

# **Consultation on Freedom of Information extension of coverage**

## **Consultation Analysis**

**March 2020**

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## Introduction

### *The Freedom of Information (Scotland) Act 2002*

1. The introduction of the Freedom of Information (Scotland) Act 2002 (FOISA), which came into force in 2005, effected a significant enhancement of rights to access information held by Scottish public authorities.
2. FOISA provides a statutory right of access to information held by Scottish public authorities. These include the Scottish Parliament and the Scottish Government, local authorities, NHS Boards, higher and further education institutions, Police Scotland, doctors and dentists, among others.
3. In order to keep FOISA up to date, section 5 enables the Scottish Ministers to designate additional bodies as Scottish public authorities. Once designated, any new Scottish public authority is required to comply with FOISA, including the three principal duties of proactively publishing information, responding to requests for information, and providing advice and assistance to requesters. It also automatically becomes subject to the Environmental Information (Scotland) Regulations 2004.
4. Where Scottish public authorities are designated in respect of certain functions or services, they are only required to provide information that relates to those functions or services.
5. A section 5 order can designate persons or bodies that:
  - (a) appear to the Scottish Ministers to exercise functions of a public nature; or
  - (b) provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority.
6. It is not possible to designate a person or body if it could be added to schedule 1 instead (section 4 of FOISA explains who can be added to schedule 1) or if it is a public body or the holder of a public office.
7. In other words, designation under section 5 is for persons or bodies that are not themselves public, but either exercise functions of a public nature or have a contract with a Scottish public authority to provide a service which is a function of that authority.
8. The Scottish Ministers have carried out three previous extensions of FOISA using their section 5 powers, in 2013, 2016 and 2019. The most recent order came into force on 11 November 2019, extending coverage to registered social landlords and their subsidiaries. The earlier orders extended FOISA to:
  - (a) arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities (2013 Order)
  - (b) grant-aided schools and independent special schools (2016 Order)
  - (c) providers of secure accommodation (2016 Order)

(d) Scottish Health Innovations Limited (2016 Order)

(e) private prison contractors (2016 Order)

9. In June 2018, the Scottish Parliament agreed that the Scottish Government should consult on proposals to further extend coverage of Scotland's freedom of information legislation, for example, to companies providing services on behalf of the public sector. Accordingly, the principal focus of the consultation has therefore been to establish the potential range of organisations which may be identified as providing services on behalf of a Scottish public authority and which might therefore be considered as candidates for designation for that reason.

10. However, the consultation also provided an opportunity to consider the potential for extension to organisations which exercise functions of a public nature.

11. This report presents the analysis of responses to the public consultation exercise. That consultation has taken place concurrently with, but independently from, the post-legislative scrutiny of FOISA being undertaken by the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee. Many of the oral and written submissions to the Committee also raised issues regarding the coverage of FOISA, and whether it should be extended. When considering our next steps, we will take into account the points made in these submissions to the Committee. We will also consider any views about extension expressed by the Committee itself in its report.

#### *The consultation*

12. The Scottish Government sought views on further extending the coverage of FOISA, with a focus on those who provide services on behalf of the public sector, via a public consultation exercise which ran from 30 August to 3 December 2019.

13. The consultation paper provided information on FOISA, the Scottish Ministers' powers to extend coverage under section 5, and previous extensions. It posed the following questions:

1. Do you think that the Scottish Ministers should extend the Freedom of Information (Scotland) Act 2002 to organisations that provide services on behalf of the public sector?
2. Which services provided on behalf of the public sector by organisations should be considered for extension?
3. Are there any services provided on behalf of the public sector by organisations that you think should be excluded from consideration?
4. Are there any conditions that you think should be satisfied before organisations providing services on behalf of the public sector become subject to FOISA?
5. Do you have any comments on whether extending FOISA to organisations providing services on behalf of the public sector is likely to impact on those organisations' ability to provide services in this way?

