access to more information, and often find informal ways of requesting and accessing information. Outsider groups often have less opportunity to secure information and tend to have to rely on official communication channels. Such groups are less likely to view FOI as aggressive or confrontational, particularly if they use it and find it a quick and effective method of obtaining information.

The perception that FOI-use potentially or actually damages funding or working relations seems to

be based on the idea that there is an unhealthy power imbalance in favour of public authorities relative to the voluntary sector. A minority of our interviewees were keen to challenge this perception, and clearly identified FOI as a significant means to redress any imbalance, though virtually all respondents recognised that such challenge is more likely from a position of financial independence: 'FOISA puts us on a par with local authorities. We are a tiny organisation, but we can ask them questions and they have to reply.' Some respondents who had used FOI suggested to us that this activity was not unrelated to their organisations subsequently facing funding cuts. However this research and responses to the 'Called to Account' study suggests that the perceived risk is perhaps greater than the actual risk.

There may also be a perception within public authorities, identified by one FOI officer, that sharing information that is not in the public domain will cause problems, in that information which is not in the public domain is not there for a good reason, rather than just a cultural and historical feature of UK governance. 'We haven't yet learned how you actually work in an environment where the information we have is routinely disclosed to the public or published. It's great when you talk to someone from Sweden and they just release the stuff – someone asks for the file and there it is. We are not at that stage and it has taken them a couple of hundred years to get there.' All this suggests that the application and utilisation of FOI, and the wider issue of transparency and accountability across public life in Scotland, is still evolving. The pace, scope and scale of this evolution is considered in the conclusions to this report.

5. Conclusion: A Changing Culture?

It is worth remembering that freedom of information in Scotland is still in its infancy. It is just over a decade since the devolution of political power to Holyrood, and we are only six and a half years into the Scottish experiment with FOI. It is clear that over the last decade governance and decision-making in Scotland has become more transparent and open. Nevertheless, there remain significant challenges to maintain openness and improve the transparency of the Scottish polity. While much of the attention (both praise and criticism) rightly focuses on the performance of public servants and officials charged with ensuring an open and responsive political culture, it is also clear that civil society has an important contribution to make in holding decision makers to account, scrutinizing policy making, contributing to political dialogue and public deliberation, exercising rights to information, and campaigning for redress when such rights are not honoured.

We detected some disagreement amongst civil society actors about the depth of the culture shift towards increased transparency in Scotland. Many interviewees recognised progress and change on these issues, and one particular respondent was in no doubt that a feature of devolution has been more open government, seeing this as a reason why third sector use of FOI may be lower than expected. However, while another FOI officer identified the commitment of senior managers within their local authority to freedom of information as an ethos, they also noted that this was somewhat undermined by the practical challenges relating to the actual release of specific information. Clearly, implementation of FOI and disclosure practices is not uniform, and they are perceived differently depending on the role, experiences, and organisational culture of the respondent. This is likely to remain a feature of FOI in Scotland as public bodies continue to take tentative steps towards greater disclosure and information sharing with the public.

Cost was also identified by FOI officers as a significant limiting factor to fully realising the potential of FOI. Some authorities have found it is more cost effective to publish data proactively on their websites for identifiable areas of interest, in an attempt to offset anticipated high volumes of FOI requests. Such practices are still not routine, but there is pressure for further travel in this direction: 'we keep saying [to colleagues] once it's released it's released so it doesn't really matter who's asking for it. If we had the time, or the money, or resources we would probably release half of it anyway.'

Despite such progress, there remains scepticism and mistrust in many Scottish civil society organisations about the readiness of public bodies to fully disclose information, particularly information that may be politically sensitive and impact of the delivery of public services. In a climate of public service retrenchment such fears are acute. There is a strong concern among respondents that recourse to FOI is a rather impolite means of accessing information and for some there continues to be a strong sense that using FOI may harm working relations and impact negatively on funding from public authorities.

An anxiety shared by several respondents relates to the privacy of those making FOI requests. One of the possible mooted solutions to addressing worries about the exercise of FOI rights damaging the individuals and organisations concerned is that the identity of the requester is not disclosed to public officials by the FOI officer(s) dealing with the requests. In principle this seems an attractive means to boost confidence in FOI. In practice the confidentiality of the requester may be more difficult to secure. Depending on the nature and focus of an FOI request it is likely that more specific and specialist requests will be of interest to a narrow range of actors, and officials in public bodies may be able to easily guess the source of the information request. One of the solutions that has emerged to concerns over the repercussions of using FOI has been the use of third parties to submit FOI requests. The media have a role to play here, and contrary to the image of journalists simply using FOI as a method of trawling for stories, there is evidence that organisations in Scottish civil society cooperate with the media to get information and issues into the public domain.

Another feature of FOI uptake across Scottish civil society is that perceptions of how well FOI can

help campaigning and advance the interests of voluntary organisations vary considerably. This is related to a number of factors including: how often respondents actually use FOI (which is closely linked to their knowledge of the legislation and expertise in drafting FOI requests); whether organisations are ‘insiders’ or ‘outsiders’, and what other means of accessing information are available to them. Some of the early adopters and enthusiasts of FOI have become somewhat disenchanted by the often long delays in securing all the information they have requested, and protracted negotiations and bargaining over what officials are prepared to release.

