



**The Freedom of Information (Amendment) (Scotland) Bill
Stage 2 Consideration of the Bill, Wednesday 5th December 2012
at the Finance Committee**

Please support all the amendments in the name of Elaine Murray MSP

'At lang an last, it is forby an important richt in a free society tae be free tae haud-haun tae the weel o society. But, for this tae gae forrit, it maun be possible for the state o society tae be something that awbody kens about an can openly crack about. Whaur this daesna happen, speak o leeberty isna worth a docken.'¹

Case for Reform of FoISA

The Campaign for Freedom of Information in Scotland (CFoIS) believes the Freedom of Information (Amendment) (Scotland) Bill needs to be significantly amended to protect the public's right to know in Scotland. Amending the Bill is necessary to meet the Scottish Government's first and second FoI principles 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".²

CFoIS wants the Freedom of Information (Scotland) Act 2002 (FoISA) to provide a robust framework to ensure the public equally enjoys an enforceable right to know. A major reason for the weakening of freedom of information rights is that promises to add named bodies and categories of bodies have not been honoured. The Scottish Government has confirmed that the existing power under FoISA has never been used as there "has yet to be an order under section 5 of the Act"³.

CFoIS drafted amendments to reflect our substantial concerns and we are pleased at the response from members of the Finance Committee. We thank Elaine Murray MSP for taking up the amendments and call on MSPs of all parties to support them when the Bill is considered at Stage 2. However the amendments are not enough and the 'action' list, previously circulated, needs to be delivered in parallel to ensure robust reform (reproduced in Appendix 1).

FoISA has served Scotland well and groups and people have exercised their rights to benefit very often the wider community and helped deliver better and more responsive public services (see Appendix 2 for some examples). That benefit needs to be maintained as well as extended though reform of FoISA.

¹ C. Dauvit Horsbroch, Scots Language Centre, trans.Peter Forsskal,'Thoughts on Civil Liberty',1759

² <http://www.scotland.gov.uk/About/Information/FoI/6principles>

³ Email of 16th November 2012

Amendments

CFoIS welcomes the decision of the Scottish Government to withdraw S1 of the Bill and we are pleased it has listened to the variety of representations on 'The Royal Exemption'. The amendments which CFoIS is endorsing are:

Purpose Clause - CFoIS believes the Bill creates an opportunity for the Scottish Parliament to explicitly set out that rights under FOISA must be maintained as well as developed eg when public authorities create ALEOs, contract with private companies or voluntary organisations. The introduction of a purpose clause will ensure that however public services are delivered now and in the future, the public's right to know remains effective. Commonwealth countries such as New Zealand have a purpose clause in its national legislation.⁴ It is also important for Parliament to state that an outcome should be to increase the availability of information and that requires legal as well as cultural change.

Before section 1

Elaine Murray

8 Before section 1, insert—

<Purposes of FOI Act

Before section 1 of the FOI Act there is inserted—

“A1 Purposes

- (1) The purposes of this Act are, consistent with the Scottish Parliament's founding principles of openness, accessibility and accountability—
 - (a) to increase progressively the availability of information held by Scottish public authorities in order—
 - (i) to enable more effective public participation in the making and administration of laws and policies,
 - (ii) to promote the accountability of Scottish public authorities, and
 - (iii) to facilitate the informed discussion of public affairs,and, in doing so, enhance respect for the law and promote good government, and
 - (b) to provide an enforceable right of access to information held by Scottish public authorities or persons providing services for them in accordance with the principle that information should be available to any person requesting it.”>

Consultation - The introduction of a clause that has the effect of amending S5 (5) 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 responses to be given due consideration.

The motivation for this amendment is to ensure balance in the existing consultation process so that the views of those proposed for coverage by FOISA

⁴ <http://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html>

are balanced by those of those who may choose to make an FoI request. CFoIS understands that the public consultation process can be open to manipulation so does not propose that Scottish Government Ministers are burdened by obligations but rather are required to respect and ensure the views of the public are given due consideration when deciding to use the power to designate Scottish public authorities.

After section 1

Elaine Murray

2A As an amendment to amendment 2, line 9, leave out from <such> to end of line and insert <members of the public and other interested parties.”.>

Elaine Murray

2B As an amendment to amendment 2, line 9, at end insert—

<() The Scottish Ministers must have due regard to any responses made to the consultation under subsection (5) in deciding how to proceed in relation to the order.”.>

Annual Reviews – proposals and reporting outcomes

The introduction of a clause that has the effect of amending S5 of FoISA and placing a duty on Scottish Government Ministers to annually add any bodies to coverage of FoISA. The power of Scottish Ministers to make an order or regulations under FoISA is exercisable by Statutory Instrument (S72). The timescale proposed by the Scottish Government amendment is unrealistic given that we have been waiting for S5 to be used since 2002.

