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Freedom of Information International Review: Scope of Bodies Included

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Freedom of Information International Review: Scope of Bodies Included

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This review was undertaken by Douglas Jack as part of a Scottish Graduate School of Social Science (SGSSS) internship with the Scottish Government's Strategic Analysis Unit, completed during his PhD studies at the University of Strathclyde

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Introduction

The number of international jurisdictions that have adopted freedom of information laws has expanded greatly since the mid-1990s. In the same time period, many countries have seen a transformation in the role of the state and the way public services are delivered.

Scotland enacted its freedom of information legislation in 2002, although it wouldn't be until the beginning of 2005 that the Act came into force. The Act includes provisions that empower the Scottish Ministers to expand its scope as required.

This paper sets out the findings of a review of freedom of information legislation in eleven international jurisdictions, with a particular focus on the scope of bodies included. The laws of the jurisdictions examined are compared with the Freedom of Information (Scotland) Act 2002.

The report addresses two main questions:
1) How do other jurisdictions determine which bodies are subject to their FOI law(s)?
2) Which bodies are subject to FOI law(s) in other jurisdictions?

How other jurisdictions determine which bodies are subject to their FOI law(s)

Table 1, below, sets out the position across the eleven jurisdictions included in the review. In summary:

- All of the jurisdictions examined, to a greater or lesser extent, require bodies that fall within the terms of a definition to comply with their FOI legislation.
- A few jurisdictions primarily list the bodies subject to their FOI law(s) in a schedule to the legislation, although this tends to be those with older legislation.
- Some jurisdictions, whilst primarily assigning bodies that fall within in a definition, allow for the specific designation of certain bodies.

Table 1: How do other jurisdictions determine which bodies are subject to their FOI law(s)?

	Definition	Specific Designation
Scotland		x
Brazil	x	
Estonia	x	
India	x	
Ireland		x
Kenya	x	
Mexico	x	x
Netherlands	x	
New Zealand		x
Nigeria	x	
South Africa	x	
Sweden		x

Which bodies are subject to FOI laws in other jurisdictions?

Table 2, overleaf, sets out the position across the eleven jurisdictions included in the review. In summary:

- Most states assign core-public bodies as well as state-owned enterprises, bodies that perform public functions and bodies that receive public funds.
- The term 'bodies that perform public functions' differs in meaning across the jurisdictions' laws. It can be construed either narrowly, to relate specifically to the performance of public services, or broadly, to include a number of the other sub-categories.
- A few of the jurisdictions' laws cover private entities that have recently been privatised or otherwise have some key importance to the public (eg natural monopolies).
- For many laws there is a bifurcation of obligations between core-public bodies and private bodies that nonetheless have some public role. The former are fully subject to the Act's obligations. The latter are only subject to the extent of their public role.

Potential areas of alteration for Scotland's FOI legislation

The review findings point to a number of alterations that could be considered for Scottish FOI legislation, including:

- a move towards a broad definition combined with designation for certain bodies.
- a change in the statutory criteria for designation under s.5(2)(b) to bodies that receive significant public funds.
- allowing public authorities to temporarily assign certain bodies for specific activities according to statutory criteria and with the help of the Scottish Information Commissioner.
- designation of private entities that exercise administrative authority and those that are monopolies or have a dominant position in the market.

Table 2: Bodies that are subject to FOI laws in other jurisdictions

	State-Owned Enterprises	Political Parties	Private entities that:						
			Perform public functions	Receive public funds or are contracted to deliver public services	Are controlled by a public authority	Exercise administrative authority	Were established by legislation	Are monopolies or have a dominant position in the market	Hold information that is required for the exercise or protection of any rights
Scotland	x		x	x					
Brazil	x		x	x	x				
Estonia	x		x	x			x	x	
India	x	x		x	x		x		
Ireland	x		x	x	x		x		
Kenya	x		x	x			x	x	x
Mexico	x	x	x	x		x			
Netherlands	x				x	x			
New Zealand	x		x	x					
Nigeria	x		x	x	x		x		
South Africa	x	x	x			x			x
Sweden	x				x	x			

Introduction

Context

The number of international jurisdictions that have adopted freedom of information laws has expanded greatly since the mid-1990s. In the same time period, many countries have seen a transformation in the role of the state and the way public services are delivered. Countries with older FOI legislation have found that their laws, in terms of the bodies that are required to provide access to information, are often lagging behind the laws of countries that have recently adopted legislation.

Scotland enacted its freedom of information legislation in 2002, although it wouldn't be until the beginning of 2005 that the Act came into force. At the time of enactment, it was never imagined that the bodies required to comply with the Act's obligations would remain constant[1]. Indeed, the Act included provisions that explicitly empowered the Scottish Ministers to expand the scope as required[2]. Despite this, during its first eight years, the Act underwent little change. The first extension of the Act came in 2013, when arms-length organisations, set up by local authorities to perform recreational, cultural, sporting and social activities on the authorities' behalf, were designated as public authorities[3]. The second came in 2015, when grant-aided schools, independent special schools, Scottish Health Innovations Ltd, those providing a 'secure accommodation service' for children whose liberty is restricted, and private prisons were made subject to the Act's requirements[4]. An Order for a third extension, designating registered social landlords, was laid in February 2019. In addition, the Public Audit and Post-Legislative Scrutiny Committee of the Scottish Parliament has committed to an inquiry into the Act itself[5], under which scope will surely be considered.

At the beginning of her first term of Office, the First Minister of Scotland committed to leading 'the most open and accessible government[6]' in the history of Scotland. The Scottish Government is a member of the Open Government Partnership, and in 2016, was selected to be a 'pioneer government' of that particular programme. There is therefore a responsibility on the Scottish Government to ensure that its freedom of information legislation is amongst the most open in the world. In the 2018-19 Programme for Government, the Scottish Government committed to consulting on proposals to extend coverage of the Freedom of Information (Scotland) Act 2002, specifically mentioning companies providing services on behalf of the public sector[7].

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[1] Jim Wallace MSP, Minister for Justice, Freedom of Information (Scotland) Bill: Stage 3 debate, SP OR 24 April 2002, cols 8111-8112
[2] Freedom of Information (Scotland) Act 2002, s.4 and 5
[3] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013
[4] Freedom of Information (Scotland) Act 2001 (Designation of Persons as Scottish Public Authorities) Order 2016
[5] SP M PAPLS 22 March 2018
[6] Nicola Sturgeon MSP, First Minister of Scotland, Keynote Speech at Caird Hall, Dundee, Friday 7th November 2014
[7] Scottish Government, (2018) 'Delivering for Today, Investing for Tomorrow: The Government's Programme for Scotland 2018-19', Available at https://www.gov.scot/publications/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/pages/4/ (Accessed 25/01/19), p93

It is in this context, that a review of international laws concerning the inclusion of private and non-core public bodies was considered helpful. There may be lessons for Scotland by considering both how laws in other countries determine which bodies should be subject to the legislation and, of course, which bodies are required to comply with the law(s).

This report is split into two parts. The main report contains a discussion of the findings of the review and illustrates these findings with a number of examples. However, most of the detail is included in the annex to the report. Here, the scope of bodies included in the FOI laws of each of the jurisdictions is considered in detail, by asking the same questions of each. Scotland has also been included to aid comparison. Finally, from the insight gained, suggestions are made as to how the Scottish Government and Parliament may update the law, so that it is at the vanguard of international standards.

Aims and Objectives

- To gain an understanding of international freedom of information laws, particularly those that construe scope widely to include bodies outwith the core public sector.
- To compare freedom of information laws internationally with the law in Scotland.
- To identify potential areas of alteration for Scotland's FOI legislation in relation to the possible method and substance of any future extension of the scope of the Freedom of Information (Scotland) Act 2002.

Methodology and limitations

When selecting the jurisdictions for examination, there were two main considerations. First, jurisdictions were considered that had a relatively expansive approach to making bodies subject to FOI. Second, states with disparate legal and political cultures were considered. Geographically, there is wide range of states represented, with a number of different languages, in an attempt to sufficiently reflect the diversity of the laws. Six states that were previously subject to British colonial control and who thus share a common constitutional heritage with Scotland were also included. This meant that states with a similar legal culture to Scotland as well as states where the legal culture is distinct were considered. Right2Info.org, a project of the Open Society Justice Initiative, that compares the FOI laws of several jurisdictions was particularly helpful in determining which bodies merited further examination.

The following jurisdictions were therefore selected:

- Brazil
- Estonia
- India
- Ireland
- Kenya
- Mexico
- The Netherlands
- New Zealand
- Nigeria
- South Africa
- Sweden

For most of the jurisdictions examined, academic articles or book chapters were first consulted to get a sense of the states' FOI Law(s) and how they operated. When a basic understanding of the relevant laws was gained, the legislation was directly consulted. Most of the laws were available in English. Where they were not, eg Sweden and the Netherlands, translations were made with Google Translate. The Swedish and Dutch Laws therefore may not be perfectly translated, although the translation was cross-referenced with English-language commentary to ensure that they were broadly the same. From there, webpages of the relevant supervisory bodies/government departments were browsed for reports/guidance to determine whether the scope of the Act had been considered in more detail.

