



Uncovered!

Bodies outwith freedom of information legislation in Scotland

A briefing by the Campaign for Freedom of Information in Scotland

12th November 2012

<http://www.cfoi.org.uk/scotland.html>

About the Campaign for Freedom of Information

The Campaign for Freedom of Information (CFoIS) 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 the Freedom of Information (Scotland) Act 2002 (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 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 Freedom of Information Implementation Group and the Scottish Public Information Forum. <http://www.cfoi.org.uk/scotland.html>

Your support counts!

Currently CFoIS is working on the Freedom of Information (Amendment) (Scotland) Bill and is seeking support and funds to undertake this work. If your organisation can assist then please contact the Co-convenor and Treasurer, Derek Manson Smith.

CFoIS would like to thank UNSON Scotland and the NUJ for their support for our campaign to extend the public's right to know in Scotland.

For up to date information on the Bill go to

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx>

Acknowledgements

This publication has been inspired by the many people who want to access information from bodies that are not covered by FoISA. We thank you for your stories and apologise that we have been able to draw on only a selection of your experiences.

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1. Introduction

'International Right to Know Day' celebrated its tenth anniversary in 2012, which coincidentally falls on the tenth anniversary of the passing of the Freedom of Information (Scotland) Act in 2002 (FoISA). It is timely to reflect on what has happened in the last ten years in Scotland, assess whether the law has delivered an enforceable right to access information and evaluate the case for reform. As the Scottish Parliament is currently considering the Freedom of Information (Amendment) (Scotland) Bill, we have an opportunity to achieve legal change if it is necessary and sensible to do so¹ (See Appendix 1).

CFoIS concludes that the public's right to know is now far weaker than it was when FoISA was passed by the Scottish Parliament in 2002 and came into force in 2005. The main reason is that S5 of FoISA has never been used to add/designate additional bodies to be covered. So the 'information access right' is certainly strong and enforceable but the range of information we can access is getting smaller as public services are increasingly moved to other bodies which are not covered by FoISA.

CFoIS wants our right to access 'public information' to be restored as well as extended. This publication sets out the evidence. We hope you will support us in our campaign to extend the coverage of FoISA to arm's-length external organisations (ALEOs) that are delivering a wide range of 'public services', such as parking and leisure. We also want other bodies such as registered social landlords (RSLs) (housing associations) to be covered. This will require legislative as well as cultural change: instead of FoISA being regarded as a burden it should be treated as a precious right. The machinery to respect that right should become as routine as compliance with Health and Safety and with Data Protection laws.

2. Broken Promises

CFoIS is publishing this briefing to encourage and inform debate on the need to extend FoISA to a wide range of bodies and for that reform to be embedded in law. Section 5 of FoISA has proven to be a failure as no existing bodies have been added to the freedom of information regime since 2002. When new bodies have been set up, such as the Scottish Human Rights Commission, the primary legislation has obliged them to be covered by FoISA and action has been taken to accommodate the change in name of bodies originally covered by FoISA.

People in Scotland have been promised that FoISA would be extended to a range of new bodies since 2002 when the Minister 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

¹ Scottish Government FoI Principle 2

consultation.” He also pointed out the urgency of the task “Once the bill has received royal assent we can begin the consultation process”.²

Although the Minister decided to remove RSLs from the Bill during the Stage 3 debate, he 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.”³

Ten years later, we are still awaiting such additions. There have been consultations which repeatedly supported additions but these have been ignored:

- 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 carried out in 2010 which found wide support for the addition of new bodies.

CFoIS is concerned that that S5 (6) of FoISA creates an imbalance: the duty to consult is with “every person to whom the order relates”. Whilst that does mean the named bodies or categories, it must also mean people, and their representative organisations, who may wish to exercise their right to information eg on housing associations or leisure trusts. Their views must be given ‘due regard’ in the process.

No timetable has been published to add 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

Since 2002, the need for progressive reform of FoISA has also been prompted by the changes in how public services are delivered across Scotland. Many of these changes were unforeseen in 2002. There continues to be change in how public services, and those of a public nature, are delivered and funded across Scotland. FoISA has failed to keep up!

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

Furthermore, people who have exercised their right to access information are now clearer about the benefits of exercising their right: individuals gain and communities gain. People have been enabled and encouraged to think about what kinds of information they need to deal with subjects such as policing, education and housing as well as process issues such as obtaining the rules on decision making and what information was used to inform the decision-making process. People also need information to protect and extend services to particular groups of people such as children and elderly relatives.

3. What Kinds of Information do People Want?

CFoIS is regularly asked what types of information people want that they currently cannot get. The list is long!

