

**1. An extract from a brief for the First Minister on the Campaign for Freedom of Information's "Get it Minuted" campaign, dated 16 January 2018.**

**Issue:**

Post-Legislative Scrutiny of the Freedom of Information Act 2002

**Top Lines:**

- Post-legislative Scrutiny is entirely a matter for the Parliament.
- FOISA is one of 5 Acts shortlisted by the Public Audit and Post-legislative Scrutiny Committee for detailed scrutiny.
- The Scottish Government will co-operate fully with Post-Legislative Scrutiny, should this proceed.



**2. An email chain from the freedom of information unit to the Minister for Parliamentary Business regarding a briefing for the First Minister on freedom of information. Furthermore an extract from the brief, dated 16 January 2018.**

**From:** [redacted]  
**Sent:** 16 January 2018 18:37  
**To:** Minister for Parliamentary Business; [redacted]  
**Subject:** Re: Get It Minuted Campaign

And the general FOI note.

[redacted]

**From:** [redacted]  
**Sent:** Tuesday, 16 January 2018 18:31  
**To:** Minister for Parliamentary Business; [redacted]  
**Cc:** Davidson I (Ian) (CUKR); Minister for Parliamentary Business  
**Subject:** Re: Get It Minuted Campaign

Kathryn

There is an FMQ note on FOI. There is also a specific note on the get it minuted campaign.

I will forward both.

[redacted]

**Key Issue:**

- On 21 June, the Parliament passed a motion without opposition condemning the Scottish Government's poor performance in responding to freedom of information requests; calling for an independent inquiry into the way that it deals with these, and agreeing to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002

**Top Lines:****Scotland already has the most open and far-reaching freedom of information laws in the UK and this Government has a track record of building on that**

- We have brought within scope of FOI various bodies that deliver public services, including local authority arm's-length trusts and private prison contractors.
- Our 2013 FOI Amendment Act improved the legislation by strengthening the ability to prosecute for an offence.
- The Scottish Government is currently consulting on a draft order extending FOI to Registered Social Landlords.

### **3. An email chain from the freedom of information unit to the Minister for Parliamentary Business regarding a press enquiry on post legislative scrutiny of the Freedom of Information Scotland Act, dated 9 January 2018.**

**From:**[redacted]

**Sent:** 09 January 2018 09:40

**To:** Minister for Parliamentary Business; DG Constitution and External Affairs; Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; [redacted]

**Subject:** Today's Herald: FOI inquiry & post-legislative scrutiny

For information.

The journalist does not appear to understand that it is for the parliament, rather than the government, to act on post-legislative scrutiny and may not have noticed that the Commissioner is moving his intervention into independent inquiry space.

Nothing on the CFOIS site yet about a "get it minuted" campaign.

[redacted]

#### **More open government is the goal as "get it minuted" campaign launched**

Stephen Naysmith

WHY would you have a meeting and not make a record of it? For many suspicious or cynical types, the answer might be because you have something to hide.

I used to sit on the committee of my local allotments. There may be some who would imagine this to be deathly dull. I have to tell you it was not. There was no shortage of personal rifts, political manoeuvring and a need for robust financial accountability.

(My aunt is involved her allotment committee in rural Yorkshire and hers is almost as bad, so I believe vegetable gardening is universally more exciting than it sounds).

My point, here, is that despite our small membership, despite the relatively minor import of the decisions we made, despite that fact that our business was mainly – ahem – small potatoes, minutes were one of the ways we kept ourselves straight.

The Campaign for Freedom of Information in Scotland (CFOIS) may well contain its share of cynics, but exists simply to ensure the public can find out how they are governed and how their services are delivered.

But the campaign is increasingly concerned about a decline in the simple habit of recording meetings to discuss government business.

