



Restore publicly funded services to accountability.

Response of the Campaign for Freedom of Information in Scotland to the Scottish Government consultation on extending the Freedom of Information (Scotland) Act 2002, to more organisations.

4th September 2015

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About CFoI in S

The Campaign for Freedom of Information in Scotland is an independent campaigning organisation which is part of the UK Campaign for Freedom of Information. It is supported by voluntary effort and delivers training as well as participating in public policy debate.

Drafting this response was an experience akin to ‘groundhog day’ as we have made the same arguments since 2002 and have participated in numerous consultations eg in 2005, 2010 and in 2012. We would prefer to invest our scarce resources in a consultation and a process which proposes a significant extension of FoISA.

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1. Developing a Culture of Openness across Scotland

The purpose of providing the public with an enforceable right to access information is transparency and an outcome is accountability. The pro-active disclosure of information is necessary as is members of the public and organisations asserting their right to access information which they think is important to their lives, their interests and to the community.

Scotland was slow to introduce a freedom of information law which only became effective in January 2005 - The Freedom of Information (Scotland) Act (FoISA) 2002. The world's first freedom of information law was introduced in 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. Developing a culture of openness had to happen too for the law to be effective and ensure that the state and its various public sector arms need to be more pro-active in disclosure. Another ingredients is for the public to have the stamina and determination to make requests for information. The more information is asked for and disclosed, the more the public see the value as does the public sector. As FoI laws become embedded in attitudes and practice government is more open and accountable and the public have access to more information in which to make informed decisions.

The failure of the Scottish Government to be bold and ambitious about extending FoISA to many more bodies indicates a worrying culture within government. Scotland has still much to do to change the culture on FoI and we can learn from practice elsewhere to make us more ambitious about what organisations/functions should be covered by FoISA.

This publication will, therefore, be used to raise awareness about the deficiencies in the freedom of information regime in Scotland as well as provide a commentary on the Scottish Government's consultation on extending FoISA.

Relevant Legislation in Scotland

The Freedom of Information (Scotland) Act (FoISA) 2002

The Environmental Information (Scotland) Regulations 2004

The Freedom of Information (Amendment) Scotland Act 2013

The INSPIRE (Scotland) Regulations 2009

For more information go to the Scottish Information Commissioner's website
<http://www.itspublicknowledge.info/Law/Legislation.aspx>

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/>

2. Context to Consultation Response

The proposed extension to FoISA is woeful². Repeatedly consultations have been issued and every time there is consensus amongst organisations representing requesters that the Freedom of Information (Scotland) Act 2002 (FOISA) should be extended to cover a number of key named organisations and categories of organisations. However that consensus is ignored as it appears that greater emphasis is placed on the views of those who hold information. Therefore CFol in S will use this document as a response to the Scottish Government's consultation and also as a briefing for MSPs and those who are interested in progressive extension of FoISA. By increasing awareness, CFol in S expects that support will grow to increase the number of organisations to be designated under FoISA.

The current consultation confirms that the Scottish Government is timid on freedom of information rights for the people of Scotland. However there is overwhelming public support for our freedom of information rights to be maintained and extended so it is useful to repeat the statistics. Research published by the Scottish Information Commissioner in 2011 revealed strong public support for FOI to be extended to additional organisations: 88% agreeing that trusts providing services on behalf of local authorities, 82% agreeing housing associations, 83% agreeing private sector companies who build and maintain local authority schools or hospitals and 73% agreeing that prisons which are run by the private sector should be covered.³

It is surprising that the public's will is continuing to be frustrated by Scottish Government resistance. It is also interesting to reflect that there is a history of broken promises on extending Fol beginning in 2002 and including raising hopes in 2010 when a list of bodies was proposed that never actually were included in the Bill published in 2012. (See Appendix 1)

The narrowness of this consultation is out of step with the "Scottish Government's three key priorities participation, prosperity and fairness"⁴ and contradicts other policies.

- 'Being an open and accessible government... which hands decision-making powers back to communities.'⁵
- Harnessing democratic energy to build a better country⁶
- Delivery of Scotland's National Action Plan on Human Rights and that includes promoting Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights.⁷
- Creating a Fairer Scotland as freedom of information empowers people and enables them to hold government and the public sector to account.⁸

² For more information on the consultation go to the Scottish Government website <http://www.gov.scot/About/Information/FoI/Coverage>

³ News Release 16th December 2011 <http://www.itpublicknowledge.info/home/News/20111612.asp>

⁴ From the speech in Scottish Parliament by First Minister Nicola Sturgeon setting out a one year Programme for Government, on 26th November 2014 <http://news.scotland.gov.uk/Speeches-Briefings/First-Minister-Programme-for-Government-12b1.aspx>

⁵ Ibid

⁶ Ibid

⁷ <http://www.scottishhumanrights.com/actionplan>

⁸ Conversation on Creating a Fairer Scotland – What Matters to You? <http://www.gov.scot/Publications/2015/06/4845/1>

On 1st September 2015, the First Minister set out her Government's programme and this consultation does not sit comfortably with the plans and philosophy articulated. For example on closing the attainment gap in education she recognised the importance of accessing information to make better decisions:

