

**Scottish Government Report on the exercise of the Section
5 power under the Freedom of Information (Scotland) Act
2002 (as amended)**

Laid before the Scottish Parliament by the Scottish Ministers under section 7A of the
Freedom of Information (Scotland) Act 2002 (as amended)

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Purpose

Under the terms of the Freedom of Information (Scotland) Act 2002 (as amended) the Scottish Ministers are required to lay a report before the Scottish Parliament every two years about the exercise of the section 5 order-making power. This is the second of these reports.

The section 5 order-making power

Section 5 of the Freedom of Information (Scotland) Act 2002 ('the Act') provides the Scottish Government with the power to designate as a Scottish public authority any organisation which:

- 'appears to the Scottish Ministers to exercise functions of a public nature; or
- provides, under a contract made with a Scottish public authority, any service whose provision is a function of the authority.'

In line with the requirement to report on whether the section 5 power has been exercised during the reporting period (covering the time between the previous report and the date of this report) we note that one order has been passed by the Scottish Parliament during this time.

Exercise of the section 5 order-making power

At the time of the previous report the Scottish Government had recently concluded consultation on bringing within scope of the Act:

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

During the consultation period Scottish Health Innovations Ltd (SHIL) was also consulted with a view to also extending the Act to them.

The [formal response](#)¹ to this consultation was published in January 2016. Ministers concluded that, for the reasons set out in the response paper, all those categories of organisations consulted, as well as SHIL, should be brought within scope of the Act.

Consequently, [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2016](#)² came into effect on 1 September 2016.

¹ <https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/results/foi-analysis.pdf>

² <http://www.legislation.gov.uk/ssi/2016/139/contents/made>

Objective of the 2016 Order

As with the 2013 order which designated a range of arm's length external organisations as Scottish Public Authorities for the purposes of the Act, those bodies brought within scope by the 2016 order are considered to be undertaking 'functions of a public nature'. For example, they receive considerable public funding to undertake functions underpinned by statute and which are widely recognised as being for the collective good.

The order also removed the anomalous situation whereby bodies providing identical services but which were (in the case of a school or secure unit) part of a local authority, or, in the case of prisons owned by the Scottish Prison Service, already subject to the Act.

Further information on the 2016 order is contained in the order's [Policy Note](#)³.

Time for Compliance Regulations

In tandem with the order extending coverage of the Act to, among others, grant-aided and independent special schools, the Scottish Parliament also agreed [The Freedom of Information \(Scotland\) Act 2002 \(Time for Compliance\) Regulations 2016](#)⁴. The Regulations allow, in certain circumstances, for an extension of the time period within which a grant-aided or independent special school must respond to a request (or request for a review) made under the Act.

This is intended as a practical measure to take into account the impact of school holiday periods when a school may be closed.

In parallel with the Time for Compliance Regulations coming into effect, changes to the Section 60 [Code of Practice](#)⁵ emphasised the duty, irrespective of the Regulations, for a reply to be issued 'promptly'.

³ <http://www.legislation.gov.uk/ssi/2016/139/policy-note/contents>

⁴ <http://www.legislation.gov.uk/ssi/2016/346/contents/made>

⁵ <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

Assessing the impact of the 2016 Order

In order to assess the results of extending coverage of the Act – and to inform future such orders – organisations brought within scope were invited to comment on their experience of designation, both in terms of preparation and the practical impact.

A number of common themes came out of their responses. Of those organisations responding all had received support in preparing for designation. While this support was primarily from the Office of the Scottish Information Commissioner (OSIC) reference was also made to, among others, the Scottish Prison Service, Education through Care Scotland and the Golden Jubilee National Hospital (in regard to Scottish Heath Innovations Ltd).

Support took various forms – though primarily was through training and workshops – and was widely considered to be very helpful in preparing bodies for designation. The designated bodies in general considered themselves to be well prepared by 1 September 2016.

The Business and Regulatory Impact Assessment contained in the 2015 [consultation paper](#)⁶ anticipated generally low numbers of requests in respect of the bodies proposed for designation. Feedback from the designated bodies shows these estimates to have been broadly accurate with the numbers of requests responded to in terms of the Act universally in single figures (if any).