This follows concerns raised by Neil Findlay MSP, who last June told Holyrood: "We are regularly told that meetings listed in ministerial diaries have no agenda and no minutes and that no notes were taken because no substantive government business was discussed". He suggested it was not credible to suggest ministers met people like the heads of Scotrail, petrochemical giant Ineos, Cosla, without

discussing relevant political matters. But maybe he's cynical too and they were sharing views of the weather over an afternoon tea. Many more meetings go unrecorded, CFIOS claim.

Perhaps this is a reaction specifically to the freedom of information laws. The right to request information under this law simply doesn't exist if the information is not recorded somewhere. Perhaps our political leaders have simply got sloppy.

But when the campaign used FOI laws to ask about the rules which determine when civil servants and Scottish Government ministers decide to produce written agendas notes or minutes for meetings they discovered, frankly, a mess.

The rules were too complex to be consistent, while being too vague to provide any kind of guarantee of openness. In fact, the campaign says, this confusing combination results in loopholes which are all too easy to exploit if, for some reason, a record is not to be kept.

The Scottish Parliament has agreed two measures to sharpen up the way freedom of information operates. It voted for an independent inquiry into the way the Scottish Government itself response to FOI requests, and for post-legislative scrutiny of the 2002 Freedom of Information act, to see how the law is functioning 15 years on.

I say 15 years - it will now be 16, as the Government has yet to act on either of these votes.

#### **4. Extracts from a briefing for the Minister for Parliamentary Business regarding the 15<sup>th</sup> Annual Holyrood Freedom of Information, dated 6 December 2017.**

##### **Key Message**

Speech reflecting on the last year – including Scottish Government FOI performance, Parliamentary focus on FOI and the Commissioner's intervention process. Reference also to bringing forward a draft order on extending FOISA to RSLs and to membership of the Open Government Partnership

##### **Session 1: Reshaping the FOI Landscape**

To date, two orders have been made extending coverage of FOISA with a further extension of coverage currently under consideration. At the same time GDPR and recent press reports on the management of FOISA are encouraging organisations to review practice around FOI requests.

##### **Speech**

###### **Inquiry and Review**

FOI is about the public's right to access information.

This right was the focus of not one but two Parliamentary debates earlier this year.

The debate of 21 June called for an independent inquiry into the Scottish Government's FOI performance – and for post legislative scrutiny of the legislation.

And perhaps not surprisingly, the inquiry and possibility of post legislative scrutiny were high on the agenda at my first meeting with the new Commissioner.

The issue of post legislative scrutiny is, rightly, a matter for the Public Audit and Post Legislative Scrutiny Committee. In the event of the Committee deciding to review the Act the Scottish Government will engage fully in the process. In the meantime, our priority must be on performance.

###### **Extending FOI to Registered Social Landlords**

Last year at this conference, the Minister for Local Government and Housing announced the start of consultation on proposals to extend coverage of FOI to Registered Social Landlords, or RSLs. Thank you to all who responded.

Today, I am pleased to announce that we intend to designate RSLs as public authorities for the purposes of FOI, subject to consultation on the terms of an order. This consultation will be available on the Scottish Government website later today, and will run until March next year.

RSLs core functions concern the provision of housing services. I consider these to be functions of a public nature and grounds for designating RSLs as public authorities for the purposes of FOI.

Registered Social Landlords are already subject to regulation and oversight by a number of organisations. These include the Scottish Housing Regulator and the Scottish Public Services Ombudsman.

And, while not 'public authorities', in performing at least some public functions, RSLs are considered subject to human rights legislation.

RSLs are of course covered by the Environmental Information (Scotland) Regulations 2004. There is clearly concern – not least on the part of the Commissioner – that a potential consequence of the Housing (Amendment) Bill would be to remove RSLs from the scope of the EIRs.

In extending FOI to RSLs we would therefore ensure that the right to access to information held by RSLs will be protected – and strengthened.

An order extending coverage to RSLs would be this Government's third order under section 5 of FOISA since 2013.

But, as the biennial report published in October made clear, there is much more that can be done. We need to ensure that coverage reflects the changing patterns of public service delivery. And going forward this must mean a more flexible, more agile approach to securing information rights.



