

THE COST OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT AND 'VEXATIOUS' REQUESTS.

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ABSTRACT

Purpose: *The aim of this study is to investigate the cost and incidence of Freedom of Information (FOI) requests within local authorities 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 local authorities are using to define 'vexatious' are also examined.*

Design/Methodology/Approach: *The approach taken to the research in this study is a survey of the 32 local authorities in Scotland using freedom of information requests as the data collection method. Additionally, the appeals data found within the Scottish Information Commissioner's website is examined to ascertain the incidence of 'vexatious' requests that were taken to appeal, in order to reveal whether or not authorities are assigning the 'vexatious' definition appropriately.*

Findings: *The findings from the survey revealed that none of the local authorities 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.

Analysis of the Scottish Information Commissioner's appeals data revealed that very few (3%) of the requests referred to the Commissioner for appeal cited exemption 14(1) vexatious request. The Commissioner agreed with the 'vexatious' definition assigned by the authority in half of all of these cases.

The findings highlight the difficulties in recording cost data and the general lack of record keeping within organisations. The findings also indicate a very low incidence of 'vexatious' requests and suggest that the 'vexatious' definition may be applied inappropriately by public authorities.

Research limitations/ implications: *The research survey examines only local authorities in Scotland so cannot claim to be representative of all public authorities in Scotland or in the UK as a whole. Analysis of the appeals data is limited as it can only examine those requests defined as 'vexatious' which were then taken to appeal so does not consider all 'vexatious' requests. However, it does highlight several key issues for further investigation.*

Practical Implications: *The research should be of interest to those administering the Freedom of Information legislation within public authorities, Freedom of Information campaigners and others conducting research into the legislation.*

Originality/value: *This research is the first study to have investigated the cost and incidence of 'vexatious' requests and to have examined the use of criteria and guidelines when assigning the 'vexatious' definition in any detail, so its findings should be of value.*

Keywords: *Freedom of Information, vexatious, cost, exemptions, Information Commissioner*

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1. Introduction

This aim of this dissertation 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.

1.1 Background

Freedom of information (FOI) legislation has now been implemented into more than 75 countries in the world (Hazell et al, 2011) and exists within the UK as 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). Many refer to it as a 'window into government' (Holsen, 2007, p50).

The UK lagged behind other countries in introducing such legislation and has been described as a 'relative latecomer' (Hazell et al, 2011, p3). The success of Freedom of Information legislation is dependent on good government support and this is reinforced by Hazell and Worthy in their statement, 'Above all, an effective FOI regime requires strong government commitment and political will' (Hazell and Worthy, 2010, p358). Internationally, there are examples of countries where such legislation has thrived with strong political support, such as in New Zealand (Hazell and Worthy, 2010). In the UK and Scotland, Information Commissioners are responsible for overseeing the acts and they play a vital role in ensuring compliance, raising public awareness and dealing with appeals.

Currently, the Freedom of Information legislation is being delineated in practice with precedents being set and experience of the Act providing valuable guidance to FOI practitioners and those involved in administering the legislation. There is presently a Parliamentary review of the UK legislation, with critics seeking to limit the scope of the Act.

The Freedom of Information Act 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. Although

brought in 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 by Frontier Economics, commissioned by the Government, 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). Several 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 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.

This raises some interesting questions and leads to the research problem.

1.2 Research Problem

The cost and incidence of FOI requests are difficult to measure due to a number of reasons including the lack of a statutory requirement for organisations to keep records of such requests. There is also a perception amongst the media and some working with the legislation that it is expensive and time consuming, particularly dealing with those requests that are considered 'vexatious'. The actual incidence of such requests and the way in which organisations are dealing with the definition of 'vexatious' has not yet been investigated.

1.3 Research Questions

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'?

This research study will also reveal the extent to which public bodies in Scotland are keeping records of requests and in particular those requests that they have defined as 'vexatious'.

It is anticipated that the study will provide an indication of the level of FOI requests received by local authorities within Scotland, the level of 'vexatious' FOI requests received and will reveal what criteria local authorities are using to determine a 'vexatious' request and additionally, whether or not they are keeping records of requests.

1.4 Methodology

The study involves a survey of the 32 local authorities in Scotland using freedom of information requests as the data collection method and an analysis of the appeals data found within the Scottish Information Commissioner's website, to ascertain the incidence of 'vexatious' requests that were taken to appeal, in order to reveal whether or not the local authorities are assigning the 'vexatious' definition appropriately.

2. Literature Review

2.1 Introduction

There are several key areas for research relating to the Freedom of Information Act and a review of the literature in this area reveals that very little has been written. This year saw the publication of 'The impact of the Freedom of Information on central government in the UK: Does FOI work?' which outlines a comprehensive and systematic evaluation of the FOI legislation and its success in meeting its objectives, but this is one of few studies that have been done (Hazell et al, 2011).

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). This is further reinforced by McLean as she refers to FOI as a 'relatively under researched field of academic study in the UK and internationally' (McLean, [in press]).

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 Act which can be problematic and lead to misinformed perceptions of the use of the legislation in practice (Hazell et al, 2011). Requesters represent a very small minority of the population, meaning that most people have no real experience of the Act themselves. Furthermore it may be that practitioners using the legislation remember the small number of perhaps troublesome requests that they receive rather than the majority of requests which are routine and non-remarkable. This can undoubtedly affect their perception of the legislation in practice.

2.2 Research

Much of the research and academic literature that does exist has come from The Constitution Unit, University College London (UCL), which is one of the key research centres investigating the Freedom of Information legislation. Another significant source is the Information Commissioner and his Scottish counterpart, who have commissioned independent research companies to perform studies in a number of key areas, particularly looking at performance of the Act, public awareness and perceptions of public authorities. Several other authors have undertaken research but there is still a relatively insignificant amount of literature and comment in this field.

Research undertaken in the period immediately following implementation of the Act 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, p4). However, the small sample size

limited the significance of these results. Another study, again undertaken in the first 6 months and prepared for the Improvement and Development Agency, 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, when they tested the compliance of local authorities with the Act utilising FOI requests as part of their methodology. They found that although most authorities endeavoured to comply with the legislation, there was a significant minority who did not (Ross and Whittaker, 2007).

The Information Commissioner also commissioned research by an independent research company Continental Research at the one, two and three year stages following implementation of the Act, with the first study providing a benchmark. The 2007 research study 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).

The Scottish Information Commissioner, as well as conducting annual research into public awareness of the legislation 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.

2.3 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 says 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).

In addition the fact that FOI requesters are under no obligation to state that their request is an 'FOI request' also means that many requests are not regarded as such and are treated as a 'business as usual request' and this also contributes to the difficulties in assessing the level of usage and cost of FOI.

However, not everyone sees the cost of FOI as an issue. Another view, expressed by Mulgan, was to compare the 'tiny' cost spent on the FOI to the 'resources governments pour into manipulating information for political and bureaucratic self-interest' (McLean, [in press]). Indeed, some have also discussed the savings that could result from the legislation, for example due to much reduced MP's expenses and on a broader scale due to the culture of openness and transparency within public bodies resulting in more efficient and effective work practices (Brooke, 2006).

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. Frontier's report which, as discussed, 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.

Fortunately, campaigners, media groups and MP's firmly opposed the reforms and this led to Gordon Brown ruling out any such changes. (Worthy, 2008) However, this attempt to limit the release of information represents a serious challenge by government to limit the effectiveness of the legislation and indicates how vulnerable the Act can be.

Furthermore, anecdotal evidence and articles in the press, have provided further indications that cost is a real concern, particularly in relation to the processing of requests that staff feel are 'vexatious'. One such article reporting on 'wacky FOI requests' gives the impression that organisations are being overwhelmed by 'vexatious' requests (Harris, 2012).

Again, this points to the need for organisations to keep a record of FOI requests and other relevant details. Only then can an accurate picture of usage and cost be established, allowing misinformed perceptions of the Act to be quashed.

2.4 Vexatious Requests

Several studies mention the term ‘vexatious requests’ but none actually address the issue in any detail or attempt to estimate the incidence, with the exception of the Frontier Economics Report, which has been found to have ‘grossly inflated’ the figures. It appears to be on the most part anecdotal evidence and perceptions of staff administering the Act that is fuelling the perception of the Act as being used inappropriately. 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 on her website as part of the Exemption Briefing Series called ‘Vexatious or Repeated Requests’ which outlines guidance for public bodies on how to deal with such requests (Scottish Information Commissioner, 2012a). It would be interesting to know if public bodies are aware of this guidance and if they are following it when dealing with potentially ‘vexatious’ requests.

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. Holsen (2007) comments on how crucial the interpretation and application of exemptions are to the release of information:

‘Exemptions are the key section of any FOI legislation because their breadth and depth determine how much information is actually disclosed’ (Holsen, 2007).

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’?

2.5 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 UK

Information Commissioner (ICO) produces the Annual Track report which tracks awareness and understanding of both the Data Protection Act and the Freedom of Information Act for both organisations and individuals. The ICO also commissioned Continental Research to conduct research at the one, two and three year stages which looked at perceptions of the public authorities working with the legislation. Research into public awareness from the Scottish Information Commissioner is also undertaken annually.

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 undertaken by researchers from the University of St Andrews and the Caledonian Business School on behalf of the Scottish Information Commissioner which amongst other areas 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 undoubtedly 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.

2.5.1 A 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). Martin Rosenbaum is the FOI Specialist for the BBC and through the BBC website and his FOI blog 'Open Secrets' he offers comment and supports discussion in this area (Rosenbaum, 2012). The Guardian has its Datablog website again offering comment, articles and discussion (The Guardian, 2012c). The tabloid press also frequently feature stories which result from FOI requests.

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 (The Guardian, 2012a). Although the article was designed to 'shock' the general public, inspection of the facts, actually revealed the figures to be entirely reasonable. Further examples of such articles are not difficult to find in the press.

2.5.2 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' (The 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 (The 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' (The

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 and Worthy describe the reliance of the FOI legislation on a number of different factors:

'The state of government and media relations, the nature of the media, levels of political support and levels of public trust can all influence how FOI operates' (Hazell and Worthy, 2010, p358).

Hazell, Worthy and Glover, in their recent publication 'The impact of the Freedom of Information on central government in the UK: Does FOI work?' 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). One comment from an interviewee when discussing requesters reinforces this:

'I think there is a very small minority which tend to grab the headlines and therefore will shape perception whereas in the vast majority of cases, the information will be processed generally without any difficulty' (Hazell et al, 2012, p65).

Perceptions and attitudes of individuals and organisations towards the legislation vary widely and are probably largely dependent on involvement and experience of the legislation. Undoubtedly the media has had a significant influence on shaping perceptions, particularly in those with no personal experience of the legislation.

This literature review has drawn attention to several gaps in the literature relating to the use of the freedom of information legislation that warrant further investigation. The research problem is therefore:

The cost and incidence of FOI requests are difficult to measure due to a number of reasons including the lack of a statutory requirement for organisations to keep records of such requests. There is also a perception amongst some working with the legislation that it is expensive and time consuming, particularly dealing with those requests that are considered 'vexatious'. The actual incidence of such requests has not been investigated.

This study will therefore investigate the incidence of 'vexatious' requests in Scotland and their cost in order to examine whether the critics have a reasonable concern. It will also examine the overall cost of FOI to public authorities and in doing so reveal the extent to which organisations are keeping accurate records of numbers of requests and in particular those that they define as 'vexatious'. Finally, the study will look at the criteria that organisations are using to define 'vexatious'.

3. Methodology

3.1 Introduction

The research method utilised for this study was a survey based approach using Freedom of Information (FOI) requests as the method of data collection and additionally, an analysis of appeal information provided on the Scottish Information Commissioner's website. This chapter will describe in detail the rationale for selecting this approach, the research process, including participants and procedures, and the data analysis techniques employed, before discussing the limitations of the study.

3.2 Rationale

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'. In order to address these research questions, consideration was given to a number of different research methods.

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).

In order to answer the research questions, a predominantly quantitative study was considered to be appropriate due to the primarily numerical nature of the information sought (Rudestam and Newton, 2007). However, in order to investigate the use of the 'vexatious' definition it was also deemed necessary to utilise a more qualitative approach in order to elicit more in depth data that as described by Rudestam and Newton would 'identify themes that are evaluated subjectively to shed light on a phenomenon of interest' (Rudestam and Newton, 2007, p38). The use of a 'mixed model' study combining both quantitative and qualitative methodologies has been discussed by Tashakkori and Teddlie (1998) and is an 'increasingly popular approach to designing a dissertation' (Rudestam and Newton, 2007, p51). It allows a combination of both the precision of quantitative data with the depth of qualitative data. (Rudestam and Newton, 2007).

