

Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations

Scottish Government Response

January 2016

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Introduction

The Freedom of Information (Scotland) Act 2002 ('FOISA')

FOISA provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and Government, to local authorities, NHS boards, higher and further education bodies, doctors and dental practitioners.

The provisions of FOISA can be extended to bodies that carry out functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

This can be done by making an order under section 5 of FOISA, which designates those bodies as a Scottish public authority for the purposes of the legislation. They are then subject to the full requirements of FOISA and must therefore respond to written requests for information and proactively publish information described in their Publication Scheme. They would also automatically become subject to the requirements of the Environmental Information (Scotland) Regulations 2004 (EIRs).

Bodies proposed for coverage would only be covered in respect of the information they hold about specified public functions or services. Their duties under FOISA would therefore be limited to those functions or services as set out in the order.

The Scottish Government brought forward Scotland's first order under section 5(1) of FOISA in September 2013. Following consideration by the Parliament the order came into effect on 1 April 2014.

The order extended coverage of FOISA to certain trusts which have been created by local authorities to deliver sporting, cultural and leisure facilities and/or activities on behalf of the local authority(ies).

At the time that order was debated by the lead Parliamentary Committee the then Deputy First Minister made clear that it was seen as an initial order and that consultation on further extension would follow once we had had an opportunity to see how FOISA impacted on the trusts covered by the first order.

In line with this commitment the Scottish Government brought forward further proposals and consulted on extending coverage of FOISA to:

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

During the consultation period we also formally consulted Scottish Health Innovations Ltd (SHIL) with a view to extending coverage of FOISA to them as, in our opinion, they also exercised functions of a public nature.

The consultation paper – as well as responses to the consultation – can be accessed via the Scottish Government [consultation webpages](#). This paper summarises key points raised in the consultation and confirms the Scottish Government's views in relation to these key issues and how they will be taken forward in the draft order which will shortly be laid in the Scottish Parliament.

Analysis of key points raised in responses to the consultation

Question 1 - Contractors who run privately managed prisons

Of those responding to this part of the consultation, there was almost universal support for extending coverage to private contractors responsible for managing prisons.

This was primarily for reasons of equity. As noted by the **Prison Reform Trust**, private prisons are providing the same service as state run prisons and as such should be held to the same standards of responsibility in providing information. The Trust also noted (reflecting a point made in the response by the **Centre for Freedom of Information**) that prisoners have no choice as to whether they are held in a private or state-run prison and the rights of people held in these prisons should be equivalent.

In addition, the response from **The Law Society of Scotland (LSS)** noted that the two privately managed prisons were an integral part of the Scottish Penal system. LSS also commented that there was public interest in the taxpayer being able to access relevant matters of expenditure and correct management information in order to ensure best value is being obtained and to ensure transparency in the management of public funds.

We also note the response from **WhatDoTheyKnow (WDTK)** who strongly supported extension to private prison contractors given their view that the detention of individuals in custody under order or sentence of the courts was undoubtedly a public function.

Of the two contractors operating the private prisons, only **Addiewell Prison Ltd (APL)** responded. Key points in their response noted that, to date, private prison contractors had fully supported the Scottish Government in providing information to support FOISA requests. APL also considered that information held by public authorities (as the contracting authority) was already accessible and, given the existing structure in place with the authority, it would be prudent and the most efficient and effective way for the authority to remain as the gatekeeper for requests.

We note APL's concerns about the practical impact – and potential cost implications – of extending coverage to private prison contractors (these are discussed further in the Business and Regulatory Impact Assessment¹).

However, we consider that, for such a key public service, the principle of bringing private prison contractors directly within scope of FOISA as the providers of the service ultimately outweighs any disadvantages due to impacts on the contractors themselves (which are expected to be relatively minor). We also consider that there is a basic issue of parity and equity in terms of accessing information, irrespective of whether the prison is publicly or privately operated.

¹ A copy of the Business and Regulatory Impact Assessment is available at <http://www.gov.scot/About/Information/FOI/Coverage>

Therefore we consider that there is a strong case for proceeding on the basis of the consultation proposals and intend to proceed with extension of coverage to private prison contractors. The draft order proposes to extend coverage to those contracted by Scottish Ministers to provide or run a prison and also those subcontracted to run a prison. In effect, this will extend FOISA to the special purpose vehicles contracted to provide and operate a prison and the sub-contractor operating the prison.

Question 2 - Providers of secure accommodation for children

Responses about providers of secure accommodation for children were very similar in substance to those received in terms of private prison contractors. As with private prison contractors, the majority, but not all, respondents expressed support for extension.