The low numbers of requests responded to by the newly designated bodies is also reflected in the statistical data compiled by OSIC and available via the OSIC [database](#)⁷. Comments provided very limited evidence of an increase in requests for information received by the various bodies following designation - or in the nature of the information requested.

Feedback in respect of the resource impact of designation varied greatly. While a number of bodies referred to the considerable time required in terms of, for example, training, the setting up of systems and IT/website implications (especially given the limited actual demand), others observed far less of an impact on resources.

Responses from designated bodies indicate that responsibility for handling information requests has generally been recognised as a corporate function and is handled alongside similar governance duties, such as compliance with data protection legislation and record management. We also note reference to the involvement of senior management in a number of the designated bodies.

While most respondents considered that, following designation, their organisation was proactively publishing more information there was little suggestion of designation itself leading to improvements or benefits in stakeholder engagement.

⁶ https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/user_uploads/foi.pdf

⁷ <http://www.itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx>

Separately, we note the difficulties encountered by OSIC with ensuring that newly designated bodies were compliant with publication scheme requirements by the due date of 1 September 2016.

This applied in particular to grant-aided and independent special schools, where, as is noted in the Scottish Information Commissioner's [annual report and accounts](#)⁸ for 2016/17, intervention and enforcement action were required in a number of cases.

In analysing the reasons for this, OSIC is of the view that the difficulties arose due to the schools generally working very independently of one another – with little opportunity therefore of wider peer group support. This is in contrast to the close working relationship between the private prisons – as well as with the Scottish Prison Service – and the long-established association between the secure accommodation providers.

There are clearly many factors important to successful designation, as with the implementation of any new law or regulation. For the purposes of the Act these will include compliance with publication scheme obligations, appropriate records management systems, staff training and awareness etc.

Experience outlined above demonstrates that preparation is critical for successful designation under the Act. And while a designated body has ultimate responsibility for ensuring its preparedness for designation, external input is clearly important – not least the support provided by OSIC. In addition, as was also shown in feedback to the Scottish Government, peer group support and close working relationships with public authorities already subject to the Act are critical in ensuring smooth designation.

⁸ <http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx>

Consultation on designation of Registered Social Landlords

In December 2016 the Minister for Parliamentary Business announced the start of a 12 week consultation on extending the Act to Registered Social Landlords.

As noted in the [consultation paper](#)⁹, at the time of debate on the original Freedom of Information Bill there was considerable discussion about the inclusion of RSLs in the legislation. Given the decision at the time not to include RSLs within scope of the Act as passed this debate has continued.

We note in particular the recommendation in the Scottish Information Commissioner's Special Report '[FOI 10 Years On – are the right organisations covered?](#)'¹⁰ that the Scottish Ministers consider making a section 5 order in relation to access to information rights about social housing, administered by housing associations.

The consultation paper set out a range of reasons for proposing that RSLs be brought within scope of the Act – adopting the 'factor-based' approach used in previous such exercises.

Factors considered included the statutory underpinning of certain functions of RSLs, the extent of public funding, the perceived social role of RSLs and the range of existing regulation, primarily by the Scottish Housing Regulator.

The consultation also noted the position of the Scottish Ministers as being that RSLs should be brought within scope of the Act, subject to consultation and related stakeholder engagement. Any resulting order would also be subject to affirmative procedure in the Scottish Parliament.

In June 2017 the Scottish Government published an [Interim Report](#)¹¹ on the consultation.

The Interim Report highlighted the central issues raised during consultation, primarily in respect of the varied functions undertaken by RSLs, the role and relationship of RSLs to their subsidiaries and concerns about the administrative and resource implications of becoming subject to the Act.

A response to the consultation is anticipated shortly.

⁹ <https://consult.scotland.gov.uk/freedom-of-information/foi-social-landlords/>

¹⁰ <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

¹¹ <https://beta.gov.scot/publications/consultation-extending-coverage-freedom-information-scotland-act-2002-registered-social-9781788510783/>

Promoting openness and transparency

As noted in the [Scottish Government FOI Policy Statement](#)¹² the Scottish Government is accountable to the people of Scotland, and their representatives, for all that it does on their behalf. A cornerstone of that accountability is the Government's commitment to being open and transparent across all of its activities.