What emerges then is a varied picture, with examples of good practice, strategic and efficacious use of FOI by campaigning groups, and more routine and proactive disclosure of some kinds of data and information by public authorities. In addition, the fact that groups and individuals have recourse to FOI, and appeals, has promoted greater information sharing between the public sector and civil society. Nevertheless, there remain concerns that politically sensitive information can be withheld or its release delayed until it is no longer useful to the requesters.

Last year former UK Prime Minister Tony Blair detailed his regret at introducing the UK’s FOI legislation in his memoir,²⁵ claiming it was not used by the people but instead had given journalists a weapon to attack government with. This does not chime with either the Commissioner’s appeal statistics (over 70% of which come from the public) or the Scottish Government’s FOI request statistics for 2010 (49% individuals, 17% journalists). Blair also emphasised the need for politicians to deliberate and take advice in private. However, there remains a strong sense among some respondents that officials have adapted to FOI by changing their working practices in terms of recording and minuting key conversations and decisions. The Blair administration became known, and severely criticised, for a ‘sofa style of government’ that by-passed traditional accountability.

Several organisations with relationships with public bodies mentioned anecdotal conversations about minimal recording of meetings and one FOI officer also commented on this: ‘it is far easier to discuss something face to face or over the phone and then do it and there is no evidence. That is only rumour though.’ This concurs with some of the findings in other research²⁶ but other studies suggest that this effect has been overstated.²⁷ Although this is difficult to measure precisely, our findings suggest that many civil society respondents nevertheless believe that officials are now much more sensitive to the potential disclosure of information, and have modified their recording and storage of information in response. Others believe that FOI has contributed to more disclosure generally, with public bodies routinely publishing information that would have been withheld before the introduction of FOI.

The Freedom of Information (Scotland) Act is ‘usually superior [to the FOIA] in terms of the public’s right to know’²⁸ and was considered a more progressive and open system than the regime that applies throughout the rest of the UK, reflecting the ethos of devolution. However, in January 2011 the Scottish Government decided not to extend the Scottish FOI Act to cover additional bodies now involved in delivering public services, citing the cost and administrative burden of the FOISA as key reasons for putting this on hold. The minister offered the following justification for this decision in the light of consultation responses: ‘it is clear that, while there is broad support for the principles of openness and transparency, any extension of legislation is not favoured by the majority of those bodies proposed for coverage at the present time’.²⁹ This decision may indicate a waning of the government’s commitment to the principles of openness and transparency enshrined in the Act. In respect of Scottish civil society, this comes at a time when the funding cuts beginning to take effect across the public and voluntary sector may lead to the reticence and caution that typifies much of

25 Blair, T (2010) *A Journey: My Political Life*, London: Random House

26 See Burt and Taylor, 2007: p. 25.

27 R. Hazel ‘Freedom of Information in Australia, Canada, and New Zealand’, *Public Administration*, 67 Summer, p.204.

R. Hazel, B. Worthy, M. Glover (2010) *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work? Understanding Governance*, Palgrave Macmillan, , p262-3

28 Brooke 2005, p. 22

29 <http://www.scotland.gov.uk/News/Releases/2011/01/26154714> (last accessed May 2011)

sector's approach to FOI being put to one side as the balance of the risk reward calculus shifts. It appears that we may have reached an important moment in the evolution of FOI in Scotland, and it is salutary to reflect on some international lessons as organisations think their way through these issues:

'In order to continue to push forward the worldwide movement toward open government and freedom of information, the contributions of civil society will be absolutely necessary. Without constant pressure and activism, FOI laws will turn into dead letters, and their principle statutes will be slowly eaten away by other concerns... What are the social, political, and economic conditions that constitute a particularly good "enabling environment" for the consolidation of FOI laws?'³⁰

Progress in relation to openness and transparency in Scotland has been quite marked over the last decade. The introduction of FOI in Scotland in 2005 was a critical development: the availability of rights rather than rhetoric added much needed substance to the high principles of devolution. For transparency regimes to be effective they must command respect and individuals and organisations must use such legislation to exercise their democratic rights. In Scottish civil society the embrace of FOI has been somewhat hesitant. Many established organisations clearly have tried and tested means of securing information they require. Other groups have had recourse to FOI, yet there has been mixed experience of the efficacy of FOI as a tool for accessing information to aid wider campaigning, outreach, lobbying and public-awareness raising. FOI is, however, beginning to be seen as one available tactic that can be used to inform an organisation's strategic communications, and there is clear evidence that organisations are learning how best to use FOI. This is reciprocated within public bodies too, and the dynamics of FOI transparency are still unfolding in Scotland.

How Scottish civil society may use FOI in future remains an open question. What is evident at this juncture is that many organisations are primarily concerned with immediate funding issues and the core concerns of their organisation and client groups. Under such conditions it may be difficult to focus on principles and develop sector wide strategies to advance transparency.

³⁰ Ackerman and Sandoval-Ballesteros, p. 129-130.