"But we also need to have better information about attainment so that we measure progress consistently and drive change. We need to be able to see what's working and where we still need to improve."⁹

The First Minister concluded:

"This ambitious and reforming Programme for Government speaks to our aspirations. It sets out how this Government will work - now and in the long term - to achieve our vision for Scotland's future. And it demonstrates how enduring values - a belief in enterprise, a faith in the value of education, a commitment to fairness and solidarity, and a passion for democratic engagement – can be applied to make Scotland a fairer and more prosperous country."¹⁰

CFoI in S believes that extending the public's right to access information is a fundamental pillar of that fairer and more prosperous society and is a constant example of democratic engagement. CFoIS also believes this is a human rights issue which MSPs are required to address under sections 29, 57, 100 and Schedule 5 (7) of the Scotland Act 1998.

Worryingly this sustained policy of diminishing our FoI rights copies the strategy of the UK government which has, deservedly, received much negative press coverage on its activities (see section 4). It is time for people in Scotland to get active about rights and lobby their MSPs to question, challenge and assert that FoI rights are fundamental to the core purpose of the Scottish Parliament which was promised to be 'open, accessible and accountable' as far back as 1999.

3. Scottish FoI

CFoIS believes the Freedom of Information (Scotland) Act 2002 (FoISA) must apply to many other organisations to ensure a robust framework so the public enjoy an enforceable right to know. A major cause of the weakening of FoISA is that promises to add named bodies and categories of bodies have not been honoured and the law has failed to keep up with the new ways in which public services and functions are delivered.

The Scottish Government has the power to fix the problem by issuing an order under section 5 of FoISA¹¹. CFoIS is hugely disappointed that the Scottish Government has failed to use this power more effectively in the current consultation.

Broadening the range of bodies covered by freedom of information is a catch up – as so many public services are now delivered by other bodies and is also necessary to meet the Scottish Government's own FoI principles that "the public's right to know

⁹ Scottish Government News Release 1st September 2015 at <http://news.scotland.gov.uk/News/A-stronger-Scotland-1c7c.aspx>

¹⁰ Ibid

¹¹ Stage 1 debate at Scottish Parliament 16th November 2012

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”.¹²

The Scottish Government’s consultation on extending the range of Organisations covered by the Freedom of Information (Scotland) Act 2002, as amended in 2013 (FoISA)¹³ is very weak as extension is only proposed to:

- contractors who run privately-managed prisons
- providers of secure accommodation for children
- grant-aided schools
- independent special schools¹⁴

Extending FoISA to more organisations serves three purposes:

- Shares power with the public who have an enforceable right to access information from organisations which deliver public services or those of a public nature.
- Restores rights that have been taken away as public ly funded services are delivered by new organisations
- Extend information rights to bodies that should be covered as they are in receipt of public funds or because they deliver services of a public nature. For example housing associations are covered by the Human Rights Act 1998 as they deliver services of a public nature but they are not covered by FoISA so people do not have an enforceable right to access information but a council tenant has. The bodies may be private or voluntary organisations.

We need to get the extension to FoISA right in respect of devolved powers as there will be further deliberations on what public services are covered by FoISA given the current Scotland Bill¹⁵ which is being debated at Westminster. It is possible that new bodies will be created which should come within the scope of FoISA or that matters become devolved which were previously reserved and therefore subject to UK FoI law. FoI rights should follow the public money.

About FoISA

If an organisation is covered by FoISA then the public has an enforceable right of access to information – unless it is covered by one of the specific exemptions eg national security. Enforcement is carried out by the Scottish Information Commissioner.¹⁶ Examples of bodies not covered by FoISA include:

- Registered social landlords (RSLs) ie housing associations – the Scottish Information Commissioner said in 2013 that 15,000 council house tenants had

¹² See principles 1 and 2 <http://www.scotland.gov.uk/About/Information/FoI/6principles>

¹³ The Act, as amended appears on UK Government website at <http://www.legislation.gov.uk/asp/2002/13/contents>

¹⁴ For more information on the consultation go to the Scottish Government website <http://www.gov.scot/About/Information/FoI/Coverage>

¹⁵ Information on The Scotland Bill can be found on the Parliament website at <http://services.parliament.uk/bills/2015-16/scotland.html>

¹⁶ For more information on her functions go to <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx>

lost their right to access information as a result of the transfer of housing stock from councils (which are covered by FoISA) to housing associations (which are not).

- Many arm's length external organisations (ALEOs) which are taking over the direct delivery of public services or services of a public nature.
- Umbrella bodies which deliver public functions, such as Convention of Scottish Local Authorities (CoSLA).

Undertakings have been made in the past to add in organisations eg the then Justice Minister, Jim Wallace, promised to add housing associations in March 2002. This has still not been done. An amendment tabled by Ian Gray MSP in 2013 to specifically designate Glasgow Housing Association to be covered by FoISA was defeated at the Scottish Parliament – See Appendix 2.

