



Briefing for MSPs

(Draft) Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013

Consideration by the Local Government and Regeneration Committee 4th September 2013

Summary

The Campaign for Freedom of Information in Scotland (CFoIS) welcomes the draft Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013. However we must remind the Committee that to protect the public's right to know, requires further 'Orders' to bring many more bodies under the Freedom of Information (Scotland) Act 2002 (FoISA).

A major reason for the weakening of FoISA is that promises to add named bodies and categories of bodies have not been honoured despite major changes in how public services are delivered in Scotland. The result is that the public can access less information as services are delivered by bodies that have been set up but are not covered by FoISA, e.g. housing associations and arms-length external organisations (ALEOs).

Further Orders are needed to 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 calls on MSPs of all parties to ask the Deputy First Minister questions on:

- The First Minister has confirmed that he '...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 arms-length bodies that local authorities have set up.'² Can the DFM explain what further ALEOs are under consideration by the Scottish Government?
- A timeline for the addition of further bodies
- Has the Scottish Government considered that maintaining FoISA rights is necessary to uphold the public's enjoyment of their Article 10 right under the European Convention on Human Rights: *Everyone has the right to freedom of*

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

² First Minister, Scottish Parliament, 20th September 2012 Official Report column 11704

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. See separate CFoIS briefing on human rights
<http://www.cfoi.org.uk/pdf/foisahumanrightsbrief.pdf>

Broken Promises

People in Scotland have been promised that FoISA would be extended to a range of new bodies since 2002 when the Minister (Jim Wallace MSP) outlined the range of bodies he expected to be covered and 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.*³

And the Minister also successfully removed RSLs (housing associations) from the Bill during the Stage 3 debate but stated:

*However, 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. When RSLs were added to the list of authorities at stage 2, I do not think that there had been any consultation with that sector—I think that I am right in saying that no evidence had been taken from the sector prior to the addition of RSLs. There will be consultation before any organisation is added. I assure members that we expect the majority of organisations to be covered.*⁴

Eleven years later, we are still awaiting such additions.

List of Bodies Already Consulted under S5 of FoISA

CFoIS wishes to remind the Committee of the bodies that were originally the subject of a Scottish Government consultation and which can now be designated for coverage, immediately.

In 2010, the Scottish Government undertook a consultation, as prescribed by S5 of FoISA, to get views on whether FOISA should be extended to cover private organisations that deliver a public service and specifically:

- Contractors who run privately managed prisons and provide prison escort services
- Contractors who build and maintain schools
- Contractors who build and maintain hospitals

³ 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>

⁴ Ibid, column 8206

- Leisure, sport and cultural trusts and bodies established or created by local authorities – **subject of the current Order**
- 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.

Evidence of Harm

A range of evidence exists to demonstrate that the public's FoI rights in 2013 are weaker than when the legislation became effective in 2005 including:

- Office of the Scottish Information Commissioner (OSIC) has advised that 15,000 council tenants have lost their FoISA rights when their landlord changed to an RSL;
- The DFM has stated "I am also minded to produce an order, in early course, to address the fact that outsourcing by local authorities has eroded the protection of freedom of information legislation"⁶

Outsourcing has been completed by public authorities such as health boards as well as by local authorities.

ALEO Research

*The principles of openness, integrity and accountability that councils observe apply equally when services are delivered through ALEOs.
Audit Scotland 2011⁷*

It is timely to remind the Committee of the purpose of FoISA "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. Part of the reason is that we 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.

ALEO is a general term used to describe a range of bodies that have been set up by councils to deliver a wide range of activities such as leisure services, economic development and property maintenance. Although separate from the local authority, each is subject to local authority control or influence. 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."⁸ However it acknowledged there are 130 'major' ALEOS.

Audit Scotland has warned that ALEOs are likely to increase in the future due to financial cuts so a mechanism must be developed which applies when new bodies

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

⁶ Ibid

⁷ 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 5

⁸ How councils work: an improvement series for councillors and officers, Para 19

are created by public authorities so that the public's right to know is maintained. Retrospective action is also needed. CFoIS suggests that the Committee asks Audit Scotland precisely how many ALEOs there are in Scotland, how much they spend and a list of their functions. We believe this would assist understanding the extent to which the public's right to know is being diminished. We believe 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.

Conclusion

Eleven years after FoISA was passed and eight years since it came into force, current MSPs and the Scottish Government need to explicitly state that they wish to further extend the public's enforceable right to access information in Scotland. That right needs to apply to those services that we, the public, receive eg bodies delivering public services and services of a public nature.

CFoIS knows the progressive reform of FoISA has strong public support as research commissioned by the Scottish Information Commissioner in 2011 revealed:

- 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.⁹

CFoIS is happy to answer any questions or provide clarification to enable robust consideration of the Order by the Committee.

For further information contact our Convener: Carole Ewart carole@ewartcc.com

⁹ News Release 16th December 2011 <http://www.itstopublicknowledge.info/home/News/20111612.asp>