

# The Campaign for Freedom of Information in Scotland

Wellpark Enterprise Centre  
120 Sydney Street  
Glasgow G31 1JF  
Tel/Fax: 0141 554 5161  
Web: [www.cfoi.org.uk/scotland.html](http://www.cfoi.org.uk/scotland.html)



## **Response to Scottish Government consultation on extending the coverage of the Freedom of Information (Scotland) Act 2002**

2 November 2010

## Executive Summary

- The Campaign for Freedom of Information (Scotland) warmly welcomes this proposal to utilise the powers contained in Section 5 of the Freedom of Information (Scotland) Act (FOISA). Transparency and openness should be part of doing business with the public sector.
- We welcome the acceptance that anomalies in access to information on public services, created by differing methods of delivery, should be abolished, and that public services should continue to be publicly accountable.
- We welcome the acceptance of the principle of using class-based descriptions as far as possible to avoid continual redesignations.
- However, we are concerned that the proposals create a whole new set of anomalies by only proposing coverage to certain bodies in key sectors. Many Registered Social Landlords (RSLs); trunk roads contractors; many PFI contractors including those in the water and sewage service; some local authority trusts and arms length organisations will remain outside the Act's scope.
- Similarly the creation of arbitrary financial/contract length limits mean important services spending large sums of our money will fail to be accessible and accountable.
- We welcome the conclusion that the cost of providing information will not be a significant 'burden' to designated bodies, as such assumptions would run contrary to the principle of transparency and openness.
- The coverage of organisations is far from comprehensive.
- The proposed coverage of prisons and escort services are welcome and should be a model for other sectors.
- An artificial distinction of 'core' public services and cost/time limits in contractors running schools and hospitals may lead to crucial public services such as catering and cleaning being excluded from coverage. This is an inconsistent approach as Section 6 of the Human Rights Act 1998 defines coverage in terms of those delivering public services and those of a public nature.
- Restricting coverage of local authority Trusts to Leisure, Culture and Sport excludes many other arms length and joint ventures set up by local councils and others.
- The Glasgow Housing Association (GHA) is not unique in remit or function and it is difficult to see why it is the only RSL covered. We regard people as individual 'rights' holders and they should equally exercise their right rather than the 'right' being defined by the identity of the landlord.

- The major trunk roads maintenance contracts are not included. Nor is a major strategic transport contract.
- The arguments contained in the Partial Business and Regulatory Impact Assessment regarding the need for the extension of coverage are welcome and accurate. It is important that public services and public finances are accountable and information is freely accessible.
- Many of the arguments put forward by potential candidates for designation do not bear examination. Some are factually inaccurate, some are unfounded and some, in our view, actually make the case for increased coverage!

## Introduction

The Campaign for Freedom of Information has long campaigned for people to be able to access information about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels.

During the passage of the Scottish Act and subsequently we have consistently argued for the legislation to cover a much wider section of Scottish society, recognising that our public services are delivered by more than public authorities, and that public money is increasingly paid to non-public bodies for this and other purposes.

It is also clear from regular opinion surveys carried out by the Act's regulator - the Scottish Information Commissioner - that the Scottish public are aware of the anomalies and difficulties in access to information created by the variety of delivery vehicles covered and not covered by the Act and are very much in favour of extension to resolve these anomalies.

The proposal to utilise the Act's powers under Section 5 is therefore welcome, and we are pleased to be asked to respond to this consultation.

We would, however like to make both general and specific comments on the paper, and point also to our response to the discussion paper that the Scottish Government issued last year - <http://www.cfoi.org.uk/pdf/ExtensionFOISAresponse.pdf> - these comments should be read in conjunction with that response.

## General Comments - important developments

The Campaign warmly welcomes some important developments outlined in the proposed orders and the covering consultation. In particular we welcome acceptance of the following principles:

- That anomalies in access to information on public services caused by varying delivery methods, should be abolished
- That contracted-out public services should continue to be publicly accountable
- That government should use class-based descriptions to extend coverage where possible to avoid continual redesignations
- That co-operation with contractors, or other regulatory coverage does not replace the need for coverage under the Act.
- That transparency and openness should be seen as part of doing business with the public sector.