Addressing the Consultation Document

The consultation document is disingenuous when it states “In addition to the organisations discussed in this paper, we would welcome suggestions as to what other bodies – whether individually or collectively - should be considered in any future consultation.” Consultations in 2005¹⁷, 2010, and 2012 received the same responses: all ALEOS, RSLs and umbrella bodies delivering a public function eg COSLA. There appears to be a pretence about listening and consulting.

The Consultation states “we are not currently persuaded of the merits of extending coverage to housing associations” and sets out a series of ‘arguments’ against extending FoI to cover Registered Social Landlords (RSLs). The irony is that many of the statements are countered by arguments in the same document for the bodies that are proposed for coverage! For example, both grant-aided and independent special schools are already under considerable regulation according to the consultation paper, implying that the extra duty of FoI will be not onerous. However, similar existing regulation is given as a reason NOT to extend coverage to housing associations!

Similarly one of the special pleadings on behalf of RSLs – that they carry out other (non-public) functions – is comprehensively undermined by the consultation paper’s own admission that the only impact would be on ‘the information they hold concerning their functions of a public nature’. In addition we would submit the following rebuttals:

- 1) “While some functions undertaken by RSLs satisfy some of the factors identified above, others do not. For example, many RSLs, or their subsidiaries, undertake essentially ‘private’ activities, often on an entirely commercial basis, rather than activities which would generally be considered to be of a ‘public’ nature.” This argument is not credible as precedent can be found under the Human Rights Act 1998 where bodies are covered such as private schools and hospitals but only in respect of their public functions.
- 2) “..as part of a wider engagement process, we propose to engage with RSLs and registered tenant organisations to identify any specific areas of concern or difficulty. This argument is not credible as the Scottish Government

¹⁷ Announced by Margaret Curran MSP, Minister for Parliamentary Business
<http://www.gov.scot/Publications/2006/09/foireview/contents>

already knows about the tenant's petition that was recently considered by the Parliament's Petitions Committee¹⁸ and since 2001, CFol in S has called for RSLs to be included as have others eg UNISON Scotland and there has been a persistent, similar call from our two Scottish Information Commissioners.

- 3) The operation of the Scottish Social Housing Charter since 1st April 2012 is a red herring as it completely misses the point: Fol is about individuals asking for information that they want whereas the Charter makes them passive recipients of information chosen to be disclosed by the regulator and RSLs. Fol is about empowerment, and provides a consistent, enforceable right. Fol provides time limits and specific rules when information is not disclosed. Fol provides a framework which is independent and is not part of the housing structures. It is interesting to note that the Scottish Information Commissioner has reported that 63% of new bodies report no difference in the volume of requests after FOI designation.¹⁹

The consultation is illogical as it is inconsistent in its arguments. For example the reasoning for extending FoISA to private prisons could equally apply to RSLs, ALEOS and umbrella bodies such as COSLA:

"While there is currently little evidence of people unable to access information, in part as the two prisons are not currently required to respond to requests, it would ensure that there is an equal right of access to information about all prisons in Scotland, whether public or private."²⁰

In respect of secure accommodation of children the same reasoning could equally apply to RSLs, ALEOS and umbrella bodies such as COSLA as it is stated:

"primarily the statutory underpinning of the service, the public funding and the degree of regulation of secure accommodation, clearly indicate that the functions being undertaken are of a public nature for the purposes of a section 5 order. This means there are strong grounds for these private bodies being subject to the requirements of FOI legislation."²¹

In respect of grant-aided schools, the reasoning provided could equally apply to RSLs, ALEOS and umbrella bodies such as COSLA:

"Information on grant-aided schools is available from the Scottish Government and may be available from local authorities as well if they place children in a particular school(s). Indeed, the Regulations referred to above place a variety of conditions on any school in receipt of grant aid, including certain reporting duties... Therefore, extending the Act to grant-aided schools in effect would provide the same right of information access as currently exists for schools under local authority control."²²

¹⁸ For more information see www.scottish.parliament.uk/GettingInvolved/Petitions/PE01539

¹⁹ "10 Years of Fol" pub by OSIC

²⁰ Pg 9

²¹ Pg 11

²² Pg 12

In respect of special schools, the reasoning provided could equally apply to RSLs, ALEOS and umbrella bodies such as COSLA:

“However, extending the Act to independent special schools will provide the same right of information access as currently exists for schools directly under local authority control. Therefore, in similar terms to the reasons for extending the Act to grant-aided schools, we consider that given the factors highlighted above, independent special schools should be considered for inclusion within scope of freedom of information legislation.”²³

An additional area of concern is that the right to access information is being weakened by the contracting out of public services to bodies which are not subject to FoISA. There needs to be a considered approach to close this loophole so that FoI rights in Scotland remain strong. CFoI in S has pushed for this loophole to be closed by suggesting amendments (See Appendix 2) but they were opposed by the Scottish Government.

We do not have the imagination to set out what mediums will be created to deliver public services and those of a public nature so we agree that designation under FoISA should go with the service rather than the body that delivers it.

