

Freedom of Information (Scotland) Act 2002

Report on exercise of section 5 power

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

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Contents

Introduction	1
Purpose of report.....	1
The Freedom of Information (Scotland) Act 2002.....	1
The section 5 power	2
Exercise of the section 5 power	3
Other work undertaken during the reporting period	4
Future intentions for use of the section 5 power	5
Conclusion	6

Introduction

Purpose of report

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. The Scottish Ministers have powers under FOISA to extend its coverage by making subordinate legislation. The main power to do so is in section 5 of FOISA (the section 5 power).
2. The Scottish Ministers are required to lay a report before the Scottish Parliament every two years about the exercise of the section 5 power, in accordance with section 7A of FOISA. This requirement came into force on 31 May 2013, with the first report due on 31 October 2015. The second report was laid on 31 October 2017 and the third report was laid on 31 October 2019.
3. This fourth report covers the period from 1 November 2019 to 31 October 2021 (the reporting period).

The Freedom of Information (Scotland) Act 2002

4. FOISA came into force on 1 January 2005. It provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and the Scottish Government to local authorities, NHS boards, higher and further education institutions, doctors and dentists, among others.
5. 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.
6. 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.
7. 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.

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

The section 5 power

9. When the Scottish Ministers make a section 5 order, the order designates a person or body as a Scottish public authority for the purposes of FOISA. 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.

10. It is not possible to designate a person or body if it is already listed in schedule 1 or could be added to that schedule 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.

11. 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.

12. In previous reporting periods, section 5 orders have been used to extend 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)
- (f) registered social landlords and their subsidiaries (2019 Order)

Exercise of the section 5 power

13. Section 7A(4) requires the Scottish Government to state whether the section 5 power has been exercised during the reporting period. Where it has not been used, we are also required to give the reason for leaving the power unexercised.

14. The Scottish Ministers have not made any orders using the section 5 power during the reporting period, for the following reasons:

15. In the third report, we noted that the main focus of the Scottish Government in that reporting period had been on extending the coverage of FOISA to registered social landlords (RSLs) and their subsidiaries. This is the largest extension of FOISA since the Act came into force in 2005, with almost 200 new organisations becoming subject to the legislation as a consequence. [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2019](#) came into force on 11 November 2019, shortly after the beginning of this reporting period.

16. With work on extending the coverage of FOISA to RSLs largely complete, between 30 August 2019 and 3 December 2019, the Scottish Government ran a public consultation seeking views on the future use of the section 5 power. The consultation had a focus on organisations which provide services under contract on behalf of Scottish public authorities but also considered the potential for extension to organisations which exercise functions of a public nature more broadly. On 6 March 2020, we published the [analysis of that consultation](#).

17. Work in response to the consultation was temporarily suspended following the coronavirus outbreak. The impact of the coronavirus outbreak prevented us from making progress with this work, but it has now resumed and we shortly intend to produce a policy paper which will set out the Scottish Government's broad approach to the use of the power over the coming years.

Other work undertaken during the reporting period

18. Whilst no orders under section 5 have been made during the reporting period, a number of bodies have been listed in schedule 1 to the Act and have become subject to FOISA as a consequence.

19. Under section 4 of FOISA the Scottish Ministers have the power to add to schedule 1 any body or office holder which is not already listed there and which is a Scottish public authority with mixed or no reserved functions. In May 2020, the Scottish Ministers exercised their section 4 powers to make the [Freedom of Information \(Scotland\) Act 2002 \(Scottish Public Authorities\) Amendment Order 2020](#). This Order added the new Scottish Animal Welfare Commission to schedule 1, making it subject to FOISA from 26 June 2020.

20. There have also been a number of bodies added to schedule 1 by primary legislation:

- (a) **Consumer Scotland** (Consumer Scotland Act 2020)
- (b) **Scottish Biometrics Commissioner** (Scottish Biometrics Commissioner Act 2020)
- (c) **Scottish National Investment Bank** (Scottish National Investment Bank Act 2020)
- (d) **Redress Scotland** (Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021)
- (e) **Environmental Standards Scotland** (UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021)

21. This demonstrates our commitment to ensuring that the coverage of FOISA keeps pace with changes in the public sector landscape.

22. Additionally, in March 2021 the Scottish Information Commissioner [published his report on the experiences of RSLs one year on](#) from their designation. This report drew from the 'Registered Social Landlords and FOI: One Year On survey' and the Scottish Information Commissioner's FOI statistics portal. The Commissioner's office sought input from Scottish Government officials on the design of the survey, and we are grateful to the Commissioner for formally sharing the report with us. The report found that RSLs were responding well to their FOI responsibilities.

Future intentions for use of the section 5 power

23. As mentioned above, the Scottish Government intends to bring forward a policy paper in the near future, setting out the Scottish Ministers' broad approach to the use of their section 5 power over the coming years, drawing on the evidence gathered during our 2019 consultation.

24. We note that as specific orders to extend FOISA are considered, further, targeted consultation will follow with the candidates for inclusion, 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 persons¹.

¹ Section 5(5)(a) of FOISA.

Conclusion

25. As the first of our Six Principles of FOI sets out, the Scottish Government supports FOI as an essential part of open democratic government and responsive public services. We are therefore committed to making effective use of the powers in FOISA, including the section 5 power.

26. The section 5 power is used to protect and maintain existing information rights (as with the 2013 extension to certain arms-length external organisations) as well as expanding those rights further. This reflects the ever-evolving nature of the public sector and its delivery mechanisms.

27. During this reporting period we have concluded a full public consultation exercise to gather views on the future use of the section 5 power and we look forward to publishing a policy paper in the near future setting out the Scottish Ministers' broad approach to the future use of the powers.

28. We will continue to assess options for future section 5 orders with the objective of ensuring that coverage is robust and reflects changing patterns of public service delivery.



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