

The following items of information are provided as extracts. They are provided as extracts because they are taken from internal Scottish Government emails which contain information outside of the scope of your request.

Item 1:

From: [Redacted S.38(1.)(b)]
Sent: 31 July 2019 15:32
To: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Subject: RE: URGENT - Citizens' Assembly - MoU - assurance

Penny

I think you can offer the assurance sought, subject to your views on my comment immediately below:

I might be over-complicating this, but two things spring to mind:

- I wonder if we should make it clear in the MOU that, while the Assembly will have an information handling/publication policy, it is not (we assume) a public authority. Suggested amendment below; and
- I am slightly surprised there is no mention of personal data. The Assembly will process personal data and so will have Data Protection obligations. People may be more concerned about how they handle/share personal data than other information (I assume the MOU will be published so it might be an idea to make that clear).

A passing thought - the message does not have the remit or letter of appointment (though I assume do not touch on FOI, so that is probably not important).

[Redacted S.38(1.)(b)]

Information

15. The Assembly **is not a Scottish public authority (and hence is not subject to FOISA) in its own right. However, it will have, and will publish, a policy setting out its approach to the handling and publication of information, and on how it will respond to requests made to the Assembly for information.**

16. Where the Assembly reasonably requires data or information held by the Scottish Ministers in order to carry out its functions, Ministers will provide the Assembly with that data or information if satisfied that it is lawful and appropriate for them to do so.

From: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Sent: 31 July 2019 13:53
To: [Redacted S.38(1.)(b)]
Subject: FW: URGENT - Citizens' Assembly - MoU - assurance

[Redacted S.38(1.)(b)]

I'm being asked to offer assurance about the proposed MOU. The statement about information in the draft is high level, requiring the assembly to have and publish a policy about its approach to information publication and dealing with requests. It also requires Ministers to provide information in response to reasonable requests providing its lawful and

appropriate. You've shared with me the advice [Redacted S.38(1.)(b)] provided to be made available to the Assembly to inform their approach to information. I am confident that I can offer assurance sought – that the proper advice was sought. Is there anything you need to draw my attention to?

Thanks

Penny

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Item 2:

From: [Redacted S.38(1.)(b)]
Sent: 26 July 2019 09:25
To: [Redacted S.38(1.)(b)]
Cc: [Redacted S.38(1.)(b)] Davidson I (Ian) (CUKR) <ian.Davidson2@gov.scot>; Hynd JS (James) <James.Hynd@gov.scot>
Subject: RE: Citizens' Assembly - FOI considerations - draft minute

[Redacted S.38(1.)(b)]

This looks like exactly what is needed. Thank you.

I'll consider this minute in detail soon, but on the basis that it reflects and expands on previous advice FOI Unit have provided us, I'm happy that it allows us to conclude the following:

- While there is a risk that ultimately the Assembly may be regarded as subject to FOISA by the Commissioner, the better view (and the view most consistent with SG's wider practice and approach) is that it is not.
- It is a risk that can be mitigated and controlled mainly by (i) a clear policy on handling requests for information, and (ii) a strong policy and practice of routinely publishing information generated by and relating to the Assembly.
- The Assembly not being subject to FOISA also usefully gives us flexibility that may allow us to adopt a stronger policy re: protection of Members' identities than we would otherwise, and this can be reflected in the Assembly's information policies.

[Redacted S.38(1.)(b)] has also provided us with excellent advice on the contents of an information policy for the Assembly, which I will now prepare on this basis.

[Redacted S.38(1.)(b)]

From: [Redacted S.38(1.)(b)]
Sent: 25 July 2019 17:32
To: [Redacted S.38(1.)(b)]
Cc: [Redacted S.38(1.)(b)]
Subject: Citizens' Assembly - FOI considerations - draft minute

[Redacted S.38(1.)(b)]

Further to our discussions last Thursday, I now attach a draft minute setting out our initial thoughts on the FOI considerations that you had identified. I appreciate it's probably longer and later than anticipated – apologies. It can probably be tailored more closely once there is some clarity on what line is to be taken about the relationship between the Assembly and the Ministers, as trying to cover the different possibilities makes it rather broad.