Of those supporting extension to the sector, **Scotland's Commissioner for Children and Young People (SCCYP)** noted the importance of the public service provided to children and young people and that most will have their costs met by their local authority.

The **Prison Reform Trust** also provided strong support for the proposals, in particular noting that all providers of secure accommodation should be held to the same standards of transparency and accountability as state providers are. Similarly, the **Law Society of Scotland** felt there was no strong or logical reason why FOISA should not be extended to include providers of secure accommodation which are managed independently.

However, contrary views were expressed in the response from **Kibble Education and Care Centre** for a number of reasons (though recognising the importance and benefits of freedom of information legislation). Paramount among the various concerns was the potential identification of individuals primarily due to the small number of young people in secure accommodation. Kibble also questioned what further information would require to be provided that was not already available from public bodies including local authorities, the Care Inspectorate, Education Scotland, the Mental Welfare Commission and the Scottish Social Services Council.

In addition, Kibble raised concerns about the investment of resources required to comply with the legislation. On a practical level, Kibble noted the potential implications in terms of cost and time if required to separate information relating to non Scottish-funded young people and non-public funded money and/or of separating information relating to different functions, given the integration of social care, health and education records.

We consider that similar arguments apply to the secure accommodation sector as with the prison sector – both in terms of the functions delivered by the providers of secure accommodation and equity of access to information (one provider is already subject to FOISA as part of a local authority). Becoming subject to FOISA will have some impact on the various bodies. However, given these organisations already comply with the Data Protection Act as well as multiple other regulatory and reporting requirements, we consider this impact can be minimised, especially with appropriate guidance and training.

We remain persuaded by the arguments, given the functions undertaken, in favour of extending coverage of FOISA to providers of secure accommodation for children and young people. The order therefore proposes to extend coverage to organisations providing a secure accommodation service.

Question 3 - Grant-aided schools

Responses concerning grant-aided schools again showed strong support for extending coverage to this particular sector. Responses from the schools themselves, while broadly neutral, suggested general acceptance of the principle behind the proposals.

Support for extension was provided by, among others, **Scotland's Commissioner for Children and Young People (SCCYP)** who considered it appropriate that children, young people and other interested parties were able to hold public services to account. The **Care Inspectorate** also agreed with the proposal to extend coverage to all grant-aided schools due to their reliance of public funding.

The response from the **Scottish Council for Independent Schools (SCIS)**, whose members include grant-aided schools, highlighted a number of concerns about the proposals. In summary, these related to the small size of many of the schools, whether parent or subsidiary bodies would be included within coverage, the range of functions to be included e.g. beyond 'education', as well as more practical issues such as responding to requests outwith term time, the support and training available and the timescale for implementation.

Responses from the sector itself included a representative submission, as well as several submissions from individual schools. The brief collective response from the **grant-aided special schools** focussed on their common concerns regarding the additional administrative and financial burden of responding to FoI requests and the potential resource implications, particularly during school holidays.

Harmeny Education Trust Ltd raised concerns about the pressures of responding to requests detracting administrative staff from supporting those working with a highly complex group of children; the importance of safeguarding the privacy of children and their families; the disproportionate approach given existing reporting requirements and regulation; the unfair focus on a limited number of organisations involved in childcare; and the proposed timescale for implementation.

Similarly, the **Royal Blind School** suggested the proposals would create an administrative burden as well as being at odds with the position of the school as an independent charitable organisation and not an arm of government. The school was also concerned about the scope of the order including non-school activities and the need to modify or qualify the time for compliance in so far as it applied to schools.

Capability Scotland (responsible for Corseford and Stanmore House Schools) believed it to be in the public interest to include grant-aided special schools within scope, along with local authority schools, but also raised concerns about the practical impact of coverage, the support available for preparation, along with the proposed timescale for implementation and responding to requests during holiday periods. Finally, **Jordanhill School**, while also agreeing with the proposal to extend coverage to grant-aided schools, highlighted the issue of appropriate preparation as well as ensuring that information relating to pupils was not inappropriately released.

We acknowledge the various concerns of the sector, particularly in terms of administrative burden, especially during school holidays, and in terms of ensuring adequate protection for personal data.

Extending coverage of FOISA will have some resource impacts, though, with adequate preparation and guidance, experience suggests the impact can be minimised.

In terms of personal data, the schools already comply with data protection legislation. There should be no more requirement to – or probability of – release of personal information simply because an organisation is subject to FOISA than under data protection law.

We continue to consider that there are strong arguments for bringing grant-aided schools within scope of FOISA, given their functions and the fact that they are so significantly dependent on public funding.