Where possible, case law was also consulted, although this was limited to English-speaking jurisdictions. It is therefore possible that further clarification of scope has been missed in jurisdictions where case law could not be accessed. Further, Freedom.org, an NGO specialising in international FOI laws was browsed for relevant news related to scope and keyword searches on google were also made to determine whether there were news stories reported that concerned the scope of the relevant legislation. Finally, where the legislation requires pro-active disclosure or the appointment and publication of details of an Officer in charge of FOI duties, the webpages of some bodies subject to the Act were browsed to determine whether the bodies were complying with their duties.

Research questions

In order to aid comparison between the Freedom of Information (Scotland) Act 2002 and the laws of the other jurisdictions, two main questions were asked:

1) How do other jurisdictions determine which bodies are subject to their FOI law(s)?
2) Which bodies are subject to FOI law(s) in other jurisdictions?

The first question was selected in order to illustrate that different jurisdictions have different processes for ensuring that sufficient bodies are subject to FOI requirements. This, of course, means that legislation is considered, but also any other methods of including bodies for example by granting a Minister or an oversight body the power to designate bodies. By discussing the way different laws determine which bodies should be required to comply with the FOI law it is hoped that the advantages and disadvantages of the different approaches can be observed, and their relevance, when considered in a Scottish context.

The second question, which is divided further into sub-questions, aims to directly compare the bodies that tend to be covered by the legislation. This allows for comparison between the scope of bodies covered in the FOI laws of different countries. By locating the particular bodies that are required to comply with FOI laws in the jurisdictions; the extent to which those bodies are required to comply with FOI obligations; why those bodies have been included; and how successful such bodies have been in complying with their obligations, it may inform consideration of extending FOISA to include other bodies.

The report will therefore explore both questions (and their sub-questions) in detail and highlight any illustrative examples from the jurisdictions examined.

How other jurisdictions determine which bodies are subject to their FOI legislation

The first question relates to legislative drafting. Drafters can designate bodies by requiring all bodies that fall within the terms of a definition to comply with the Act. Alternatively, they may decide to include bodies by listing those that are required to comply. It is also open to drafters to include some bodies by using a definition and others by including them in a list, which in some states is added to by Ministerial Order[8] or an oversight body's designation[9].

A related question is the manner in which the laws determine which bodies are subject to which obligations. Some statutes require all of the bodies that are required to comply with the Act to abide by all of the Act's obligations. Others state that some of the bodies have full obligations under the Act whereas others are only partially required to comply.

There are advantages and disadvantages to each approach. The different approaches will therefore be discussed and a few examples considered.

Including bodies by requiring those that satisfy the terms of a definition to comply with the Act

The laws in the majority[10] of the jurisdictions examined require bodies to comply with the Act if they fall within the terms of a definition.

This approach has the benefit of being simple and, if the definition is sufficiently broad, ensuring that all bodies that should be subject to the Act are. The use of a definition also has the advantage of conveying why bodies are made subject to FOI laws. For example, a number of laws state that 'private bodies that perform public functions' or 'private bodies that receive public funds' are required to comply with the Act. Ignoring issues concerning the meaning of these terms, the above definitions make it clear that such bodies require to comply with the Act *because* they perform functions of a public nature or *because* they receive money that has been raised from the public. This makes the decision to include the body less arbitrary than if they merely have been listed with no further explanation. It also makes it easier for the public to get a sense of the type of scenarios in which they are entitled to access information.

The major disadvantage of designating bodies by using a broad definition is a lack of certainty. Bodies that wish to evade their responsibilities under the Act may deny that they are subject as they have not been specifically designated. This can be observed in Kenya, where it has been suggested that some bodies, which are thought to satisfy the definition

[8] Eg, Scotland, Freedom of Information (Scotland) Act 2002, s.4 and 5; Ireland, Freedom of Information Act 2014

[9] Eg, Mexico, Ley General De Transparencia Y Accesso A La Información Pública 2015, (General Act of Transparency and Access to Public Information 2015), Article 81

[10] Brazil, Estonia, India, Kenya, Mexico, The Netherlands, Nigeria and South Africa (see annex)

of 'private body[11]' within the Kenyan Access to Information Act, are failing to comply with their duties, claiming that they are not subject to the Act[12].

Moreover, a number of the terms used in the definition may require further clarification. Take the previous example of, 'private bodies that perform public functions'. This leads to the question of how to define a 'public function'. The answer to such a question is highly contested and is likely to change over time. Some jurisdictions have attempted to resolve this problem by including a relatively detailed definition of the bodies that are subject to the Act. For example, the Swedish Law states that the Act applies:

> *"to documents of public limited companies, commercial companies, economic associations and foundations where municipalities or county councils exercise a controlling influence.[13]"*

And that,

> *"Municipalities and county councils shall be deemed to exercise a controlling influence if they alone or together,*
>
> *Own shares in limited liability company or are participants in an economic association with more than half of all votes in the company or association or otherwise possess so many votes in the company or association;*
>
> *Has the right to appoint or remove more than half of the members of the board of a limited liability company, an economic association or a foundation; or*
>
> *Constitutes all responsible partners in a corporation[14].*

This detailed definition helps to clarify which bodies are subject to the Act, but can significantly lengthen the definition, which compromises its simplicity.

An alternative approach is to keep a relatively broad definition but to allow for terms in the Act to be interpreted elsewhere. This could be in an explanatory memorandum[15] or other government guidance[16], by allowing an oversight body to determine whether bodies are subject on the basis of statutory criteria[17] or leaving it up to the courts[18]. This compromises the simplicity of the definition and requires requesters to look beyond the statute to gain a

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[11] Access to Information Act (31 of 2016), s.2

[12] Herbling, D. (04/06/17). 'Kenyan firms slow in enforcing Access to Information Act', *Business Daily Africa,* Available at https://www.businessdailyafrica.com/economy/Kenyan-firms-slow-in-enforcing-Access-to-Information-Act/3946234-3955564-126nyqy/index.html (Accessed 16/01/19)

[13] Offentighets-och sekretesslag (2009:400), (Public Access to Information and Secrecy Act) 3 §

[14] Public Access to Information and Secrecy Act 2009, 3 §

[15] Netherlands, Wet openbaarheid van bestuur (Public Access Act) 1991, Explanatory Memorandum

[16] Scottish Government, (2010), 'Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002' Available at https://www2.gov.scot/Resource/Doc/319057/0101913.pdf (Accessed 23/01/2019); and Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019),

[17] Eg Mexico, General Act of Transparency and Access to Public Information 2015, Art 81

[18] Eg, South Africa and Nigeria

true understanding of the bodies subject to the legislation. Relying on courts to confirm the designation of bodies can be slow and costly process. This may lead some bodies to refuse to comply in bad faith, in the hope that requesters decide not to pursue legal action. However, despite all options having drawbacks, a combination between a broad definition and specific designation according to certain statutory requirements might represent the best option.

Including bodies by specific designation

The advantages and disadvantages of designating bodies by including them in a list is a mirror image to the advantages and disadvantages of assigning bodies by definition. None of the jurisdictions examined exclusively use a list. Due to the multiplicity of organisations subject to FOI, such a list would be extremely long and almost certainly incomplete. However, some jurisdictions such as New Zealand, Ireland, Sweden and, of course, Scotland make partial use of a list. Further, while Mexico does not list bodies that have been specifically assigned, private bodies that perform public functions or receive public funds must be directly assigned by the Mexican oversight body.

Those considering the relative advantages and disadvantages of direct designation may perhaps be interested to note the example of Ireland. Ireland's FOI law is in its third iteration. The current Act assigns bodies by using a broad definition[19] as well as a list[20]. This list contains bodies that have been prescribed by a Minister but that have only certain obligations under the Act[21]. Interestingly, it also contains bodies that would otherwise fall within the definition of 'public authority' but have been specifically exempted, either partially or completely, from complying with the Act[22]. This stands in contrast to the previous iteration of the Act, where bodies were either listed or designated by Ministerial Order[23]. That Ireland decided to move from almost exclusively listing to mainly using a definition suggests that the exclusive use of a list was an unsatisfactory approach.

The main advantage of designation by list is that bodies and the public can be absolutely certain of whether a body is subject to the Act and, if so, what obligations that body is required to comply with. States that use some form of list have been largely recognised for having comparatively strong records of compliance with their respective Acts[24]. This is probably not a coincidence.