As mentioned I'm on leave from this evening, returning on the 5th (though if I've said something that really doesn't make sense you have my number). Otherwise, [Redacted S.38(1.)(b)] has had sight of this and is probably your best contact in my absence.

Thanks,

[Redacted S.38(1.)(b)]

Please note, the attached draft minute is provided as Document 1, enclosed with this letter.

Item 3:

From: [Redacted S.38(1.)(b)]

Sent: 25 July 2019 19:09

To: [Redacted S.38(1.)(b)]

Cc: [Redacted S.38(1.)(b)]

Subject: Citizens' Assembly - outline draft information-handling policy

[Redacted S.38(1.)(b)]

Further to last week's discussions, I have looked into what the Assembly might do by way of pulling together an information-handling policy. I appreciate you would have probably preferred a draft policy itself, but on investigation I think there are too many variables to come up with one just yet – so what I offer is a very rough outline of things to consider, based on a review of how other bodies have approached this issue.

The starting point is to note that (per my previous minute) if the Assembly ends up being subject to FOISA because it is thought to fall within the Scottish Ministers' designation then this is largely all academic. In that case, you would be looking more to agree between the Ministers and the Assembly how the responsibilities under FOISA were to be discharged. Some executive agencies (which would be the closest parallel) have very heavily-devolved handling models, e.g. SPS (for historic reasons). Others operate more or less as any other Directorate in SG does. I appreciate that the Assembly being subject to FOISA in this way is not the policy intention, but think it's as well to flag in case that is where you end up.

What should the policy cover?

As an entirely voluntary exercise, there is no prescribed checklist. Looking at how other bodies have dealt with this, you could take a more or less expansive approach but for FOI purposes there are probably two main things to cover off: a) a statement that narrates that FOISA doesn't apply and setting out a high level approach to access to information and b) a guide to the information you intend to publish (a very light touch publication scheme, in other words).

Separately (and I assume the DPIA team –[Redacted S.38(1.)(b)] is your best contact – is advising on this), I imagine the Assembly will turn out to be a data controller and so will require a privacy notice. I'm not proposing to comment further because frankly I know very little about privacy notices, but ultimately it would probably make sense for it to live in the same place as your access to information material.

A) Statement on access to information

The main purpose of this is to set out unambiguously the position that FOISA does not apply. There are a number of formulations in existence, reflecting I suspect varying attitudes to the appropriateness of allowing access to information.

As examples, the [Fair Work Convention](#) and [Infrastructure Commission Scotland](#) are fairly standard. As previously advised, I am not aware of these statements having been tested before the Commissioner. In effect, they set out a high level position that broadly says there is no *legal* right to information, but the body will consider any requests made for additional information.

The [Buchanan and St Ambrose High School Campus Review](#) is an interesting example as it probably goes further – I offered Paul Cackette the above models but he wanted to be more explicit. The relevant bits of the letter set out a clear intention to act as if bound by FOISA:

“The information requested by the Review includes all reports held or created by you, including matters of a confidential nature. Subject as below, our intention, where legally possible and appropriate, is to make publicly available all materials provided to this Review.”

[GDPR material]

The Review is committed to being open and transparent and will proactively share the information provided to it where it is appropriate to do so.

The Review is independent of the Scottish Government, North Lanarkshire Council and NHS Lanarkshire, and it has not been designated as a Scottish public authority for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA). However, it is our intention to respond to requests for information as if it were so designated. We will only withhold information if we consider that an FOI exemption could be applied and (where appropriate) the public interest test favours withholding it.

At this stage, if you consider that an exemption would apply to any of the information that you provide to the Review, please make clear what that information is, the exemption you consider applies and the basis for holding that view, including (where appropriate) why you believe the public interest test favours withholding it.

Should we receive a request for information that we have not proactively published, we would consult you and offer you the opportunity to comment further.”