A survey was selected as it provides a quantitative approach to the research and was appropriate for this study as it allowed time for the responder to obtain specific data, for example the number of FOI requests in a particular year, unlike an interview situation which would require an immediate response from the interviewee.

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. This data collection method has been successfully utilised in several other research studies (Ross and Whittaker (2007), Brown and McMenemy [in press]).

Additionally, to investigate the issue of the definition 'vexatious' in more detail, it was decided to take a different approach. Several research methods were considered for this additional part of the research but due to time constraints with the study, case studies and interviews were ruled out. An examination of the Scottish Information Commissioner's website as part of the literature review revealed that details of all appeals to the Commissioner are published on the website allowing their appraisal. It was then decided to utilise this information to perform an analysis of the information relating to those requests that were taken to appeal due to a 'vexatious' definition. This would allow a more qualitative approach to the research and address the research questions relating to the use of the 'vexatious' definition. It was anticipated to provide more in depth detail alongside the quantitative data (Rudestam and Newton, 2007).

3.3 Process

Survey/Questionnaire

The first part of the research study involved a questionnaire which was presented to the selected participants as a FOI request.

Participants:

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, 2003). It would not be feasible for the purposes of this study to include them all in the study so the decision was taken to focus on local government. The 32 local authorities 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. 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.

Procedures:

The FOI request was constructed using guidance provided on the Scottish Information Commissioner's website (Scottish Information Commissioner, 2012). (See appendix 1) 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 local authorities 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 local authority 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. See Appendix 1 for a copy of the FOI request.

The results of the survey which were returned by e-mail were examined and coded. The information from each local authority was recorded in a standard table format which was then transferred to excel spread sheets for further data analysis.

Analysis of Scottish Information Commissioner's Appeals Data

The second part of the research study involved analysis of information provided on the Scottish Information Commissioner's website.

The Scottish Information Commissioner's website provides details of all FOI requests that have been referred to them for appeal. Information on all appeal cases is provided via a table and further details are given in the Decision Notice relating to each case. This document outlines detailed information on the background to the case, the investigation, the Commissioner's analysis and findings and the resulting decision.

A search of the appeal cases was conducted using the online search function to retrieve those cases which were referred to the Commissioner for the reason that the public authority had refused to disclose the information, citing exemption 14(1) (vexatious request), and the requester had appealed this decision.

Each case was examined carefully with particular regard to a number of key issues including:

- the nature of the requester;
- the nature of the organisation receiving the request;
- the subject of the request;
- the reason for non-disclosure of the information i.e. which exemption(s) were cited;
- the reasons underlying the request being defined by the organisation as 'vexatious';
- the Commissioner's decision and the rationale behind this.

Particular attention was paid to the criteria that organisations were using to assess and define requests as 'vexatious' and whether or not the Commissioner concurred with these in individual cases. This was intended to provide some indication of whether or not organisations were interpreting the legislation appropriately and applying the exemptions suitably.

It was anticipated that analysis of such appeal cases would allow investigation of the interpretation and use of the 'vexatious' definition by public authorities in Scotland and give an indication of whether it was in line with the Commissioner's interpretation of the situation.

3.4 Data Analysis

In order to examine the results of both the survey and the appeals analysis 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. In both cases a table format was utilised to record the relevant information allowing a consistent approach.

Survey/Questionnaire

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.

Analysis of Scottish Information Commissioner's Appeals Data

The information provided within the Scottish Information Commissioner's Appeals Data was more complex and required to be carefully categorised in order to allow it to be analysed.

Initially an inductive approach was applied to the classification process, where categories were derived from the results themselves and the information was developed into categories by either grouping together or subdividing data. However, further investigation of the literature in order to examine the classification used in other studies revealed existing categories utilised by the Scottish Information Commissioner in his annual reports (Scottish Information Commissioner, 2011b). It was then decided to utilise these categories with changes where necessary.

The categories used by the Scottish Information Commissioner to classify the requester were as follows:

- Adult;
- Media;
- Public authority;
- Private/Commercial enterprise;
- Voluntary/campaign organisation;

- Solicitor;
- Elected representative (MP, MSP, MEP, Councillor);
- Union.

The only amendment was to change the first category 'Adult' to 'Individual' as it was deemed to be more appropriate for this study as it would differentiate between single requesters and organisations.

The categories used by the Scottish Information Commissioner to classify the organisation receiving the request were as follows:

- Local government;
- Other public authorities;
- Ministers, the Parliament;
- Educational institutions;
- The NHS;
- Non-ministerial office holders;
- Publicly owned companies;
- Police.

Again, these categories were amended slightly to accommodate the results of the study and to highlight the nature of the organisations involved with requests. There were three main amendments. Firstly Prisons were given their own category as it was difficult to group them with any other while still highlighting their purpose and secondly 'Non –ministerial office holders' were removed. Finally the 'Other public authorities' category was changed to simply 'Other' to allow it to accommodate a greater diversity of organisations such as the Scottish Legal Complaints Commission (SLCC) which is a 'hybrid' organisation and has both private and public attributes. (SLCC, 2012).

The amended categories were as follows:

- Local government;
- Ministers, the Parliament;
- Police;
- The NHS;
- Educational institutions;
- Publicly owned companies;
- Prisons;
- Other.

Finally, the categories used by the Scottish Information Commissioner to classify the subject of the request were also utilised in the study and these are as follows:

- Administration of the authority;
- Employment and employees;
- Finance/expenses;
- Planning;
- Safety and crime;
- Court/legal action;
- Water and sewerage;
- Transport and roads;
- Commercial activities & contracts;
- Property;
- Education and learning;
- Regulatory;
- Health;
- Care (children and older people);
- Grants and funding;
- Housing;
- Environment;
- Agriculture and fisheries;
- Leisure and parks;
- Trading standards;
- Other.

The only amendments in this case were the addition of three categories: Complaints handling, Research and Political as these were required to accommodate the results data.

The final part of the classification process was to categorise and code the information provided in the documentation regarding the reasons that the authority had defined the request as 'vexatious' and the Commissioner's response to this.

The Scottish Information Commissioner's guidelines discuss a number of criteria that have to be met in order to define a request as 'vexatious'. This guidance has been taken from the SIC briefing document on their website:

'The Commissioner's general approach is that a request (which may be a single request, the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:

(a) it has the effect of harassing the public authority; and/or

(b) it does not have a serious purpose or value; and/or

(c) it is designed to cause disruption or annoyance to the public authority; and/or

(d) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.' (Scottish Information Commissioner, 2012a)

It was decided to categorise the authority's reasons for defining the requests as 'vexatious' in accordance with these criteria and then apply the same categorisation to the Commissioner's reasoning. This would allow standardisation and comparison between the opinions of the authority and the Commissioner and would reveal if there was agreement between the parties. Once the information from the Appeals data was categorised it was entered into the excel spreadsheet for analysis. The data was then analysed and presented using appropriate display methods depending on the results obtained.

3.5 Limitations

The results of this study are limited by a number of factors.

Survey/Questionnaire

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 local authorities did so and the response rate was 94%. Therefore, although it is a high response rate, the results cannot represent fully the situation within local authorities in Scotland.

Secondly, the data received regarding cost information was limited as the local authorities did not record the necessary information.

Finally, this part of the study focussed on a specific group of public authorities 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.

Analysis of Scottish Information Commissioner's Appeals Data

Firstly, although the information provided within the Commissioner's Decision Notices was extremely detailed, there were occasions when a specific piece of information was not included in the report and this caused problems with incomplete data.

Secondly, the appeals data only included 'vexatious' requests that had been referred to the Scottish Information Commissioner for an appeal and therefore did not include all requests that had been defined as 'vexatious and this must be borne in mind when looking at the results.

Finally, categorisation and analysis of the data required a degree of subjective interpretation which may have introduced a certain bias to the results. Categorising the subjects of the appeals was particularly difficult due to the often complex and extensive nature of the requests for information. However, a best fit approach was adopted and the information interpreted accordingly.

4. Results

The results section firstly presents the results from the survey of local authorities. This is followed by the results from the investigation of the Scottish Information Commissioner's Appeals Data.

4.1 Questionnaire/Survey

Response Rates

27 out of the 32 local authorities surveyed responded within the 20 working days 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 local authorities did not respond at all. This represents an overall response rate of 94%.

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

Question 1: How many Freedom of Information requests have been received each year from 2005 to 2011?

The responses of the local authorities to this question provides information regarding the numbers of requests received, but also the extent to which local authorities are keeping records.

How many local authorities are keeping records of requests?

Out of the 30 local authorities who responded, all held records of some description relating to the numbers of FOISA requests.

24 local authorities 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 local authorities could only provide data for part of the survey period and this represents 20%.

Figure 1.1 below, illustrates the number of local authorities that provided figures for the full 7 year survey period.

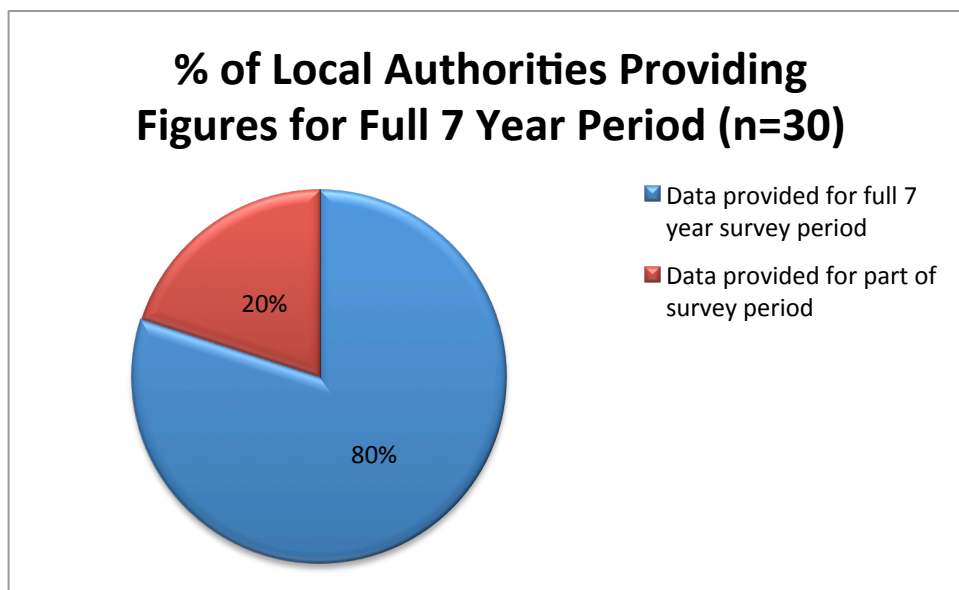


Figure 1.1 - % of Local Authorities providing figures for the full 7 year survey period (n=30)

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

Two local authorities 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.

How many FOISA Requests are being received?

Figure 1.2 indicates the total number of FOISA requests received each year by 18 local authorities during the survey period.