6. Do you have any comments or evidence about the effectiveness of accessing information about a contract to provide services to the public sector by making requests to the Scottish public authority that has contracted out the service?
7. Do you have any comments on the types of person, body or organisation – or on the functions of a public nature – which should be considered as future candidates when further extending the coverage of FOISA?

#### *The respondents and responses*

14. The consultation received 36 responses: 14 responses were from individuals and 22 responses were from organisations (see the Annex for a list of responding organisations). Generally, third sector organisations were best represented among the respondents. Relatively few private or public sector organisations responded.

15. Most of the responses were submitted via the Scottish Government's consultation hub, Citizen Space, with 10 responses submitted via email.

#### *Approach to analysing the responses*

16. The consultation sought to gather as wide as possible a range of views, and posed a number of open questions. The analysis was therefore primarily qualitative in nature. All responses were downloaded from Citizen Space and reviewed to identify the themes and factors raised. Responses were coded and frequency analysis undertaken to identify the most frequently raised points (although, as noted in the section below, this was not a quantitative exercise due to the non-representative nature of the response).

17. It should be noted that this analysis presents the views as provided by respondents, and does not comment on the accuracy or otherwise of the points they raise.

#### *Interpretation of the findings*

18. It is important to note that the views of those who have responded cannot be assumed to be representative of the views of the wider population due to the relatively small number of respondents and the self-selecting nature of the response. This analysis therefore seeks to draw out the range of factors and issues raised by respondents. It provides some indication of how widespread views were among respondents, but intentionally avoids a quantitative assessment of the response as being to any extent 'representative' of all views.

#### *This report*

19. This report presents an overview of the range of responses received to the consultation, drawing out the themes that emerged and the detail of specific points raised by respondents.

## Analysis of responses

### *Introduction*

20. The consultation asked a number of questions intended to provide respondents with the opportunity to contribute their views on the issue of extension of FOISA. This reflects the purpose of this exercise: to gather evidence of stakeholders' views and experiences in order to inform the Scottish Government's next steps.

21. The sections below briefly summarise the responses received to the specific questions posed. It should be noted respondents to this exercise were self-selecting, and relatively small in number. This exercise cannot therefore be regarded as providing a robust analysis of the views of all relevant stakeholders or the wider public. The qualitative analysis which follows therefore focuses on drawing out the key themes raised by stakeholders and the main alternative perspectives which arise from the 36 responses.

22. Of the 22 responses received from organisations, 15 were from third sector organisations or organisations which represent or regulate the third sector (including the Office of the Scottish Charities Regulator (OSCR)). By contrast only 3 were from private sector organisations or industry bodies. Besides the response from OSCR, a further 3 public sector organisations (including the Scottish Information Commissioner) responded. A trade union (with members across the public, private and third sector) also responded.

23. Therefore it might be considered that private and public sector organisational perspectives were somewhat under-represented among the responses in comparison to third sector perspectives. A list of organisations who responded is provided in the Annex.

### *Question 1*

#### **Do you think that the Scottish Ministers should extend the Freedom of Information (Scotland) Act 2002 to organisations that provide services on behalf of the public sector?**

24. Almost half of the respondents to the consultation (17 of 36 respondents) stated that they did think that the Scottish Ministers should extend FOISA to organisations that provide services on behalf of the public sector. Just over one-fifth of respondents (8 of 36) stated that they did not think that the Scottish Ministers should extend FOISA to organisations that provide services on behalf of the public sector. A total of 11 respondents either stated that they were unsure (6 respondents) or did not directly address the question (5 respondents).

25. However, of the 11 respondents who stated they were unsure or did not directly address this question, 9 did so in the context of raising particular concerns about the impact of extension in their own sector. There was therefore an approximately equal division between responses broadly in favour of extension of FOISA and those which were either opposed, or which raised particular concerns about the impact in the respondent's own sector.