Certain organisations have been flagged us as interesting creations which do not explicitly advertise FoI rights on their website. There is uncertainty as to whether they are subject to FoISA. How they were set up is crucial eg if set up by the local authorities as jointly-owned then it is covered and if wholly-owned by a public authority then it should be covered? Examples include:

- Hubco – in 2012 hub East Central Scotland Limited (hubco) was set up as a procurement vehicle to support, develop and deliver well designed, affordable, sustainable and functional community facilities that enable effective service delivery throughout the East Central Territory.
<http://www.hubeastcentralscotland.co.uk/about-us/>
- Salus - an NHS based provider of Occupational Health, Safety and Return to Work Services across the public and private sectors. It is the largest multidisciplinary service of the NHS and operates as a social enterprise model. <http://www.salus.co.uk/Pages/default.aspx>

As the consultation points out “In accordance with section 7(3) of the Act, bodies proposed for coverage would only be covered in respect of the information they hold about specified public functions or services. Their duties under the Act would therefore be limited to those functions or services as set out in the order.”²⁴

Complying with freedom of information laws should be an obligation for doing business with the public sector and receiving contracts paid for with public money. Companies and organisations need not seek to deliver such services if they are unwilling to be covered by FoISA.

4. Scotland and the UK FoI Act

²³ Pg 15

²⁴ Pg of the Scottish Government consultation

In Scotland, the UK Freedom of Information Act 2000²⁵ covers reserved bodies such as the Department for Work and Pensions. The Freedom of Information Act is under serious attack as the government has announced a new Commission on Freedom of Information. The terms of reference and composition indicate that its sole purpose is to consider the case for restricting the right of access. It is likely to consider restrictions in three key areas:

- preventing the disclosure of government policy discussions;
- strengthening the ministerial veto; and
- reducing the Act's 'burden' on public authorities.

The case for strengthening the legislation is not on the agenda and the Commission does not include the perspective of the requester. Its report will be issued at the end of November 2015.

In May, the newly elected UK government announced it planned to take powers that enabled it to veto a decision of a court or tribunal. This plan is a reaction to the government's defeat at the UK Supreme Court over whether it should publish Prince Charles' letters to government. A UK government lobby briefing said it was considering moves 'to strengthen the ability of the government to veto the publication of documents' but CFol in S believes that is too much power for Ministers to have.

Practices have also emerged whose impact is to make less information available eg routine email deletions in the civil service and other public bodies and automated systems whereby the sender knows that an email has been deleted without the recipient opening it.

The government is also proposing to introduce fees for appealing against the Information Commissioner's FOI decisions to the Tribunal²⁶. An appeal solely based on written submissions would cost £100; an appeal with an oral hearing would cost £600. Appeals are currently free of charge. Unlike other tribunal proceedings, which typically involve the appellant's *private* rights, FOI appeals generally seek to promote the *public interest* by making information public. Measures that restrict the ability to appeal will affect the whole public, not just the individual requester. The introduction of fees for appeals to the employment tribunal has severely cut the number of unfair dismissal claims to about 1/3 of their previous level. Introducing fees for FOI appeals is likely to have a similarly drastic impact. However, public authorities challenging pro-disclosure decisions are unlikely to be deterred by the proposed fees. The proposals are available for consultation until 15th September 2015.

We need to work with colleagues across the UK to defend current FOI rights and campaign for existing rights to be extended so there is robust and enforceable transparency in government.

5. Partial Business and Regulatory Impact Assessment'

²⁵ The Act, as amended appears on UK Government website at <http://www.legislation.gov.uk/ukpga/2000/36/contents>

²⁶ For more information on the consultation see https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/enhancedfeesresponseconsultationonfurtherfees.pdf

It is odd that a 'Partial Business and Regulatory Impact Assessment' was undertaken but no Human Rights Impact Assessment (see Section 6). The objective of the assessment is stated as

"To consider whether certain bodies considered to deliver 'functions of a public nature' should be made subject to the requirements of the Act and the Environmental Information (Scotland) Regulations 2004 (EIRs) and other legislation including those duties public authorities are required to undertake under the Climate Change (Scotland) Act 2009."²⁷

Furthermore we are reminded that "Under section 5 of the Act, coverage can be extended by order to bodies which appear to the Scottish Government to be exercising functions of a public nature and to contractors who provide services that are a function of a public authority." Accepting this logic, it is difficult to understand why such a narrow number of functions/bodies are proposed for FoISA coverage.

The assessment actually makes the case for the CFoI in S position:

"The Scottish Government is concerned that the provision of public services or services of a public nature by private bodies which are not subject to the requirements of the Act may limit the public's right of access to information about those services. Ministers are committed to promoting increased openness and transparency in the delivery of public services. It is a key 'national outcome' within the Government's performance framework that Scotland's public services are high quality, continually improving, efficient and responsive to local people's needs. The rights afforded by freedom of information legislation can play a key part in achieving this goal, by allowing people to hold their public services fully to account and in promoting increased transparency.

And

"Enabling the public to make information requests directly to the bodies themselves would address any difficulties the public may have in obtaining information which may result from outsourcing of public functions. It would also in some cases facilitate more consistent disclosure of information about, for example, how a public service is being delivered."²⁸

And

"Under section 60 of the Act a statutory Code of Practice provides guidance to public authorities about their duties under the Act. The Code includes the promotion of transparency with regards to making available contractual and procurement related information. The Code sets out a series of guiding principles, including transparency in the use of public funds."²⁹

The assessment fails to acknowledge that, currently, the EIR(S)s can also apply to private companies.

