

Freedom of Information extension of coverage

Consultation

August 2019



Scottish Government
Riaghaltas na h-Alba
gov.scot

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Introduction

1. The Scottish Government has a longstanding commitment to keep the Freedom of Information (Scotland) Act 2002 (FOISA) under review, and this includes considering extending its coverage where it is appropriate to do so. In the [Programme for Government](#) 2018-19, the Government committed to consult on proposals to extend FOISA, for example to companies providing services on behalf of the public sector.

2. This consultation asks for your views on further extending the coverage of FOISA, with a focus on those who provide services on behalf of the public sector.

The Freedom of Information (Scotland) Act 2002

3. FOISA came into force on 1 January 2005. It provides a statutory right of access to information held by Scottish public authorities. These include the Scottish Parliament and the Scottish Government to local authorities, NHS boards, higher and further education institutions, doctors and dentists, among others.

4. Requested information must be provided unless it is subject to one or more exemptions, as set out in FOISA. If a requester is dissatisfied with the response received to a request or does not receive a response, he or she can ask the authority to review its decision or handling of the request.

5. The Scottish Information Commissioner both promotes and enforces FOISA. Requesters who remain dissatisfied with the conclusions of an authority's review of their request can appeal to the Commissioner for a decision.

6. The Scottish Government's longstanding approach to freedom of information law is set out in its [Six Principles of FOI](#). The second principle enshrines the incremental approach adopted by the Scottish Ministers towards reform of FOISA:

[The Scottish Government] operates within the Freedom of Information (Scotland) Act 2002 rather than proposing significant changes to it, but adjusts the regime where it is necessary and sensible to do so. The Act must operate well for both members of the public and Scottish public authorities. We will keep the Act under review by promoting good practice within existing frameworks and considering extending coverage.

7. As part of this principle, the Scottish Government keeps under review the coverage of FOISA.

Extending the coverage of FOISA

8. FOISA applies to persons, bodies and officeholders who fall within the definition of a Scottish public authority as set out in the legislation. Many Scottish public authorities are listed in schedule 1 to FOISA. Others are designated in subordinate legislation made by the Scottish Ministers under section 5 of FOISA. Finally, publicly-owned companies that meet the criteria in section 6 are also Scottish public authorities. The number of Scottish public authorities accordingly changes regularly as new authorities are created or dissolved, and as new publicly-owned companies are set up.

9. This consultation will help the Scottish Government to understand whether there is a need to extend FOISA to further entities through a new section 5 order. A section 5 order designates a person or body as a Scottish public authority for the purposes of FOISA.

10. This consultation is not looking at other ways of extending FOISA or wider changes to the legislation. Consultees may, however, wish to be aware that the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee is currently carrying out [post-legislative scrutiny of FOISA](#) and the Committee may explore these areas when it takes oral evidence in autumn 2019.

Who can be designated in a section 5 order?

11. 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.

12. 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.

13. 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.

Consequences of designation

14. A person or body which is designated as a Scottish public authority in a section 5 order becomes subject to FOISA. It must comply with the three principal duties of proactively publishing information, responding to requests for information, and providing advice and assistance to requesters.

15. However, the new authority is only subject to FOISA in a limited way. The section 5 order has to set out the functions of a public nature exercised by the authority or the services that it is providing under contract with a Scottish public authority. The new authority's duties under FOISA are limited to those functions and services – they do not apply to all of the information it holds.

16. The person or body would also automatically become subject to the requirements of the Environmental Information (Scotland) Regulations 2004 (EIRs), a parallel legislative regime for requesting environmental information.

Previous extensions

17. The Scottish Ministers have made three previous section 5 orders in 2013, 2016 and 2019. The most recent order comes into force on 11 November 2019 and it extends 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)

18. These previous extensions have largely focused on persons or bodies that appeared to the Scottish Government to be exercising functions of a public nature (with the exception of the designation of private prison contractors, who provide a service under a contract made with a Scottish public authority).

Proposals for further extension

Background

19. FOISA requires the Scottish Ministers to lay a report before the Scottish Parliament every two years about the exercise of the section 5 order-making power. The report must either explain how the power to designate further Scottish public authorities has been used, or give the reason for not doing so. It may also outline the Government's future intentions for the use of the power. The second of these reports was laid in October 2017 and the next one will be laid in October 2019.