## **Key Issues and Top Lines**

### **Independent Inquiry**

#### **Issue**

On 21 June 2017 the Scottish Parliament passed a motion

‘That the Parliament condemns the Scottish Government’s poor performance in responding to freedom of information requests; calls for an independent inquiry into the way that it deals with these, and agrees to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002.’

### **Review of FOISA**

#### **Issue**

The Public Audit and Post Legislative Scrutiny Committee is currently considering the views of stakeholders and members of the public on post legislative scrutiny. In respect of FOISA the Committee has agreed to await the outcome of discussions between the Scottish Information Commissioner and the Minister for Parliamentary Business following the Parliamentary Motion of 21 June.

#### **Top Lines**

- Post legislative scrutiny is a matter for the Public Audit and Post-legislative Scrutiny Committee of the Scottish Parliament.
- In the event of scrutiny, the Scottish Government will fully engage with the Committee. However, at present, our focus is on performance issues.

### **Human Rights (Magyar Helsinki Bizottsag vs Hungary judgement)**

#### **Issue**

A decision in November 2016 of the Grand Chamber of the European Court of Human Rights found that, given the greater recognition now afforded to access to information at the international level, Article 10 ECHR must now be read as containing a free-standing right of access to information.

#### **Top line**

- The Scottish Government currently considers the European Convention on Human Rights (ECHR) to be complementary to existing domestic access to information law. The terms of the Grand Chamber decision are being considered together with assessment of the impact on current FOI legislation and practice.

## **Coverage of FOISA**

### **Issue**

Criticism that FOISA is not being extended quickly or broadly enough.

### **Top lines**

- The Scottish Government takes an incremental approach to extending coverage. An order extending coverage to RSLs would be the third such order – and the most extensive to date.
- This year's biennial report set out proposals 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 will also be liaising with Audit Scotland on their work relating to issues around the governance of ALEOs – including on issues of openness.
- We will also 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.

## **POST LEGISLATIVE SCRUTINY**

### **Q) Does the Government have any plans to review FOISA?**

A) Our focus at present is on performance. If the Public Audit and Post Legislative Scrutiny Committee take forward scrutiny of FOISA we will of course fully engage. It may be that proposals to amend FOISA emerge as part of the Commissioner's intervention process. FOISA is well regarded internationally in terms of strength and effectiveness – not least due to the independence of the Commissioner. We certainly do not rule out legislative change in the interests of maintaining a robust FOI regime.

## **COVERAGE OF THE LEGISLATION**

### **Q) Why are you consulting again on extending coverage to RSLs?**

A) We are consulting on the terms of a draft order bringing RSLs within scope of FOISA. We anticipate laying the order in spring and it coming into force from 1 April 2019. It is in everyone's interests to get the wording of the order right – hence consultation on its terms. And as experience demonstrates, allowing sufficient time for preparation is critical for effective implementation.

**Q) The Commissioner has raised concerns about the Environmental Information Regulations no longer applying to RSLs following changes to the role of the Scottish Housing Regulator. Do you share those concerns?**

A) I am aware of this issue. The two pieces of legislation serve very different purposes. For FOI interests it is clearly important for there to be adequate time for the RSLs to prepare for coverage.

I am happy to consider this question as part of the wider consultation process but, at least on a practical level, I don't anticipate RSLs would immediately stop responding to information requests if this indeed is a consequence of the Housing Amendment Bill.

**Q) What are your plans for further extension?**

A) The biennial report highlights certain areas to explore, for example, health and social care, as well as ALEOS (in conjunction with work by Audit Scotland). Longer-term, I would certainly wish to explore how we can move to a more flexible approach to ensuring that information rights automatically follow the provision of a particular function or service.



**5. An email chain regarding a press enquiry on a parliamentary draft order to extend coverage of the Freedom of Information Scotland Act to Registered Social Landlords, dated 6 December 2017.**

**From:** [redacted]  
**Sent:** 06 December 2017 11:28  
**To:** Minister for Parliamentary Business  
**Cc:** [redacted]  
**Subject:** FW: FOI powers for social landlords - follow-up - proactive comment

[redacted],

I'm just picking up on Mr FitzPatrick's request last night, and we propose issuing the following to housing specialist publications and the National today.