26. On the whole, individual respondents were more sympathetic to the principle of extension than organisations were. Of the 22 organisations which responded to the consultation, 6 indicated they were in favour of extension, 7 indicated that they were opposed to extension and 9 either stated they were unsure or did not directly address the question in their response. Of the 14 individuals who responded, 11 indicated that they were in favour of extension, 1 stated that they were opposed, 1 stated they were unsure and 1 did not answer the question.

27. The Scottish Information Commissioner was among those respondents who indicated that they were strongly in favour of further extension. However, the Commissioner also indicated some concern about the emphasis in the consultation document on using the Scottish Ministers' powers to designate organisations that deliver services under contract with a Scottish public authority as opposed to designating organisations exercising functions of a public nature. The Commissioner considered this could risk creating new inequalities in access to information, for example by treating a service delivered under contract with a Scottish public authority differently from a qualitatively similar service delivered through grant funding received from a Scottish public authority. To mitigate this risk the Commissioner's response proposed that the Scottish Ministers might wish to consider the simultaneous designation of equivalent functions and services under both limbs of section 5.

28. The Scottish Government has noted the Commissioner's views in this regard. We would highlight that previous section 5 orders have mostly designated organisations exercising functions of a public nature. The focus of this consultation on those who provide services on behalf of the public sector has given increased prominence to section 5(2)(b). Nevertheless, we confirm that the purpose of the consultation is to inform the further use of the Scottish Ministers' section 5 powers as a whole.

## *Question 2*

### **Which services provided on behalf of the public sector by organisations should be considered for extension?**

29. A total of 23 respondents answered this question. Of these, 7 expressed strong support for a broad extension to any organisation which receives public funds for the delivery of a service. This included the official responses from the Campaign for Freedom of Information in Scotland and UNISON Scotland as well as 5 individual respondents.

30. A further 5 respondents (4 organisations, 1 individual) express support for a broad extension, but with some qualifications aimed at ensuring proportionality. These included the Scottish Information Commissioner who highlighted the following four specific areas for consideration:

- health and social care services provided under contract to Scottish public authorities
- services provided under PFI/PPP/NPD contract arrangements
- HubCos and services provided under contract through the HubCo model

- transport services provided on behalf of Scottish public authorities

31. A number of other respondents made specific suggestions for organisations or services to which FOISA might be extended, including:

- victim support services provided under contract with the Scottish Ministers (1 respondent) (individual)
- health and care providers (1 respondent) (individual)
- regulatory bodies (1 respondent) (individual)

32. A further 8 respondents (all of them organisations) used their answers to the question to explain their caution about or opposition to any extension to additional bodies.

### *Question 3*

#### **Are there any services provided on behalf of the public sector by organisations that you think should be excluded from consideration?**

33. A total of 12 respondents (1 individual, 11 organisations) indicated that they believed at least some services provided by organisations on behalf of the public sector should be excluded from consideration. Another 11 respondents (7 individuals, 4 organisations) indicated that they did not think any such services should be excluded from consideration. A further 5 respondents (2 individuals, 3 organisations) stated that they were unsure and 8 (4 individuals, 4 organisations) did not directly address the question.

34. In the main, those respondents who indicated some services should be excluded from consideration were concerned about issues of proportionality, and avoiding excessive burden on organisations. Three organisations, all active in the health and social care sector, specifically argued that third sector or private sector health and social care providers should be excluded from consideration. Arguments advanced in support of these views included the need to avoid imposing additional burdens on providers of social care, and the significant level of regulation and measures to ensure transparency already present in the health and social care sector.

35. Responses from two organisations concerned with tackling violence against women (including the response from Scottish Women's Aid) argued that organisations working on issues of violence against women should be excluded from consideration. These respondents perceived that violence against women organisations might be at greater risk of receiving vexatious and malicious requests, and expressed concern that designation under FOISA might give rise to fears – whether or not well founded – among clients that their personal information might be released.