However, in the context of the designation of private bodies, it is probably unrealistic to expect a definitive list. This is especially the case if bodies are included that receive public funds or are contracted to perform public functions as such bodies are likely to vary significantly over time. An update to legislation every time a private body receives public

[19] Ireland, Freedom of Information Act 2014, s.6
[20] Ireland, Freedom of Information Act 2014, s.7 and Schedule 1, Part 1 and Part 2
[21] Ireland, Freedom of Information Act 2014, Schedule 1, Part 1
[22] Ireland, Freedom of Information Act 2014, Schedule 1, Part 2
[23] Ireland, Freedom of Information Act 1997, Schedule 1
[24] See for example, Liddle, C & McMenemy, D (2014) 'An evaluation of the United Kingdom and Scottish freedom of information regimes: comparative law and real-world practice' *Communications Law 19(3),* pp77-85; Worthy, B (2017) *The Politics of Freedom of Information,* Manchester: Manchester University Press, Chapter 9; Peled, R & Rabin, Y (2010). 'The Constitutional Right to Information' *Columbia Human Rights Law Review 42:357,* p397

funds or is contracted to provide a public service would be an inefficient use of parliamentary time.

An alternative perhaps is designation by Ministerial Order, but again, depending on how broad the criteria for designation is, Ministerial Orders may not be sufficiently responsive to the changing nature of bodies performing public functions or receiving public funds.

Another alternative could be the system in Mexico whereby agencies responsible for oversight of the Act are given the power to designate bodies according to specific statutory criteria[25]. In order to identify bodies that should potentially be required to comply with the Act, public authorities are required to send a list of otherwise private entities to the relevant agency (the oversight agency in Mexico is structured so that each state has its own agency) detailing the extent to which such entities have received public funds or are performing public functions (expressed as a power emanating from statute)[26]. This gives the certainty needed but also retains a degree of flexibility.

Following the Mexican model in Scotland however, would likely require considerable alterations to the functions and size of the Scottish Information Commissioner – as it does not have vast resources and operates centrally. To counter this, the decision to temporarily designate bodies that either perform the functions of a public authority or that receive significant public funds could be given to the public authorities themselves. The Scottish Information Commissioner could produce detailed guidance that helps such bodies to determine whether to designate, perhaps based on the factors discussed in a report produced in 2015[27]. Such guidance would include: the extent of funds received by the body; the purpose for which the funds were sent; and, whether the public had an interest in the disclosure of the body's records. Each public body could be required to publish a list of the bodies that it has sent funds to, the bodies it has decided to designate and what information the public is entitled to receive from each body. This list would serve as information for the public in terms of which bodies and records they are entitled to receive information from, and as an accountability mechanism for the public authority.

Degree of designation?

A related question is whether the Act determines the obligations that bodies are required to comply with under the Act. All of the jurisdictions considered require what can be described as core public authorities[28] to fully comply with the Act, subject to exemptions. However, where there is some variation, is the manner in which the jurisdictions' legislation determine the obligations of private entities.

One option is to state that all bodies that are subject to the Act have the same obligations. India appears to adopt this position. It could be argued, however, that requiring private

[25] General Act of Transparency and Access to Public Information 2015, Art 81

[26] General Act of Transparency and Access to Public Information 2015, Art 82

[27] Scottish Information Commissioner (2015). 'Commissioner's Special Report: FOI 10 Years On – are the right organisations covered? Available at http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportsandotherpublications.aspx (Accessed 25/01/19)

[28] Government, Administrative, Parliamentary and Judicial Bodies

bodies to disclose information in areas where there is no public interest is unnecessary, and that placing this burden on some private bodies and not others would be unfair.

A second option is to only require bodies to comply with the Act to the extent of the reason for their designation. For example, if bodies have been included that perform public functions, the Act could only require bodies to release information related to the performance of that public function. Most of the jurisdictions under consideration tend to favour this approach. However, again this can be relatively vague, and some public functions of a private body may be difficult to extrapolate from their private dealings.

Finally, if bodies are explicitly designated, it is possible for a body to be required to comply with the Act only in respect of specific functions. For example, in Sweden, bodies that are not core public authorities are included in the Annex to the Public Access to Information and Secrecy Act 2009. On one side of the Annex the body's name is stated and on the other, the body's obligations under the Act are set out (see table 3). This approach has the benefit of ensuring bodies are certain about their obligations, although, it makes the designation of bodies a far more complex task.

Table 3: Extract from Annex to Swedish Public Access to Information and Secrecy Act 2009 showing different obligations for different bodies

Organ	Activities/functions subject to FOI
Unemployment funds under the Unemployment Insurance Fund Law (1997:239)	Review of unemployment benefit cases (SFS 1997: 238) and cases of membership fee for unemployed member (SFS 1997: 239)
Chalmers University of Technology, limited liability company	All activities
The Association of Visual Arts Copyright in Sweden (BUS)	Allocation of state funds to image and form artists (SFS 1992: 318)
Posten Aktiebolag	Participation in elections (SFS 1993: 1689 and 1993: 1690), referendum (SFS 1993: 1696), special postal service (SFS 1993: 1688), customs control (SFS 1993: 1698), license release (SFS 1993: 1695) of relocation reports (SFS 1993: 1699)
The Swedish Church and its organizational parts	Activities carried out under the Funeral Act (1990: 1144) as well as the distribution and use of the state compensation received by the Church of Sweden under Chapter 4. Section 16 (1988: 950) on cultural heritage, etc.
Swedfund International AB	Review of state aid issues for small and medium-sized Swedish companies in Swedfund's partner countries (SFS 2008: 1272)

Bodies that are subject to FOI laws in other jurisdictions

The second question concerns which private and non-core public bodies tend to be included in the legislation of the jurisdictions examined. The below sub-sections reflect the categories of bodies expressed most in the legislation. Often, the same body may fall within more than one definition, or indeed a term may be interpreted broadly to subsume some of the other categories.

For example, India's Right to Information Act[29] has a relatively extensive definition that includes a number of the sub-categories below, including state-owned enterprises[30], private entities controlled by a public body[31], entities that were established by legislation[32] and private entities that receive public funds[33]. However, the Airports Authority of India, established by the Airports Authority of India Act 1994, and owned, controlled and funded by the Indian Government could feasibly have been made subject to the Act on a number of grounds.

Conversely, in Scotland, the legislation empowers Ministers to designate private and non-core public bodies if they perform public functions[34] or are contracted to provide public services[35]. However, when consulting on whether to extend coverage of the Act, the Scottish Government has adopted a factor-based approach that takes into account, amongst other things: the extent of public funding; whether the activities of a body are enmeshed with the relevant public authority; and, whether the body has extensive or monopolistic powers[36]. Public function has thus been interpreted broadly in Scotland, to the extent that it encompasses some of the other categories below.

In addition, for some of the jurisdictions that make most bodies subject to the Act using a list, such as New Zealand, the criteria for designation is not explicit. Therefore some bodies that fall within the below categories may be made subject to the Act, but it is not clear why they have been designated.

Finally, some bodies that fall within the below definitions may be included, whereas others may not. In Ireland for example, Irish Rail is subject to the Act but Bus Éireann[37] is not, despite both being state-owned enterprises.

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[29] The Right to Information Act, 2005, Clause 2(h)
[30] The Right to Information Act, 2005, Clause 2(h)(d)(i)
[31] The Right to Information Act, 2005, Clause 2(h)(d)(i)
[32] The Right to Information Act, 2005, Clause 2(h)(b) and (c)
[33] The Right to Information Act, 2005, Clause 2(h)(d)(ii)
[34] Freedom of Information (Scotland) Act 2002, s.5(2)(a)
[35] Freedom of Information (Scotland) Act 2002, s.5(2)(b)
[36] Scottish Government, (2010), 'Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002' Available at https://www2.gov.scot/Resource/Doc/319057/0101913.pdf (Accessed 23/01/2019); and Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019),
[37] Scottish Government, (2010), 'Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002' Available at https://www2.gov.scot/Resource/Doc/319057/0101913.pdf (Accessed 23/01/2019); and Scottish Government (2015) 'Consultation of Further Extension of Coverage of the

Thus, while dividing the bodies subject to FOI legislation into categories is a convenient method of comparing the jurisdictions examined, focusing on the number of subcategories that a law's definition includes paints a misleading picture of the true coverage of the Act. This is particularly true of private entities that perform public functions, exercise administrative authority, are controlled by a public body, are established by legislation and that receive public funds as these categories tend to have the most overlap. Clarification of the exact position of each of the jurisdiction's laws can be found in the annex. Nonetheless, it is helpful to consider each of the sub-categories below and note how each state places emphasis on different factors that they consider important for designation.