The order proposes a 'class designation' in effect bringing within scope all functions relating to the running of a grant-aided school. We consider this approach provides clarity for both the schools and requesters about what is covered. It would not be practical to seek to limit coverage only to aspects of the schools' work funded by Scottish Government grants; in effect, the great majority of their work in educating and providing care for children and young people is publicly funded (either by central or local government or others). We would also clarify that neither parent bodies nor subsidiaries would be brought within the scope of FOISA by the order.

Finally, we note that the impact of the [Doran review](#) may affect funding arrangements for these schools. Depending on the outcome of this review and to ensure continuity of coverage, we would intend, if necessary, to bring forward a further section 5 order in future.

Question 4 - Independent special schools

Again, the majority of responses to this section were supportive of extending coverage of FOISA to independent special schools. However, those responses from the sector itself were not persuaded of the case for extension.

While specific support for extension was again received from **Scotland's Commissioner for Children and Young People (SCCYP)**, the **Scottish Council of Independent Schools** (representing several of the affected bodies) echoed concerns raised in respect of the grant-aided sector (see above) – primarily relating to the administrative impact of coverage.

Of the schools themselves, **Snowdon School** raised concerns about the impact on their service due to the resource burden of compliance with freedom of information legislation as well as risks around the privacy of the young people given the small number of individuals involved. The school considered that the current mechanism of providing information to local authorities was effective and that extension of coverage would not bring any more information into the public domain – particularly as there was already substantial scrutiny, examination and public accountability via the Care Inspectorate, Education Scotland and the Scottish Social Services Council.

Similar points regarding existing transparency and the potential burden of coverage were made by **Crossreach** (responsible for Ballikinrain School) and **Balnacraig School**. Finally, **Kibble Education and Care Centre**, while again recognising the importance of FOI, reflected their earlier comments in respect of secure accommodation (see above).

As with grant-aided schools discussed above, we acknowledge the concerns of the independent special school sector in terms of administrative burden and the risks around the potential release of personal information. However, as suggested above, we consider that, with adequate preparation and guidance, the impact can be minimised.

Again, as independent special schools will already be complying with data protection legislation, the introduction of FOISA should not in practice increase the possibility of the release of personal data.

Given the range of what we would consider to be public functions undertaken by independent special schools, as well as their considerable reliance on public funding, we remain of the opinion that FOISA should be extended to this sector. As with the grant-aided schools above, the order proposes a 'class designation' in effect bringing within scope all functions relating to the running of an independent special school. Again, we consider this approach provides clarity for both the schools and requesters.

Question 5 – coming into force date

A majority of those who answered this question were broadly happy with the proposal that the bodies should come under FOISA from 1 April 2016. However, there were quite a number of respondents who raised significant concerns, particularly many of those from the affected bodies, that this would not give them enough time to prepare for coverage. We also note that the Scottish Information Commissioner expressed concern about the proposed timescale and whether this provided adequate preparation time for the various bodies.

We are sympathetic to these concerns and consider it imperative that organisations have sufficient time to prepare for inclusion within scope of FOISA. This should also include appropriate time for the Commissioner and her staff to provide training and guidance for those organisations.

To take into account these practical concerns and in the interests of effective implementation, we now intend that the order should come into force on **1 September 2016**.

In addition, noting that many of the bodies proposed for inclusion are schools, we intend to consult on regulations under section 10 of FOISA amending 'time for compliance' requirements to allow schools more time to respond to information requests over holiday periods.

Questions 6 and 7 – Business and Regulatory Impact Assessment (BRIA) and Equalities Impact Assessment (EQIA)

Only a minority of respondents commented on the draft BRIA or on whether there were likely to be any impacts on any particular equalities groups as a result of the proposals. Any comments have been taken into account in finalising the BRIA and EQIA² for these proposals.

² Links to copies of the BRIA and EQIA are available at <http://www.gov.scot/About/Information/FOI/Coverage>

Question 8 – bodies suggested for future orders, including Registered Social Landlords

The consultation paper invited proposals in respect of other organisations or types of body which should be considered in future for inclusion within scope of FOISA.

The consultation did not propose to extend coverage of FOISA to registered social landlords (RSLs) – noting that the Scottish Government was ‘not currently persuaded of the merits of extending coverage’. However, acknowledging the continuing interest in extending coverage to this sector, the consultation paper encouraged landlords and tenants to provide their views.

Approximately half of all responses made reference to RSLs. The majority of these responses were from RSLs themselves or from representative tenant organisations.

Of the RSLs which responded, several of which stressed the extent that they were already subject to regulation, almost all endorsed the response from the Glasgow and West of Scotland Forum of Housing Associations (GWSF).