#### Question 4

### **Are there any conditions that you think should be satisfied before organisations providing services on behalf of the public sector become subject to FOISA?**

36. Respondents varied in their interpretation of this question. Some responses referred to conditions which may require to be satisfied by individual organisations or services before becoming subject to FOISA. Others provided reflections on conditions which may require to be met before any process of extension of FOISA could take place. The thoughts and reflections provided by stakeholders under this question were therefore diverse.

37. In total, 19 respondents (4 individuals, 15 organisations) indicated that there were conditions they thought should be satisfied before organisations providing services on behalf of the public sector become subject to FOISA. A further 8 respondents (4 individuals, 4 organisations) said there were no such conditions, 6 (3 individuals, 3 organisations) stated that they were unsure and a further 3 (all of them individuals) did not answer the question. However, some of those who were 'unsure' did provide clear views about conditions they felt might need to be met. Additionally, some respondents who answered 'no' to the question provided additional comments clarifying their views.

38. In total, 6 respondents (1 individual, 5 organisations) directly indicated that they felt organisations should have to be above a particular size, or income threshold, in order to qualify for designation under FOISA. One of those (OSCR) also referred to the level of public funding received as another possible 'condition' for coverage. A further 3 respondents (2 individuals, 1 organisation) separately referred to the level of public funding received as a possible 'condition'.

39. The Scottish Information Commissioner did not agree that any conditions required to be satisfied, but qualified this response by indicating that:

*“organisations providing public services under contract to public bodies should only be covered in relation to those functions, and the scope of any designation order should therefore be clearly defined to limit the functions and services covered.”*

40. The Commissioner also argued against the use of 'specified and fixed thresholds for coverage' in terms of either the cost or lifespan of a project, citing the view of his predecessor that these can result in unhelpful arbitrary cut-off points. This view is in tension with the views of other stakeholders who, have suggested thresholds for coverage in terms of organisation size and/or the level of funding.

41. As noted above, one of those stakeholders is OSCR, which suggested that the Scottish Government consider and test a variety of possible exclusions to extension, for example based on:

- organisation size
- income

- staffing levels
- contract value
- contract length

42. A number of stakeholders suggested other specific conditions that might be required to designate an organisation under FOISA. Scottish Water suggested that only organisations wholly or mainly performing public services should be designated. The National Trust for Scotland suggested that extension should not apply if there is a risk to charities' ability to carry out their functions.

43. Serco suggested that contracts subject to tendering must include specific notification in relation to FOISA provisions of the contract. Similarly, the Archives and Records Association (UK & Ireland) suggested that any public authority contracting out any of its functions should provide the contracted organisation with a statement of which of the authority's functions is to be provided through its services, to provide clarity for the purposes of FOISA.

44. Other respondents suggested broader conditions which should be met prior to any extension of FOISA to organisations that provide services on behalf of the public sector:

- The Church of Scotland/Crossreach suggested that:
  - the Scottish Information Commissioner should issue guidance to affected organisations
  - additional funding should be made available by public authorities to resource any extra burden falling on such organisations.
- The Scottish Federation of Housing Associations considered that any extension:
  - should use the Office for National Statistics definition of 'public sector'
  - should only apply to functions already subject to FOISA
  - should avoid 'inappropriately capturing' commercial organisations.
- Another respondent suggested that extension should only take place following an assessment of whether it would in fact allow members of the public to access additional information.

#### *Question 5*

**Do you have any comments on whether extending FOISA to organisations providing services on behalf of the public sector is likely to impact on those organisations' ability to provide services in this way?**

45. A total of 27 respondents (6 individuals, 21 organisations) provided substantive comments directly relevant to this question. Of these, 19 (all of them organisations) expressed a degree of concern about the impact that becoming subject to FOISA might have on certain organisations. For 18 of those respondents, the concerns related principally to the cost and administrative burden of handling requests under FOISA. Of those, 5 directly indicated concern that these issues might discourage

contractors from entering contracts with the public sector or cause them to hand back contracts already awarded.