State-owned enterprises

State-owned enterprises (SOEs) or government-owned enterprises are subject (or capable of being subject) to FOI laws in all of the jurisdictions considered[38]. State-owned enterprises are commercial companies, owned by the government, that undertake commercial dealings on behalf of the government. Common state-owned enterprises include airports, banks, transport companies and companies that extract natural resources. State-owned enterprises tend not to be included in the core definition of state body, because, despite state ownership, they exist to undertake commercial dealings – and as such are not considered to be a core public body. Despite this, as SOEs are run by the Government and are often guaranteed by Government money, as well as often operating in areas in which there is a strong public interest to ensure there is proper management, there are thus are strong reasons for the designation of SOEs.

The main point of contention in relation to state-owned enterprises is the degree of ownership required for bodies to made subject to the Act. A few laws require 100% ownership before bodies are required to comply with the Act[39] but most require at least more than 50% ownership[40]. In some instances state-owned enterprises need to be specifically designated in order to be subject to the Act's obligations[41]. For example in New Zealand, Solid Energy New Zealand[42] is subject to the legislation but Genesis Energy is not, despite the New Zealand Government owning a majority share in both. Further, in some jurisdictions state-owned enterprises are only partially subject. For example, in Sweden, PostNord Sverige is only required to provide access to documents in relation to its roles in which it has statutory powers[43].

The Scottish Government could potentially amend Section 6 of FOI(S)A to cover companies that are more than 50% owned by a public authority (or public

Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019),

[38] In some jurisdictions, for example Estonia, Kenya, the Netherlands and Sweden state-owned enterprises are not explicitly mentioned in the legislation. However, state-owned enterprises fit within another definition or have been confirmed elsewhere as subject to the Act. Please see the annex for more details.

[39] For example Scotland and New Zealand, see annex for more details

[40] Brazil, India, Ireland, Mexico, Nigeria and Sweden – See annex for more details

[41] Ireland, New Zealand and Sweden – See annex for more details

[42] Official Information Act 1986, s.2; State-Owned Enterprises Act 1982, s.2

[43] Public Access to Information and Secrecy Act 2009, Annex

authorities), other than those listed only in relation to information of a specified description. This would bring the Act in line with other international jurisdictions.

Private entities that perform public functions

Eight of the eleven jurisdictions considered allow for the designation of private entities that perform public functions or some variation of that term. Further, in the remaining three jurisdictions, it appears that the performance of a public function is a relevant criterion for designation under the Act.

The major problem with the designation of private bodies that perform public functions is that there are varying ideas about what 'public function' actually means.

Some laws[44] answer this question pragmatically and require bodies that have duties arising from legislation or the constitution to comply with the Act[45]. The problem with such a definition is that it does not cover the non-statutory duties that public authorities may have. A way to cover such duties is to make bodies that are contracted to provide public services capable of being designated[46]. However, this definition is relatively circular as it leaves open the question of how to define a 'public service'. Estonia is the only state examined that specifically spells out what is meant by 'public duties' stating that it 'includes the provision of educational, health care, social or other public services.[47]' However, even here, the definition is meant to be non-exclusive suggesting that other services may also be considered to be public functions.

As already discussed, 'public function' can be defined narrowly, and used in combination with other categories in an attempt to catch as many bodies as possible. Alternatively, it can be defined broadly to include the receipt of public funds, the exercise of administrative authority, being established by legislation, and even bodies that have access to natural resources (including monopolies).

In some jurisdictions[48], bodies that have public functions are only subject to the Act if they have been pro-actively designated. This tends to be by Ministerial Order[49]. However in Mexico the task is given to the oversight body who, after receipt of a list of entities that have been given funds by public authorities[50], must determine according to statutory criteria, whether the body should be subject to the Act's obligations and what its obligations should be[51].

In the vast majority of cases, private bodies that undertake public functions are only subject to the Act to the extent of the performance of those functions. Indeed, in New

[44] Estonia, Ireland, South Africa and Sweden – See Annex for more details
[45] Eg Mexico, Sweden – See Annex for more details
[46] Scotland, Brazil, Estonia, the Netherlands and New Zealand - See Annex for more details
[47] Avaliku teave seadus 2000 (RT I 2000, 92, 597) (Public Information Act 2000), s.5(2)
[48] Scotland, Ireland, Mexico and Sweden – See Annex for more details
[49] Eg Scotland and Ireland – See Annex for more details
[50] General Act of Transparency and Access to Public Information 2015, Art 82
[51] General Act of Transparency and Access to Public Information 2015, Art 81

Zealand, it is not the body itself that is required to respond to the request, but rather the public body that is usually required to perform the function[52].

Therefore, although a very common criterion for designation, the exact meaning and method of designation of entities that perform public functions varies greatly from law to law. **Scotland conceives of 'public function' quite broadly and could perhaps benefit from a more explicit deconstruction of the term in the legislation – so that the relevant factors that the government takes into account when designating bodies is clearer.**

Private entities that receive public funds

Private entities that receive public funds are often connected with bodies that perform public functions. Indeed, in India, it appears that the receipt of public funds determines whether a body is performing a public function, as 'public function' is not mentioned in the Act.

Most of the laws considered mention 'private entities that receive public funds' or 'are contracted to provide public services' as criteria capable of leading to designation. Those that do not do so explicitly[53], appear to view such factors as a determinant leading to designation.

New Zealand, Scotland and Estonia all continue to tie the receipt of public funds to the performance of public services. New Zealand, for example, makes it possible to request information from 'independent contractor[s]' engaged by a public authority[54]. However, the rest of the jurisdictions do not tie the receipt of public funds to public functions.

The key question in relation to the receipt of public funds is the level required for designation. In Brazil, all bodies in receipt of public funding are required to comply with requests. However, such bodies need only comply in respect of those funds. In India, all bodies 'substantially financed[55]' by public funds are subject to the Act. 'Substantially financed' has been defined in another Act as a 'grant or loan… not less than rupees twenty-five lahks [about £27,000] and the amount of such grant or loan is not less than seventy-five percent of the total expenditure of that body or authority[56]'. This specific criteria has the benefit of clarity but, if stuck to rigidly, may result in some bodies that should be subject to the Act avoiding designation.

Another question is whether all bodies that receive funds are required to comply with the legislation or rather only bodies that have been given funds for a particular purpose. As mentioned, most jurisdictions accept that bodies that receive public funds to perform a public function should be designated. However, in India and Ireland[57], funding for other

[52] Official Information Act 1986, s.2(2)
[53] The Netherlands, South Africa and Sweden, see Annex for more details
[54] Official Information Act, s.2(5)
[55] Right to Information Act. 2005, Clause 2(h)(d)(i)
[56] Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971, s.14
[57] See Annex

purposes such as grants or loans are also deemed to be funding capable of leading to designation.

Most jurisdictions do not require bodies in receipt of public funding to be fully compliant with the Act. In most cases the extent of the bodies' obligations relates to the extent of the funding and the activities to which the funding has been used. Further, many countries do not automatically designate bodies that receive public funding. Bodies responsible for designation are usually required to weigh up whether to designate by considering the degree of public funding and for what purpose before making a decision. This can be seen, for example in Mexico, India and Ireland.

In Scotland, the receipt of significant public funds might be considered sufficient to require designation. If so, section 5(2)(b) might be amended to remove reference to the contracting of public services and move towards the more general, private bodies that 'receive significant public funds'. Any public authority that assigns significant funds to a private entity should be required to specify the purpose for which the funds were granted.

Private entities controlled by a public body

Six of the eleven jurisdictions considered require bodies that are subject to the control of public authorities to comply with obligations under the Act. However there seems to be variation as to what is meant by 'control'.

In Sweden and Nigeria, 'control' means financial control and tends to include bodies in which the state has a 'controlling stake'.

In Brazil, Ireland and the Netherlands bodies can be designated if they are 'directly or indirectly controlled' by public authorities. Whilst the meaning of 'control' still is not clear, this could cover arms-length bodies created by public authorities to perform specific tasks or indeed bodies in which the government has no financial stake but which rely on government funding to survive. It thus appears here that control is still related to funding.

It is in India, however, that there has been most discussion of the concept of 'control'. One case has suggested that governance 'through the medium of Acts/Rules[58]', is sufficient to establish control. In other words, any entity subject to mere regulation of public authorities may be subject to the Act. However, this ruling is considered contentious and it has been disputed in other cases[59].

For the most part therefore it seems that 'control', tends to imply financial control. This can be through ownership, funding or the imposition of a contract. In some of the jurisdictions that do not mention control, the receipt of public funds or bodies in which the government has more than 50% ownership would include the same bodies as 'bodies controlled by public authority'.

[58] The Hindu Urban Cooperative Bank Limited and Others v. The State Information Commission and Others (Pun & Har HC) *1190/2011,* para 87

[59] Dattaprasad Co-operative Housing Society Ltd v. Karnataka State Chief Information Commissioner [2009] *5 RCR (Civil) 833* (Karc HC)

Entities that exercise administrative authority

The expression 'entities that exercise administrative authority' is not one that actually appears in any of the Acts. Mexico, the Netherlands and Nigeria come the closest by designating 'autonomous bodies[60]', 'regulatory industrial organisations[61]', and any 'administrative or advisory body of the government[62]', respectively. However, if one considers the specific bodies subject to the Acts it can be that such bodies are often subsumed under a different definition.