GWSF noted that the results of the first year of the Scottish Social Housing Charter indicated that RSLs scored more highly than local authorities on how well informed tenants felt about their landlords’ services, that a number of RSL activities did not fall into the ‘of a public nature’ category - and that coverage would have resource implications for often very small organisations.

Broadly similar points were made by the Scottish Federation of Housing Associations (SFHA) who welcomed the decision not to consult on extension at this time in favour of focussing on the forthcoming review of the Charter to assess its effectiveness in terms of promoting openness and transparency.

We also note that the Chartered Institute of Housing Scotland welcomed the decision not to extend coverage at this point in time, in particular commenting that housing association activities were overseen by the Scottish Housing Regulator and noting that it was unclear whether extension of coverage might lead to their reclassification as public bodies.

The key issue for the registered tenant organisations – who were universally in favour of extending coverage – was one of achieving parity and equity with local authority tenants (themselves able to access information under Fol from their local authority landlords).

We also note the response in support of extending coverage to RSLs from Ann Booth (whose petition on this is currently before the Scottish Parliament’s Infrastructure and Capital Investment Committee) which in particular considered that the broad range of functions of RSLs were of a ‘public nature’ and that the Charter was inadequate in that the Scottish Housing Regulator could not compel an RSL to provide information to a tenant.

While both BBC Scotland and Homeless Action Scotland supported extension to RSLs, their responses reflected that an order could take into consideration the

particular functions of the organisations, such as exempting commercial elements of their work, as well as potentially excluding RSLs below a certain size.

Finally, the Scottish Information Commissioner made a number of comments on this issue in her response, which noted that there are potentially both strong arguments for and against extending coverage to RSLs.

Extending coverage to RSLs

The question of whether registered social landlords should be subject to freedom of information legislation is one that has been discussed since the Scottish Parliament debated the original Freedom of Information Bill. As noted above, there is currently a petition before the Scottish Parliament requesting that FOISA be extended to RSLs. A considerable number of consultation responses have made the same proposal and we also acknowledge the view of the Scottish Information Commissioner, in her 'Special Report' on coverage, that consideration be given to an order extending FOISA to registered social landlords.

Given this combination of factors we are now of the view that there are persuasive arguments favouring extension of coverage of FOISA to registered social landlords and that the sector should be formally consulted in order to fully explore the issues involved and consider which of their functions should be subject to FOISA.

We therefore propose to consult the RSL sector in tandem with this year's review of the Scottish Social Housing Charter.

Future orders covering other sectors

In addition to RSLs, a relatively small number of respondents identified a wide range of organisations undertaking a variety of functions considered appropriate for inclusion.

The main bodies suggested included:

- outsourced health and social care providers;
- arm's length external organisations (ALEOs);
- public transport companies (train and bus);
- third sector organisations;
- energy companies;
- port authorities;
- Hub companies (Hubcos);
- Community councils.

As noted in the consultation paper, we seek to ensure Scotland's freedom of information legislation remains robust and up-to-date. This means the legislation should where appropriate reflect the variety of ways in which key public functions are delivered.

We intend to maintain our incremental approach to extending coverage of FOISA. As such, we will engage with relevant stakeholders before bringing forward further proposals for extending coverage in due course. In considering which bodies should be proposed for FOISA coverage in future, we will look at the extent to which each of the types of body suggested meets the factors identified in the recent report³ which the Scottish Government laid in the Scottish Parliament on extension of coverage.

³ See <http://www.gov.scot/Resource/0048/00488439.pdf> (especially pages 7 to 8)

Next Steps

Having considered the responses made to the consultation we remain of the opinion that the organisations set out in the consultation paper perform functions of a public nature – or are providing under contract made with a Scottish public authority a service whose provision is a function of an authority. We are therefore laying an order on the basis of the proposals set out in the consultation paper, but, as noted above, we have taken account of concerns raised about having the order coming into force on 1 April 2016. The commencement date has therefore been moved back to **1 September 2016**.

In addition, noting the fact that many of the affected bodies are schools, many of which only operate during term-time, we propose to consult on Regulations under section 10 of FOISA amending the ‘time for compliance’ in respect of requests made to those individual schools which would be brought within the scope of FOISA. Normally public authorities must respond to requests within 20 working days, but it is possible to bring forward regulations to vary this for certain bodies in certain circumstances. These Regulations will be subject to consultation in early 2016.

Finally, as noted above, we are persuaded that there should be formal consultation with the registered social landlord sector, complementary to this year’s review of the Scottish Social Housing Charter.



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