46. Another 2 (1 individual, 1 organisation) of those commenting indicated that they believed becoming subject to FOISA should not impact on organisations' ability to deliver services. A further 2 (both individuals) indicated that, while becoming subject to FOISA may have impacts on organisations, this should not be considered a reason not to extend.

47. Four respondents provided other comments regarding impact. Among these were extensive comments by the Scottish Information Commissioner, who set out what he sees as the key considerations regarding impact of extension, as follows:

- the need for a sense of perspective about the likely impact of FOISA on newly designated organisations
- recognition that nevertheless, designation does create significant new obligations for those organisations.
- that there are positive benefits for organisations arising from FOISA compliance, which must be balanced against the costs.
- the need to see FOI principally in terms of individual and community rights.
- that any extension of FOISA will also have resource implications for the Commissioner's office

48. The Campaign for Freedom of Information in Scotland underlined the value of proactive publication, both as a tool for mitigating impact, and as best practice in its own right. A single (individual) respondent suggested that the designation of an organisation under FOISA might also affect its position as it would become a public authority for the purposes of section 7(1)(b) of the Data Protection Act 2018, and paragraph 22 of the schedule to the Lobbying (Scotland) Act 2016 would apply to it. Another indicated that they believed FOISA designation would have a positive impact on designated organisations in terms of reputation and greater accountability.

#### *Question 6*

**Do you have any comments or evidence about the effectiveness of accessing information about a contract to provide services to the public sector by making requests to the Scottish public authority that has contracted out the service?**

49. A total of 18 respondents (12 organisations, 6 individuals) made substantive responses to this question. Of those, 10 (9 organisations, 1 individual) made positive comments about the effectiveness of accessing information about contracts by making requests to the contracting public authority. A further 5 respondents (2 organisations, 3 individuals) made negative comments about the effectiveness of doing so. A single respondent (Serco) made a mixture of positive and negative comments. A further 2 provided general comments which were neither positive nor negative.

50. Those making positive comments generally cited their experience of effective working between contractors and contracting authorities to provide information for the purposes of complying with obligations under FOISA. For example, Moray Council indicated:

*“our contracts with third-party organisations contain provisions to the effect of 'you are obliged to help us answer Fol enquiries if the information we have provided you with is relevant'. Where we have needed to call on contracted parties to help answer Fol enquiries that we have received (not a common occurrence at all) this has been effective.”*

51. Those making negative comments about the effectiveness of accessing information about contracts by making requests to the contracting authority, raised concerns about not all information being shared between contractors and contracting authorities. UNISON Scotland cited specific difficulties experienced in accessing information via requests to contracting authorities. The Scottish Information Commissioner echoed the concerns of others about the effectiveness of current arrangements:

*“I...regularly see appeals to my office in relation to requests for information regarding to contracted services. These show that some requesters clearly perceive difficulties in accessing information from some contracting authorities.”*

52. The Commissioner also voiced concern that current arrangements can lead to inequality of access to information and may fail to ensure proactive publication of information held by contractors.

53. Elsewhere in his response to the consultation (response to Question 1) the Commissioner commented that direct designation of contractors would give the public a more direct right of access to information. He emphasised the importance of the appeal rights associated with this, in cases where information is withheld.

54. Serco provided their balance of positive and negative comments drawing on their experience - before and since their designation as a Scottish public authority - in respect of their operation of HMP Kilmarnock. Serco commented that, since designation in 2016:

*“three of the responses to FOISA requests that apply to the HMP Kilmarnock contract directly would have been provided to the Scottish Prison Service for release had the request been made to that authority.”*

55. However, Serco also recognised that this would not apply in all cases. Serco indicated that another advantage of direct designation of contractors is that it may facilitate FOI requests being made at the individual's point of contact with the relevant service, rather than having to separately approach the contracting authority.