Entities that exercise administrative authority tend to be bodies formally independent of government, and occasionally even completely separate from the Government, that nonetheless possess some administrative or regulatory power. Often entities that exercise administrative authority are government funded but they also may be funded by membership contributions.

Examples of bodies that exercise administrative authority include professional licensing and standard setting organisations. In Sweden, several bodies that could be described as exercising administrative authority have been designated, for example the Royal Swedish Aeroclub is required to allow access to documents related to the 'inspection and supervision of aircraft and issue and renewals of the airworthiness certificate[63]' or the Institute for the Professional Development of Doctors in Sweden (IPULS) is required to facilitate access to public documents related to the examination of issues concerning the provision and distribution of places for specialist competence courses that are included in doctors' continuing education and which are organized with state funds'[64].

In Scotland, state bodies that exercise administrative authority such as the Law Commission and the Scottish Information Commissioner are subject to the Act. However, principally member-based organisations that vest administrative authority, for example the Law Society of Scotland, are not. Perhaps this is an area where the law could be extended – although the Act's obligations should only stretch to the extent to which such bodies exercise administrative authority.

Entities that were established by legislation

Five of the eleven international jurisdictions explicitly designate entities that 'were established by legislation'. However, several others include such bodies either by specifically listing them[65] or by using an alternative definition[66]. Bodies established by legislation tend to be state-bodies formally separate from the three traditional branches of state, for example independent commissions and ombudsmen as well as central banks and public corporations. Public corporations are distinguished from state-owned enterprises in that they are not registered according to the states companies legislation and that they often do not have any financial objectives. An example of a public

[60] General Act of Transparency and Access to Public Information 2015, Article 23
[61] Public Access Act 1991, S.1a(1)(b)
[62] Freedom of Information Act 2011, s.2(7) and s.31
[63] Public Access to Information and Secrecy Act 2009, Annex
[64] Public Access to Information and Secrecy Act 2009, Annex
[65] Scotland and Sweden, See Annex
[66] See Annex

corporation would be the Airports Authority of India, responsible for the maintenance of civil aviation infrastructure in India which was established by the Airports Authority of India Act 1999.

In India, there have been some attempts to suggest that bodies created according to the terms of legislation, for example those registered under the Multi-State Co-operative Societies Act 2002[67] and those under the Companies Act 2013, are subject to the RTI Act. However, the Supreme Court has distinguished between bodies established by legislation and bodies established according to the terms of legislation[68]. The Court noted that the Indian Act designates bodies that are created 'by or under the Constitution' but only designates bodies created 'by any other law made in Parliament', suggesting that the drafters deliberately intended to exclude bodies created under legislation[69].

Political parties

Political parties are required to comply with access to information legislation in only a few of the jurisdictions reviewed. Even then, only in Mexico are political parties explicitly mentioned in the legislation[70].

In South Africa and India, where political parties are not explicitly cited in the legislation but have been found to be subject in decisions by a court and the oversight body respectively, designation remains contentious.

In India, political parties have refused to comply with the ruling of the Central Information Commissioner, the chief oversight body with the power to determine whether a body is subject Right to Information Act. A number of cases challenging their lack of compliance were before the Supreme Court at the time of writing[71].

In South Africa, the Western Cape High Court said the constitutional right to access information[72] in combination with the right to vote[73] required political parties to disclose the details of entity that had provided significant donations to the party[74]. As the South African Act did not necessitate the release of this information, it was deemed to be unconstitutional. The court have allowed the legislature 18 months to remedy the lack of law, the result of which is the Political Party Funding Bill, which is yet to receive Presidential assent.

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[67] Thalappalam Ser. Coop. Bank Ltd and others v. State of Kerala and others, *Civil Appeal No.9017 of 2013*
[68] Thalappalam Ser. Coop. Bank Ltd and others v. State of Kerala and others, *Civil Appeal No.9017 of 2013,* para 15
[69] Thalappalam Ser. Coop. Bank Ltd and others v. State of Kerala and others, *Civil Appeal No.9017 of 2013,* para 15
[70] General Act of Transparency and Access to Public Information 2015, Art 23
[71] Political parties under RTI: Election Commission contradicts CIC directive' *The Hindu (27/05/18)*, Available at https://www.thehindu.com/news/national/political-parties-under-rti-election-commission-contradicts-cic-directive/article24006404.ece (Accessed 23/01/19)
[72] The Constitution of the Republic of South Africa, 1996, s.32(1)
[73] The Constitution of the Republic of South Africa, 1996, s.19(3)
[74] My Vote Counts NPC v President of the Republic of South Africa and Others (13372/2016) [2017] *ZAWCHC 105*

There is therefore no international trend towards the designation of political parties. Political parties sit outside the traditional public/private divide and thus tend not to be covered by wider definitions. Clearly, there is a public interest in the release of some information held by political parties such as funding, pay-grades, disciplinary procedures etc. Further, their public facing nature and need to gain public support means that political parties are likely to act in a relatively transparent manner as a matter of course - think, for example, of televised annual party conferences and public meetings. There has been some suggestion that MSPs should be required to comply with FOI(S)A. However, as seen above, the designation of political parties and/or MSPs is likely to be highly controversial.

Monopolies or private entities with a dominant position in the market

Another interesting way to catch bodies that might be considered to hold information that is in the public interest is to require monopolies or private entities with a dominant position in the market to comply with the duty to provide information. Only three of the laws examined specifically capture such bodies in the law. That said, they do so in relatively different manners and to relatively different degrees.

The only law to explicitly reflect the above language is the Estonian PIA. Here the law provides that 'undertakings which have a dominant position in the market or special or exclusive rights or which are natural monopolies[,][75]' are required to comply with the Act. However, such bodies are only required to comply 'with regard to information concerning the conditions and prices of the supply of goods and services and changes thereto[76]'. The Estonian Act seems to have included such bodies on the basis that their dominant position in the market gives them a higher degree of power over the average consumer than companies that are obliged to compete for a share of the market. The power of the company to determine changes in price, in the knowledge that those relying on the service do not have the option to opt for a competitor, suggests there is an enhanced need for the public to gain an understanding into how prices are determined.

In Kenya, the reasoning for the inclusion of similar bodies appears to be slightly different. Kenya's law provides that a body that 'has exclusive contracts to exploit natural resources[77]' is required to comply with the Act in relation to those resources. The inclusion of such bodies in Kenya appears to derive from the inherent public interest in the exploitation of resources that are properly deemed to belong to the state – and thus the public.

In the Netherlands, although not arising from the Dutch legislation, any private entity that is directly competing with a state-owned enterprise is subject to the same obligations of that state-owned enterprise[78]. This requirement exists in order to prevent state-owned enterprises being placed at a competitive disadvantage in relation to non-state owned companies. Indeed, if the state-owned enterprise is privatised none of its competitors are

[75] Public Information Act 2000, s.5(3)(1)
[76] Public Information Act 2000, s.5(3)(1)
[77] Access to Information Act (31 of 2016), s.2 'Private body': (a)
[78] Right2info. (13/09/13) 'Private Bodies and Public Corporations' Available at https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 23/01/19)

any longer required to have their information disclosed. This suggests that the Dutch requirement isn't based on any wider sense of the public interest.

A related concept to those above is the requirement, which has been developed in the case law of some of the jurisdictions, for example South Africa[79] and India[80], that requires previously state-owned enterprises to continue to comply with the Act's obligations. This ties in with what has been described by the Scottish Information Commissioner as a '*loss of rights'* approach[81], whereby the requester retains their right to receive information regardless of whether the body performing the function is owned by the state or privately.

Scotland could perhaps consider the designation of bodies that are monopolies or have privileged rights to provide public services or exploit natural resources. The provision of public transport, energy etc are areas where, despite their private provision, have significant importance to the public. Both the essential nature of these services and the fact that the companies that provide them are given a privileged place in the market heightens the need for stronger accountability to the public. Whether such bodies should be fully required to comply with the Act, or only subject to certain disclosure obligations, such as in terms of the setting of prices, is an area that merits further consideration.

Private entities that hold information that is required for the exercise or protection of constitutional rights

Two of the jurisdictions examined, South Africa and Kenya, constitutionally guarantee the right to information from private entities, if that information is required for the exercise or protection of any other constitutional rights. The inclusion of such an article reflects the recognition that the state is required to protect the rights of its citizens, even when the threat stems from non-state actors.

There have been a number of cases in both South Africa and Kenya that have clarified how this right works in practice.

