

The Campaign for Freedom of Information in Scotland

6A Park Circus Place
Glasgow
G3 6AN
Tel: 0141 332 2341
Fax: 0870 056 0844
Email: dms@ircuk.demon.co.uk
Web: www.cfoi.org.uk/scotland.html



The Public's Right To Know – Support progressive reform on freedom of information

Briefing from the Campaign for Freedom of Information in Scotland

Overview and Six 'Asks'

Legislation has given people an enforceable right to access 'official' information in Scotland since 2005. Currently our right to know is dependent on which organisation holds the information. The kinds of organisations that receive public money which are not covered by the Freedom of Information (Scotland) Act (FoISA) include housing associations, arms-length organisations (ALEOs) and private companies.

People want to use their information right regardless of who is delivering the service. Research commissioned by the Scottish Information Commissioner in 2011 revealed that 89% of respondents agree that it is important for the public to be able to access information held by public authorities, 88% agree that trusts providing services for local authorities should be covered and 82% agree that housing associations should be covered. Ten years ago, the then Scottish Executive promised that additional bodies would soon be covered by FoISA:

"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...."

The Campaign for Freedom of Information in Scotland (CFoIS) is disappointed at the inadequacy of the long awaited and just published Freedom of Information (Amendment) (Scotland) Bill. We will work to raise awareness of the need to amend the Bill over the coming months. As a first step we have drafted this briefing to inform and remind people of the history and broken promises on freedom of information in Scotland. A more detailed briefing on the actual detail of the Bill is currently being drafted. In the meantime we urge people and organisations to alert their MSPs to the inadequacy of the Bill and seek their support for progressive reform by adopting the six 'asks' listed below.

1. A purpose clause is added so that the principle of the Bill is about giving the public an enforceable right to information from bodies delivering public services or services of a public nature.
2. There is a simple system so that people can exercise their right to receive and impart information from bodies funded by public money, rather than the current system whereby some bodies are covered and some are not.
3. Transparency and openness should be part of doing business with the public sector so private contractors and voluntary organisations should be included.
4. All housing associations are included.
5. The range of information proactively disclosed is extended to include all new Scottish Government contracts and tender documents over £10,000 – featuring all performance indicators, break clauses and penalty measures – and all new local government contracts and tender documents over £500 – again, in full.
6. Contractors responsible for contracts above certain values are included but the thresholds must be realistic and subject to consultation.

History

Scotland was slow to adopt a freedom of information regime passing the Freedom of Information (Scotland) Act in 2002 but giving bodies a generous time for preparation with the law coming into effect on 1st January 2005. The world's first freedom of information law was Sweden in 1766¹ and since then many countries have adopted legislation such as the US in 1966 and the Czech Republic in 2000. FoISA was implemented by over 10,000 public bodies with no additional funding from the then Scottish Executive. Scotland's public sector bodies were expected to mainstream the law into their existing operations – and have done so successfully.

The purpose of freedom of information is to give the public an enforceable right to access information. Members of the public, the media, community groups and campaign organisations decide what information they would like to access rather than the body deciding what it will disclose. Currently a range of agencies operate outwith FoISA and so decide what and if they want to make information public. If they decide not to disclose information there is no appeal to the Scottish Information Commissioner. This has created anomalies and, increasingly, the public do not have a general right to access information.

Freedom of Information (Amendment) (Scotland) Bill

The Bill was published on 30th May 2012 and is a wasted opportunity as it fails to broaden the range of bodies covered. The types of organisations which were supposed to be added ten years ago but are still not covered include:

¹ The Freedom of Printing Act.13 Sweden's new majority party in 1766 wanted to see the documents that the previous government had kept secret. 'Thoughts on Civil Liberty' by Peter Forsskal <http://www.peterforsskal.com/>

- Local authority trusts such as leisure, culture and sport and other arms-length and joint ventures 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 and the Faculty of Advocates

The general principles of the Bill must to be expanded to focus on the public's right to know.