Open Government Partnership

In April 2016 Scotland was selected by the Open Government Partnership (OGP) as one of 15 Pioneer governments around the world to join a programme to bring new leadership and innovation into the OGP at all levels of government.

Both the Scottish Government and Scottish Civil Society share the values of Open Government and the aim to foster openness, transparency and citizen participation.

Scotland's first [National Action Plan](#)¹³, launched in December 2016, was developed jointly by the Scottish Government and the Scottish Civil Society Network with the OGP.

The five commitments laid out in the Scottish Plan aim to help people living in Scotland to better understand how government works so that they can have real influence and more effectively hold government to account. The commitments also support the development of newly devolved responsibilities such as Scotland's significant tax, borrowing and welfare responsibilities.

1. Financial Transparency: to clearly explain how public finances work, so people can understand how money flows into and out of the Scottish Government, to support public spending in Scotland

2. Measure Scotland's progress: by making understandable information available through the [National Performance Framework](#)¹⁴, which will be reviewed to reflect our commitments to Human Rights and the United Nations [Sustainable Development Goals](#)¹⁵

3. Deliver a Fairer Scotland: through implementation of the Actions developed with civil society in the [Fairer Scotland](#)¹⁶ action plan

4. Participatory budgeting: to empower communities through direct action ensuring they have influence over setting budget priorities

5. Increasing participation: improving citizen participation in local democracy and developing skills to make sure public services are designed with input from users and with user needs to the fore

¹² <http://www.gov.scot/About/Information/FOI/foipolicy>

¹³ <https://beta.gov.scot/publications/open-government-partnership-scottish-action-plan/>

¹⁴ <http://www.gov.scot/Resource/0049/00497339.pdf>

¹⁵ <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

¹⁶ <http://www.gov.scot/Resource/0050/00506841.pdf>

Updating Schedule 1 of the Freedom of Information (Scotland) Act 2002

Schedule 1 of the Act identifies all Scottish public authorities subject to freedom of information legislation. The Schedule has been updated on multiple occasions to take into account the creation of new public bodies (and termination of others).

For example, recent amendments to Schedule 1 follow the creation of new Scottish public authorities such as Community Justice Scotland, Crown Estate Scotland, The Scottish Fiscal Commission and The Scottish Land Commission.

Information on coverage of the Act – including an up-to-date Schedule 1 – can be found on the [Scottish Information Commissioner's website¹⁷](#).

¹⁷

http://www.itspublicknowledge.info/YourRights/Whocanlask/Authorities_listed_in_Schedule_1_of_the_Act.aspx

Conclusion

The Scottish Government supports Freedom of Information as an essential part of open democratic government and responsive public services. As part of this key principle we are committed to making effective use of the range of existing powers in the Act.

This includes appropriate exercise of the section 5 power to both protect and maintain existing information access rights as well as to expand those rights further, particularly as public service delivery mechanisms continue to evolve.

In this last reporting period the Act has been extended to, among others, grant-aided and independent special schools and private prison contractors. The focus is currently on registered social landlords. However, as consultation has previously suggested, there are many other organisations and service providers delivering functions considered to be of a public nature.

In the next two year reporting period we will therefore continue to assess options for further section 5 orders with the objective of ensuring coverage is robust and reflects changing patterns of public service delivery.

As part of this work we propose to explore whether certain organisations – or class of organisation – delivering health and social care functions, but currently not subject to the Act, should be brought within scope of the legislation.

We also note the establishment of a project by Audit Scotland assessing the delivery of council services by ALEOs – including around issues of governance - and will liaise with Audit Scotland for our joint interests as this work is taken forward.

More broadly, we will seek to engage with the third sector, noting the extent that third sector bodies can be publicly funded to exercise functions which may be considered to be of a public nature, or provide services which are functions of an authority.

We will also continue to pursue the opportunities provided as a Pioneer member of the Open Government Partnership to explore further development of Scotland's Freedom of Information legislation as well as wider openness and transparency initiatives, including through engagement with representatives of civic Scotland.