In Kenya, the High Court of Nairobi determined that the right to information[82] in conjunction with the right to freedom of expression[83] and of the media[84] did not require private bodies to release information requested by the media[85]. The court argued that it would be unrealistic to assume that the right to information required 'a positive obligation on

[79] See Roberts, A. (2010). 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act', *Public Information Review November/December,* p932
[80] Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) *SA 66 (SCA)*
[81] Scottish Information Commissioner (2015). 'Commissioner's Special Report: FOI 10 Years On – are the right organisations covered? Available at http://www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportsandotherpublications.aspx (Accessed 25/01/19)
[82] Constitution of Kenya, 2010, Article 35(1)
[83] Constitution of Kenya, 2010, Article 33
[84] Constitution of Kenya, 2010, Article 34
[85] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 67

everyone to give it [the media company] whatever information it sought in order to enable it to publish stories and information.[86]'

In South Africa, the case law is even further developed. In order to make use of the right it has been held that, 'an applicant has to state what the right is that he wishes to exercise or protect, what information is required and how that information would assist him in exercising or protecting that right.[87]' This position has been criticised for placing a too onerous burden on requesters of information[88]. It is argued that those asking for information often do so precisely because they do not know its contents. Therefore requiring requesters to prove that the information they request, which they often have not seen, is necessary for the protection of another right is extremely difficult. This has been made even more difficult by the decision to interpret the term 'reasonably required' as 'understood to connote a substantial advantage or an element of need', which has been considered to be a relatively high standard for the requester to prove. However, use of this provision in South African law is not impossible. It has been relied on, for example, to require political parties to release details of their funding[89] and for an individual to gain information on reasons behind their dismissal from employment[90].

[86] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 67
[87] Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others, 2001(3) *SA 1013 (SCA),* para 28
[88] Peekhaus, W. (2014). 'South Africa's *Promotion of Access to Information Act:* An Analysis of Relevant Jurisprudence' *Journal of Information Policy 4,* p580
[89] My Vote Counts NPC v President of the Republic of South Africa and Others (13372/2016) [2017] *ZAWCHC 105*
[90] Claase v Information Officer of South African Airways (Pty) Ltd. [2006] *SCA 163*

Summary

This report aimed to review international FOI laws, focusing on the scope of bodies included, and to compare this with the bodies subject to the Freedom of Information (Scotland) Act 2002. It sought to do so by asking two main questions.

1) How do other jurisdictions determine which bodies are subject to their FOI law(s)?
2) Which bodies are subject to FOI law(s) in other jurisdictions?

How do other jurisdictions determine which bodies are subject to their FOI law(s)?

In terms of the first question, it was found that jurisdictions may either include bodies by requiring those that fall within the terms of a definition to comply, or by specifically designating individual bodies. The first approach has the benefit of clarifying *why* bodies have been included but can lack certainty about which ones are covered. The second approach allows for certainty but can be relatively unresponsive to changes in the public service delivery landscape. However, it was found that a hybrid approach, in which some bodies fall within a definition and others are directly designated is possible. This has the benefit of retaining most of the benefits of each approach while mitigating the drawbacks. The Mexican Act is probably the best example of this approach. Most bodies in Mexico are included by falling within the terms of a broad definition. However, otherwise private bodies that receive public funds or perform public functions, may be designated by the oversight body. The oversight body receives a list from the relevant public authority that outlines all bodies to which public funds have been sent and the reasons for which the funds have been sent. The oversight body then determines whether the body should be subject to the Act and, if so, to what information the entity should be required to grant access.

Potential areas of alteration for Scotland's FOI legislation

There are a number of areas that could be explored further based on the findings of the review in relation to question 1, including:

- Rather than being listed in a Schedule to the Act, core public authorities could be included by a broad definition. Bodies included in this definition should be required to fully comply with the Act. Bodies included in the core definition could also include entities established by legislation and state-owned enterprises.
- Section 5(2) of the Act could be amended to extend the contexts that allow for the extension of the Act to further bodies, eg to allow for the designation of private bodies that 'receive significant public funds', regardless of purpose, rather than merely those contracted to provide public services.
- Public authorities could be given the power to designate bodies on a short term basis, if the body (a) performs a public function or (b) receives significant public funds. The Scottish Information Commissioner might produce guidance that outlines factors that tend towards and against designation, including the extent of public funds received, the purpose for which the funds were sent and the function performed by the body. Scottish Public Authorities would publish a list, each year,

outlining the funds sent to private bodies, the purpose of the funds, whether the body has been designated and, if so, the extent of the body's obligations. This list should serve as information for the public and as an accountability mechanism.

Which bodies are subject to FOI law(s) in other jurisdictions?

The second question was broken down into sub-categories to reflect the types of bodies that tend to be included in the jurisdictions considered. It was acknowledged that there is significant overlap between some of the categories, especially: private entities performing public functions; receiving public funds; that are controlled by a public authority; or that exercise administrative authority. Focus exclusively on the legislative provision therefore gave an unrealistic picture of the types of bodies covered by the Acts. Each of the sub-categories was explored in detail with reference to examples. Some of the examples may provide lessons for Scotland, for example requiring monopolies or entities that have rights to exploit natural resources to provide access to certain classes of information. Others, for example 'information that is required for the exercise or protection of another right', were interesting to note but are unlikely to have much relevance to the Scottish context.

Potential areas of alteration for Scotland's FOI legislation

There are a number of areas that could be explored further based on the findings of the review in relation to question 2, including:

- Section 6 of FOI(S)A could be amended so that a 'publicly-owned company' is one that is 'more than 50% owned' by a Scottish Public Authority (or Authorities), other than an authority so listed only in relation to information of a specified description.
- Section 5(2)(b) of FOI(S)A could be deleted and replaced with 'receive significant public funds'.
- Private bodies that exercise administrative authority, for example professional standard setting bodies, could be subject to the Act but only in respect of information relating to that authority.
- Consideration might be given to designating bodies that operate in areas in which there is little consumer choice or where the service provided is of fundamental importance to the public, for example, rail operators and utilities companies, as well as bodies that have exclusive rights to exploit a natural resource.

Annex

SCOTLAND

History and Summary of FOI Law(s)

Freedom of Information in Scotland is governed principally by the Freedom of Information (Scotland) Act 2002.

How does the FOI Law determine which bodies are subject to the Act?

Section 3 of FOI(S)A defines a 'Scottish public authority' as any 'body', 'person' or 'holder of any office' which is listed in schedule 1[91] or is designated by order under section 5(1)[92] or is a publicly-owned company, as defined by section 6[93].

There are thus three principal routes by which a body can discover whether they are subject to the Act.

First, the body can be listed in schedule 1 of the Act. This includes all bodies that were initially made subject to the Act and any bodies that have been subsequently designated by a Scottish Minister according to the requirements of Section 4(1) of the Act. Further, schedule 1 of the Act may be amended by other Acts of the Scottish Parliament. Bodies may also be removed from Schedule 1 by a Section 4(1) Order or by statutory amendment.

Second, bodies may be designated by a Scottish Minister according to the requirements in section 5 of the Act. Bodies that are designated in this manner are not included in schedule 1 of the Act. This is because such bodies tend not to be orthodox public authorities and are instead private or quasi-public bodies that are performing public functions. Section 5 states that Scottish Ministers may designate as a public authority persons that are not public bodies or holders of public office but appear to exercising functions of a public nature[94] or have been contracted by a Scottish public authority to provide a service which is function of that public authority[95]. Two such orders have been made; the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013, which extended coverage to arms-length external organisations that performed sporting, cultural, recreational and social functions on behalf of local authorities[96] and the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016, which designated grant-aided schools, independent special schools, Scottish Health Innovations Ltd, those providing a 'secure accommodation service' to children and private prisons[97]. Both of these Orders are interesting in that they do not produce a comprehensive list of the bodies being designated

[91] Freedom of Information (Scotland) Act 2002, s.3(1)(a)(i)
[92] Freedom of Information (Scotland) Act 2002, s.3(1)(a)(ii)
[93] Freedom of Information (Scotland) Act 2002, s.3(1)(b)
[94] Freedom of Information (Scotland) Act 2002, s.5(2)(a)
[95] Freedom of Information (Scotland) Act 2002, s.5(2)(b)
[96] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013, Schedule
[97] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016, Schedule

by the Order but instead describe which bodies will be subject to the Act's provisions. A further Order is currently being contemplated in which registered social landlords will be designated.

Finally, bodies that are 'publicly-owned companies' according to the conditions of Section 6 FOI(S)A are deemed to be 'public authorities' for the purposes of the Act. A company is a 'publicly-owned company' if it is wholly owned by either the Scottish Ministers[98] by any other Scottish public authority listed in schedule 1[99].

The Freedom of Information (Scotland) Act 2002 therefore makes use of both a list and a definition to determine which bodies are subject to the Act.

Which bodies are subject to the FOI law?

State Owned Enterprises?