For example in relation to RSLs, 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".⁶ GHA was created in 2003 and the housing stock transferred from Glasgow prior to FoISA coming into force in 2005. Council tenants elsewhere that were covered by FoISA have since had their homes transferred to RSLs, losing their FoISA rights in the process. 15,000 people have had their rights under FoISA removed as local authority housing has shifted to the control of RSLs.⁷

Research commissioned by the Scottish Information Commissioner in 2011 revealed 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 should be covered and 73% agreeing that prisons which are run by the private sector should be covered.⁸

Interest in FoI and its benefits increases as people and organisations become more used to exercising their right to access information and learn from others whose campaigns have been informed by previously undisclosed information, facts and figures. We cannot underestimate the importance of the cultural change that has taken place amongst the public in Scotland since 2005 when the right became effective and was well publicised by the marketing strategy of the Office of the Scottish Information Commissioner (OSIC).

CFoIS has drawn on just a few of the examples it has been provided with on the kinds of information people want but which they cannot get.

Commonwealth Games

People and groups have all sorts of questions about the organisation of the

⁶ 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>

⁷ Scottish Information Commissioner, Evidence to Finance Committee at Scottish Parliament, 12th September 2012.

⁸ News Release 16th December 2011 <http://www.itspublicknowledge.info/home/News/20111612.asp>

Commonwealth Games and have thought of making an information request. It has been a shock that they do not have a legal right to do so despite the organising committee being made up of Glasgow City Council and the Scottish Government. Glasgow 2014 Ltd is the company set up to deliver the XX Commonwealth Games in Glasgow from 23rd July to 4th August 2014. On its website there is a link to FoI but the statement confirms that the company is not covered by FoI:

“Glasgow 2014 Limited, the Organising Committee of the Glasgow 2014 Commonwealth Games (“OC”) is a private company and is not subject to the Freedom of Information (Scotland) Act 2002, however, you can send a general enquiry which is not an FOI request to the OC.”

So, there is no enforceable right and a member of the public cannot complain to the Scottish Information Commissioner for failure by the OC to supply the information and within a certain time. The ‘voluntary’ arrangement is entirely inadequate as Glasgow 2014 can choose not to supply information or can take as long as it wants to respond. As has been pointed out by several groups and individuals, this approach is almost identical to LOCOG – The London Organising Committee of the Olympic and Paralympics Games, which was responsible for preparing and staging the London 2012 Games:

LOCOG is not covered by the Freedom of Information Act, as it is not a ‘public authority’ for the purposes of that Act. The reason for this is that LOCOG is not wholly owned by three public authorities: one of its three stakeholders, the BOA, is a private company limited by guarantee and is not a public body. As a result, LOCOG is not required to respond to any formal Freedom of Information Act requests.⁹

Women’s pay and conditions impacted by public service cuts?

The STUC Women’s Committee and Close the Gap conducted research which was intended to assess the impact of current public spending cuts on women’s employment in local government in Scotland. They wanted to collate and analyse local government employment data obtained by submitting freedom of information requests to each local authority in Scotland. However, the research identified particular issues around the capacity of local authorities to identify ALEOs with which they contracted, and how the establishment of ALEOs was recorded within a local authority and elsewhere. So they did not get the information requested.¹⁰

Parking

A member of the public parked her car on a city street and checked the road signs for any parking restriction. They were faded and damaged so unreadable. She went off to her meeting. Several hours later she returned and her car had disappeared. Incredulous that it had been stolen and quite upset she went into a shop to be told that it was a regular occurrence and that her car had been towed away by parking attendants. She was informed that people are regularly caught in the area. She paid the fine and paid to get her car back but made a freedom of information request as she wanted to know how many motorists had been captured at that one site, how

⁹ <http://ask.london2012.com/>

¹⁰ ‘Invisible Women: Employment Data Collection In Scottish Local Government’ Close the Gap Working Paper 6, published 2012

many had complained about the lack of signage, etc. She was advised that as the company was not covered by FoISA she had no right to the information.

4. Arm's-Length External Organisations

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

Audit Scotland 2011¹¹

"The right to information is being eroded in many places by the provision of public services by arm's length organisations and private contractors, yet the power to bring some of these bodies within the scope of FOISA by ministerial designation has not been used."

Scottish Information Commissioner 2012¹²

An 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.