20. The 2017 report outlined the Government's intention to assess options for further section 5 orders with the objective of ensuring coverage is robust and reflects changing patterns of public service delivery. In particular, we indicated that we would:

- (a) explore whether certain organisations – or classes of organisation – **delivering health and social care functions**, but currently not subject to the Act, should be brought within scope of the legislation
- (b) liaise with Audit Scotland for our joint interests in its project assessing the **delivery of council services by arms-length external organisations** (some of which were designated in the first section 5 order)
- (c) engage with the third sector **because third sector bodies can be publicly funded to exercise functions which may be considered to be of a public nature, or to provide services which are functions of an authority**

21. On 20 June 2018, the Scottish Parliament agreed (among other things) 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.**"

22. We will report more fully on the work undertaken in response to those intentions in the next report which will be laid in October 2019. However, this consultation focuses on organisations providing services on behalf of the public sector. For example, organisations delivering health and social care functions may do so under contract with a Scottish public authority to provide a service that is a function of that authority, and similar considerations may apply to some third sector bodies. Looking first at organisations providing services on behalf of the public sector may also help to identify more clearly where future work on extension should be targeted.

23. Additionally, the Scottish Information Commissioner commissioned research on the views of the public about the sort of organisations they thought should be covered by FOISA, reporting on it in a [Special Report](#) published in January 2015¹. The Commissioner found "overwhelming" support for further extension.

¹ See paragraphs 36 to 39.

Organisations providing services on behalf of the public sector

24. Although the Parliamentary motion agreed that the Scottish Government should consult on extending FOISA to *companies* providing services on behalf of the public sector, this consultation paper instead uses the term “organisations” because it is broader than “companies” and reflects the fact that a variety of corporate structures might be used when providing services on behalf of the public sector. We do not consider that the corporate structure adopted should affect whether or not an organisation becomes subject to FOISA – indeed, if certain forms (say companies) were potentially designated and others were not, then this would result in a weakness in the section 5 order that could be exploited to avoid designation. FOISA itself uses the term “person”, which includes both individuals and bodies corporate like companies, but we think that using that term could be confusing because in ordinary usage “person” is generally understood to be synonymous with “individual”.

25. Additionally, this consultation paper refers to “providing services on behalf of the public sector” throughout. Given the requirements of section 5 of FOISA, when we talk about “the public sector” we mean existing Scottish public authorities for the purposes of FOISA². Additionally, as we discuss below, FOISA imposes tests about the services that can be covered in a section 5 order³: they have to be provided under a contract made with an existing Scottish public authority, and the service must be one which the authority has the function of providing.

Who should be covered?

26. When the Scottish Ministers designate an organisation as a Scottish public authority by making a section 5 order, they must do two things in the order. First, they have to say what the organisation being designated is (or say that all organisations that meet a specific description are being designated). Secondly, they must say what the service is that the organisation is providing.

27. For example, the [2016 Order](#) extended FOISA to private prison contractors. It did this by describing the organisations being designated as “persons providing services under a contract with the Scottish Ministers for the running of a prison or part of a prison in Scotland”. It also said that the service being provided was “the provision or running of a prison or a part of a prison in Scotland under section 106(1) of the Criminal Justice and Public Order Act 1994”.

28. In order to comply with the requirements of section 5, we expect that any further designations will work in broadly the same way: they will identify both the organisations affected (possibly by description) and also the services being provided.

29. A number of tests must also be satisfied. First, the organisation must be providing the services under a contract made with an existing Scottish public authority. Secondly, the service must be one which the authority has the function of providing – it does not encompass every contract for services entered into by an authority.

² See paragraphs 8 and 17 for information about existing Scottish public authorities.

³ See paragraphs 29 to 31.

30. For example, we would not expect to designate organisations that have a contract to supply stationery to the Scottish Government because it will not have the function of providing stationery to anyone else. Stationery is simply needed so that it can discharge its functions. By contrast, contracts for the provision and running of prisons are contracts to provide a service that the Scottish Ministers have the function of providing⁴.