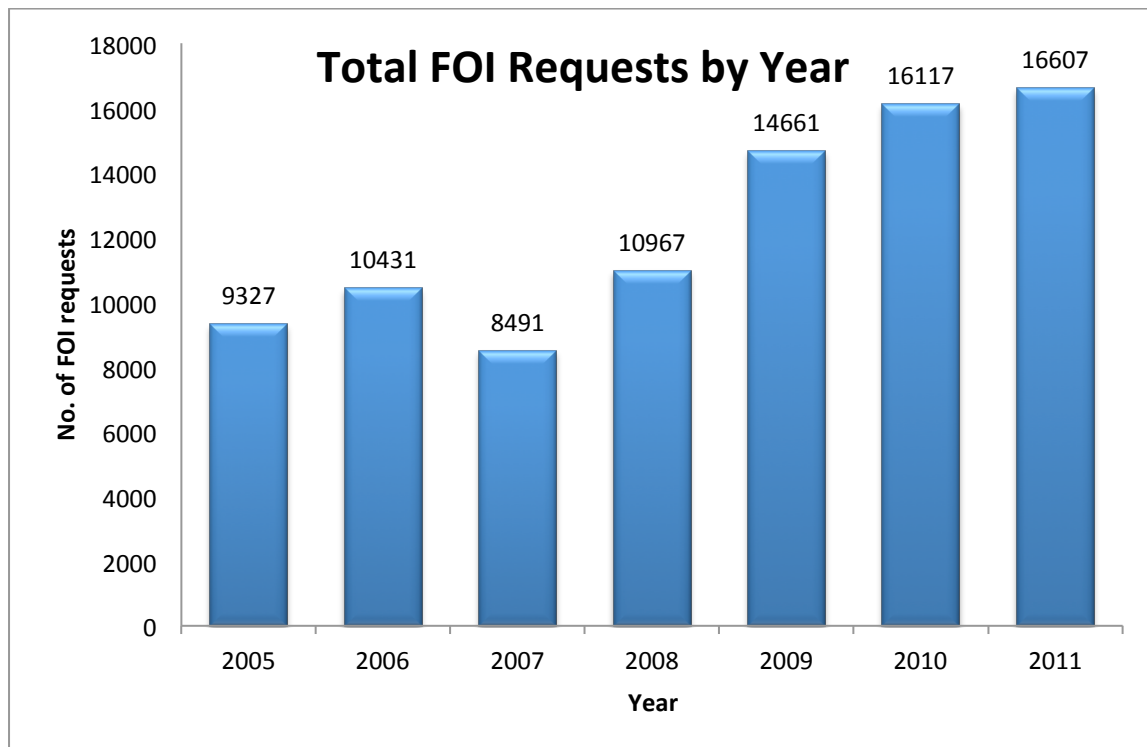


Figure 1.2 - Total FOI requests per year (18 local authorities in Scotland)

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

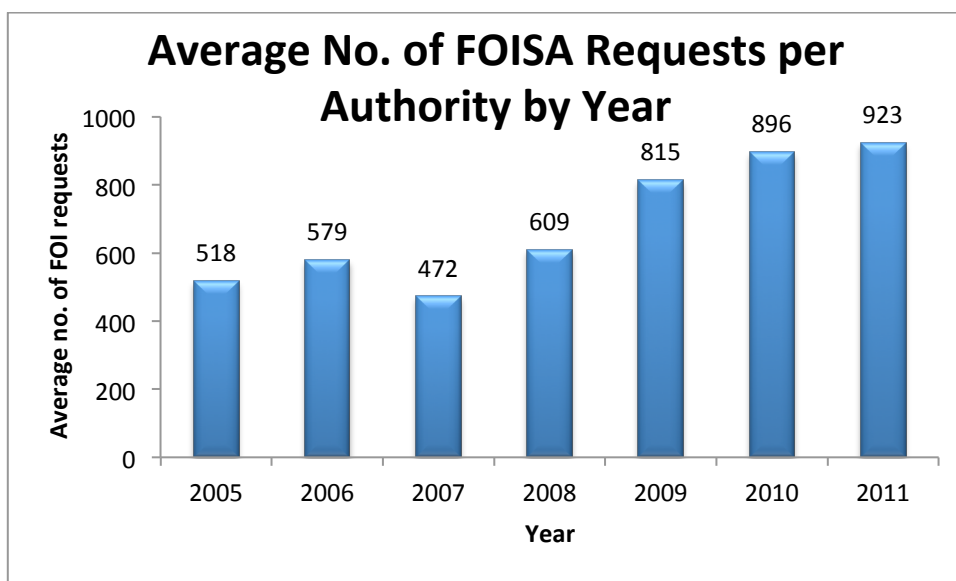


Figure 1.3 - Average Number of FOI requests per Local Authority per Year

An investigation of the average number of FOISA requests experienced per local authority per year since implementation of the legislation consequently also shows an increase each year, again with the exception of 2007.

The average number of requests experienced by a local authority in 2011 was 923.

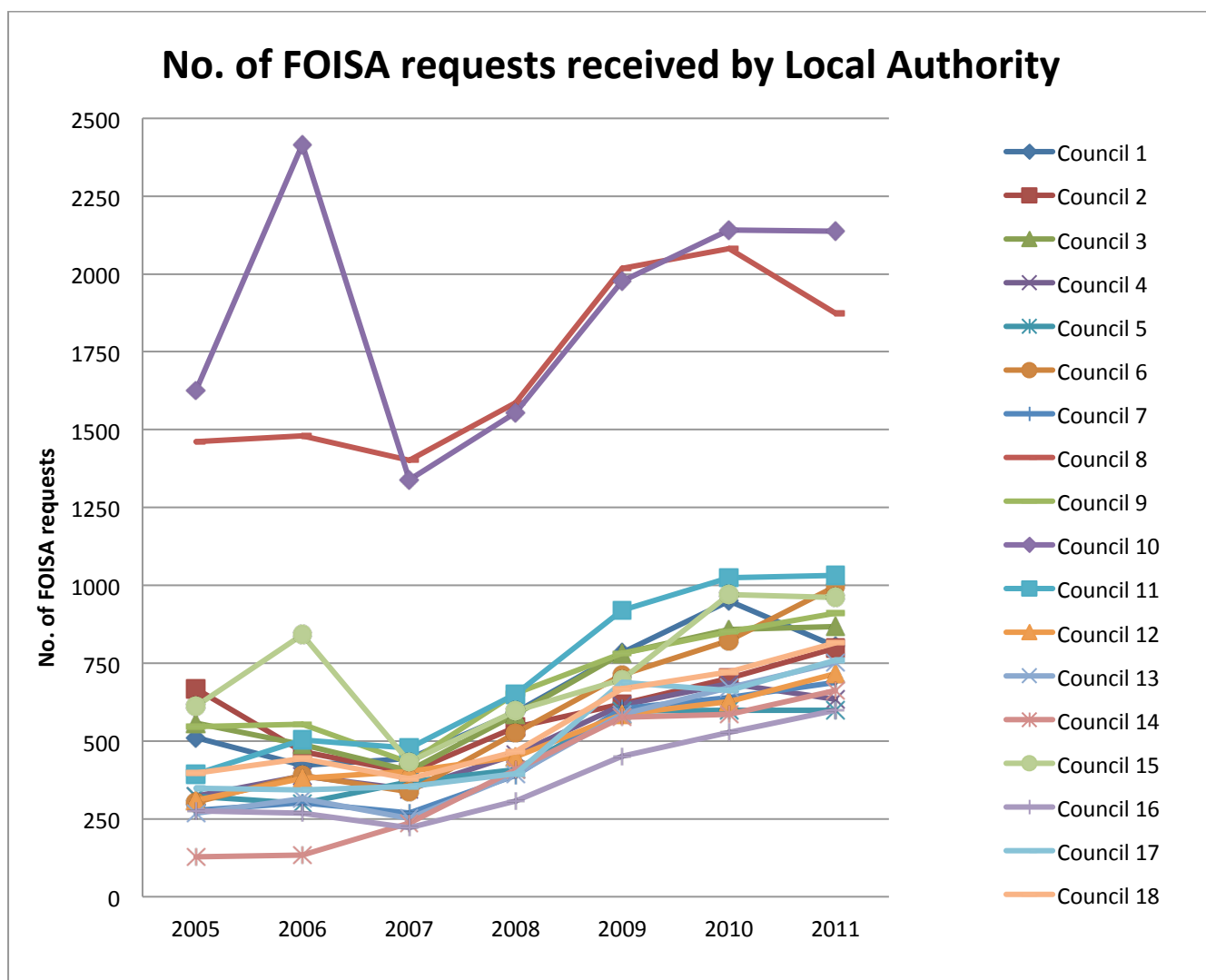


Figure 1.4 - Number of FOISA Requests Received per Local Authority

Examining the number of requests received by each local authority each year again shows an increase in numbers since 2007.

Question 2: What has been the overall financial cost of answering these requests each year from 2005 to 2011?

The responses of the local authorities 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.

Are local authorities recording cost information?

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

What is the financial cost of answering FOISA requests?

26 local authorities (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 local authority 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.

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'.

Question 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 local authorities 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.

How many local authorities are keeping records of vexatious requests?

Of the 30 local authorities 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.

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 local authorities had not had a 'vexatious' request. This is illustrated in Figure 1.5

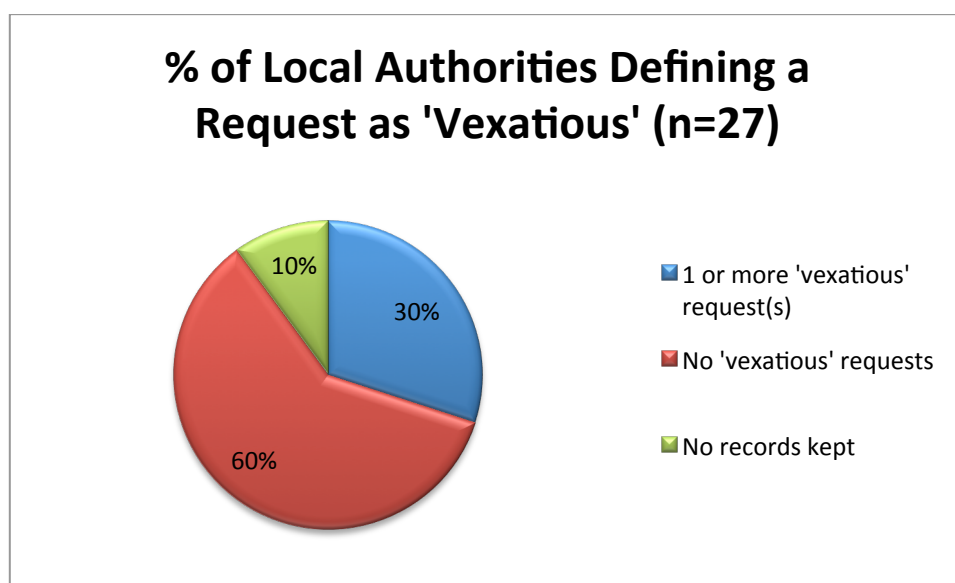


Figure 1.5 - The % of Local Authorities that have Defined a Request as 'Vexatious' (n=27)

Figure 1.6 below shows the number of 'vexatious' requests experienced by local authorities.

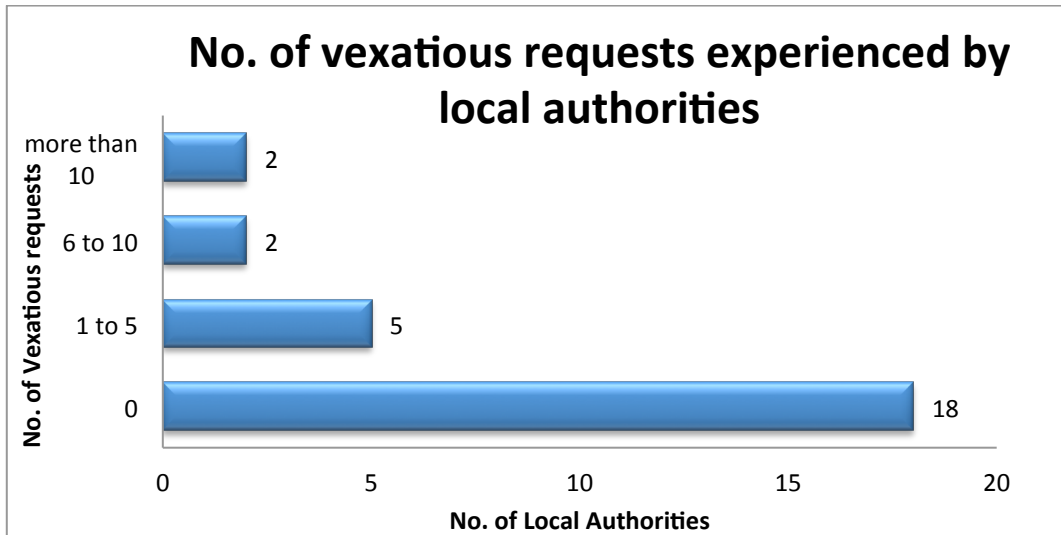


Figure 1.6 - The Numbers of 'Vexatious' Requests Defined by Local Authorities

The numbers of 'vexatious' requests experienced over the 7 year survey period ranged from 0 (18 local authorities) to 15 (1 local authority).

