



Briefing for MSPs
The Freedom of Information (Amendment) (Scotland) Bill
Stage 1 Debate, Thursday 15th November 2012 at 2.45pm

Summary

The Campaign for Freedom of Information in Scotland (CFoIS) believes the Bill requires to be significantly amended by the Government to protect the public's right to know in Scotland. CFoIS calls on MSPs of all parties to endorse the Stage 1 report from the Finance Committee and invite the Scottish Government to amend the Bill in four ways:

1. The introduction of a purpose clause so that however public services are delivered now and in the future, the public's right to know remains.
2. The introduction of a clause that has the effect of amending S5 (6) of the Freedom of Information (Scotland) Act 2002 (FoISA) to oblige Scottish Government Ministers to consult the public on what bodies should be included **and** for their response to be given due consideration.
3. The introduction of a clause that has the effect of amending S5 of FoISA and places a duty on Scottish Government Ministers to annually add any new bodies to coverage of FoISA. This provision would have immediate effect. Within 20 days of Royal Assent, S5 of FoISA could be used for the first time and the list of bodies, already consulted on in 2010, added.
4. To delete S1 of the Bill to maintain the public interest test in respect of Royal Correspondence with Her Majesty and heirs. This retains consistency with the Environmental Information (Scotland) Regulations (EIRs) where the public interest test is still in place.

CFoIS believes the Bill must deliver progressive reform of FoISA and meet the Scottish Government's FoI principles one and two: that "the public's right to know remains an essential part of an open, democratic government and responsive public services" and FoISA "will be adjusted where it is necessary and sensible to do so".¹

CFoIS believes the public's right to know is now far weaker than when FoISA was passed by the Scottish Parliament in 2002 and became effective in 2005. The key reason is that S5 of FoISA has never been used to add/designate more bodies. Our 'information access right' is strong and enforceable but the range of information we can access is getting smaller as public services are increasingly moved to other bodies and those bodies are not covered by FoISA. CFoIS wants our right to access 'public information' to be restored as well as extended.

For further information contact our Co-conveners: Carole Ewart carole@ewartcc.com or Derek Manson-Smith dms@ircuk.demon.co.uk

¹ <http://www.scotland.gov.uk/About/Information/FoI/6principles>

History of Inactivity

CFoIS is impatient for change. There is a history of inactivity across successive administrations. Since 2002, people in Scotland have been promised that FoISA would be extended to a range of new bodies as the Justice Minister stated:

“We recognise that companies involved in major PPP/PFI contracts are delivering important public services. I assure members that companies that are involved in contracts of that nature—whether those relate to prisons or to matters such as road maintenance—are the sort of bodies that we want to add to schedule 1 after proper consultation.” The Minister also pointed out the urgency of the task “Once the bill has received royal assent we can begin the consultation process.”²

RSLs (housing associations) were removed from the Bill at Stage 3 but the Minister assured that “... the Executive recognises that larger and more formal RSLs might be appropriate for coverage by the Freedom of Information (Scotland) Bill, and they can be added to the bill. There is a statutory obligation to consult before that is done and we will consult the sector. ... I assure members that we expect the majority of organisations to be covered.”³

Ten years later, we are still awaiting such additions. Consultation has already produced a degree of consensus that is not reflected in the Bill.

- Scottish Executive launched a consultation in 2006 but declined to introduce reform in 2007 and instead committed to further consultation and consideration.⁴
- A discussion paper was launched by the Scottish Government in 2008;
- A consultation was issued in 2010 which commanded wide support for addition of new bodies.

No timetable has been published to add in new bodies and no action is expected until 2013 when the current Bill is passed as The First Minister has confirmed:

“I will be extremely sympathetic, once we get the Freedom of Information (Amendment) (Scotland) Bill through the Parliament in this term to make the legislation more robust, to the Information Commissioner’s request to extend the legislation to arm’s-length bodies that local authorities have set up.”⁵

The problem is that not all bodies that should be covered have been consulted eg only Glasgow Housing Association was consulted but we want all RSLs covered by FoISA. CFoIS wants the following categories and named bodies to be added:

- Local authority trusts such as leisure, culture and sport and other arms-length and joint ventures (ALEOs) set up by local councils and others.
- Private prisons and escort services
- The Association of Chief Police Officers in Scotland (ACPOS), CoSLA, the Improvement Service, the Law Society of Scotland & Faculty of Advocates

² Stage 3 Debate Freedom of Information (Scotland) Bill 24th April 2002, columns 8208-8209
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4372&mode=pdf>

³ Ibid, column 8206

⁴ Statement by Minister for Parliamentary Business Margaret Curran. 15th March 2007
<http://www.scotland.gov.uk/About/Information/FOI/foireview2005/foireviewintro>

⁵ First Minister, Scottish Parliament, 20th September 2012 Official Report column 11704

- Registered Social Landlords (RSLs)
- Private and voluntary sector organisations only in respect of the services they deliver of a public nature.