Section 3(1)(b) of FOI(S)A states that a 'publicly-owned company, as defined by section 6' is a Scottish public authority for the purpose of the Act. Section 6 defines a publicly owned company as a company that is 'wholly owned' by either (a) the Scottish Ministers or (b) any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.

State owned enterprises therefore are subject to FOI(S)A where they are 100% owned by either the Scottish Government or any other Scottish Public Authority subject to the Act.

Private entities that perform public functions?

Section 3(1)(a)(ii) of FOI(S)A states that a Scottish Minister may designate a person as a public authority under the section 5(1) of the Act. Section 5(1) provides for designation of persons that are (a) not currently and not capable of being added to schedule 1 of the Act and (b) not a public body or holder of a public office. Such persons can be designated if they (a) appear to exercise functions of a public nature or (b) are contracted to provide a service where provision of that service is a function of a Scottish public authority. Section 5(1) is thus designed to allow for the designation of private bodies that perform public functions. However, as only bodies that are designated under a Section 5(1) order are 'public authorities' for the purpose of the Act, many private bodies that provide public services may not be subject to the Act. Further, the Minister is required to designate such bodies only to the extent of their public functions.

As mentioned above, there have, thus far, been two section 5(1) Orders. The first, designated arms-length external organisations created by a local authority to provide recreational, sporting, cultural and social activities to the authority's inhabitants. The second, designated grant-aided schools, independent special schools, Scottish Health Innovations Ltd, those providing a 'secure accommodation service' and private prisons. For both orders, the bodies were included only to the extent of their public functions. For example, Scottish Health Innovations Ltd are required to comply with the Act only in

[98] Freedom of Information (Scotland) Act 2002, s.6(1)(a)
[99] Freedom of Information (Scotland) Act 2002, s.6(1)(b)

respect of their function of 'promoting research and development within the National Health Service in Scotland.[100]' A further order which designates registered social landlords is currently being prepared by the Government.

Although section 5(1) of FOI(S)A requires potentially designable bodies to have public functions, the Scottish Government has tended to define this broadly. In both its 2010[101] and 2015[102] consultations on extending the coverage of the Act, the Scottish Government adopted a factor based approach to determine whether a body can be described as having functions 'of a public nature'. It considered that a range of the stated factors could be considered to determine whether the functions were public. One of these factors is 'whether the public has lost rights to access information under the Act as a result of outsourcing how public services are delivered[103].' This has been described as a 'loss of rights' approach[104] and aims to ensure that the public's interest in receiving information is not compromised when the nature of provision changes.

Private entities that receive public funds?

FOI(S)A makes no mention of a body 'receiving public funds' as part of the criteria that leads to designation. However, according to section 5(1) of the Act, a Minister may designate a body if it has been contracted to provide public services. Thus, although public funds are important for designation, such funds must have been provided to perform a public function. For example, The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013 designates bodies that, amongst other things, are 'financed wholly or in part' by local authorities in order to carry out certain functions.

However, the 2010 and 2015 consultation exercises mention 'the extent of public funding of the activity' as a factor that indicates that the body may have public functions and should be designated. Relatedly, 'the length and value of the contract[,]' should also be considered with the acknowledgment that designation of bodies with short term or low value contracts would be 'impractical.'

Thus, a private body receiving public funding is considered as designable by the Scottish Government but must receive such funds in order to provide a public service.

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[100] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016, Schedule

[101] Scottish Government, (2010), 'Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002' Available at https://www2.gov.scot/Resource/Doc/319057/0101913.pdf (Accessed 23/01/2019)

[102] Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019),

[103] Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019), p4

[104] Scottish Information Commissioner (2015) 'FOI 10 years on: Are the right organisations covered?' *Special Report*

Private entities that are controlled by a public authority?

FOI(S)A makes no mention of 'control' as part of the criteria that leads to designation. However, Section 6, which relates to designated state-owned enterprises, means that all companies that are 100% owned by a relevant authority are subject to the Act.

In addition, in the aforementioned government consultations, one of the factors that favours designation is 'whether the body in question has activities that are enmeshed with a relevant Scottish public authority[105]'.

Thus, the Government clearly considers bodies that are controlled by public authorities or have a close association with public service delivery may be capable of being designated under the Act.

Private entities that exercise administrative authority?

FOI(S)A makes no mention of the 'exercise of administrative authority' as part of the criteria that lead to designation.

However, if one considers some of the bodies listed in Schedule 1, for example the Scottish Law Commission, the Scottish Information Commissioner and the Crofting Commission it is clear that bodies that exercise administrative authority have been included as public authorities for the purpose of the Act.

Further, a number of the factors identified by the Scottish Government as capable of making a body subject to the Act indicate the Government considers the exercise of administrative authority as a legitimate basis for designation. Examples of such factors include, that a body 'exercises extensive or monopolistic powers which it otherwise would not have[106]' and 'the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.[107]' However, despite this criterion, professional or membership bodies, some that have been created by statute, such as the Law Society of Scotland, that vest administrative control are not currently subject to the Act.

Entities were established by legislation?

FOI(S)A makes no mention of a body being 'established by legislation' as part of the criteria that leads to designation.

However, if one considers some of the bodies listed in Schedule 1, for example, the Scottish Information Commissioner (FOI(S)A), the Judicial Appointments Board for

[105] Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019), p4
[106] Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019), p4
[107] Scottish Government (2015) 'Consultation of Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations' Available at https://www2.gov.scot/Resource/0047/00479060.pdf (Accessed 23/01/2019), p4

Scotland (Judiciary and Courts (Scotland) Act 2008) and the Scottish Human Rights Commission (Scottish Commission for Human Rights (Scotland) Act 2006) it is clear that bodies that were established by legislation are often included as public authorities for the purpose of the Act.

Political Parties?

Political parties are not subject to FOI(S)A.

Monopolies or private entities with a dominant positon in the market?

FOI(S)A makes no mention of monopolies or private companies that have a dominant position in the market as part of the criteria that leads to designation. Further, schedule 1 of the Act does not appear to include monopolies, nor do any of the subsequent orders.

Private entities that hold information that is required for the exercise or protection of any rights?

FOI(S)A does not require private entities that hold information that is required for the exercise or protection of any other rights to provide information according to the provisions of the Act. This is unsurprising, since the right to information is not explicitly protected in the Scotland Act 1998 or the Human Rights Act 1998.

BRAZIL

History and Summary of FOI Law(s)

The right to information is protected by Article 5 XIV and XXXIII of the Brazilian Constitution 1998 (as amended)[108]. The federal Government has also passed legislation that gives effect to the right, the Access to Public Information Law[109]. Previously, there existed a number of disparate laws that intended to facilitate access to government records but none were as comprehensive as the Access to Public Information Law. The law applies at the federal, state, federal district and municipal level and encompasses all branches of the state.

How does the FOI law determine which bodies are subject to the Act?

Article 1 of the Access to Public Information Law states that the law applies to the Federal Government, the States, the Federal District and Municipalities. It clarifies this by stating that the law applies to the three branches of government[110] as well as 'autonomous government agencies, public foundations, public companies, mixed-capital companies and other entities directly or indirectly controlled[,][111]' by the state. Such bodies are subject to all obligations under the Access to Public Information Act.

Further, Article 2 of the Act provides that '[t]he provisions of this Law are applicable, whenever possible, to non-profit entities which receive, in order to perform actions of public interest, public funds directly from the budget or through social subsidies, management or partnership agreements, contracts, adjustment agreements, or other instruments of the same kind.[112]' However, such organisations are only required to comply with the Act to the extent of the 'received portion of public funds and its respective destination.[113]'

The Brazilian Access to Public Information Act therefore assigns bodies using a broad definition. Brazilian bodies are therefore not explicitly designated; a body that wishes to determine whether it is subject to FOI, and which of the FOI obligations it is required to fulfil, must consider the definition and ask whether it qualifies.

The Brazilian Law requires bodies subject to the Act to appoint a Citizen Information Service Officer as a point of contact between the authority and the public.[114] The Federal Government's access to information portal contains a list of such Officers[115]. This may be used by the public to determine whether a body is subject to the Act.

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[108] Constitution of the Federative Republic of Brazil, 1988
[109] Lei de Acesso à Informação Pública n° 12.527/2011 (Access to Public Information Law)
[110] Access to Public Information Law 2011, Article 1 (I)
[111] Access to Public Information Law 2011, Article 1 (II)
[112]Access to Public Information Law 2011, Article 2
[113] Access to Public Information Law 2011, Article 2 (I)
[114] Access to Public Information Law 2011, Article 9
[115] Available at http://www.acessoainformacao.gov.br/lai-para-sic/sic-apoio-orientacoes/lista-de-sics (Accessed 23/01/19)

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Article 1, sub paragraph II of the Access to Public Information Act states that public companies and mixed-capital companies are fully subject to the law's publication requirements.