CFoIS believes the Scottish Parliament should be more proactive in monitoring how FoISA is operating across Scotland. The Bill provides an opportunity to embed new ways of achieving this goal specifically this amendment requires publication of an annual report on consultations/decisions under section 5. This deals with the power to designate as public authorities, bodies with public functions or contractors providing services on behalf of public authorities. At present, Scottish Ministers must consult any body whom they proposes to designate under s.5. However, they do not have to announce who is currently being consulted or which bodies they decided not to designate after consulting.

The amendment would require the Scottish Ministers to produce an annual report saying which bodies they consulted with a view to their designation, and what decisions they made. This would ensure that progress towards extending the Act was transparent and perhaps provide an additional stimulus towards maintaining such progress.

Elaine Murray

2C As an amendment to amendment 2, line 14, leave out <2016> and insert <2013>

Elaine Murray

2D As an amendment to amendment 2, line 15, leave out <3 years> and insert <12 months>

Elaine Murray

2E As an amendment to amendment 2, line 25, leave out from <may> to end of line 27 and insert <must also—

- (a) state whether any consultation has been carried out during the reporting period as regards the exercise of the section 5 power,
- (b) summarise any responses made to such a consultation, and
- (c) explain how any such responses influenced the decision on whether to exercise the section 5 power.

() A report may also>

Elaine Murray

2F As an amendment to amendment 2, line 33, leave out <3 years> and insert <12 months>

Elaine Murray

9 After section 1, insert—

<Duty to exercise power to designate Scottish public authorities

After section 7 of the FOI Act there is inserted—

“7A Duty to exercise power to designate Scottish public authorities

- (1) The Scottish Ministers must—
 - (a) lay before the Scottish Parliament reports setting out proposals for the exercise of the order-making power conferred by section 5(1), and
 - (b) no later than 20 working days (excluding days when the Parliament is in recess) after laying a report under paragraph (a), lay (under section 72(2)) a draft of a statutory instrument containing an order implementing those proposals.
- (2) The first report under subsection (1) must be laid on or before 30 September 2013.
- (3) Each subsequent report must be laid no later than 12 months after the day on which the previous report is laid.
- (4) Subject to subsection (5), an order under section 5(1) made by virtue of subsection (1) must provide for the bodies listed in the order to be designated as Scottish public authorities with effect from the day after the order is made.
- (5) The order may, in exceptional circumstances, provide for the designation of a body as a Scottish public authority to take effect on a later date than that specified in subsection (4).
- (6) If an order makes provision of the kind mentioned in subsection (5), the Scottish Ministers must lay, along with the draft statutory instrument containing the order, an explanation of the exceptional circumstances.
- (7) The Scottish Ministers need not comply with subsection (1) if, at the time when a report under paragraph (a) of that subsection would (but for this subsection) be due to be laid, there are no bodies eligible for designation as Scottish public authorities under section 5(1) which have not already been so designated.”>

Responsibility for Maintaining FoISA Rights - During debate on the Bill, there has been much discussion about the public losing their FoI rights as new bodies are increasingly delivering public services and those of a public nature. There has also been discussion about whether public authorities establishing ALEOS should be obliged to maintain the public's right to know with whatever existing ALEO they contract with or establish. The amendment places an obligation on public authorities to act proactively to protect the public's right to know. This amendment will over time, reduce the workload on the Scottish Parliament to add bodies under S5.

Elaine Murray

10 After section 1, insert—

<Protection of rights to access information

After section 7A of the FOI Act there is inserted—

“7B Protection of rights to access information

- (1) Subsection (2) applies where—
 - (a) a Scottish public authority proposes to make arrangements for another person (other than another Scottish public authority) to exercise any of its functions or provide services on its behalf, and
 - (b) the proposed arrangements are not arrangements that will result in—
 - (i) the person being a Scottish public authority within the meaning of section 3(1)(a)(i) or (b), or
 - (ii) information relating to the functions or services being regarded as information held on behalf of the authority within the meaning of section 3(2)(b).
- (2) The arrangements made by the authority must include provision ensuring that the rights of persons to access information relating to the functions or services will be at least equivalent to the rights that those persons would have under this Act in relation to that information if the authority continued to exercise the functions or, as the case may be, provide the services itself.”>

Keeping the Process Simple - The simplicity of FoISA is one of its major benefits – people can make a request, do not even need to mention FoISA and can complain for free to the Office of the Scottish Information Commissioner (OSIC) if they do not get the information they want. The process is well-known and there is a pleasing degree of recognition of the existence of OSIC. When people want information about public services or those of a public nature, they will be inclined to automatically associate it with the public authority such as the health board or local authority rather than the individual contractor providing the service. So for simplicity, it may be best to retain the FoISA right with the public authority rather than transfer it to the contractor.