31. We are therefore seeking views about which organisations (if any) should be considered as candidates for further extension of FOISA, and which services they are providing on behalf of a Scottish public authority.

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?

Yes

No

Unsure

Question 2

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

For the services that you identify, you may wish to give examples of organisations that provide the service (e.g. "Company X") or to describe types of organisations that provide it (e.g. "every person who has a contract with Authority Y to provide service Z")

Question 3

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

Yes

No

Unsure

If you answered "Yes", please explain why you think that they should be excluded.

⁴ Criminal Justice and Public Order Act 1994, section 106(1).

32. We are also seeking views on whether any conditions should have to be satisfied before organisations providing services on behalf of the public sector should be subject to FOISA. There may be circumstances where that would be disproportionate, for example if the services are being provided only on a temporary, intermittent or emergency basis, or if the contract for the services has a very low value. We would therefore welcome your views on potential conditions that should have to be satisfied before an organisation providing services on behalf of the public sector becomes subject to FOISA.

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?

Yes

No

Unsure

If you answered “Yes”, please explain what those conditions are and why they should apply.

Impact on organisations

33. We welcome views and evidence 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.

34. We note that organisations may already have some exposure to FOISA because the Scottish public authorities with which they contract are subject to the legislation. We are aware that authorities sometimes ask their contractors for information they hold in order to help the authority respond to a request for 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?

It would be helpful if you could provide any examples where you are aware that the impact of FOISA has been a factor for organisations in deciding whether or not to contract with a Scottish public authority.

Other means of accessing information

35. As outlined above, the focus of this consultation is on organisations providing services on behalf of the public sector. However, they will be doing so under contract with existing Scottish public authorities which are, of course, subject to FOISA in their own right. This means that requests can already be made to one of the parties to the contract – for example, the Scottish Government receives requests for information about the contracts it has with contractors who provide roads and other infrastructure, and local authorities receive requests for information about the contracts they have with contractors who build and maintain facilities like schools.

36. It is therefore already possible to access some information about services provided on behalf of the public sector, by asking the Scottish public authority that has contracted out the service.

37. However, this assists only in relation to information held by the Scottish public authority itself. It may be that some information is held only by the organisation that has the contract to provide the service. FOISA does not enable direct access to this information, as the organisation is not a Scottish public authority in its own right. That said, the information may still be accessible if the contract contains provisions about the disclosure of information between the contractor and the authority. Provisions of this nature would typically oblige the contractor to provide information to the authority if needed in order to respond to an FOI request.

38. The Scottish Government's [Open Contracting Strategy](#) sets out the ambition to proactively publish more procurement information. Since the publication of the strategy the Scottish Government has included a transparency clause within its standard terms and conditions to make its intentions regarding the publication of information clear to suppliers. Other Scottish public authorities may include similar provisions.

39. The Scottish Ministers are required to publish a [Code of Practice](#) under FOISA, setting out best practice guidance for Scottish public authorities. Authorities that include provisions about the disclosure of information by contractors are following FOI best practice⁵, but they are not required to do so. Accordingly, we would be interested in views about how well this contractual approach to accessing information is working.

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?

Examples of situations where you have successfully accessed information in this way or where you have experienced barriers to accessing information in this way would be helpful.

Examples of authorities' and contractors' experiences of including provisions about the disclosure of information by contractors would also be helpful.

⁵ See Part 8 of the Code, and in particular paragraphs 8.4.9 to 8.4.13.

Future orders

40. Previous consultations have focused on identifying persons or bodies that appear to the Scottish Ministers to exercise functions of a public nature. While the principal focus of this consultation is to identify candidates for designation who provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority, the Scottish Government remains committed in the future to designating persons and bodies that appear to exercise functions of a public nature.

41. FOISA does not define “functions of a public nature” or set out criteria that the Scottish Ministers should apply in deciding whether a given function appears to be of a public nature. The Scottish Government considers that a range of factors can be used in determining whether an person or body would generally be recognised as exercising functions of a public nature. Accordingly, in previous consultations they have adopted a factor-based approach.