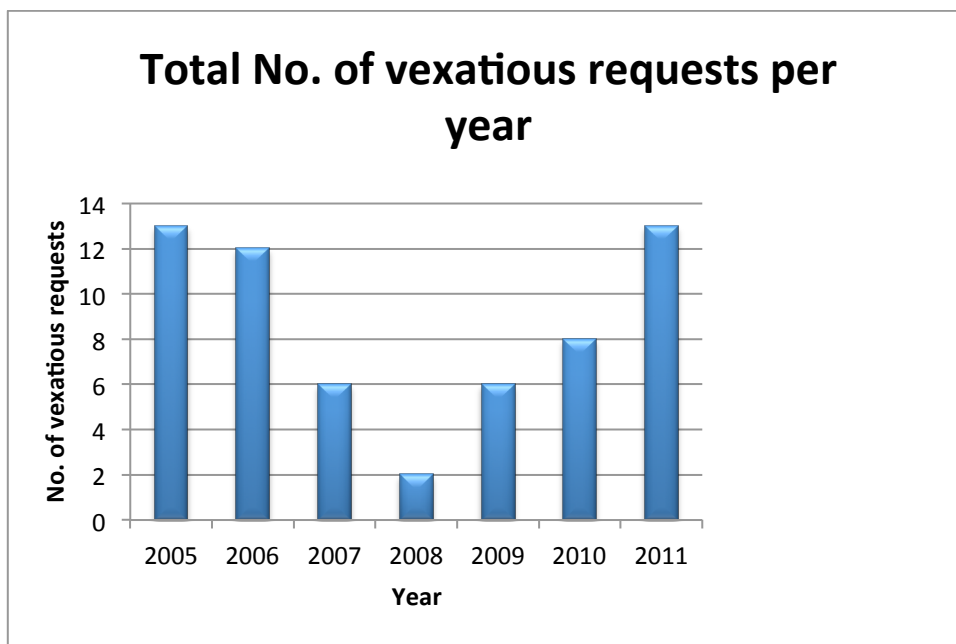


Figure 1.7 - The total Number of 'Vexatious' Requests Defined by Local Authorities Per Year

Figure 1.7 illustrates the total number of 'vexatious' requests defined by local authorities per year. These figures include the 27 local authorities that kept records of 'vexatious' requests.

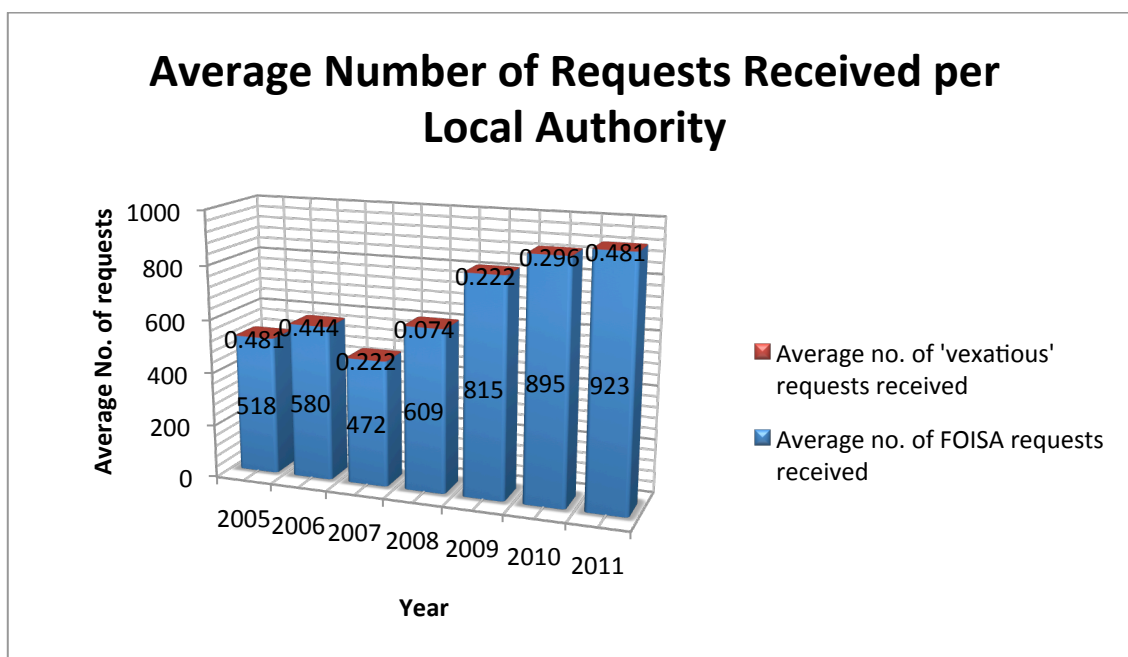


Figure 1.8 – The Average Number of Requests per Local Authority

It is difficult to compare the number of FOISA requests received with the number of requests received that were defined as ‘vexatious’ due to the diversity of information provided by the local authorities and the formats used. However, examination of the average number of FOISA requests received per authority per year compared to the average number of requests received that have been defined as ‘vexatious’ is shown in Figure 1.8 and highlights that the number of ‘vexatious’ requests received is very low indeed and is barely visible on the graph.

Question 4: What has been the overall financial cost of dealing with ‘vexatious requests’ each year from 2005 to 2011?

Again, the responses of the local authorities 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.

Are local authorities recording cost information in relation to ‘vexatious’ requests?

Of the 30 local authorities 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 local authorities 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 local authorities 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.

Question 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 local authorities 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 local authorities 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 local authority were that they 'were masking personal attacks against members of staff'.

Figure 1.9 indicates the type of information provided by the local authorities.

Local Authority	Subject of Request	Reasons for 'vexatious' definition
Council A	Not stated	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.
Council B	Land dispute Council tax	A continuous series of very similar requests.
Council C	Car parking Appointment of council employee	Not stated.
Council D	Social work, Social work staffing Penalty charge notices	Repeated requests for the same information.
Council E	Council External bodies Communications with council	Requests collectively intended to disrupt the work of the council rather than to obtain information. Manifestly unreasonable/disproportionate.

Local Authority	Subject of Request	Reasons for 'vexatious' definition
Council F	Not stated	Information provided already. The requester was deliberately creating requests to cause a burden to the council.
Council G	Not stated	The requests were masking personal attacks against members of staff.

Figure 1.9 Details of 'Vexatious' Requests Received by Local Authorities

**Question 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?**

How many local authorities have their own guidelines?

Of the 30 local authorities 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. This is shown in Figure 1.10.

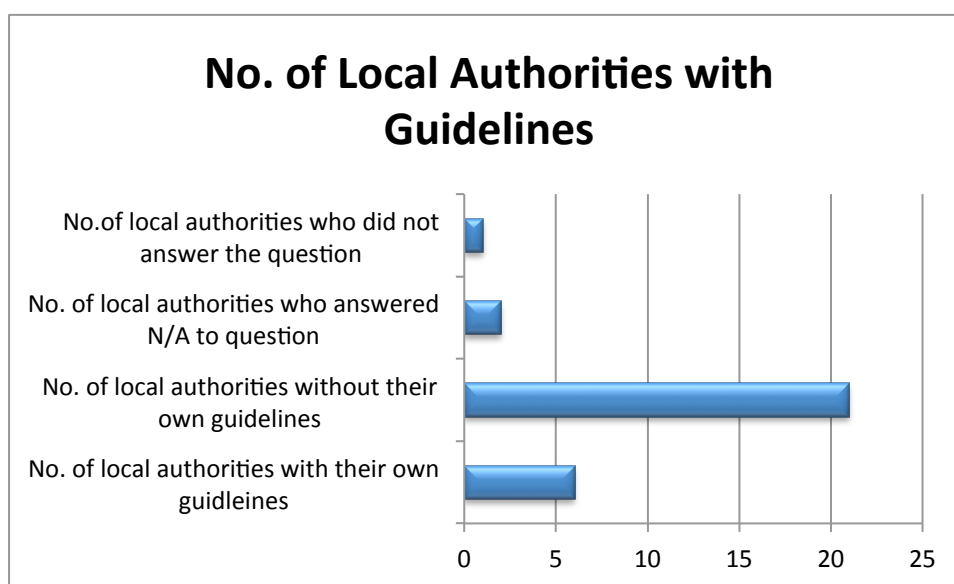


Figure 1.10 – Number of Local Authorities with Their Own Guidelines

How many local authorities use the Scottish Information Commissioner's guidelines?

Of the 30 local authorities 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 local authorities made no mention of the Scottish Information Commissioner's guidelines and this represents 13%.

Additionally, two local authorities 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 local authority specifically pointed out that it does not use any guidelines and two local authorities answered not applicable to the question.

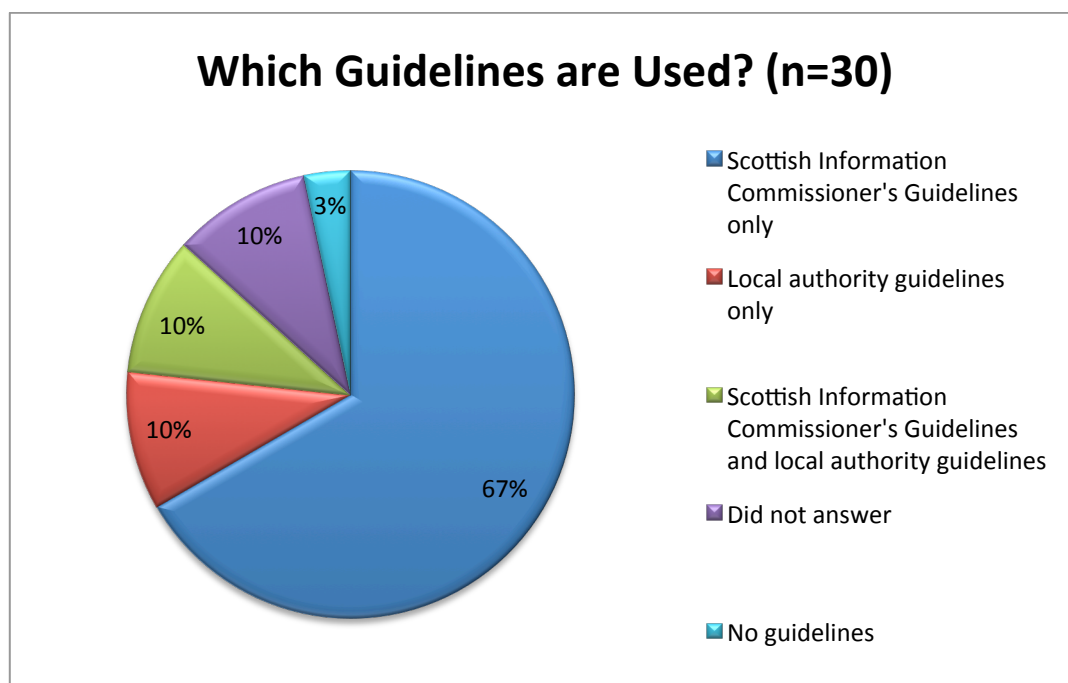


Figure 1.11 - Guidelines Used by Local Authorities (n=30)

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'.

4.2 Scottish Information Commissioner Appeals Data

Investigation of the Scottish Information Commissioner's website revealed that since implementation of the legislation in 2005, there have been 52 cases referred to the commissioner for appeal which cited exemption 14(1) as the reason for non-disclosure of the information. There were a total of 1,464 cases referred for appeal during this period.

Of the initial 52 cases, four were not investigated as part of this study. Two of these cases seem to have been added to the data in error as there is no mention of 'vexatious' within the detail of the cases, while in the two other cases, the 'vexatious' definition was not investigated due to technical reasons. For example, the local authority commented that they were 'intending' to say that the request was 'vexatious' but hadn't yet done so and in the other case the 'vexatious' definition was mentioned but had not been specifically applied to the request.

When were the appeals?

Figure 2.1 shows the distribution of the appeal cases since implementation of the legislation. The data for 2012 has been omitted from this graph as it does not represent a full year. There were no cases referred to the Commissioner for an appeal citing exemption 14(1) in 2006.