- We also welcome the acceptance that the Act should be extended to contractors responsible for prisons, prison escort services, and the building and maintenance of schools, hospitals and trunk roads.

## General Comments – weaknesses

It is unfortunate that there are a number of weaknesses written into the extension proposals that run counter to the principles outlined above and create potential future problems. In particular:

- The proposals create new anomalies while seeking to do away with anomalies. For example the GHA is designated but not other Housing Associations or even other bodies set up to receive HST stock. Many bodies similar to designated bodies are being excluded from coverage. For example trunk roads contractors; private contractors running health facilities other than hospitals; contractors providing water and sewerage services through PFI contracts with Scottish Water; Local Council trusts other than those providing leisure, sports and cultural facilities, and Arms Length External Organisations (ALEOs)
- We are concerned about the debate in the consultation paper over distinctions in public services, favouring ‘core’, ‘significant’ and ‘front-line’ services for coverage. We cannot see the value of or basis for such distinctions eg are cleaning a hospital, or catering for our children at school, not ‘core’ services? How do ‘front-line’ services function without necessary ‘backroom’ support?
- The introduction of (a series of different) financial and contract length limits to be surpassed before contractors etc. are covered. The differences highlight how arbitrary these limits are. For leisure etc trusts the limit is £100,000 pa but for roads contracts the limits are £90m total contract, and 30 years length. It is interesting to note that if the schools/hospitals limits were applied to prisons - Kilmarnock Prison would fall outside it!
- We welcome and agree with the consultation’s assessment that the provision of public information on public money spent on public services will not be a significant ‘burden’. This agreement is on the basis that efficient management of public money means that information should be available to expedite any response to a FoI request. We are however aware of the Audit Scotland finding in local government, that *“Councils have some way to go in developing medium to long-term financial strategies which are based on good information about service costs and value for money and which provide a framework to compare the financial effects of different policy options.”*<sup>1</sup>
- Any assumption that an increased ‘burden’ exists runs contrary to the principle that there must be increased transparency in doing business with the public sector. Are we to accept that the private sector is NOT as transparent as the public sector on what it does with our money?

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<sup>1</sup> ‘An overview of local government in Scotland 2009’ pub by Audit Scotland February 2010 Para 35

- A failure to recognise that the private sector uses FOI to assist them in working with the public sector, and extension will, in fact, benefit them and assist their work. Similarly it will be recognised by forward-looking companies, that being 'compliance-savvy' and aware of the need to work with the FOI(S)A will make their company more attractive to clients - in particular to public sector bodies looking to work with a partner.
- The proposals fail to adequately recognise people's right to access information when the spend of public resources is involved. There is a danger that people will be confused about when they can exercise their right. We should minimise the amount of information people need to obtain and understand before they make a FOI request.
- The Human Rights Act 1998 enables domestic enforcement of European Convention on Human Rights (ECHR) as part of the wider initiative to ensure open and accountable Government. For example the UK Government believed human rights was a tool to deliver better public services. "*A framework for policy formulation which leads to better outcomes, and ensur[es] that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect.*"<sup>2</sup> That accountability is being compromised by introducing confusing distinctions and criteria governing the right to access information.

## Coverage not comprehensive

While it is proposed that the Association of Chief police Officers in Scotland (ACPOS) is covered for its public functions, and this is an important precedent, other organisations that have similarly important public and strategic functions are missed out. These include the Law Society and Faculty of Advocates, and the Convention of Scottish Local Authorities (CoSLA) and its offshoot - the Improvement Service. It is important to note that coverage discussion at UK level have included extending coverage to the Local Government Association (the equivalent of CoSLA) and the NHS Confederation. It would be important to have at least as good coverage in Scotland.<sup>3</sup> No doubt there will be other organisations.

## Specific coverage:

### Prisons/escort services

The coverage of this sector of public services is welcome. In particular the proposed coverage - for the full range and duration of contracts - should be a model for other sectors. Coverage of other private sector contracts to provide public services should follow suit to provide a more comprehensive approach, and avoid the need to redesignate in the future.