6. Human Rights

FOI can be interpreted from a human rights perspective as the "free circulation of ideas" and FOI as "access to information held by public authorities". Two different

²⁷ Pg 16

²⁸ Para 2.6 – 2.7 pg 17

²⁹ Pg 18

conceptions and for the purposes of this document, CFoI in S is concentrating on the latter.

The human rights implications of this consultation should be considered by two sets of civil servants: those working for the Scottish Government to ensure compliance and those working for the Scottish Parliament to ensure compliance. However MSPs will not have any detailed information on compliance – just a standard statement.

The right to access information is a human right and it appears that case law at the European Court of Human Rights is upholding the right to empower individuals and organisations to hold States to account and be more transparent. That progressive approach is not being replicated in Scotland.

It is a fundamental human right to form an opinion and in order to do that you have to receive and impart information.

- The Universal Declaration on Human Rights includes this right - Article 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- The European Convention on Human Rights (ECHR) is described as a 'living treaty' as rights evolve over time and are interpreted by decisions of the European Court of Human Rights (ECtHR). One clear example is Article 10 of the ECHR which states: "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..."

According to S6 of the Human Rights Act 1998, all public authorities and those delivering services of a public nature are covered by the ECHR eg Housing Associations. As the right to know can be interpreted as a human right, whatever the Scottish Parliament or the Scottish Government decides, people can exercise their human right to access information. That may be more complex but the result could be the same. It would be simpler just to reform FoISA following this consultation, and add appropriate organisations such as RSLs and Housing Association to the list of named bodies using FoISA's section 5 powers.

The following selection of cases and trends are highlighted to enable informed discussion about the consultation's compliance with ECHR given that it fails to amend FoISA and bring in a range of ALEOs, housing associations and bodies that deliver services of a public nature: *Tarsasag v. Hungary* 2009³⁰, *Kenedi v.*

³⁰ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171#{"itemid":\["001-92171"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171#{)

Hungary³¹, Matky v Czech Republic³², Gillberg v Sweden³³, Hadzhiev v. Bulgaria³⁴ and Guerra and Others v. Italy³⁵

Furthermore Article 19 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to information and has relevance to the work of the Scottish Parliament given articles 29, 57, 100 and Schedule 5(7) of the Scotland Act 1998:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

For more information see our 30th Anniversary publication “30:10 Reflecting and Protecting Freedom of Information Rights”.³⁶

We are disappointed that no ‘Equality and Human Rights Impact Assessment’ (EqHRIA) was undertaken as part of this consultation process. It is reasonable to assume that one would be undertaken as good practice and to comply with the Scotland Act 1998. In addition such an assessment would evidence the Scottish Government’s commitment to deliver on Scotland’s National Action Plan on Human Rights (SNAP). The framework for an EqHRIA has been developed by the Scottish Human Rights Commission and the Equality and Human Rights Commission Scotland.³⁷

We note the BRIA and suggest that sends out a poor message that understanding the impact on individual rights is less important than the impact on business.

5. Conclusions

The information and analysis provided in this consultation is very interesting and useful, for example that only one out of the five services providing secure accommodation for children is run directly by a public authority. We agree with the Scottish Government that a factor based approach is sensible “class as set out in the consultation document, in deciding which additional bodies should be designated under FoISA.

We are alarmed that the Scottish Government is using a consultation on FoI to define what it considers to be “core” public services. This is a huge issue and would remind the Scottish Government that the debate should be about FoI rights following the public pound. We reject any attempt to introduce a hierarchy of services.

³¹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663#{\"itemid\":\[\"001-92663\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663#{\)

³² 19101/03 ECHR 1205 (10 July 2006)

³³ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144#{\"itemid\":\[\"001-110144\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144#{\)

³⁴ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{\"itemid\":\[\"001-114076\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{\)

³⁵ http://www.hrcr.org/safrica/environmental/guerra_italy.html

³⁶ At our website <https://www.cfoi.org.uk/2015/01/3010-reflecting-and-protecting-freedom-of-information-rights/>

³⁷ More information can be found at <http://www.scottishhumanrights.com/eqhria>

Accessing information is a fundamental human right. The right enables people to choose the time of their engagement and what information they need, it enables active people rather than passive recipients of services.

The Scottish Government is saying all the right things about access to information, openness, accountability, participation, but it is not doing the right thing. We call on the Scottish Government to restore our freedom of information rights to their 2002 state and to extend FoI rights to new bodies such as RSLs. There is no shortage of evidence to support our arguments – we have provided responses and commentary on consultations and bills as have other organisations such as UNISON. There is also a significant body of research and evidence, over a prolonged period from the first and second Information Commissioners in Scotland including “FoI Ten years on: are the right organisations covered?”³⁸

The Scottish Government states that “Responses to the consultation will clearly be a critical element in developing the terms of any draft order.”³⁹ We are not optimistic that the views of the requester will be listened to.