42. We consider these factors to include:

- (a) the extent to which particular functions are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities;
- (b) the extent of public funding of the activity;
- (c) whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them;
- (d) whether the body exercises extensive or monopolistic powers;
- (e) the extent to which the body is subject to state regulation, oversight or control.

43. More widely, we would also consider as part of this assessment process:

- (a) whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;
- (b) whether coverage would impose a significant administrative burden that may be considered to have a disproportionate business impact;
- (c) the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

44. We note that broadly similar factors have also been identified by the Scottish Information Commissioner's [Special Report](#) on coverage published in January 2015⁶.

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?

It would be helpful if you could set out the key factors that you consider favour the extension of coverage in the way that you propose.

⁶ See page 18.

Responding to this consultation

45. We are inviting responses to this consultation by **Tuesday 3 December 2019**.

46. Please respond to this consultation using the online platform Citizen Space which can be found at: <https://consult.gov.scot>

47. You can save and return to your responses whilst the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

48. If you are unable to respond using Citizen Space, please send your views and comments:

(a) by email to foi@gov.scot; or

(b) by post to FOI Unit, Scottish Government, 2W, St Andrew's House, Edinburgh EH1 3DG

49. However you respond, please complete the Respondent Information Form (see 'Handling your response' below). Responses should reach us by **Tuesday 3 December 2019** but earlier responses would be welcome.

Handling your response

50. If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

51. If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached to the end of this document. This will ensure that we treat your response appropriately. All respondents need to be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the 2002 Act for information relating to responses made to this consultation exercise.

52. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly. If the response comes from an organisation, we will indicate that the organisation has responded to the consultation.

What happens next

53. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, or offensive material, we will make responses available to the public at <https://consult.gov.scot>. If you use Citizen Space to respond, you will receive a copy of your response by email.

54. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

55. This consultation seeks to establish the potential range of persons who may be identified as providing services on behalf of a Scottish public authority and to inform how the Ministers might prioritise designating them.

56. Once that exercise is complete we anticipate that further, targeted consultation will follow once candidates for inclusion in a particular order are identified, in order to discharge the Scottish Ministers' statutory duty to consult every person to whom the section 5 order relates or persons appearing to the Ministers to represent the affected persons⁷.

Comments and complaints

57. If you have any comments about how this consultation exercise has been conducted, please send them by email to foi@gov.scot or by post to the address above.

Scottish Government consultation process

58. Consultation is an essential part of the policy-making process. We will consider the views expressed in response to this consultation along with other available evidence to help inform the Scottish Government's decisions. You can find Scottish Government consultations online: <https://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views.

59. Consultation may also involve seeking views in other ways, such as public meetings.

60. Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation.

61. Depending on the nature of the consultation exercise, the responses received may:

- (a) indicate the need for policy development or review;
- (b) inform the development of a particular policy;
- (c) help decisions to be made between alternative policy proposals; or
- (d) be used to finalise legislation before it is implemented.

62. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

⁷ Section 5(5)(a) of FOISA.

Annex A

Respondent Information Form

Freedom of information extension of coverage: consultation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://gov.scot/privacy>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Annex B: consultation questions

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?

Yes

No

Unsure

Question 2

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

For the services that you identify, you may wish to give examples of organisations that provide the service (e.g. "Company X") or to describe types of organisations that provide it (e.g. "every person who has a contract with Authority Y to provide service Z")

Question 3

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

Yes

No

Unsure

If you answered "Yes", please explain why you think that they should be excluded.

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?

Yes

No

Unsure

If you answered "Yes", please explain what those conditions are and why they should apply.

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?

It would be helpful if you could provide any examples where you are aware that the impact of FOISA has been a factor for organisations in deciding whether or not to contract with a Scottish public authority.

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?

Examples of situations where you have successfully accessed information in this way or where you have experienced barriers to accessing information in this way would be helpful.

Examples of authorities' and contractors' experiences of including provisions about the disclosure of information by contractors would also be helpful.

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?

It would be helpful if you could set out the key factors that you consider favour the extension of coverage in the way that you propose.



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-83960-107-1 (web only)

Published by The Scottish Government, August 2019

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS629030 (08/19)

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