An Audit Scotland report *Arm's-length external organisations (ALEOs): are you getting it right?* 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." ¹³

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". ¹⁴

Currently, ALEOs can be limited liability partnerships, leisure trusts, and partnerships. We cannot predict what form they will take in the future. There are various opinions about why local authorities have set up ALEOs including VAT advantages, rates advantages and that they are more likely to secure philanthropic support. Whatever the motivation, the public is always assured that the service will remain and improve so there is no doubt that public money is involved and that the users are the public. Which ALEOs are covered by FoISA and which are not makes exercising the right to information unpredictable and confusing. The right needs to be simple to be accessible to the public and fairly delivered by the public sector.

As the Scottish Information Commissioner has pointed out, local authorities can decide whether ALEOs are covered by FoISA and which are not:

"Glasgow City Council, for example, has divested a range of services by establishing companies, including Cordia Care, which are limited by guarantee. The Council has

¹¹ 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

¹² 'Informing the Future' The Scottish Information Commissioner's Special Report to the Scottish Parliament' pub January 2012 pg 4

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=5266&SID=5972>

¹³ Note 11, pg 3 Para 4

¹⁴ Note 11, pg 6 para 19

ensured however that these remain publicly owned companies by retaining sole ownership. As a result Glasgow City Council's companies remain subject to FOISA and the public right to information is safeguarded without the need for designation. Most authorities, however, have not chosen to adopt this approach, which is why designation is so important.”¹⁵

FoISA has a role to play in ensuring proper scrutiny of the public pound. Members of the public can request information to satisfy and inform themselves about how services are managed, funded and delivered. This can assist a range of agencies including Audit Scotland in its regulatory work.

The use of ALEOs is set to increase, given the drive to save money and create new ways to deliver public services. As Audit Scotland points out “ALEOs are now an established part of local government in Scotland and play an increasing role in service delivery. In the past decade, for example, the number of ALEOs set up to deliver leisure services has almost doubled.”¹⁶ Audit Scotland acknowledges that there may be “further and more innovative use of ALEOs” but “ALEOs themselves face a challenging financial and operating environment. Councils need good information so they have early warning of difficulties and are ready to deal with any financial and service risks that may arise.”¹⁷

Scottish Ministers have already chosen to influence how ALEOs are run. The Local Governance (Scotland) Act 2004 (Remuneration) Amendment Regulations 2011, which came into force on 1st July 2011, prohibits payment to a councillor by an ALEO for undertaking their work as a councillor as they are already remunerated for this by their council.

5. Transparency Agenda

The Scottish Government is promoting a ‘transparency agenda’ which it claims is ‘designed to improve accountability and the quality of decision making across Scotland’, e.g. in public procurement. This strategy runs in parallel to the use of FoISA.

In evidence to the Finance Committee, the lead committee considering The Freedom of Information (Amendment) (Scotland) Bill, both the Minister and civil servants referred to the transparency agenda as a way of disclosing information from public bodies that are not covered by FoISA¹⁸. CFoIS is concerned that an increased focus on transparency will be at a cost: instead of more bodies being covered by FoISA, as was promised in 2002, the Scottish Government will include them in a transparency agenda. What and when information is disclosed will be decided by the holder of the information rather than the public exercising an enforceable right to choose the information they want to access. The types of bodies are RSLs, ALEOs and private and voluntary organisations that are delivering services of a public nature.

¹⁵ Note 12, pg 19

¹⁶ 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 5

¹⁷ Ibid Pg 3 Para 9

¹⁸ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7438&mode=pdf>
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7354&mode=pdf> Evidence delivered to the Finance Committee on 5th and 12th September 2012

This is a developing agenda. The debate around reform of freedom of information legislation has prompted the Scottish Government to contextualise the strategy. In a letter to the Finance Committee¹⁹ the Minister for Parliamentary Business stated that the Scottish Government is committed “to consult on the far broader issue of a Scottish transparency agenda. The Scottish Government has always considered transparency as integral to effective and efficient administration and seeks to build transparency into policy delivery. I would draw your attention to two examples of this objective in practice” and then goes on to highlight The Scottish Housing Charter and The Procurement Reform Bill. Consultation on the draft Bill ended on 2nd November 2012.

The Scottish Government also highlights the conclusions of the recently-published report by the House of Commons Justice Committee on post-legislative scrutiny of the UK Freedom of Information Act 2000 which concluded that, while “openness should follow public money when public services are outsourced...in our view this can best be achieved through clear and enforceable contract provisions rather than by designating commercial companies under the Act, which should be retained as a last resort.” It is very disappointing that the Scottish Government appears to be copying this ‘logic’.

6. Scotland Losing Ground?

The UK Government has already begun the process of designating additional bodies under the UK FoI Act and is currently considering designation of further bodies, e.g. housing associations. So far it has designated/added the Universities and Colleges Admissions Service (UCAS), the Association of Chief Police Officers (ACPO) and the Financial Ombudsman Service Ltd.