7. Recommendations

CFoIS wants organisations and individuals to understand the impact of the subtle and systematic weakening of our right to know. So we recommend that:

1. The Scottish Parliament undertakes an inquiry into the weakening of FoI rights in Scotland.
2. The draft order which is the result of this consultation should list those bodies to be designated, and functions to be designated, which are subject to FoISA. That list should contain those proposed in the Scottish Government consultation of 2010:
 - 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
 - Contractors who build, manage and maintain trunk roads under private finance contracts.
 - Third sector charities and non-profit bodies providing eg residential and/or community-based care.
3. In addition, all public contracts over an agreed amount should be subject to FoISA.
4. Private organisations that deliver a public service or a service of a public nature should be covered.

³⁸

<http://www.itspubliknowledge.info/home/SICReports/OtherReports/DesignationConsultation2015CommissionersResponse.aspx>

³⁹ Pg 7

5. All Arms-Length External Organisations (ALEOS) should be subject to FoISA. We recognise that this is a generic term but it is universally understood in Scotland.
6. The recommendations in the Scottish Information Commissioner's report 'Fol Ten years on: are the right organisations covered?'⁴⁰ should be implemented in full.

Question 1

Do you agree with the proposal to extend freedom of information coverage to contractors who run privately managed prisons?

Yes, but the same arguments for freedom of information coverage apply to RSLs, ALEOS, contractors who build and maintain hospitals and schools.

Question 2

Do you agree with the proposal to extend freedom of information coverage to providers of secure accommodation for children?

Yes, but the same arguments for freedom of information coverage apply to RSLs, ALEOS, contractors who build and maintain hospitals and schools.

Question 3

Do you agree with the proposal to extend freedom of information coverage to grantaided schools?

Yes, but the same arguments for freedom of information coverage apply to RSLs, ALEOS, contractors who build and maintain hospitals and schools.

Question 4

Do you agree with the proposal to extend freedom of information coverage to independent special schools?

Yes, but the same arguments for freedom of information coverage apply to RSLs, ALEOS, contractors who build and maintain hospitals and schools.

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<http://www.itspublicknowledge.info/home/SICReports/OtherReports/DesignationConsultation2015CommissionersResponse.aspx>

Appendix 1 Consultation in 2010

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
- 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 consultation⁴¹.

Appendix 2 Amendments Lodged at Stage 3 of the Freedom of Information (Amendment) Scotland Bill

CFoI in S has decided to re-produce the amendments tabled in 2013 to evidence that our repeated calls for FoISA to be extended to a broad range of organisations/functions, have been ignored. We have made reasoned arguments.

Stage 1 Report

Extending the range of bodies covered by FoISA was a matter raised by a range of organisations in evidence submitted. In the Finance Committee's Stage 1 report it was acknowledged, for example, "extending FoI coverage to public contracts with arm's length organisations featured in a number of submissions including the CFIS, South Lanarkshire Council, Consumer Focus Scotland, SCVO, UNISON Scotland and the STUC"⁴². In oral evidence, extension of coverage was raised by CFoIS and the Office of the Scottish Information Commissioner (OSIC). In evidence a report on ALEOs by Audit Scotland was highlighted including that there are over 130 "major" ALEOs' and that Audit Scotland was not able to identify all ALEOs that operate⁴³. We welcomed the opinion of the Committee to 'note the report from Audit Scotland which identifies around 130 major ALEOs and shares the concerns of witnesses set out above.'⁴⁴

The Finance Committee's Stage 1 report concluded that "The Committee also invites the Cabinet Secretary to provide details and timings of how the Scottish Government

⁴¹ <http://www.scotland.gov.uk/Resource/Doc/319057/0101913.pdf>

⁴² Stage 1 Report of the Finance Committee published 2nd November 2012 Para 57
http://www.scottish.parliament.uk/S4_FinanceCommittee/Reports/fir-12-06w.pdf

⁴³ 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, pg 5, pg 6 Para 19

⁴⁴ Stage 1 Report of the Finance Committee published 2nd November 2012 Para 77

intends to take forward the issue of extension of coverage and clarify what the options are which she is 'actively considering', including the possibility of Stage 2 amendments to section 5 of the 2002 Act."⁴⁵ We regard the current amendments from the Scottish Government are inadequate: the focus must be on maintaining and extending FoISA rights to 'public' services that people receive and timescales on using the S5 power must be precise to protect the public's enforceable right to know.

Transparency Agenda Undermining FoISA Rights?

It is not a competition – the public's enforceable right to know can be maintained and extended as well as the public sector proactively disclosing more information under the 'transparency agenda'. Unfortunately it appears that transparency is being used to undermine FoISA rights eg housing associations are still not covered by FoISA (despite promises in 2002) and instead the Scottish Housing Charter is being promoted. Under FoISA the public can choose what and when it wants information and can appeal to the OSIC if the information is refused: transparency means the power to withhold and to publish, to decide timelines is held by the public sector, including Government.