Section 1 of the Freedom of Information (Scotland) Act 2002 establishes that the right of access is to information which a Scottish public authority “holds”. Section 3(2)(b) of the Act provides that information which another person holds “on behalf of” the authority is treated as held by the authority itself.

But how much of the information that a contractor holds about a contract is held “on behalf of” an authority? The answer is not self-evident. The contract itself may specify that particular information is to be treated as held on behalf of the authority. Or it may say that a specified type of information must be provided to the authority if it asks for it, to help it answer an FOI request. But what if such a provision applies only to a very limited class of information? The effect may be to exclude from access any information which is not specifically mentioned.

This amendment would ensure that any contract with a value of more than £1 million between a Scottish public authority and any other person is deemed to include a provision that all information held by the contractor which relates to the performance of the contract is held on behalf of the authority, for the purposes of the Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations.

Such information can then be sought by means of an FOI or Environmental Information (Scotland) regulations (EISRs) request to the authority. This also applies where parts of the contract are performed by a sub-contractor, or where some of the information is held by someone else on behalf of the contractor or subcontractor, eg the contractor’s surveyor or lawyer. The intention is that the public’s rights to information should be the same, whether a particular service is provided in-house or contracted out.

The provision would only apply to contracts entered into after the section becomes law.

It does not follow that any information held by the contractor would necessarily have to be disclosed: this would depend on whether an exemption applied.

The provision envisages that an FOI/EISR request would be made to the authority for information about the performance of a contract, the contractor would then be required to provide that information to the authority which would decide – presumably after consulting the contractor – whether disclosure was required or whether an exemption applied.

Elaine Murray

11 After section 1, insert—

<Information relating to performance of contracts

In section 3 (Scottish public authorities) of the FOI Act, after subsection (3) there is inserted—

“(3A) Subsection (3B) applies where—

- (a) a person (“the contractor”) is providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority,
- (b) the contract was entered into after the day on which this subsection came into force, and
- (c) the total sum to be paid by the authority under the contract exceeds £1 million.

- (3B) Information of the type mentioned in subsection (3C) is to be regarded, for the purposes of subsection (2)(b), as information held on behalf of the authority.
- (3C) That information is information, relating to the performance of the contract, which is held by—
 - (a) the contractor,
 - (b) any person sub-contracted to provide the service or any part of it (“a sub-contractor”), or
 - (c) any person holding information on behalf of the contractor or a sub-contractor.”.>

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

Appendix 1 Action List and Suggested Order for Reform of FoISA

In addition to the above proposed list of amendments, we invite you to secure promises from the Deputy First Minister. Given the repeated promises to act by successive administrations, CFoIS recognises that the Finance Committee is in a unique position to secure undertakings and timelines from the Scottish Government. We urge you to consider seeking the following from the Scottish Government:

1. Accept amendments to the Bill as above.
2. Scottish Government must add those bodies already consulted during the 2010 consultation without delay and no later than Friday 12th January 2013
3. Scottish Government should set out what reasonable delay there will be from bodies being subject to an order and people being able to exercise their S1 rights under FoISA. CFoIS suggests there should be no longer than a three month delay as FoISA is now an established legal process and the Office of the Scottish Information Commissioner is experienced in assisting public bodies to meet their FoISA obligations.
4. Finance Committee should set out which individual bodies and groups it thinks the Scottish Government should now consult under S5 of FoISA, based on submissions it has received during this process. CFoIS suggests CoSLA, The Improvement Service, The Faculty of Advocates, The Law Society of Scotland and all registered social landlords (RSLs) and ALEOS.
5. Scottish Government must issue a consultation by 11th January 2013 with a three month response time setting out which bodies it proposes to be brought under FoISA using S5 powers.
6. The Deputy First Minister should report back to Parliament no later than Friday 17th May which bodies will be subject to an order under S5 of FoISA and that order should be tabled promptly.
7. Consider what additional funding is required by the Office of the Scottish Information Commissioner (OSIC) as it will incur new work eg developing a model publication scheme for RSLs.