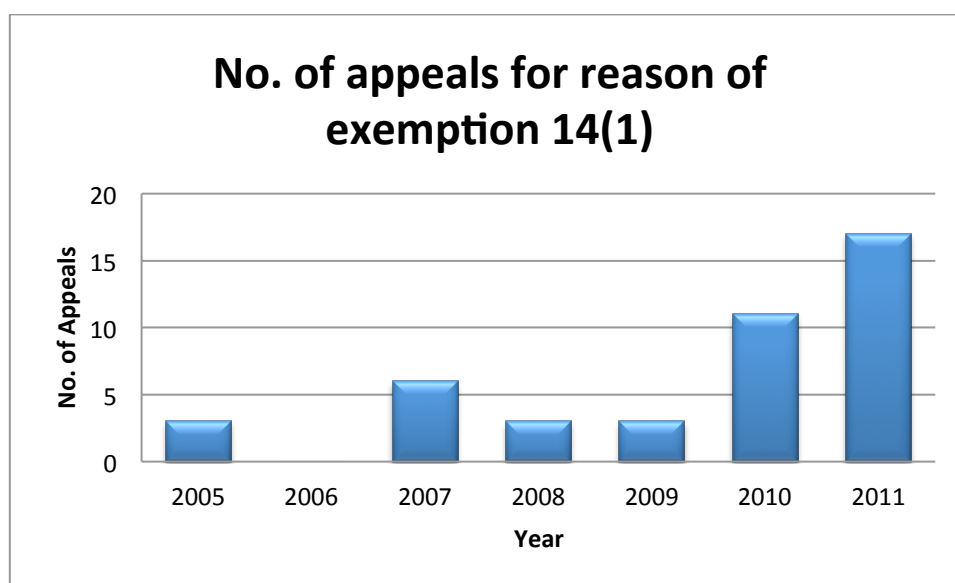


Figure 2.1 - The Number of Appeals per Year for Reason of Exemption 14(1) 'Vexatious' Request

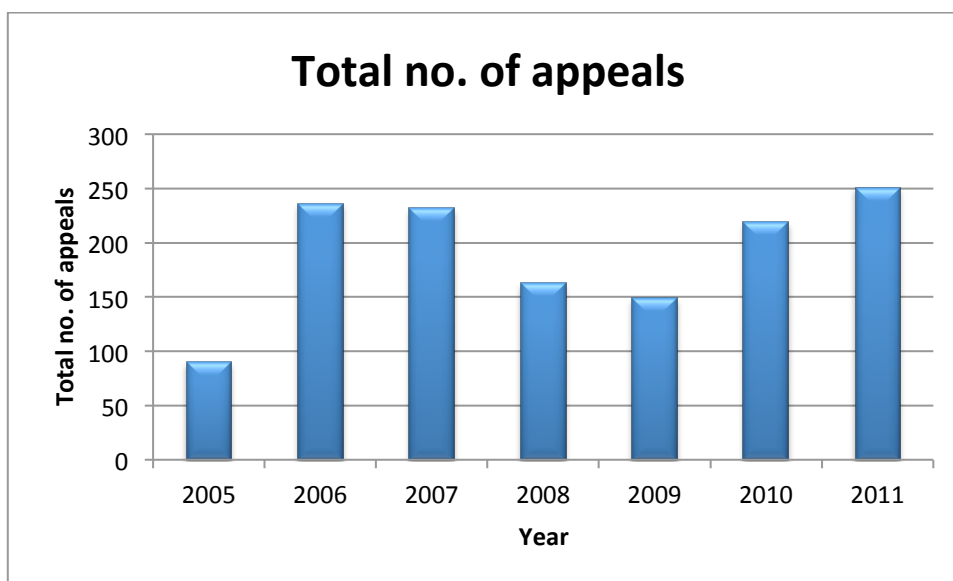


Figure 2.2 - The Total Number of Appeals per Year

Figure 2.2 shows the total number of appeal cases referred to the Commissioner each year. The total number of appeals has shown an increase each year for the last two years. The appeal cases citing exemption 14(1) have also shown an increase over the last two years. (Figure 2.1)

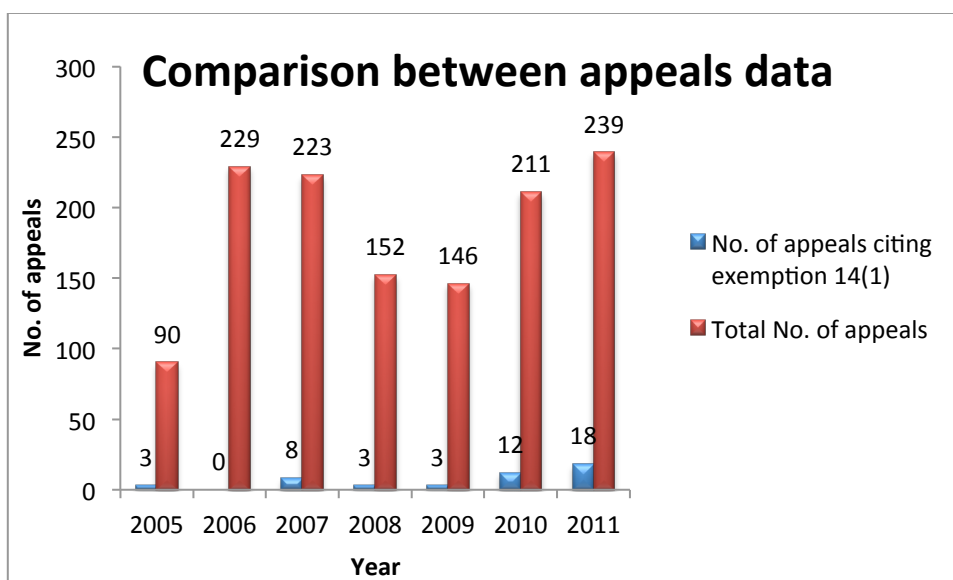


Figure 2.3 - Comparison between the Total Number of Appeals and Appeals Citing Exemption 14(1) 'Vexatious' Requests

Comparing the total number of appeals to the Commissioner with the number of appeals citing exemption 14(1) reveals that the proportion of 'vexatious' appeals is very low.

Figure 2.4 shows the percentage of appeals that cited exemption 14(1) as compared with the total number of appeals.

	2005	2006	2007	2008	2009	2010	2011
No. of appeals citing exemption 14(1)	3	0	8	3	3	12	18
Total no. of appeals	90	229	223	152	146	211	239
% of appeals citing exemption 14(1)	3%	0%	4%	2%	2%	6%	8%

Figure 2.4 - The Number of Appeals Citing Exemption 14(1) Compared to the Total Number of Appeals

Who is requesting the information?

Of the 48 cases referred to the commissioner for appeal, 31 of the requests were from individuals which represents 65%, 10 were from private/commercial enterprise organisations, six were from journalists (media) and one was from another public authority. This is presented below in figures 2.5 and 2.6.

	No. of Appeals for reason exemption 14(1)	% of Appeals for reason exemption 14(1)
Individual	31	65%
Media	6	12%
Public authority	1	2%
Private/Commercial enterprise	10	21%
Voluntary/campaign organisation	0	0
Solicitor	0	0
Elected representative (MP, MSP, MEP, Councillor)	0	0
Union	0	0

Figure 2.5 - Categories of Requesters

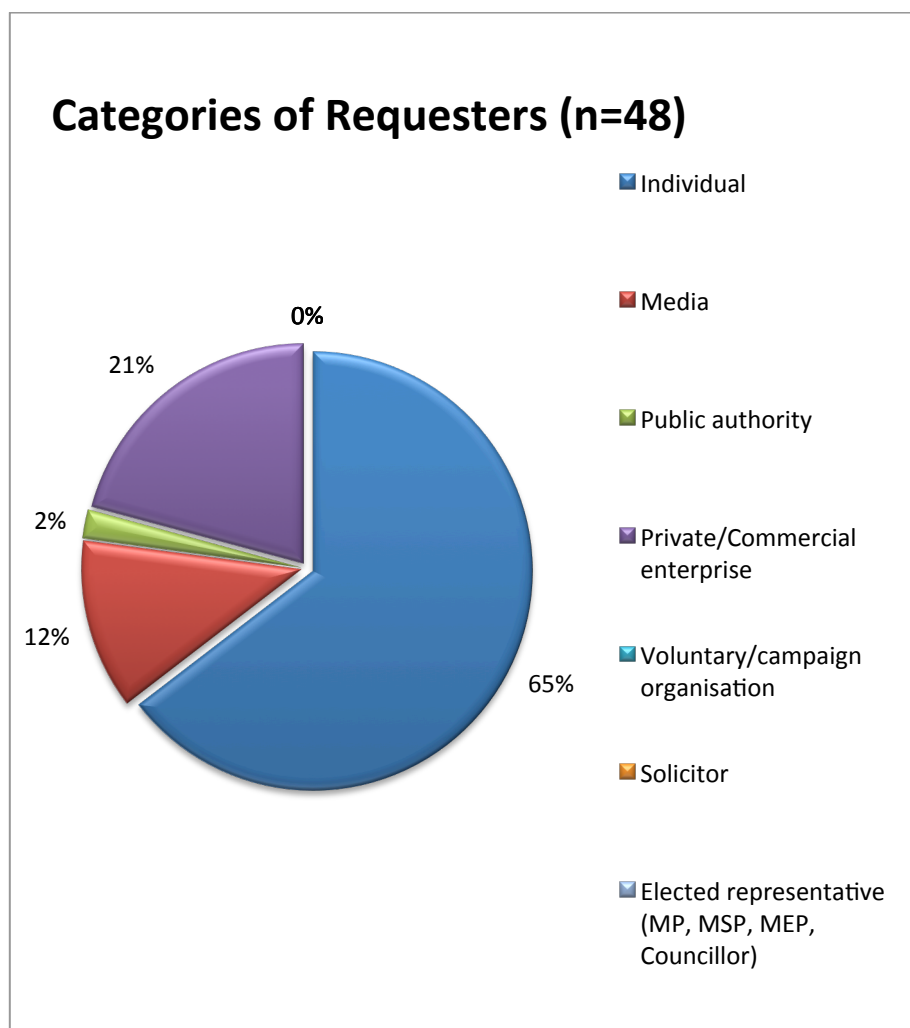


Figure 2.6 - Categories of Requesters (n=48)

What organisations are they requesting information from?

Of the 48 cases referred for appeal, 11 were to local government, six were to educational institutions, 10 were to Ministers, The Parliament, six were to publicly owned companies, including Scottish Water and Caledonian MacBrayne, one was to the Police and one was to the Prison Service. Finally, two were to the NHS and 9 were to other organisations which did not fit into any of the other categories. These included, the Scottish Legal Complaints Commission, which had six appeals, the Scottish Housing Regulator, North Lanarkshire Leisure Limited and the Accountant in Bankruptcy.

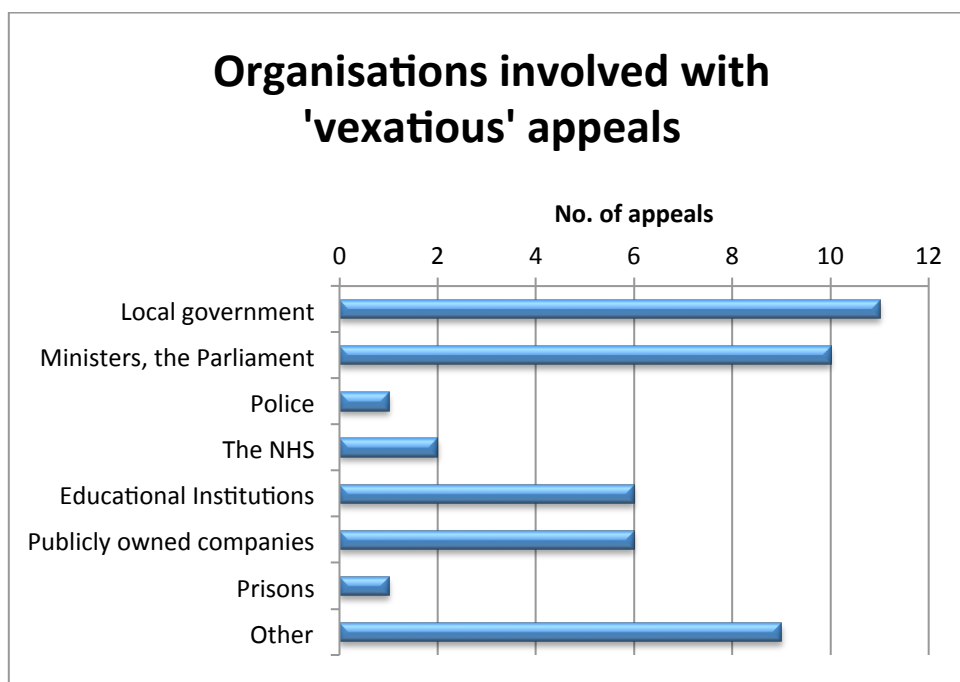


Figure 2.7 - Organisations Involved with Appeals Citing Exemption 14(1) (Vexatious)

Further examination of the organisations involved with the appeal cases reveals that for the 48 appeal cases examined, there were 23 organisations involved. See Figure 2.8.