Grateful if the Minister is content with this approach.

*Confirming a draft order to extend coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords Minister for Parliamentary Business Joe FitzPatrick said:*

*"The Scottish Government regularly reviews coverage of Freedom of information legislation. Previous orders have designated a range of arms-length trusts providing cultural, leisure and sporting services, private prison contractors, grant-aided and independent special schools.*

*"The proposed order extends the statutory right to request information to Registered Social Landlords (RSL) insofar as they – as private bodies - undertake functions for which they are already subject to regulation and oversight by the Scottish Housing Regulator.*

*"This will give RSL tenants, and others, the same rights to information as those enjoyed by tenants of local authorities."*

**Background**

*Consultation responses will inform the precise terms of the final order. Subject to Parliamentary approval it is anticipated the order will come into effect from 1 April 2019.*

Thanks [redacted]

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**From:** [redacted]  
**Sent:** 05 December 2017 18:31  
**To:** FitzPatrick J (Joe), MSP  
**Cc:** Minister for Parliamentary Business; [redacted]  
**Subject:** Lines for clearance - FOI powers for social landlords - the National

Mr Fitzpatrick.

The National have asked for a comment on draft order to extend coverage of FOISA to RSLs. SpAds and officials have cleared the lines below. Grateful for your clearance pls. Journalist looking for a response tonight.

A Scottish Government spokesman said:

“The Scottish Government regularly reviews coverage of Freedom of information legislation. Previous orders have designated a range of arms-length trusts providing cultural, leisure and sporting services, private prison contractors, grant-aided and independent special schools.

“The proposed order extends the statutory right to request information to Registered Social Landlords (RSL) insofar as they – as private bodies - undertake functions for which they are already subject to regulation and oversight by the Scottish Housing Regulator.

“This will give RSL tenants, and others, the same rights to information as those enjoyed by tenants of local authorities.”

### **Background**

Consultation responses will inform the precise terms of the final order. Subject to Parliamentary approval it is anticipated the order will come into effect from 1 April 2019.

**6. An email providing a brief report of an evidence gathering session of the Local Government and Communities Committee on the Housing (Amendment) (Scotland) Bill for the Minister for Parliamentary Business and the Minister for Local Government and Housing, dated 5 December 2017.**

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**From:** [redacted]

**Sent:** 04 December 2017 16:58

**To:** Minister for Parliamentary Business

**Cc:** Minister for Local Government and Housing; [redacted]

**Subject:** RE: HOUSING (AMENDMENT) (SCOTLAND) BILL: STAGE 1 EVIDENCE FROM STAKEHOLDERS

[redacted]

Thanks, noted.

Mr FitzPatrick may wish to be aware that FOI Unit and housing officials have spoken and the initial view is that a degree of proportionality should be applied given the 'gap' is quite short, the relatively few requests (so we understand) that RSLs respond to in terms of the EIRs, and the low risk of RSLs deciding not to respond to requests on the assumption that the EIRs no longer apply.

We have also spoken to OSIC who we understand are likely to write to the Committee setting out in more detail their views on 'plugging the gap'. OSIC are aware of the imperative to bring the Housing Amendment Bill into force as early as possible and, equally, that delaying FOISA coverage until 1 April 2019 is done both in response to consultation responses and in acknowledgement of the importance of adequate preparation time.

We anticipate further contact with the Commissioner's Office regarding this.

While we are at present unclear as to how the EIRs can apply by law to RSLs (given application to date is based solely on the basis of two Commissioner decisions rather than either judicial opinion or on being formally subject to FOISA) we will engage with SGLD for their views.