At a UK level there have been recent developments on promoting the transparency agenda. In October 2012, the Government issued a consultation on making the code of practice on transparency mandatory – requiring local authorities to publish spending over £500, contracts and tenders, salaries, etc²⁰.

The proactive publication of data and information is welcome as it saves people asking for information in the first place and local authorities spending time providing it. However, it does not need to be an either or – FoI should operate as well as a proactive, transparency agenda!

7. Conclusion

It is difficult to imagine what types of information people will want at any time of the year and stages of their lives. That is why FoISA is so accessible, because it's simple. You do not need to mention FoI or what you want the information for. All you need to do is submit a ‘recordable’ request and provide your name and contact details, e.g. an email is sufficient. The patchwork of bodies covered and not covered by FoISA causes confusion.

Since FoISA was passed in 2002, there has been a wide range of legislation passed by the Scottish Parliament that provides a framework of the operation of the public,

¹⁹ http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Minister_to_Convener_re_extension_of_FoI_coverage_28.8.2012.pdf

²⁰ <http://www.communities.gov.uk/publications/localgovernment/makingthecode>

voluntary and private sectors, e.g. The Charities and Trustees Investment (Scotland) Act 2005, The Public Services Reform (Scotland) Act 2010 and The Property Factors (Scotland) Act 2011. The initial unwillingness of Scottish Government Ministers to utilise S5 of FoISA is in contrast to their willingness to legislate on other issues that impact on the public, voluntary and private sectors. We can only conclude there is an unwillingness to respect and extend the public's right to know, which contradicts the Scottish Government's own six principles, e.g. Principle 1 "Fol is an essential part of open democratic government and responsive public services". (Appendix 1)

FoISA has failed to keep up with the pace of change in Scotland's public services and so the right to information that people had in 2002 no longer exists, e.g. in relation to some leisure trusts and parking companies set up by local authorities. A purpose clause is needed in the Freedom of Information (Amendment) (Scotland) Bill explicitly stating that the public's right to know follows the public service – whoever delivers it.

There is already protection in FoISA for new organisations brought within the regime to limit the range of information that has to be made public. The enforceable right to access information applies to the information categories listed rather than to all the information held²¹. So a member of the public could exercise the right to access information on a public service delivered by a voluntary organisation or private company but not to all of the information held by those bodies.

Some have suggested that Fol costs too much money. The research undertaken for the OSIC confirms that even in difficult, economic times for the public sector only 14% agreed with the suggestion that Fol was a waste of public money. Democracy costs money, it is not a luxury or a privilege but a valued right. The OSIC survey revealed that 80% of respondents stated they were aware of the law and 89% of respondents agree that it is important for the public to be able to access information held by public authorities. Fol has also proven to be an investment as it can also save public money by identifying wastage and abuse so that public funds are better targeted.

8. Next Steps

As the Bill is currently at Stage 1 in the Scottish Parliament, there is time to influence its content. We encourage MSPs to read and support the conclusions of this briefing. We urge people and organisations to contact their MSPs and ask them to support:

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.

²¹ S7 Freedom of Information (Scotland) Act 2002

To find out who are your MSPs go to <http://findyourmp.parliament.uk/>

To keep up to date with progress on the Bill go to <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/52148.aspx>

Appendix 1 Freedom of Information - The Scottish Government's Six Principles

The Scottish Government:

1. Supports Freedom of Information as an essential part of open democratic government and responsive public services.

The Freedom of Information (Scotland) Act 2002 provides significant and important rights to access information. We support the Act's underpinning principles by encouraging behaviour which is open, transparent and increases public participation.

2. Operates within the Freedom of Information (Scotland) Act 2002 rather than propose significant changes to it, but adjusts the regime where it is necessary and sensible to do so.

The Act must operate well for both members of the public and Scottish public authorities. We will keep the Act under review by promoting good practice within existing frameworks and considering extending coverage.

3. Publishes information proactively wherever possible.

We will publicly demonstrate our commitment to open government and Freedom of Information by ensuring as much information as possible is made available without having to be asked.

4. Maintains the exemptions set out in the Act in particular to protect "private space" for Ministers and others to consider advice and reach decisions.

The Act provides for responsible openness. We will use the exemptions in the Act where appropriate to protect for instance the formulation or development of policy, Ministerial communications, or the uninhibited provision of advice.

5. Maintains effective relationships with the Scottish Information Commissioner and other key stakeholders.

We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum.

6. Creates and shares information thoughtfully with regard to the principles above.

To support the effective application of the Act, we create and share information thoughtfully, deliberately and purposefully with a view to upholding the principles above.