Organisation	No. of 'vexatious' appeal cases
Perth and Kinross Council	2
Scottish Ministers	7
Grampian Police	1
Ayrshire and Arran NHS Board	1
Scottish Water	5
Scottish Legal Complaints Commission	6
James Watt College	2
Glasgow City Council	3
Scottish Housing Regulator	1
North Lanarkshire Leisure Ltd	1
Fife Council	1
University of St Andrews	1
Stirling University	2
Scottish Prison Service	1
Accountant in Bankruptcy	1
East Renfrewshire Council	1
South Lanarkshire Council	3
East Lothian Council	2
Highland NHS Board	1
Scottish Executive	3
Scottish Borders Council	1

Organisation	No. of 'vexatious' appeal cases
Scottish Agricultural College	1
Caledonian MacBrayne Ltd	1

Figure 2.8 - Organisations Involved with Appeals Citing Exemption 14(1) 'Vexatious'

Several organisations including Scottish Water, the Scottish Legal Complaints Commission and the Scottish Ministers have been involved with more than five appeals citing exemption 14(1) as the reason for non-disclosure of the information.

What was the subject of the initial FOI request?

The subjects of the initial FOISA requests for information were categorised according to the classifications used in the Scottish Information Commissioner's annual reports. See figure 2.9.

Subject of initial request	No. of appeals
Administration of the Authority	1
Employment and employees	5
Finance/expenses	3
Planning	1
Safety and Crime	3
Court/legal action	1
Water and sewerage	1
Transport and Roads	6
Commercial activities and contracts	5
Property	1
Education and learning	2
Regulatory	0
Health	1
Care (children and older people)	1
Grants and funding	0
Housing	5
Environment	2
Agriculture and fisheries	1
Leisure and parks	1
Trading standards	0
Complaints handling	4
Research	2
Political	2
Other	0

Figure 2.9 - Subjects of Initial Request

The following categories: employment and employees, transport and roads, commercial activities and contracts, and housing comprised the initial subjects of the largest numbers of 'vexatious' appeal cases.

Reasons for non-disclosure of information?

In all 48 cases, exemption 14(1)'vexatious' was cited as the reason for refusing the FOISA request.

In 22 of these cases, this was the only reason specified, however in 26 cases, there were other exemptions noted too. These included 14(2) (Repeated Requests), 25 (Information otherwise accessible), 27(1) (Information intended for future publication), 38 (Personal information) amongst other exemptions.

Result of the Appeal

There were three possible results of the appeal process:

- *For authority*: The commissioner upholds the decision not to provide the information;
- *Partially upheld*: Parts of the authority's decision were upheld by the commissioner but not all;
- *For applicant*: The commissioner orders the disclosure of the information.

Examination of the 48 appeal cases revealed that 19 of these cases were 'for authority' which represents 40%. 13 cases were partially upheld (27%) and finally 16 cases were 'for applicant' where the commissioner ordered disclosure of the information. This is shown in figure 2.10.

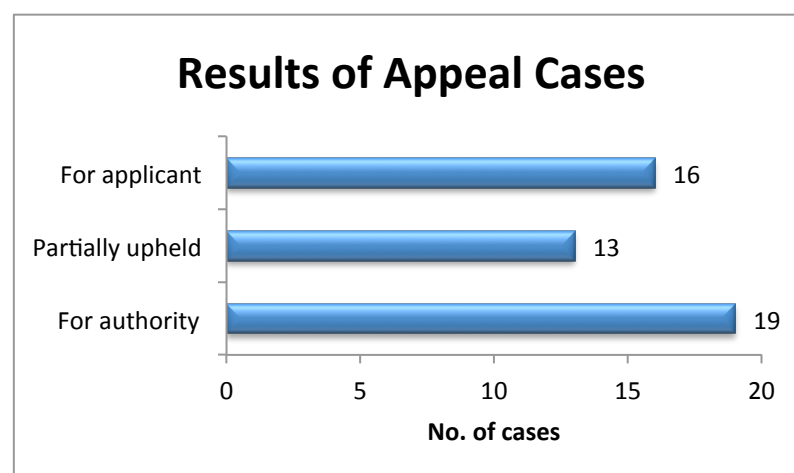


Figure 2.10 - Results of the 48 Appeal Cases

However, as the reasons for the appeals were not just related to exemption 14(1), in order to investigate the use of the 'vexatious' definition, it is more informative to look at the detail of the cases. This allows investigation of whether the commissioner agreed or disagreed with the 'vexatious' definition in each individual case.

Of the 48 cases, the Scottish Information Commissioner agreed with the authority's 'vexatious' definition in 24 cases which represents 50%.

In 20 cases, the information commissioner disagreed with the definition and in the remaining four cases, the 'vexatious' definition was not examined as part of the Commissioner's investigation.

This is shown in Figure 2.11.

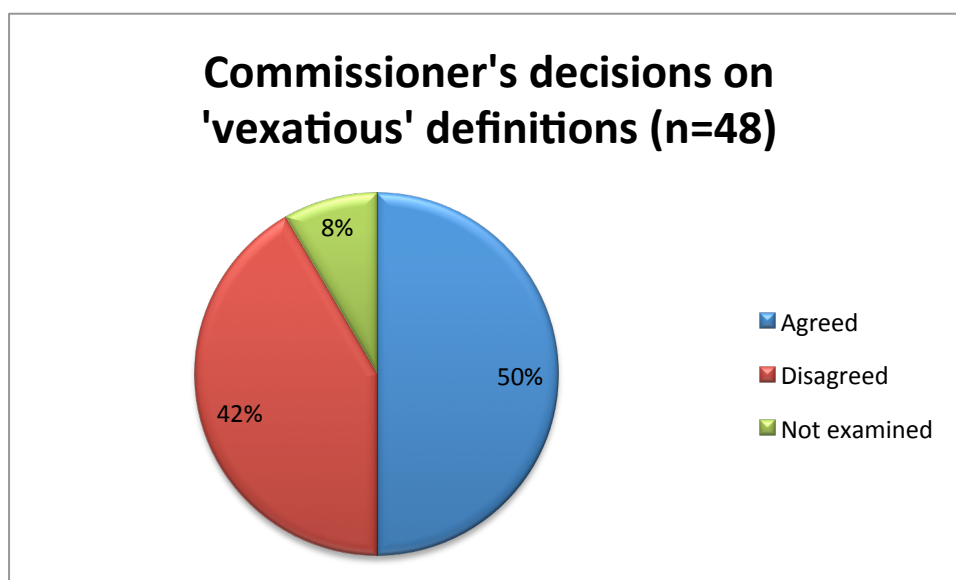


Figure 2.11 Commissioner's decisions on 'vexatious' definitions (n=48)

Further detailed examination of the Decision Notices and in particular the criteria used both by the authority when defining a request as 'vexatious' and the Commissioner when coming to a decision on this issue, has provided the following results shown in figure 2.12.

The criteria that are set out within the Commissioner's guidelines are outlined here:

*'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).

A comparison of the total number of times a specific criteria was applied to a request by the Commissioner to the total number of times it was cited by a public authority indicates that for each of the criteria, the commissioner stated less criteria. Although a crude measurement, it does illustrate that the Commissioner overall applied less ‘vexatious’ criteria to the requests. However it does not take into account where the Commissioner and authority agreed on the criteria, just the number of times they were applied.

44 of the appeal cases have been included in this part of the survey. Four cases have been omitted as the ‘vexatious’ definition was not fully investigated in these cases. This was for several reasons, for example in one case, the ‘vexatious’ definition was withdrawn during the Commissioner’s investigation.

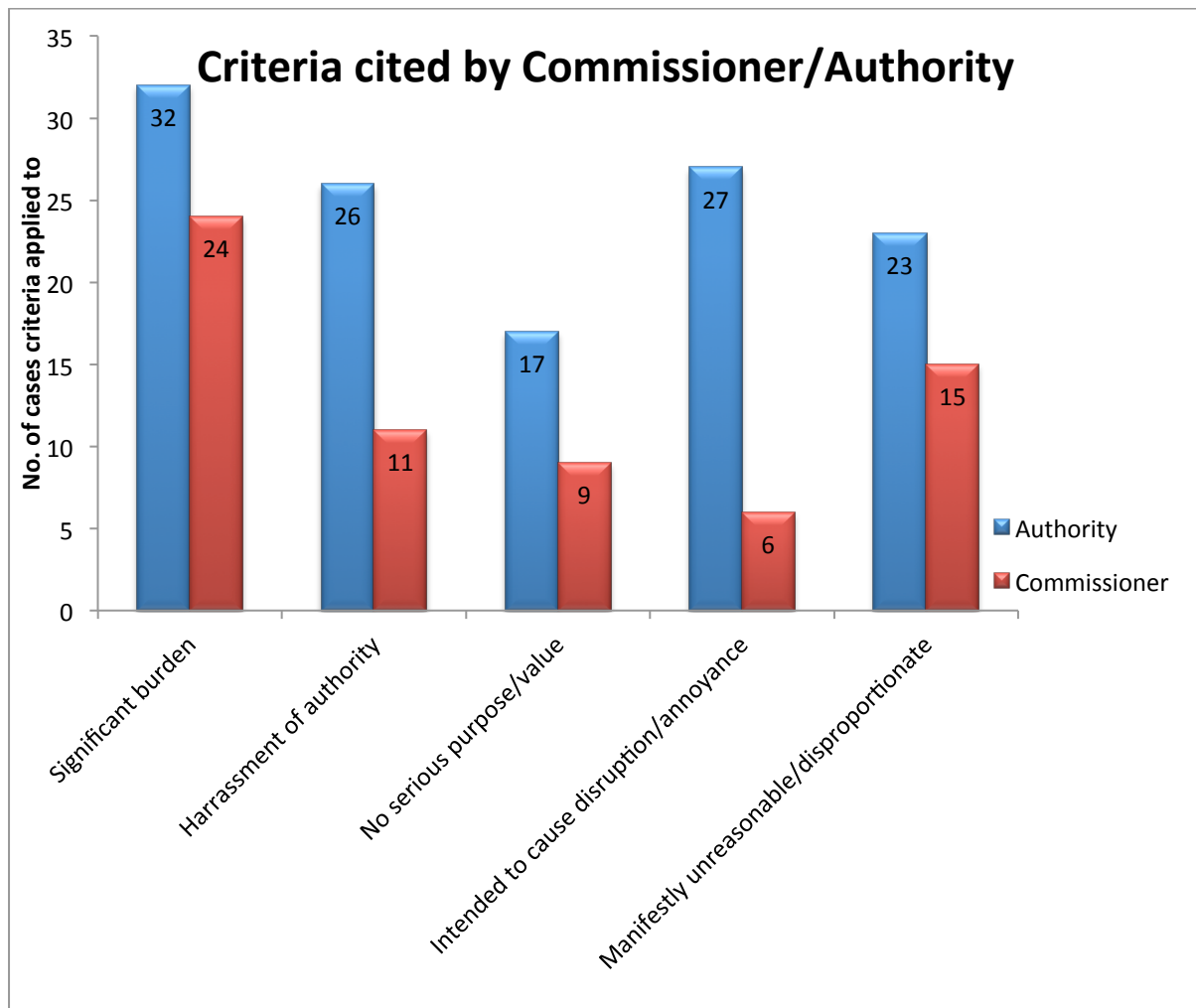


Figure 2.12 - Criteria Cited by Commissioner/Authority

Finally, examining the individual criteria more closely and particularly the instances where the authority and the Commissioner agreed revealed the following results:

- 'Significant Burden' criteria: this was alleged in 32 out of 44 cases by the authority and the commissioner agreed with this in 19 of these cases;
- 'Harassment of authority': this was alleged in 26 out of 44 cases by the authority and the commissioner agreed with this in 8 of these cases;
- 'No serious purpose/value': this was alleged in 17 cases out of 44 cases by the authority and the commissioner agreed in 8 of these cases;
- 'Disruption/annoyance of authority': this was alleged in 27 out of 44 cases by the authority and the commissioner agreed in 3 of these cases;
- 'Manifestly unreasonable/disproportionate': this was alleged in 23 out of 44 cases by the authority and the commissioner agreed in 10 of these cases.

This represents agreement between the authority and the commissioner in 48 out of 124 mentions of criteria which represents 39%. Again, this is a crude measurement but it does illustrate the lack of agreement between the commissioner and the authority in the majority of cases when applying 'vexatious' criteria.

Comments/Observations:

Finally, analysis of the appeals data also revealed a number of other comments and observations from the Information Commissioner within the detail of the Decision Notices which provided a further insight into the handling of 'vexatious' requests and the interpretation and application of criteria.