ALEOS

An arm's-length external organisation (ALEO) is a general term used to describe a range of bodies that have been set up by public bodies eg councils and health boards to deliver a wide range of activities such as leisure services, economic development and property maintenance. Although separate from eg the local authority, each is subject to local authority control or influence.

An Audit Scotland report acknowledges "ALEOs by their nature are one step removed from council control and, as a result, governance and financial arrangements can be complex. There is a risk service users and citizens have less input and influence over how services are provided."⁶ The report points out that "The principles of openness, integrity and accountability that councils observe apply equally when services are delivered through ALEOs."⁷

Audit Scotland has admitted that it does not know how many ALEOs exist and what they spend and it has chosen not to find out due to "the time and cost to councils and to us" but acknowledges there are "around 130 major ALEOS in total".⁸

Options

CFoIS believes the Bill creates an opportunity for the Scottish Parliament to decide where the responsibility for ensuring FoISA's effectiveness lies: oblige all public authorities creating ALEOs, private companies or joint public/private bodies to embed FoISA rights into the founding document or hold the Scottish Government responsible, annually, for retrospectively adding in ALEOs.

Public Support for Reform

CFoIS is regularly asked what types of information people want that they currently cannot get. Evidence exists from a variety of sources. The Scottish Government's consultation on extending FoISA in 2010 received a submission from Glasgow City Council which stated that it received a "significant number of requests" from those "who had tried unsuccessfully to obtain information from Glasgow Housing Association".⁹ The housing stock transferred from Glasgow prior to FoISA being introduced. Elsewhere council tenants that were covered by FoISA have since had their homes transferred to RSLs so have lost their FoISA rights. 15,000 people have had their rights under FoISA removed as local authority housing has shifted to the control of RSLs (housing associations).¹⁰

⁶ Arm's-length external organisations (ALEOs): are you getting it right? How councils work: an improvement series for councillors and officers, pub June 2011 pg 3 Para 4

⁷ Ibid pg 5

⁸ Ibid pg 6 para 19

⁹ Consultation Paper, Extension of Coverage of the Freedom of Information (Scotland) Act 2002 (FoISA), Scottish Government Response Paper, January 2011, pg 16

<http://www.scotland.gov.uk/Resource/Doc/175356/0112479.pdf>

¹⁰ Scottish Information Commissioner, Evidence to Finance Committee at Scottish Parliament, 12th September 2012.

Research commissioned by the Scottish Information Commissioner in 2011 revealed strong public support for FOI to cover additional organisations, with 88% agreeing that trusts providing services on behalf of local authorities should be covered, 82% agreeing that housing associations should be covered, 83% agreeing that private sector companies who build and maintain local authority schools or hospitals should be covered and 73% agreeing that prisons which are run by the private sector should be covered.¹¹

There is clear evidence of public support for the coverage of FOISA to be extended to a wide range of bodies. Those voices must be listened to when the Scottish Government consults on what bodies to add, under S5 (6) of FoISA.

Conclusion

CFoIS believes that the current number and remit of ALEOs and other bodies not covered by FoISA has created a democratic deficit on scrutiny and accountability by the public in Scotland. CFoIS wants our right to access 'public information' to be restored as well as extended.

The purpose of FoISA is set out in the legislation "to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes". It is clear that FoISA's operation has failed to live up to expectations of MSPs.

We all failed to anticipate the extent to which government and public authorities would use and construct non-public bodies that operate outwith FoISA even though they are in receipt of public money and delivering public services or services of a public nature. We cannot imagine how services will be delivered in the future so ensuring that the right goes with the service rather than with the provider is key! Adding in a purpose clause to FoISA via the Bill will ensure that the public's enforceable right to know will continue to be strong and services held accountable.

The general principles of the Bill must to be expanded to focus on the public's right to know. CFoIS is disappointed that S4 and S5 of FoISA can no longer be construed as fit for purpose. Promises to add new names, bodies and categories, such as RSLs, given during the Parliamentary debate at Stage 3, have failed to materialise. Therefore, we suggest that the Bill must be amended to place a duty on Scottish Government Ministers to add bodies annually. There are a lot to catch up on but in the future additions could be more manageable if done annually

CFoIS is not been persuaded of the need to copy the UK absolute exemption for communications with Her Majesty and heirs. We entirely reject S1 of the Bill as it contradicts the Scottish Government's FoI Principle 1 that "the public's right to know remains an essential part of an open, democratic government..."¹². The Government is proposing that the public interest in disclosing the requested information will never be considered. This contradicts our human right: Article 10 of the European Convention on Human Rights is the right to form an opinion and to receive and impart information.

¹¹ News Release 16th December 2011 <http://www.itspublicknowledge.info/home/News/20111612.asp>

¹² <http://www.scotland.gov.uk/About/Information/FOI/6principles>