Human Rights Compliance

CFoIS wants FoISA to provide a robust framework so the public can exercise an enforceable right to know. Human rights law is relevant as we have a fundamental human right to form an opinion and in order to do that you have to receive and impart information – Article 10 of the European Convention on Human Rights (ECHR).

According to S6 of the Human Rights Act 1998, all public authorities and those delivering services of a public nature are covered by the ECHR eg Housing Associations. As the right to know can be interpreted as a human right, whatever the Scottish Parliament or the Scottish Government decides, people can exercise their human right to access information. That may be more complex but the result could be the same. Simpler just to reform FoISA via this Bill, add the Glasgow Housing Association immediately and require the Scottish Government to promptly use its S5 powers to bring more named bodies and categories of organisations under FoISA.

Amendments – Explaining CFoI in S's Views Section 1A

Elaine Murray

1 In section 1A, page 1, line 11, after <persons,> insert–
<() consult members of the public,>

Support: members of the public have a specific role to play in informing the Government's view of which bodies should be covered by FoISA. Currently there is no specific duty to consult with them and to give their opinion due regard. The last formal consultation (2010) on specific bodies to be added, included a draft Order to be laid before the Scottish Parliament, but resulted in no additions to FoISA so it is

⁴⁵ Ibid, Para 93

crucial to ensure that those who want to exercise their FoI rights are listened to as well as those proposed to be obliged to give information under FoISA.

Elaine Murray

2 In section 1A, page 1, line 17, leave out <2016> and insert <2014>

Support Since 2002, when the then Scottish Executive first promised to add in new bodies, there has been a trail of broken promises to bring named bodies such as ACPOs and categories of bodies such as housing associations, under FoISA. Success was achieved at Stage 2 by accepting the principle of a timeline and reporting to Parliament on the use of the S5 power under FoISA but the first one would not happen in this Parliamentary session so the duty would be inherited by the next administration. At Stage 3 the Scottish Government is amending its own amendment and proposing to marginally bring forward to first report to 31st October 2015. Having to wait even until June 2014 seems long enough.

Elaine Murray

3 In section 1A, page 1, line 18, leave out <3> and insert <2>

Support: By requiring Scottish Ministers to report to Parliament every two years on its use of the S5 power under FoISA, at least there will be a duty to regularly consider action rather than ignoring the potential to extend the public's right to know in Scotland. Two years is sensible and proportionate.

Elaine Murray

4 In section 1A, page 1, line 19, at end insert—

<() The first report must either—

(a) explain how the section 5 power has been exercised during the reporting period (and why), or

(b) state that the Scottish Ministers will, within 3 months after the date the first report is laid, lay before the Parliament a draft of a statutory instrument containing an order exercising the section 5 power.>

Support: Reports to Parliament need to be detailed and set out opinion and analysis from Scottish Ministers as well as factual details. This amendment also recognises that after the report there needs to be action hence the timeline of three months to publish a draft statutory instrument. It would be helpful if MSPs could secure a commitment from Scottish Government Ministers that the Scottish Parliament will be asked to vote for the statutory instrument promptly.

Elaine Murray

5 In section 1A, page 1, line 20, leave out <A> and insert <Each subsequent>

Support: Provides clarity as sets out content in each report after the first one.

Before section 1A

Elaine Murray

6 Before section 1A, insert—

<**Scottish public authorities**

In section 3 (Scottish public authorities) of the FOI Act, after subsection (1) there is inserted—

“(1A) Subsection (1B) applies where, after the date on which this subsection comes into force, a Scottish public authority makes arrangements for another person (other than another Scottish public authority) to exercise any function of the authority or provide any service whose provision is a function of the authority.

(1B) That person is a Scottish public authority, but only in respect of information relating to the exercise of the function or, as the case may be, provision of the service covered by the arrangements.

(1C) In subsection (1A), “arrangements” includes—

(a) the establishment of a body for the purpose of exercising any function of the authority or providing any service whose provision is a function of the authority,

(b) contractual arrangements, but only where the total sum to be paid by the authority under the contract exceeds £1 million.”

Support: Provides legal protection to maintain the public’s right to know. Ensures that the public does not lose its right to access information if a public body chooses a different mechanism to deliver a public service. This is consistent with the original intention of FoISA as its long title states that the act makes provision for “the disclosure of information held by Scottish public authorities or by persons providing services for them”. The amendment provides protection for the provider of the service as only information relating to the exercise of the function or provision of the service is covered.

Elaine Murray

7 Before section 1A, insert—

<Information relating to functions of an authority

In section 3 (Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) Subsection (2B) applies where, after the date on which this subsection comes into force, a Scottish public authority makes arrangements for another person (other than another Scottish public authority) to exercise any function of the authority or provide any service whose provision is a function of the authority.

(2B) Information relating to the exercise of the function or, as the case may be, provision of the service covered by the arrangements, and created by or in the possession of—

(a) the person with whom the arrangements are made, or

(b) any other person sub-contracted to provide the service or exercise the function or any part of it on behalf of the person, is, for the purposes of subsection (2)(b), information held on behalf of the authority.

(2C) The arrangements must include provision to ensure the timely provision to the authority of information within the meaning of subsection (2B) where the authority receives a request for the information under section 1(1) of this Act.