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<sup>2</sup> Department of Constitutional Affairs 'Review of Implementation of the Human Rights Act' (2006)

<sup>3</sup> <http://foia.blogspot.com/2010/04/conservatives-promise-to-extend-foi-act.html>

## **Contractors who build and maintain schools**

There is much to welcome in the coverage here - the recognition of public function; the right of access to information; the need for openness and transparency as part of doing business with public sector. However the financial/time limit thresholds run the risk of creating anomalies. We think all contracts above a substantially lower de minimis threshold should be subject to the Act.

It is also unclear what 'build and maintain' covers. For example, does it cover cleaning the school and catering for the pupils? It should do. These are important public services and it would be wrong to permit the right of access which exists when these are provided in-house to be reduced by contracting out.

## **Contractors who build and maintain hospitals**

The arguments outlined above in relation to schools also apply to this section on coverage of contractors building and maintaining hospitals.

However there appear to be differences in the Order definitions of both the establishments and the functions covered, between schools (above) and hospitals. It is unclear why these differences exist. We would argue that the broadest definitions should be used to cover as many establishments and public functions as possible.

As an example the extension of coverage seems to be restricted to hospitals, whereas in schools it covers 'schools or other educational establishments'. Coverage should be extended to cover any contracted out service under the NHS, including health centres or diagnostic services.

## **Leisure, sport and cultural trusts**

We welcome the extension of the Act into this significant new and growing sector of 'outsourced' public services. The use of class-based descriptions and the definition used to establish this is supported with a reservation about the use of financial criteria. Although this is lower and therefore less problematic than those above, it still has some of the same problems.

However to restrict coverage to these particular functions ignores other similar bodies set up by local authorities to deliver services, some quite significant eg Access (GCC property and IT LLP), City Parking, City Markets, and City Building. All manage significant public monies and provide direct public services and should be directly subject to FOISA.

## **Glasgow Housing Association (GHA)**

We welcome this extension into the RSL area. While GHA publicly states it operates in the spirit of the Act, this will bring it under the regulation of the Scottish Information Commissioner for the first time.

GHA is only really unique in terms of its current size and profile. To restrict coverage to this RSL alone points out the anomaly:

- 1) of not covering all Housing Stock Transfer recipients - thus running contrary to the general principle of the public not losing information rights; and
- 2) of not covering other RSLs, meaning that the secondary transfer of GHA property to other RSLs will automatically deprive the public of their rights.

The Scottish Housing Bill and other regulations will not be substitutes for coverage (as the consultation admits elsewhere) because, for example, it would not provide for recourse to the SIC.

Concern by RSLs that they should not be considered 'public bodies' would surely be allayed if they were designated under S5. It exists specifically to cover non-public bodies, and the fact of their designation would, if anything, highlight their status as such.

It is interesting to note that the Scottish Government's current consultation *Housing: Fresh Thinking, New Ideas* acknowledges the core role of housing in our society and the broader impact on our lives: "*Even if not always the root cause, the problems associated with poor quality housing – poverty, ill health and lack of the best start in life for our young people – entail costs to our communities and are visible evidence of significant inequalities in Scottish society.*" (pg 2) Housing is a key service and so the right to access information, regardless of the landlord type is fundamental to the system. It is important to point out that the UK Supreme Court rejected the appeal of London & Quadrant Housing Trust and ruled that the provision of social housing is a "function of a public nature" for the purposes of the Human Rights Act 1998. (November 2009)

## **ACPOS**

The inclusion of a body like ACPOS recognises that such bodies may play important strategic and advisory roles in the development of public services. The fact that ACPOS themselves recognise this and have considerable experience in FOI is also welcome.

It points, however, to the lack of a comprehensive attempt to identify and designate other similar bodies. CoSLA for example - despite being comprised solely of bodies covered by the Act - is not covered itself. It too has a crucial role in public services, and has even set up - with the backing of the Scottish Government - the Improvement Service which is staffed by secondments from local councils; has a key role in the future delivery of public services; yet is not covered by the Act. It is time this anomaly was eradicated.

There will almost certainly be other similar bodies who should be considered for coverage eg the Law Society and the Faculty of Advocates.

## **Trunk Roads Contractors**

Again it is welcome that this sector of contractors is being considered for coverage. However the only contracts being considered for coverage are three specific Design, Build, Finance and Operate (DBFO) contracts (A74; M77 and M80). The majority of Scotland's

trunk road network (TRN) is not being considered for coverage - despite maintenance having been contracted out in 2001 and involving £15bn of net public assets.