[redacted]





**7. An email chain regarding the timing of extending coverage of the Freedom of Information Scotland Act to Registered Social Landlords in the context of the Housing (Amendment) (Scotland) Bill for the Minister for Parliamentary Business and the Minister for Local Government and Housing.**

**From:** [redacted]

**To:** Minister for Parliamentary Business; [redacted]

**Subject:** RE: Housing (Amendment) (Scotland) Bill: Meeting with the Scottish Information Commissioner

[redacted]

In brief, the anticipated gap is approximately 6 months between likely commencement of the Housing (Scotland) (Amendment) Bill and proposed extension of FOISA to RSLs from 1 April 2019 (this date – which took into account consultation responses from RSLs - being intended to allow adequate preparation time for extension and to incorporate sufficient time to undertake further consultation on the precise terms of the Order).

As indicated below, further advice will follow after publication of the stage 1 report to take on board both discussion with the Commissioner and the views of the Committee. This further advice will consider how to address the Commissioner's concerns over the perceived 'gap'.

Thanks

[redacted]

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**From:** [redacted]

**Sent:** 23 January 2018 09:35

**To:** Minister for Local Government and Housing

**Cc:** Minister for Parliamentary Business; [redacted]

**Subject:** Housing (Amendment) (Scotland) Bill: Meeting with the Scottish Information Commissioner

**Minister for Local Government and Housing**

**cc: As Above**

Housing (Amendment) (Scotland) Bill: Meeting with the Scottish Information Commissioner

**Purpose**

To advise you of a meeting that we had with the Scottish Information Commissioner on 18 January to discuss his concern that the Housing (Amendment) (Scotland) Bill will have the effect of removing registered social landlords (RSLs) from the scope of the Environmental Information (Scotland) Regulations (EIRs).

**Priority**

Routine – for information.

## **Background**

When the Local Government and Communities Committee took evidence on the Housing (Amendment) (Scotland) Bill from stakeholders, the Commissioner highlighted his concern that the Bill, by reducing the control that the Scottish Housing Regulator can exercise over RSLs, might make it difficult for him to continue treating RSLs as being subject to the EIRs ('control' being the determining element in how certain organisations are considered as being subject to the EIRs). In your evidence to the Committee on 13 December, you commented that it was not clear that the Bill would have the effect that the Commissioner feared; noted – in the event of the Commissioner being correct - that you would want to find a proportionate and pragmatic means of addressing his concern; and undertook that we would continue to discuss his concern with him.

## **Summary of meeting**

We began the meeting by describing the changes that the Bill makes to the Regulator's powers over RSLs, emphasising that some of these changes simply narrowed powers that currently are drawn widely, and highlighting the large number of powers the Regulator has over RSLs that remain unchanged by the Bill. The Commissioner accepted that the Regulator would clearly continue to have a measure of control over RSLs, and agreed that the position we had described offered more reassurance than he had first thought. Nevertheless, he considered that the effect of the Bill inevitably made it less certain that RSLs could be said to be sufficiently under the control of the Regulator in the future for him to argue that they should continue to be subject to the EIRs.

The Commissioner acknowledged that any uncertainty would be short-lived, existing only during the period between the Bill's provisions coming into force and Freedom of Information being extended to RSLs. He was keen however to discuss potential legislative means of re-establishing an adequate level of certainty during that period. We declined to do so, noting your comments about seeking a proportionate and pragmatic solution to any problem and the possible difficulties that legislation might involve (such as being able to draft a provision for inclusion in the Bill that would be within scope). We said that we would advise you of the points the Commissioner had made to us, and suggested that you would want to consider how to proceed in light of these and of any views on the matter expressed by the LG&C Committee in its Stage 1 report on the Bill.

The Commissioner noted our position and said he would be disappointed if the Scottish Government, in deciding how to proceed, did not demonstrate that it had examined and sought to address his concern. We undertook to continue discussions with him.

## **Conclusion**

We will provide advice on how to address the Commissioner's concern in light of our further discussions with the Commissioner and of whatever the Stage 1 report says

on the matter: Meantime, I invite you to note the discussion that we had with the Commissioner.

[redacted]