(2D) In subsection (2A), “arrangements” includes—

(a) the establishment of a body for the purpose of exercising any function of the authority or providing any service whose provision is a function of the authority,

(b) contractual arrangements, but only where the total sum to be paid by the authority under the contract exceeds £1 million.”

Support: Places a duty on contractors to provide public bodies with the information they need to answer FoISA requesters. This is in keeping with the long title of FoISA that the act makes provision for “the disclosure of information held by Scottish public authorities or by persons providing services for them”.

Section 1A

Elaine Murray

8 In section 1A, page 1, line 5, at end insert—

<() In section 5 (further power to designate Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) In considering how to exercise the power under subsection (1) the Scottish Ministers must have particular regard to the desirability of providing access to information held by—

(a) any body that has been established by a Scottish public authority to exercise any functions or provide services on its behalf which is not a Scottish public authority within the meaning of section 3(1), and

(b) any person within the meaning of subsection (2)(b) where the total sum to be paid by the authority under the contract exceeds £1 million.”>

Support: This amendment is designed to ensure that arm’s-length external organisation (ALEO) are not used as a vehicle to deprive the public of their enforceable right to access information. ALEOs 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.”⁴⁶ The report points out that “The principles of openness, integrity and accountability that councils observe apply equally when services are delivered through ALEOs.”⁴⁷ 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”.⁴⁸

Before section 1A

Michael McMahon

9 Before section 1A, insert—

<**Purposes of FOI Act**

Before section 1 of the FOI Act there is inserted—

“A1 Purposes

⁴⁶ 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

⁴⁷ Ibid pg 5

⁴⁸ Ibid pg 6 para 19

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.”.>

Support: The most important element of the amendment is "to increase progressively the availability of information held by Scottish public authorities" as that has not happened eg public authorities creating ALEOS that operate outwith FoISA. An added complication is the recent Scottish Government's attention to the 'transparency agenda' whereby the public sector decides what information it releases and when eg in respect of housing and housing associations with the Scottish Housing Charter. Instead the focus should be on extending FoISA rights so individuals and groups can decide when to use their enforceable right to access information.

During Stage 2 the DFM made a very useful statement about why she rejected the purpose clause amendment: "Adding such a clause in that manner would be unpredictable, because it could lead to the act being interpreted in a very different manner from the one in which Parliament originally intended it to be interpreted."⁴⁹

That is precisely why CFoIS wants to insert a purpose clause as already FoISA is not delivering what MSPs intended eg creation of ALEOs which operate outwith FoISA despite the fact that they deliver services 'on behalf of public authorities'.

Ten years after FoISA was passed and eight years since it became operational, current MSPs and the Scottish Government need to explicitly state that they support and will uphold the public exercising an enforceable right to access information. 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 wants MSPs to stand up for the public's enforceable right to know – on the record!

Section 1A

Nicola Sturgeon

10 In section 1A, page 1, line 17, leave out <30 June 2016> and insert <31 October 2015>

⁴⁹ Meeting of Finance Committee on 5th December 2012, Stage 2, Official Report col 1937
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7581&mode=pdf>

Oppose: This is an amendment to the amendment already proposed by the Scottish Government and is a very disappointing. Its effect is to ensure that the current administration is not required to produce a report until six months before the elections to the Scottish Parliament in May 2016. The current administration have been in office since May 2007 and could have exercised the S5 power at any time eg to add trusts providing services on behalf of local authorities ,housing associations, private sector companies who build and maintain local authority schools or hospitals and the prison run by the private sector.

Nicola Sturgeon

11 In section 1A, page 2, line 13, leave out <at least 3 years preceding> and insert <time from the date on which section 1A of the Freedom of Information (Amendment) (Scotland) Act 2013 comes into force until>

Oppose: The first report on the use of S5 power needs to be detailed and explain what has happened since 2002. To remove eleven years of detail from the report means that it will be incomplete and fail to provide proper context.

After section 3

Paul Martin

12 After section 3, insert—

<Functions of Commissioner

In section 43 (general functions of Commissioner) of the FOI Act, after subsection (3) there is inserted—

“(3A) The Commissioner must prepare, publish and update as necessary a list comprising those persons or bodies who are Scottish public authorities within the meaning of section 3(1).”.>

Support: This is helpful as the public can check which bodies are covered by FoISA and will assist in identifying gaps that need to be closed by use of the S5 power.

Section 4

Nicola Sturgeon

13 In section 4, page 3, line 1, leave out <rule> and insert <enactment>

No view as this appears a technical amendment

After section 1A

Iain Gray

14 After section 1A, insert—

<Scottish public authorities

In schedule 1 (Scottish public authorities) of the FOI Act, after paragraph 66 there is inserted—

“The Glasgow Housing Association Ltd.”.>

Support: In 2010, the Scottish Government consulted on whether to use the S5 power to add in new bodies including the Glasgow Housing Association. There was and is a lot of support for this addition to FoISA but nothing has happened. By adding the GHA directly into Schedule 1, there is no need to lay an order under S5 so this is a neat route to address an established omission.