One amendment already made to the FOI Act², which Scotland now proposes to copy, unfortunately, is a new absolute exemption for information relating to communications with the Monarch and the next two in line to the throne. This means that it will no longer be possible to apply for information about Prince Charles' attempts to influence government policy. True no-one ever got that material in the past but it was always a possibility on public interest grounds. However should the request be for *environmental* information, the public interest test will still be in place under The Environmental Information (Scotland) Regulations (EISRs). The absolute exemption will only apply to FOI requests creating a greater disparity between how requests for information will be handled in Scotland – i.e. between the EISRs and FoISA. There is no scope for such a change in the EISRs due to an EU directive.

The Finance Committee at the Scottish Parliament is leading consideration of the Bill, so please notify it of your concerns about the general principles of the Bill. There is a short period for organisations and individuals to provide written evidence by 8th August 2012 finance.committee@scottish.parliament.uk. CFoIS will be drafting its submission and will be happy for organisations to draw on it when writing their submissions and/or to support and endorse it.

Popularity of FoI

FoI is very popular in Scotland and the public acknowledge its importance in improving the design, delivery and funding of public services. The Scottish Information Commissioner commissioned research in 2011 which revealed that:

- 80% of respondents stated they were aware of the law
- 89% of respondents agree that it is important for the public to be able to access information held by public authorities
- even in straitened times for the public sector, only 14% agreed with the suggestion that FOI was a waste of public money
- there is strong public support for FOI to be extended 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

² The UK Freedom of Information Act 2000. The amendment was introduced by Section 46 and Schedule 7 of the Constitutional Reform and Governance Act 2010 and brought into force by The Constitutional Reform and Governance Act (2010) (Commencement No. 4 and Saving Provision) Order 2011.

should be covered and 73% agreeing that prisons which are run by the private sector should be covered.³

Road Blocks to ‘Reform’ in Scotland

During Stage 3 of the Bill in 2002, Registered Social Landlords (housing associations) were deleted from the Bill. The Scottish Executive was concerned that “*many RSLs are small, informally run organisations that are not geared up for such stringent regulations*”. The Minister was clear that “*There will be consultation before any organisation is added. I assure members that we expect the majority of organisations to be covered*”.⁴

The Minister outlined the range of bodies he expected to be covered by FoI and stated it would happen soon: “*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.*” He also pointed out that “*Section 5(5), which requires ministers to consult, does not require us to wait for the appointment of the commissioner before doing so. Once the bill has received royal assent we can begin the consultation process.*”⁵ Ten years later, we are still awaiting such additions.

However in 2010, a consultation on extending the coverage of FoISA was launched by the Scottish Government which identified possible additions:

- contractors who run privately managed prisons and provide prisoner escort services;
- leisure, sport and cultural trusts and bodies used by local authorities;
- the Glasgow Housing Association;
- the Association of Chief Police Officers in Scotland;
- contractors who build and maintain schools;
- contractors who build and maintain hospitals;
- and contractors who build, manage and maintain trunk roads under private finance contracts⁶.

CFoIS noted the Government’s 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 duty to consult bodies considered for FoISA resulted in the Scottish Government backtracking and stating that “*any extension of legislation is not favoured by the majority of bodies proposed for coverage at the present time.*”⁷

³ News Release 16th December 2011

<http://www.itspubliknowledge.info/home/News/20111612.asp>

⁴ Column 8206

⁵ 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>

⁶ The Scottish Government’s proposals to extend FOISA are available at:

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

CFoIS had however thought the proposals to be inadequate as:

- The effect would be to create a whole new set of anomalies by only proposing coverage to certain bodies in key sectors whereas the law should focus on people as individual 'right' holders.
- Registered Social Landlords (RSLs), trunk roads contractors, many PFI contractors including those in the water and sewerage service, some local authority trusts and arms-length organisations would remain outside the Act's scope.⁸

UK making better progress

The UK Government has recently extended the FOI Act to the Association of Chief Police Officers, UCAS and the Financial Ombudsman Service. It is also consulting on the inclusion of additional bodies which appear to have public functions such as the Law Society and Local Government Association. CFoIS wants similar progress for Scotland.

Delivering Public Services

According to the Chair of the Accounts Commission "*As budget pressures rise, councils are considering alternative ways of delivering services. This may lead to further and more innovative use of ALEOs.*"⁹ There are 130 major ALEOs in Scotland which are companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence.