The criteria states that for a request to be 'vexatious', it must pose a 'significant burden' to the organisation involved and also fulfil at least one of the other criteria. However, despite this, the Commissioner in several of the appeals cases does state that:

'There may be circumstances where the burden of responding alone justifies deeming a request to be vexatious or manifestly unreasonable, even if ordinarily the Commissioner will expect one or more of these listed criteria to be present in addition. Furthermore, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request manifestly unreasonable, even in the absence of a significant burden' (Scottish Information Commissioner, 2012c).

Thus indicating that in practice, other factors are taken into consideration along with the criteria.

The Commissioner also takes into account the history of a request:

'he is aware that, in some cases, the vexatious nature of a request will only emerge after considering the request within its context; for example, in relation to previous or on-going correspondence with the applicant' (Scottish Information Commissioner, 2012c).

Also in several cases the Commissioner cites the following information, emphasising the importance of careful application of the 'no serious purpose/value' criteria:

'The Commissioner's guidance on this issue is clear: public authorities should not lightly reach the conclusion that a request has no serious purpose or value. Even if a public authority thinks that a request lacks serious purpose or value, the applicant might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. Furthermore, the applicant is not obliged to share his/her motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in

serious purpose or value that they can only be seen as vexatious' (Scottish Information Commissioner, 2012c).

In one case the Commissioner found the request to be 'vexatious' despite there being no applicable criteria. In this particular case the council and the commissioner both agreed that the language used, offensive remarks and allegations made it impossible to understand what information the requester was looking for and made it difficult to answer (Scottish Information Commissioner, 2012c).

However, the Commissioner did say:

'The use of abusive or unacceptable language in an information request will not automatically mean that the request will be vexatious.' (Scottish Information Commissioner, 2012c)

These will be discussed further in the discussion section.

5. Discussion

5.1 Introduction

The aim of this study was to answer the 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 results from both the survey of local authorities and analysis of the Scottish Information Commissioner’s appeals data will be discussed in this section in relation to these research questions and the key issues that emerge.

Freedom of Information is increasingly seen as an essential part of a democratic society and there are now around 90 countries worldwide with ‘access to information regimes’ (Hazell and Worthy, 2010). However, the implementation of the legislation itself is only the first step in the implementation of a successful FOI regime and there are many factors that can influence this success. The interpretation and application of the legislation by those working within public authorities is crucial to the Act’s performance and clearly will have an impact on what information is ultimately disclosed. Consequently the way in which the legislation is perceived and utilised by the government, local authorities and indeed the general public can have a huge impact on its success.

The cost of administering the legislation has been raised as a concern in several studies (Frontier Economics, 2006; Ross and Whittaker, 2007) and in the media and there is some evidence of a perception amongst the general public and those administering the legislation that it is expensive and is frequently being misused (Frontier Economics, 2006; Holsen et al, 2007). This sort of perception can arguably affect the way that individuals within authorities apply and interpret the legislation in practice and could potentially damage its success. This study investigates the cost and incidence of both FOI requests and ‘vexatious’ requests in order to examine if these perceptions are justified. It also looks at the application of the ‘vexatious’ definition to investigate how authorities are interpreting and applying this particular exemption.

5.2 Cost of FOI legislation

Very few research studies have been conducted into the cost of administering the FOI legislation and those that have been undertaken have been essentially estimates due to the lack of a statutory duty

for organisations to record details of FOI requests and in addition their inability to spontaneously record such data. This can potentially misrepresent the actual situation and possibly lead to misinformed perceptions.

The report by Frontier Economics is one of the few studies that have attempted to assign a cost to the FOI Act. It was commissioned by the Department for Constitutional Affairs and looked at the cost of delivering FOI and also examined alternatives to the current charging scheme (Frontier Economics, 2006). In the study, Frontier Economics estimated the cost of the FOIA as £35 million per year (Frontier Economics, 2006, p37). The way in which Frontier Economics' research study was subsequently then used as evidence to support the government's attempts to amend and limit the legislation indicates how vulnerable the Freedom of Information legislation is and also highlights the importance of accurate record keeping within organisations, particularly of cost data, to ensure that poorly researched and biased cost estimates cannot be produced.

Experiences in other countries, Ireland in particular, has shown that it is likely that further attempts may be made to limit the legislation so it is important to prepare for this possibility (Hazell and Worthy, 2010).

There have been few other studies undertaken which have looked at cost and those which have, such as UCL's study which investigated the cost of FOI in the UK and Scotland as well as internationally (Colquhoun, 2010), have again essentially provided an indication of the costs rather than an accurate assessment. The Scottish Government's Corporate Research Team undertook a costing exercise in 2009/2010 on behalf of the FOI Unit. They found that the average cost of a request was £236 (Scottish Government, 2010). Although an interesting study providing an insight into administering FOI requests, it too can only be seen as an estimate of the true cost and only examines the Scottish Government, which is not representative of the public sector as a whole.

Cost has been raised by many working with the legislation as a concern in several studies. Ross and Whittaker who investigated the compliance of local authorities with the FOI Act discussed the concerns that senior officers in local authorities had about complying with the FOI legislation (Ross and Whittaker, 2007, p59). These included concerns about the 'significant financial cost of processing requests for information' and 'the unpredictable demand upon resources' (Ross and Whittaker, 2007 p59). Ross and Whittaker also comment on the attitudes of staff describing how 'there remains a deeply ingrained resistance in public authorities to releasing information' (Ross and Whittaker, 2007, p60).

Research undertaken by Continental Research on behalf of the Information Commissioner in 2007 also highlighted negative attitudes, when it investigated the perceptions of FOI practitioners who were dealing with the legislation. This report highlighted several issues with the Act, such as the cost and increased workload (Continental Research, 2007).

The evidence highlights the need for accurate information regarding the cost of administering the FOI legislation which can only really be achieved by a robust and comprehensive recording system across all public authorities.

The first research question was to investigate the numbers of FOISA requests that were being received by local authorities and their associated cost.

The results from the survey of local authorities 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).

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 cost data as 'incredibly difficult to accurately record'. Another described the way in which FOI requests were dealt with within their organisation made it difficult to record costs:

'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'.

Several of the comments also 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). However, despite the difficulties involved in responding to requests and record keeping, 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.

Although the study demonstrated a disappointing result in terms of recording of cost data, the fact that all of the authorities kept records of some description relating to the numbers of requests was very encouraging. Again, there is no statutory requirement for organisations to do this so this was an unexpected result. Even those authorities that were unable to supply full data for the seven year survey period, could provide information for the later years and in particular 2011, perhaps indicating that in the later years of the survey more efficient monitoring systems had been put in place. Other signs of improvement in systems were evidenced by comments from the authorities regarding their recording and monitoring systems. One authority mentioned that they had implemented a new logging and monitoring system in 2011. Although, very limited evidence, this provides some indication that perhaps organisations are gradually improving their practices and becoming more organised with respect to the FOISA.

The results also indicated that with the exception of 2007, the number of FOISA requests received has increased each year. The average number of requests experienced by a local authority in 2011 was 923, compared to 518 requests in 2005. This provides an indication that the legislation is being increasingly utilised and supports anecdotal evidence mentioned by the Scottish Information Commissioner:

'Anecdotally, public authorities tell us that the number of requests they receive has risen year on year since the legislation came into force' (Scottish Information Commissioner, 2012b, p5).

However, this result also reinforces the need to accurately record numbers and costs of requests and to improve organisational efficiency and effectiveness with regard to FOISA. If this trend is to continue and there are no improvements in organisational record keeping and efficiency in dealing with such requests, it could encourage further negative perceptions of the legislation in practice due to increased workload for staff. However, it must be remembered that these results only looked at 18 of the 32 local authorities in Scotland.

5.3 'Vexatious' requests

Several studies and articles in the media (Frontier Economics 2006, The Sun, 2011a) have highlighted the incidence of 'vexatious' requests, and these are likely to have influenced perceptions of the legislation.

In addition to examining the overall cost of the FOI legislation, the Frontier Economics report also emphasised the incidence of 'vexatious' requests and alleged that such requests were a 'key issue identified by almost all stakeholders'. (Frontier Economics, 2006, p3). The section of their report that highlighted the incidence of 'vexatious' requests also described several of these requests which had been received and focussed on the most unusual and bizarre of these. Two such examples they cited were:

'A request for the total amount spent on Ferrero Rocher chocolates in UK embassies' (Frontier Economics, 2006, p3) and

'A request for the number of eligible bachelors in the Hampshire Constabulary between the ages of 35 and 49' (Frontier Economics, 2006, p3)

It appears as if these example were selected in order to 'grab' the attention of the reader and lead them to believe that these types of requests were frequent. However, despite discussing these requests, the report did not provide any detail as to the actual numbers of 'vexatious' requests, which is arguably more relevant when considering cost issues.

Several articles in the media have also suggested that authorities are being overwhelmed by 'vexatious' requests (Harris, 2012; The Sun, 2011a). So, in addition to concerns relating to the cost of the FOISA generally, there are also concerns relating to the cost and volume of 'vexatious' requests.

However, analysis of the appeals data indicated that in comparison to the total number of appeals to the Commissioner, the number of appeals citing exemption 14(1) vexatious requests is actually very low, representing just 8% of the total number of appeals in 2011. Over the seven year period examined, there were 1464 appeals referred to the commissioner and only 52 of these cited exemption 14(1) which represents just 4%.

The results from the study of local authorities, also, do not support these reports. 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. The graph comparing the average number of 'vexatious' requests received per authority with the average number of requests received further illustrates their small number.

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 raised this point in their recent publication 'The impact of the Freedom of Information on central government in the UK: Does FOI work? ', when they discussed the 'Pareto Principle'. They suggested that the perceptions of people regarding the FOI legislation follow this 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 local authorities, 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 opinions and perceptions.

In addition, analysis of the appeals data provides further evidence of negative perceptions of the FOISA. When describing the way in which their employees feel when dealing with one particular potentially 'vexatious' request, Scottish Water said:

'this has a demotivating effect and has negatively influenced employees' opinions on whether FOI legislation is effective and appropriate or is creating too big a burden on public authorities' (Scottish Information Commissioner, 2012c).

Again, this reinforces the way in which perceptions can be shaped by the experiences of dealing with one difficult request.

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. However, with the lack of recorded information and research relating to FOISA, it is difficult to establish which is the case. There was some evidence from the study of the 'vexatious' definition being applied minimally, at least within some authorities. When asked about the reasons underlying the 'vexatious' definition, one authority said 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’.

Evidence from the literature also provides some indications of authority’s 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).

However, analysis of the appeals data provided some conflicting results, with evidence of the authorities being more aggressive in their approach to the ‘vexatious’ definition. This will be discussed further in a later section.

Regarding the cost of ‘vexatious’ requests, again the study found that none of the local authorities were recording cost information. Although this was not unexpected, it highlights the inability of local authorities 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.

Again, this highlights the need for improved organisational record keeping. This is particularly important if you consider that some ‘vexatious’ requests will be appealed by the requester and referred to the Information Commissioner. With this in mind it is even more critical to keep accurate records of the details of requests, time involved in dealing with them and the costs involved too.

5.4 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.

The Scottish Information Commissioner provides a set of guidelines as part of their Exemption Briefing Series on how to deal with ‘vexatious’ requests (Scottish Information Commissioner, 2012a) It essentially states that if a request is defined as ‘vexatious’ then the public authority can refuse to

disclose the requested information. The guidelines include a set of criteria that can be consulted when defining a request as 'vexatious'.

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 local authorities 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.

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.

The criteria that are set out within the Commissioner's guidelines are outlined here:

'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 results from the research study highlight the local authorities’ use of these criteria with three quarters of the authorities stating that they use them. However, examination of the appeals cases also indicate the subjectivity of the criteria and that in reality there is also considerable scope and flexibility to go out with these criteria on some occasions. There are many examples of this in the research (Scottish Information Commissioner, 2012c).

In one particular case, the Commissioner agreed with the authority’s ‘vexatious’ definition without either party applying any of the criteria. The case involved a request for information to the Scottish Executive from Mr David Emslie. The language used, offensive remarks and allegations within the request made it impossible to ascertain the information sought and it was defined as ‘vexatious’ (Scottish Information Commissioner, 2012c). This case highlights the latitude that the Commissioner has in deviating from the set criteria on a case by case basis.