## Question 7

**Do you have any comments on the types of person, body or organisation – or on the functions of a public nature – which should be considered as future candidates when further extending the coverage of FOISA?**

56. A total of 16 respondents (10 organisations, 6 individuals) provided substantive comments in response to this question. Of these, 3 (all of them individuals) made specific suggestions for organisations or functions which they felt should become subject to FOISA:

- the Law Society of Scotland
- the Convention of Scottish Local Authorities and the Improvement Service
- written judgements issued by sheriffs/other persons exercising judicial functions

57. The Scottish Information Commissioner also acknowledged that, besides the four areas for consideration he identified in his response to Question 2, stakeholders have at various times raised a number of specific organisations with his office as potential candidates for designation under FOISA. Those cited were:

- the Convention of Scottish Local Authorities
- the Improvement Service
- the Scottish Police Federation

58. Another individual respondent suggested that:

*“FOISA could be further extended to cover organisations: which resolve power outages, flood damage and contamination; which provide public transport services; and which advise and regulate all forms of organisations.”*

59. The Archives and Records Association (UK & Ireland) specifically suggests that any body which in the future becomes subject to the Public Records (Scotland) Act 2011 should also become subject to FOISA.

60. Other responses focused more on the basis on which extension to additional organisations should be carried forward, and in many cases reflected the earlier stated views of each respondent about whether further extension was required and the basis on which this should take place.

## **Key issues highlighted in responses**

61. Across the 36 responses received, there was a clear divergence of views about whether there should be a further extension of FOISA, and the basis on which any such extension should take place. The Campaign for Freedom of Information in Scotland and UNISON Scotland, together with most of the individual respondents expressed consistent enthusiasm for an ambitious approach to extension. This was supported to a significant extent by the detailed response from the Scottish Information Commissioner who also advocated for substantial extension, albeit qualified by an emphasis on certain areas identified as particular priorities.

62. By contrast a number of stakeholders, predominantly representing the third sector and many with an interest in the delivery of health and social care services, expressed significant concerns about the impact of extending FOISA coverage in terms of administrative burden and the willingness of third or private sector organisations to enter into contracts with public authorities. These stakeholders tended either to oppose further extension of FOISA outright or to urge a more cautious approach.

63. Responses to Question 6 – about the effectiveness of accessing information about a contract to provide services to the public sector by making requests to the Scottish public authority that has contracted out the service – illustrate a key divergence in perspectives. Those respondents who advocated an ambitious approach to extension tended to see such arrangements as inadequate to ensure the information rights of the public. Those who opposed extension or advocated a cautious approach were much more inclined to see such arrangements as sufficient and providing greatest simplicity.

## **Our next steps**

As noted earlier in this paper, this consultation exercise has taken place concurrently with post-legislative scrutiny of FOISA undertaken by the Scottish Parliament's Public Audit and Post-Legislative Scrutiny Committee. We intend to consider the responses to this consultation together with the evidence on extension given to the Committee, and in light of any recommendations the Committee may make about extension.

It is our intention therefore to produce a paper setting out our proposed approach to the use of the Scottish Ministers' section 5 powers in spring 2020.

Ultimately, as required by FOISA, any proposed section 5 order to extend the Act to new organisations will be subject to further, targeted consultation with the affected organisations, and with the wider public.

## **Annex: list of responses from organisations**

Archives and Records Association (UK & Ireland)

Campaign for Freedom of Information in Scotland

CCPS - The Coalition of Care and Support Providers in Scotland

Church of Scotland/CrossReach

Citizens Advice Bureau

Edinburgh Voluntary Organisations' Council

ENABLE Scotland

Midlothian Voluntary Action

Moray Council

National Trust for Scotland

Scottish Charity Regulator

Scottish Council for Voluntary Organisations

Scottish Federation Housing Association

Scottish Information Commissioner

Scottish Water

Scottish Women's Aid

Serco Ltd

UNISON Scotland

Four other organisations who responded indicated they did not wish their responses to be published.



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