Regulation and inspection of RSLs (housing associations) is undertaken by the Scottish Housing Regulator on behalf of tenants. RSLs must provide certain standard information regularly including completion of the Annual Performance and Statistical Return (APSR) and data about its private lending profile. RSLs already have to comply with legal duties on compiling information for the regulator so it is reasonable to give an enforceable right to tenants to access that information.

The need for information to inform the design and delivery of public services has never been greater. In May 2012, The Accounts Commission published a report '*Using cost information to improve performance: are you getting it right?*'. According to its Chair *John Baillie* "*It can be down to simply asking the right questions of officials and sharing information and best practice with other councils. This is a big challenge but it can deliver real dividends for councils and their communities.*" The public helps councils by asking for information and offering their own analysis. Exercising freedom of information rights therefore provides collective gain.

⁷ Scottish Government News release 26.1.11
<http://www.scotland.gov.uk/News/Releases/2011/01/26154714>

⁸ The Campaign for Freedom of Information in Scotland's response to the above consultation can be found at: <http://www.cfoi.org.uk/pdf/CFOLinSS5response2010.pdf>

⁹ Audit Scotland News release 'ALEOs: Accounts Commission highlights importance of clear governance and accountability' published 16th June 2011

The need for the private sector to access information has also been acknowledged by the Scottish Government as part of its reform of public procurement. Alex Neil, the Cabinet Secretary for Infrastructure and Capital Investment, has announced his intention to introduce a Procurement Bill which will ensure that:

- “public bodies adopt transparent, streamlined and standardised procurement processes that are friendly to Scottish businesses; and
- that Scottish firms have the right to access information about all contract award decisions and to challenge them if they believe the decision is unfair.”¹⁰

Instead of the Scottish Government crafting transparency and information access around specific issues, it is more reasonable to mainstream the principled approach about ensuring people have the right to access information about public services and those of a public nature.

Human Rights

The Scottish Parliament must be mindful that it can only pass legislation that is compliant with the European Convention on Human Rights (ECHR) and Scottish Government Ministers have a positive duty to comply with the ECHR.¹¹ Now that FoISA is being amended, the law must be examined through a human rights lens and in particular Article 10(1) of ECHR:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”.

Until recently ECHR case law has not been generally helpful but in the case of *Társaság a Szabadságjogokért (the Hungarian Civil Liberties Union) v. Hungary* (2009) the European Court of Human Rights (ECtHR) found a violation of Article 10 and concluded that obstacles to hinder access to information of public interest might discourage the media and other public interest organisations from pursuing their vital role as “public watchdogs”.¹²

Conclusion

CFoIS agrees with the Scottish Government that *“The Act is widely recognised as playing a significant part in making Scotland a more open, transparent and accountable society”*¹³. However that progress will only be sustained if the recently published Bill is amended to force more bodies to comply with freedom of information requests from the public and for the right to be enforced by the Scottish Information Commissioner.

¹⁰ ‘Public sector procurement reform’ Scottish Government News Release 06/02/2012
<http://www.scotland.gov.uk/News/Releases/2012/02/procurement06022012>

¹¹ Sections 29 and 57 of The Scotland Act 1998

¹² Judgment of 14 April 2009

¹³ ‘Freedom of Information legislation to be strengthened’ Scottish Government News Release 31/05/2012

The Bill fails to address the real problems that people face – getting information from those bodies that are not currently covered by FoISA. Therefore the General Principles of the Bill are inadequate and fail to protect the right to receive and impart information so that individuals and communities can form an opinion. CFoIS calls for a comprehensive extension to the current law so the Bill needs to be amended by the Scottish Parliament

About the Campaign for Freedom of Information

The Campaign for Freedom of Information was established in 1984 to secure a legal right of access to information so that people could find out 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 FoISA and subsequently we have consistently argued that the legislation should cover a much wider section of Scottish society, recognising that our public services are delivered by bodies other than public authorities, though paid for by public money.

We welcome opportunities to work with the Scottish public authorities to ensure that the FoISA is implemented effectively and have organised and participated in a number of activities to this effect such as training and participation in the Scottish Public Information Group.

For further information contact:

Carole Ewart carole@ewartcc.com or Derek Manson-Smith
dms@ircuk.demon.co.uk co-conveners of the CFoIS
<http://www.cfoi.org.uk/scotland.html> Tel: 0141 582 1207