The value and duration of the contracts being considered for coverage are of such a size as to exclude most others (including TRN contracts which have typically been signed for 5 years with extension options for a further 2 or 5 years).

The four TRN contracts arguably cover the largest single Scottish Government annual expense, and have been a matter of public concern from the moment of their proposed 'privatisation'. There has also been concern from the Police Federation over the maintenance of road safety in extreme conditions.

<http://scotlandonsunday.scotsman.com/news/Police-warning-over-road-gritting.5969641.jp>

The distinction in the consultation between contractors who 'maintain and construct' roads (not covered) and those who 'operate and maintain' (covered) appears to have no logical basis. Neither is there any reason given for the setting of the 'extended period' at 30 year contracts. Why not 15, 10 or even 5 years?

Another transport contract that has a significant strategic impact on our roads is the Traffic Scotland Operator Service contracted to Atkins in September 2007. Although this is only valued at just under £4m, its coverage of CCTV cameras and speed signs and traffic signals across Scotland means that it is something that is of huge importance to our public transport and should be covered. There are also of course human rights implications in the use of CCTV and Article 8 of the ECHR covers the 'right to respect for private and family life, home and correspondence'.

## **Partial business and Regulatory Impact Assessment**

The Campaign welcomes much contained in this assessment. In particular:

- Clarification that equivalent European legislation already covers the private sector delivering public functions.
- That if these functions are not covered the lack of accountability or transparency it will be difficult to improve the quality, efficiency and responsiveness of the public services concerned.
- That access to information should follow expenditure of public money. We regret that these proposals do not provide for this more fully.
- The factors listed as mitigating the possible costs and risks are a welcome statement of the positive factors in proceeding with designation.

However we also have some concern with a number of items. In particular:

- The acceptance that designation will place an additional burden on bodies. If they are as efficient as they claim it is surely part of their functioning to keep good records. No

allowance was made in the initial legislation for additional burdens on public bodies. Is the private sector suggesting they are in this way less efficient in accounting for our money?

- Despite the claim in par 3.2 there has been clear evidence of difficulty in obtaining information. UNISON has experienced it in getting information from Scottish Water, health boards and local councils on private contracts. It is also known that other requesters have experienced delays and refusals - including Inclusion Scotland who experienced delays on work they did on access to housing information. We are also aware of a leisure trust which refused to supply information to a requester as they were not covered by the Act.
- Environmental Information Regulations already apply to private contractors carrying out public functions and therefore these bodies should already be prepared to deal with such requests (par 4.15)
- The concern re the GHA being designated a public authority is unfounded - see above.
- If coverage under this order would deter firms from bidding for public services, as some appear to suggest, this raises the question of what quality of information they hold and/or what quality of service they are intending to provide. Neither of these would be good news for the public's services.
- If bodies are indeed 'unused to engaging with the public in an open and transparent manner' this is surely another reason why they should be subject to this legislation when delivering public services and in receipt of public money.

There are also potential benefits to the private sector from this extension:

- The private sector is in fact already making use of the Act when finding information about public bodies and the services they provide. To have a broader range of coverage can only help this aspect of their work.
- Being aware of the demands of the Act, prepared to embrace its ethos and being in general 'compliance-savvy' can only be of benefit to a private firm (or other non-public body) which seeks to do business with the public sector.

## Conclusion

It is very important that the most comprehensive extension possible is passed. But it is also important that the precedent is set, and designation under S5 is established as part of the procedure.

We welcome the proposal to use class-based definitions, and would argue that the greater use of these (for example in relation to Registered Social Landlords) will help this legislation grow and make sure that it is easier to cover relevant bodies in the future.

Just as important is to enable the public to access their right to information rather than introduce unnecessary complexity and inevitable confusion.

The Campaign welcomes the opportunity to contribute to this consultation and would be available to contribute to further debate on this legislation should that be thought useful.

If further clarification or information is required, please contact:

The Campaign for Freedom of Information in Scotland  
% Carole Ewart, Co-Convener  
Wellpark Enterprise Centre,  
120 Sydney Street,  
Glasgow  
G31 1JF