Another case which involved Millar and Bryce, a commercial property search organisation, clearly illustrated how the local authority concerned used the ‘vexatious’ exemption as an excuse not to disclose the information. Within the detail of the case, the ‘vexatious’ definition appears to have been made, again without due regard to any of the criteria. However, on this occasion the Commissioner did not agree with the ‘vexatious’ definition and the local authority were ordered to disclose the information (Scottish Information Commissioner, 2012c).

So, there may be certain cases which do not fit into the stated criteria, but can still be defined as ‘vexatious’. The flexibility with which the commissioner interprets the criteria is helpful in an environment where requesters and requests can be diverse but it does also mean that ‘vexatious’ is difficult for others to define.

Looking at the criteria in more detail, the key terms seem to be:

- **Significant burden;**
- The request **lacks serious purpose or value;**
- The request is **designed to cause disruption or annoyance;**
- The request has the **effect of harassing the public authority;**
- The request is **manifestly unreasonable or disproportionate** (Scottish Information Commissioner, 2012a).

The language used in the criteria, again, is highly subjective requiring judgement and interpretation. For example, the terms 'significant', 'disruption', 'annoyance', 'harassing' are difficult to quantify and dependent on the individual circumstances and details of the case, as well as the way it has been perceived by those dealing with it.

Results from examination of the appeals data do provide some information on how organisations and the commissioner are dealing with the 'vexatious' definition.

Of the 48 appeal cases, the Commissioner agreed with the 'vexatious' definition cited by the organisation in only 50% of the cases, which suggests that public authorities are not assigning the 'vexatious' definition appropriately in half of all cases. This result also highlights how subjective interpretation and application of the legislation can be.

Additionally, when looking at the detail of the cases more closely, comparing the criteria mentioned by the commissioner with that mentioned by the organisations in relation to the 'vexatious' definition indicates that the criteria corresponded in only 39% of citations. Although, this is a crude measure it does highlight the Commissioner's possibly more considered and conservative approach and again the subjectivity of the criteria.

Finally, looking at some of the detail from the appeal cases examined, highlights the challenging task that the Commissioner has in distinguishing between genuine requesters researching a particular issue and genuinely 'vexatious' requesters.

One particular case which involved Mr Wilson and Ayrshire and Arran Health Board illustrates how a genuine request for information regarding a completely legitimate investigation could be defined as 'vexatious' by the authority and if upheld by the Commissioner could have resulted in non-disclosure of the information. Mr Wilson requested copies of all critical incident reviews, significant adverse event reports and action plans derived from these, following an earlier incident at a hospital within Ayrshire and Arran. The Health Board defined his request as 'vexatious' and refused to provide the information. After several communications between Mr Wilson and the Health Board, the subsequent appeal by Mr Wilson led to the Commissioner carrying out an investigation into the case and fortunately disagreed with the 'vexatious' definition, ordering disclosure of the information. The Commissioner openly criticised the Health Board's conduct in relation to this request describing it as 'perhaps the most serious catalogue of failings to search for and find information within the scope of a request that the Commissioner has ever had to deal with' (Scottish Information Commissioner, 2012c).

The Commissioner also commented:

‘Were it not for the persistence of Mr Wilson both in terms of his request to the authority (which the authority at one point characterised as being vexatious) and in his application and submissions to the Commissioner, it would appear to be the case that the authority would have continued to insist that information was not held’ (Scottish Information Commissioner, 2012c).

The case which exposed potential malpractices within the hospital highlights the realistic possibility that public authorities may use the ‘vexatious’ definition as an excuse not to provide potentially embarrassing or damaging information. It also emphasises the key role of the Commissioner in investigating appeals and recognising such instances.

However, it does need to be noted that without a need for the requester to state the purpose of their request, it can be potentially difficult for the Commissioner to distinguish between a genuine need for information and a ‘vexatious’ requester, particularly where a legitimate research purpose or investigation may require a request for comprehensive and wide ranging information. In his guidance the Commissioner does point out the need to carefully consider the criteria ‘the request lacks serious purpose or value’ and in particular not to ‘reach this conclusion lightly’ (Scottish Information Commissioner, 2012a). This is reinforced by one council employee when asked to comment on a particularly bizarre request that they had received, she acknowledged the rights of individuals to request information for their own individual purposes:

‘To you it might seem frivolous and a waste of time, but to different people it actually means something. Everybody has their own interests and their own reasons for asking these questions.’ (The Sun, 2011a)

5.5 Requests, Requesters and Organisations

Analysis of the Information Commissioner’s appeals data facilitated investigation of the application of the ‘vexatious’ definition (exemption 14(1)) in practice, but also revealed some useful information regarding the types of requesters, subjects of requests and organisations involved. While this information provides useful detail and indications, it must be remembered that it relates to requests that have been defined as ‘vexatious’ and subsequently referred to the Commissioner for appeal and is not representative of FOISA requests in general.

Holsen et al comment that there has been a lack of research into who is making requests under the legislation, why they make requests and how they find the process. (Holsen, et al, 2007, p1). Research in this area can be challenging as it can be difficult to establish who is making the request and for what purpose, as there is no requirement under the legislation for the requester to state the

purpose or reason for the request. In addition, it is possible for anyone, anywhere to submit an FOI request which again can make analysis of data difficult and Holsen et al. also discuss this as a problem. (Holsen et al, 2007).

Analysis of the appeals data showed that 65% of the requests were from individual members of the public, 21% were from private commercial/enterprise organisations and 12% were from the media i.e. journalists. This supports evidence from several other studies including the Scottish Information Commissioner's Special Report (Scottish Information Commissioner, 2012c; Birkenshaw, 2010a) which also name 'ordinary individuals' as the most common requester.

The organisations involved were diverse ranging from local government to educational institutions, the Police and the NHS. However, a handful of organisations had experienced several requests relating to the same requester and issue, for example Scottish Water. Certain organisations do seem to receive more requests, but given the small numbers involved this cannot be seen as significant.

Finally, the subject of the initial FOISA request was examined and the results indicated that employment and employees, transport and roads, commercial activities and contracts, and housing comprised the subjects of the largest numbers of 'vexatious' appeal cases.

Examination of the types of requesters, organisations and subjects of requests has highlighted the diverse nature of requests and organisations involved and the fact that individuals are the most common requester as well as 'vexatious' requester. However, there are so few appeal cases in comparison to the numbers of public authorities that it is difficult to identify significant commonalities.

5.6 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 local authorities 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.

5.7 Role of the Information Commissioner

Although not a specific objective of this study, the research has highlighted the importance and key nature of the role of the Information Commissioner. Evidence from the appeals data highlights the Commissioner’s role in interpreting the legislation, conducting investigations and making significant decisions. There are many instances within the appeals cases where the Commissioner has felt it necessary to move outside the usual criteria for ‘vexatious’ requests and this is considered on a case by case basis. The experience and judgement exercised by the Commissioner is essential to interpretation and application of the legislation, particularly the exemptions.

The lack of a strict definition for the term ‘vexatious’ and the complex nature of many appeal cases contribute to the challenging nature of this role. The study of local authorities demonstrated that 77% of local authorities in Scotland are using the Scottish Information Commissioner’s Guidelines when considering ‘vexatious’ requests, which is encouraging and provides further evidence of the Commissioner’s essential role.

This also supports evidence from the literature, for example, Hazell and Worthy who discuss the importance of the Information Commissioner’s role and how they can ‘serve to rectify problems with the Act, establish precedents and provide guidance’ (Hazell and Worthy, 2010, p355). They also discuss how the absence of an ‘effective appeal body and influential focal point for the legislation’ can lead to failure as was demonstrated in Australia, where the Act was found to have ‘gradually deteriorated’ (Hazell and Worthy, 2010, p35).

The role of the Scottish Information Commissioner is thus vital in ensuring success of the Act.

6. Conclusions and Recommendations

6.1 Conclusions

The aim of this study was to investigate the cost and incidence of FOISA requests, particularly those requests defined as ‘vexatious’ in order to examine whether the negative perceptions regarding the cost and misuse of the legislation are justified. Also, additionally, to examine the way in which the ‘vexatious’ definition is being applied by public authorities.

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 local authorities to record cost data. In fact, the results of the survey found that no local authorities 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.

The local authorities 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 local authorities to log and monitor requests. Examination of the numbers of requests experienced by local authorities, found that the number of FOISA requests was increasing each year, with the exception of 2007.

Investigation of the cost of ‘vexatious’ requests again was problematic as none of the local authorities 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 local authorities 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 aren’t many potentially ‘vexatious’ requests in the first place. This result was supported by the results from the analysis of appeals data which also found that the numbers of appeals citing exemption 14(1) vexatious requests compared to the total number of appeals was again minimal.

Examination of the use of the ‘vexatious’ definition within local authorities found that only six local authorities in Scotland had developed their own guidelines for dealing with ‘vexatious’ requests.

Encouragingly, three quarters of local authorities 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 local authority staff of procedures for dealing with FOISA requests generally.

Analysis of the appeals data provided information on the types of requester as well as the organisations involved and subject of requests. This found that individual members of public are the most common requester which supports evidence from several other studies (Scottish Information Commissioner, 2012a).

Finally, the appeals data also provided information regarding the application of the 'vexatious' definition and the results found that the Scottish Information Commissioner agreed with the authority's 'vexatious' definition in only half of all cases. Further detailed examination of the criteria used within these cases, indicated that there was agreement between the authority and the Commissioner in only 39% of criteria 'citations'. This highlighted the inability of the authority to apply the 'vexatious' criteria appropriately. Although there was some evidence of the 'vexatious' criteria being used conservatively within local authorities in the survey results, analysis of the appeals data and in particular examining the level of agreement between the authority and the Commissioner with regard to 'vexatious' criteria indicated that the public authority's approach was much more aggressive. This highlighted the subjectivity of the criteria and the difficulties in interpretation and application of the exemptions within the legislation.

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 would appear that the 'Pareto Principle' suggested by Hazell et al (2011) may indeed apply to the Freedom of Information legislation and the evidence from this study does not refute this possibility.

In order to secure the success of the Freedom of Information Act, a culture change within organisations is 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.

6.2 Recommendations

Although this study was limited by its small scale and a lack of record keeping within organisations excluded analysis of the cost of FOISA, its results have highlighted some key issues and led to the following key recommendations for public authorities:

- Implementation of a comprehensive recording and monitoring system for FOISA requests which includes recording of cost data;
- Development of organisational guidelines for dealing with exemptions and in particular exemption 14(1) vexatious requests to utilise alongside the Scottish Information Commissioner's guidelines;
- Increase positive awareness within the organisation of the FOISA legislation and the statistics regarding usage and cost to challenge misinformed perceptions.

6.3 Reflections on research study

The approach taken in this research project to investigate the Freedom of Information legislation was particularly appropriate for this type of study, given that it involved utilising FOI requests to deliver the survey to local authorities. This proved a successful approach demonstrated by the high response rate of local authorities of 94%. The survey returns provided much information spontaneously provided by the local authorities in addition to the information requested which was useful and gave an insight into key issues with the legislation, such as the difficulties experienced in recording cost data.

The survey questions were deliberately designed to be clear and unambiguous, however question 5 which related to the 'types' of 'vexatious' requests experienced by local authorities could have been more explicit in defining the information required as two of the local authorities expressed that they were unsure exactly what information to provide.

Analysis of the appeals data provided a different approach to the research and highlighted several issues. However, examination of the Decision Notices involved a great deal of subjective interpretation of the detail of the cases and on several occasions, there was incomplete information. This limits the significance of the results due to the potential for researcher bias. In addition analysis of the appeals data investigated only those 'vexatious' requests that had been referred to the Information Commissioner for appeal, not all 'vexatious' requests and it is important to remember this when examining the results.

A useful additional approach to this research could have been to undertake interviews of FOI practitioners working within the local authorities to gain an insight into their perceptions and opinions of the legislation in practice, providing valuable qualitative data.

6.4 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 Scotland in order to provide an overview of the situation in Scotland. The study has also raised several other key areas of research including record keeping within organisations and an investigation into the role of the Scottish Information Commissioner. 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.

Appendices

Appendix 1: A copy of the FOI request which was sent to the 32 local authorities in Scotland.

Freedom of Information Officer

15/06/2012

Dear FOI Officer,

This is a request under the Freedom of Information Act.

Could you please supply me with 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.

If I can help to clarify this request please telephone me on 07977 452 979 or e-mail me at morag.cherry@hotmail.com

My postal address is 8 Greenfield Road, Clarkston, Glasgow, G76 7XN.

Yours sincerely,

Morag Cherry

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Please note that the appeals cases discussed as part of this study can be found at: <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.php>