The test would, of course, come should the Review seek to withhold information as there is no real scope for an internal review, much less an appeal to the Commissioner (and he has always been clear that he cannot entertain appeals on a voluntary basis, even if the supposed authority were to consent).

At the other end of the spectrum, we have the [Scottish Child Abuse Inquiry](#) approach: “The Inquiry is not a public authority for the purposes of the Freedom of Information (Scotland) Act 2001 [sic]. As a result, the Act does not apply to the Inquiry, and requests for information under that Act cannot be considered by the Inquiry.” Doubtless that is appropriate to the particular circumstances of the Inquiry – our discussions suggest you would not be adopting this approach, but I thought it would be as well to show you the full range of approaches.

In essence, the point here is that the Assembly would have reasonable freedom to design a policy that met its own particular needs. My suggestion, based on what little I know, is that the FWC/ICS approach might well make for a reasonable starting point. However, I would then build on that in relation to proactive publication, as follows – mainly because it is a good way of managing expectations.

B) Publication scheme

At the outset, I should say that calling it a publication scheme is probably rather over-ambitious. Formal ones under FOISA are cumbersome and everyone is looking at ways of reducing the burden as part of post-legislative scrutiny.

That said, a relatively light-touch section of the website that says what you propose to publish and when would go a long way to managing expectations around sharing information. So, for example, you might want to say that you will publish general information about the Assembly, its composition and governance (and then link to things you have mentioned like the remit, MoU, high level information about how the membership was drawn, profiles of the conveners, that sort of thing). You might also want to consider (and then set out) what, if anything, you propose to publish around each meeting of the Assembly. Would you, for example, make the papers available? Some of them? Before the event or after? Would there be a minute of the proceedings? Or (perhaps more likely) a summary of key points (much of this is straying into comms handling rather than FOI, but you get the gist). Formal publication schemes have [nine classes of information](#) – and you probably don’t

want to go anywhere near that level of complexity, but they are a useful prompt to think about what information the Assembly will have, and what it will make available.

My other suggestion (borrowed from the [Independent Care Review](#)) is potentially to have FAQs about what the Assembly will do with information and why. That would give an opportunity to explain the policy behind (for example) not disclosing who the members are in a way that is proactive rather than reacting to queries – again, your Comms contacts will probably have much more to say about this than me, but we are generally encouraging proactive publication and it's also something the Commissioner is very keen on.

Apologies that this is all rather a ramble and probably less focused than what you were looking for. I think the overall message though is that (so long as the Assembly is not subject to FOISA) you can have a fairly free hand in designing something that best meets the needs of the Assembly. Indeed, it might also be something that you want to keep under review – particularly as I suspect you will attract far more public (and sustained) attention than some of the bodies mentioned above.

Happy to discuss.

[Redacted S.38(1.)(b)]

Item 4:

From: [Redacted S.38(1.)(b)]

Sent: 25 July 2019 16:53

To: [Redacted S.38(1.)(b)]

Subject: RE: Citizens' Assembly - FOI considerations - draft minute

[Redacted S.38(1.)(b)]

This looks fine to me.

I have made a very small number of suggestions (tracked), but it seems very thorough (particularly given some of the uncertainties).

[Redacted S.38(1.)(b)]

From: [Redacted S.38(1.)(b)]

Sent: 25 July 2019 15:33

To: [Redacted S.38(1.)(b)]

Subject: Citizens' Assembly - FOI considerations - draft minute

[Redacted S.38(1.)(b)]

Grateful if you could cast a quick eye over this before I send it to [Redacted S.38(1.)(b)]. I'm planning deliberately to send it in draft as I think it will need a fair bit of refinement before we formally present the advice – not least because the status of the Assembly seems to be a moving target. Ideally much of this would come out if we simply had a final analysis from SGLD but I don't know whether that's likely or not.

Thanks,

[Redacted S.38(1.)(b)]

Please note, the attached draft minute is provided as Document 2, enclosed with this letter.

Item 5:

[Redacted S.38(1.)(b)]

I've updated the eRDM document for FOI interests. I don't think it says much more than what I mentioned in passing yesterday – essentially, if you know whether or not you want FOISA to apply then we have precedents for going in either direction.