Appendix 2 - Benefits of accessing information – how vorlogs have used FoI:

Learning Disability Alliance Scotland – discovered that over 800 people with learning disabilities are being housed inappropriately in care homes for the elderly. OSIC Video: <http://vimeo.com/9884752>

Age Scotland – undertook research using FOI which revealed that, despite Scottish Government guidance recommending that 20% of Change Fund funding be allocated for carer services in 2012/13, the reality is “much less”. Findings are referenced in Age Scotland’s evidence on the 2013-14 Draft Budget. See: [http://www.scottish.parliament.uk/S4_FinanceCommittee/Inquiries/Age_Scotland\(1\).pdf](http://www.scottish.parliament.uk/S4_FinanceCommittee/Inquiries/Age_Scotland(1).pdf)

Age Scotland – malnutrition has played a part in nearly 500 deaths in Scotland over the last five years. (September 2012)
<http://www.thecourier.co.uk/News/National/article/25045/malnutrition-cases-show-too-many-elderly-people-still-have-to-choose-between-heating-and-eating.html>

Action for ME – more than a quarter of primary care trusts do not provide access to specialist care for patients with chronic fatigue syndrome (September 2012)
<http://www.heraldscotland.com/news/health/patients-with-me-neglected-by-nhs.18777885>

British Union for the Abolition of Vivisection – vivisection at universities in Scotland is up 12%, despite a UK-wide commitment to reduce testing. (July 2012)

Global Alliance Against Industrial Aquaculture – 310 seals have been shot dead by Scottish fish farmers since the start of 2011 (June 2012)
www.northern-times.co.uk/News/Loch-Duart-defend-fish-cull-29062012.htm

Coalition of Care and Support Providers in Scotland – Scottish councils are paying less than £10 an hour to organisations that provide care at home services to vulnerable people. (June 2012)
www.thirdforcenews.org.uk/2012/06/councils-pay-rock-bottom-rates-for-care-at-home/

National Union of Students – “Elite” universities failing to recruit poorest students. (June 2012)
www.heraldscotland.com/news/education/elite-universities-fail-to-recruit-poorest-students.17754964

British Heart Foundation – increase in the number of “Shisha” bars trading in Glasgow in the last five years – 0 in 2007, seven in 2012. (March 2012)
www.scotsman.com/news/health/that-hubble-bubble-can-mean-health-trouble-1-2171115

Captive Animals’ Protection Society – Scottish Government spent almost £43,000 on a welcome party for giant pandas. (Herald, 5 January 2012)

Anchor (elderly charity) – Around 5,500 people die “penniless” in Scotland each year, and have to have their funerals arranged by a local authority (November 2011)
www.questia.com/library/1G1-273498157/tragedy-scots-paupers-5500-people-each-year-die-penniless

ENABLE Scotland – 75 disability “hate crimes” reported in Tayside between March 2010 and November 2011. (Courier, 23 November 2011)

Marine Conservation Society – More than 3,700 sewage overflow outlets in Scotland release waste without the public knowing where they are or how much effluent is being released. (November 2011)
www.scotsman.com/news/environment/thousands-of-sewage-overflows-secretly-pump-waste-into-sea-1-1965897

Avich and Kilchrenan Community Council – £1 million of public money is being used to help fund a route to access a windfarm. (May 2011)

www.scotsman.com/news/taxpayers-cash-used-to-build-road-for-developer-1-1631559

Inclusion Scotland, a disability charity, used FOI to gather data from local authorities on the provision of accessible and affordable housing for those with disabilities, as part of a campaign to improve services. Read Inclusion Scotland's FOI Factsheet at www.inclusionscotland.org/documents/FoIFactSheet.doc.

The Rarer Cancers Foundation used FOI to discover that Scottish patients are three times less likely to get access to newer cancer drugs than those in England. Read the report at:

www.rarercancers.org.uk/images/stories/news/8011/nations_divided_final_complete_report.pdf

Streetwork UK, a charity providing support for the homeless, used FOI to request details of a successful tender bid by a provider of similar services. Read the Scottish Information Commissioner's news release at www.itspublicknowledge.info/home/News/20080903.asp.

The Scottish Rural Schools Network - has regularly used FOI when campaigning against rural school closures. <http://vimeo.com/9884752>

C Diff Justice Group – OSIC Video: <http://vimeo.com/39398150>

Appendix 3 - List of Bodies Already Consulted under S5 of FoISA

The bodies that were originally the subject of a Scottish Government consultation and which can now be designated for coverage immediately are:

- Contractors who run privately managed prisons and provide prison escort services
- Contractors who build and maintain schools
- Contractors who build and maintain hospitals
- Leisure, sport and cultural trusts and bodies established or created by local authorities
- Glasgow Housing Association
- Association of Chief Police Officers in Scotland (ACPOS)
- Contractors who build, manage and maintain trunk roads under private finance contracts

A draft Order under S5 of FoISA was also included in the consultation⁵.

⁵ <http://www.scotland.gov.uk/Resource/Doc/319057/0101913.pdf>