My preliminary impression from your note is that you want an approach much like that of the Fair Work Convention (I've linked to their FOI page in my comments). It indicates that it's not subject to FOISA, but will consider requests for information. Some bodies go slightly further, and say that they will comply with the spirit of the legislation. Precise wording is, however, something that could be considered in due course.

There's a policy question, I suppose, about whether the work of the Assembly would be so significant that there's a reasonable expectation that it *should* be subject to FOISA. Might the Ministers be criticised for setting up a new body which is "secretive"? The precedent I have in mind here is the Independent Commission on Freedom of Information, set up to review the Freedom of Information Act 2000 by the UK Government. Rather ironically, it was not itself subject to FOIA and this attracted some adverse comment at the time (though not nearly as much as its composition did).

Separately, do you have any objection to me letting [Redacted S.38(1.)(b)] know that I've commented on this? I note what you say about keeping the copy list restricted, but he generally likes to have an overview of what the Unit is involved in. He's not back until next week so no immediate rush.

Happy to discuss.

[Redacted S.38(1.)(b)]

Item 6:

From: [Redacted S.38(1.)(b)]

Sent: 23 July 2019 14:38

To: [Redacted S.38(1.)(b)]

Cc: [Redacted S.38(1.)(b)]

Subject: RE: ministerial appointments, Citizens' Assembly - Appointments of members and advisers - payment of honorariums, expenses, [Redacted S.38(1.)(b)] July 2019

[Redacted S.38(1.)(b)]

The relationship between the Ministers and the Assembly goes to the heart of these points. As you know I'm working up separate advice for you and it covers some of this in greater detail (though I'm definitely trespassing in SGLD's territory, but it seems unavoidable). As you know, we have a variety of advisory bodies, commissions, reviews etc. which have not been set up under statute or otherwise established as bodies corporate. We have taken the position that they are not one and the same as the Scottish Ministers and so are not subjected to FOISA by the Ministers' designation – this point remains, to date, untested before the Commissioner. We have therefore never analysed in great detail *why* we think that they are not, in law, one and the same as the Scottish Ministers – but it looks like we will have to attempt that analysis now.

The quick and dirty version is that the Assembly will not have legal personality as it is not a statutory creation or otherwise to be established as a body corporate. The working assumption [Redacted S.38(1.)(b)] [Redacted S.36(1.)] the Scottish Ministers.

However, I think there is another analysis and this is what I am proposing to develop for the wider advice. The alternative view would be that the Assembly is an unincorporated association. As the Scottish Law Commission pointed out in its Report (paras 1.4 and 1.5 in particular refer), while unincorporated associations lack personality, they are assumed for a variety of purposes (including employment law) to have some sort of existence. However, their officebearers may end up with a variety of personal liabilities as set out in the four bullet points in para 1.4. However, I tend to think that those liabilities in practice would be discharged by clause 12 of the terms of appointment whereby the Ministers grant an indemnity to the conveners, which (I speculate) would help address some of [Redacted S.38(1.)(b)] concerns.

It may not be palatable (or indeed correct) to analyse the Assembly as an unincorporated association -- and that is doubtless properly a question for SGLD. However, if the Assembly is just part of the Scottish Ministers (like an executive agency) then FOISA will apply. If the intention is that it should not, we require some rationale that distinguishes the Assembly from the Ministers.

With that rather lengthy preamble – and on the assumption that the Assembly is separate to the Ministers, even if it lacks legal personality – my view on points 2 and 4 is as follows.

- Point 2: in the circumstances described, I cannot see that the Ministers could be said to hold the information for the purposes of FOISA. Paras 7 to 10 of the Commissioner's guidance refer.
- Point 4: I broadly agree. There are a number of bodies (who may or may not be subject to FOISA) that use SG systems, including SCOTS, SEAS and so on. The Ministers do not hold their information simply because it is on the Ministers' premises or systems (the guidance again refers).

Happy to discuss.

[Redacted S.38(1.)(b)]

[Redacted S.36(1.)]