This implies that companies in which the state has 100% ownership but also companies that are also jointly owned by the Government and private investors are subject to the Act.

Brazilian law defines a mixed-capital company is 'an entity that is part of Indirect Administration, with legal personality under private law, whose creation is authorized by law, as an instrument of exploitation by the State[116]'. This definition does not tell us the extent of Government ownership required to make a mixed-capital company but this has been interpreted as a majority stake[117].

Electrobras, an electricity supplier that is 52% owned by the Brazilian Government is bound to comply with the legislation as is Petrobas, which is 64% owned[118]. Recently privatised companies such as Embratel[119], however, do not appear to be subject to the Act.

Private entities the perform public functions?

Article 2 of the Access to the Public Information Act state that it is applicable 'whenever possible, to non-profit entities which receive, in order to perform actions of public interest [emphasis added] public funds directly from budget or through social subsidies, management contract, partnership terms, covenants, adjustments, or other instruments of the same kind.'

Further, Article 2 (i) states that such bodies are required to publicise only to the extent of 'the received portion of public funds and its respective destination, without prejudice to the accountability to which they are legally bound.'

Private entities are therefore subject to the Acts provisions with a few important qualifications. First, it applies only to non-profit entities performing public functions. Second, 'actions of public interest' are defined in reference to public funding and not some independent notion of the public interest. Third, such bodies need not comply with all of the obligations under the Act, but merely those to which they have received public funds and for that purpose.

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[116] Decree Law, N° 900/1967, Art 5(III)

[117] Bercovici, G. (2015). 'Mixed-Capital Companies And The Brazilian Constitution of 1988' *Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional Curtiba, 7(12) Jan-Jun,* Available at http://www.abdconst.com.br/revista13/mixedGilberto.pdf (Accessed 23/01/19) p74

[118] Both websites have 'Access to Information' portals that proactively publish information and allows individuals to make requests. See http://eletrobras.com/pt/Paginas/Home.aspx; and http://www.petrobras.com.br/en/

[119] There is no Access to Information portal on the Embratel website, see https://www.embratel.com.br/

As the Brazilian law requires public authorities to pro-actively publish certain information, the exact duties of bodies under Article 2 (I) has caused confusion. However, this was clarified by Article 63 of the Brazilian Decree N° 7.724 16 May 2012 which set out the exact requirements of pro-active publication.

Private entities that receive public funds?

As mentioned above, Article 2 of the Brazilian law states that the provisions of the law are applicable to non-profit entities performing public functions 'which receive public funds directly from the budget or indirectly through social subsidies, management contract, partnership terms, covenants, agreements, adjustments, or other instruments of the same kind.'

Non-profit bodies receiving public funds are therefore subject to the Act's provisions. However, as mentioned above, the bodies are only required to provide information in respect of the activities to which they were provided funds and have lesser pro-active disclosure obligations than the bodies that fall within the definition in Article 1.

Private entities that are controlled by a public authority?

Article 1, subparagraph II of the Access to Public Information Act states that 'entities directly or indirectly controlled by the Federal Government, the States, the Federal District and the Municipalities' are required that comply with all of the obligations under the Act.

This is a relatively broad definition as it encompasses bodies both directly and indirectly controlled by public authorities.

Entities that exercise administrative authority?

The Brazilian law makes no mention of entities that exercise administrative authority as being required to comply with the Act.

Article 1, subparagraph II mentions 'autonomous government agencies', which may cover bodies that exercise administrative authority. However, as 'autonomous government agencies' has not been defined, this is not necessarily the case.

Entities that were established by legislation?

The Brazilian Law does not explicitly mention entities that were established by legislation as subject to the Act.

However, such bodies are likely to be included to the extent that they are owned, funded or controlled by other public authorities.

Political Parties?

Political parties are not subject to the Public Access to Information Act.

Monopolies or private entities with a dominant position in the market?

The Access to Public Information Act makes no mention of monopolies or private companies that have a dominant position in the market as part of the criteria that leads to designation.

Private entities that hold information that is required for the exercise or protection of any rights?

The Brazilian Act does not require private entities that hold information that is required for the exercise or protection any other rights to provide information according to the provisions of the Act.

ESTONIA

History and Summary of FOI Law(s)

Article 44 of the Estonian Constitution of 1992 guarantees the 'free access to information disseminated for public use'. This right of access to information is provided for and qualified in several statutes, including the State Secret Act 2001, the Protection of Personal Data Act 2003 and the Archive Act 1998. However, the principle statute that provides for the right to access information is the Public Information Act 2000[120]. There have been a number of amendments to the Act since it initially coming in to force. The Act applies both to central and local government.

How does the FOI law determine which bodies are subject to the Act?

A body is subject to the provisions of the PIA if it is a 'holder of information'. Section 5 of the Act states that 1) state and local government agencies; 2) legal persons in public law; and 3) legal persons in private law and natural persons, if they satisfy the conditions in subsection (2) are holders of information for the purpose of the Act. According to subsection (2), private legal and natural persons have obligations as holders of information if they 'perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services'. Further the persons outlines in 3) are only holders of information with regard to information concerning the performance of their duties.

According to section 5(3) a body is also subject to the Act if it is deemed to be 'equal to holders of information'. Bodies that are equal to holders of information are 1) 'undertakings which have a dominant position in the market or special or exclusive rights or which are natural monopolies.' Such bodies are only required to comply 'with regard to information concerning the conditions and prices of the supply of goods and services and changes thereto'. 2) 'sole proprietors, non-profit associations, foundations and companies.' Such bodies are required to comply with the Act 'with regard to information concerning the use of funds allocated from the state or a local government budget for the performance of public duties or as support.[121]'

The Estonian law therefore determines which bodies are subject to the law with reference to a definition. There can be seen to be three broad categories of body - all of which have different duties under the Act. First, are core public authorities and bodies established by legislation which are required to comply with all of the Act's obligations. Second, are bodies that are private in nature but perform public functions, which are subject to the Act with regard to those duties. Finally, are monopolies or dominant companies who only must provide information about the conditions and prices of their goods and services and private bodies that have been funded by the state or local government with regard to the funding or support.

[120] Avaliku teave seadus 2000 (RT I 2000, 92, 597) (Public Information Act 2000)
[121] Public Information Act 2000, s.5(3)(2)

Which bodies are subject to the FOI law?

State-Owned Enterprises?

State-owned enterprises are not explicitly designated in the Public Information Act.

However, it is possible that may be included on the basis that they are legal persons in public law[122], if they perform a public function[123], have a dominant position in the market or exclusive rights[124] or have been allocated funds from a state or local government budget[125]. Depending on which definition the state-owned enterprise satisfies, the duty of the body will vary.

Private entities that perform public functions?

According to s.5(1)3)(2) of the PIA, private bodies and persons are deemed to be holders of information if they 'perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services.'

It is therefore clear that bodies providing educational, health care and social service are subject to the Acts obligations. Further, the definition is intended to be expansive and provides for the inclusion of bodies providing other 'public services'. It is not immediately clear however what other services are regarded as public. Such bodies are only subject to the Act with regard to information concerning the performance of their public duties[126].

Private entities that receive public funds?

S.5(3)2) of the PIA states that 'sole proprietors, non-profit associations, foundations and companies' that are allocated funds from the state or local authority for the performance of public duties or as support shall be deemed to be equal to holders of information. Further such entities are required to comply with the Act 'with regard to information concerning the use of [such] funds.'

Private entities that receive public funds are therefore required to comply with the Act subject to two qualifications. First, the body must be funded to either perform public duties or as 'support'. It is not clear what is meant by 'support' but the term could be read expansively to include most forms of public funding. Second, such bodies are only required to comply with the Act to the extent of the use of those funds.

Private entities that are controlled by a public authority?

Private entities that are controlled by a public authority are not explicitly mentioned in the PIA.

[122] Public Information Act 2000, s.5(1)2)
[123] Public Information Act 2000, s.5(1)3)(2)
[124] Public Information Act 2000, s.5(3)1)
[125] Public Information Act 2000, s.5(3)2)
[126] Public Information Act 2000, s.5(2)

However, it is likely that such bodies are regarded as holders of information if they have been established by law[127], perform a public function[128] or have received funding from the state or a local authority for the performance of public duties or as support[129].

Entities that exercise administrative authority?

Bodies that exercise administrative authority are not mentioned by the PIA as holders of information.

However, bodies that are legal persons in public law[130] and bodies that perform public functions are deemed to be holders of information[131]. Bodies that exercise administrative authority that satisfy such definitions will be subject to the Act. Depending on which definition that body satisfies, their duties under the Act will vary.

Entities that were established by legislation?

S.5(1)2) states that legal persons in public law are holders of information for the purposes of the Act. A legal person in public law is a legal person founded in the public interest.

One way to determine whether a legal person is founded in the public interest is that it was established by legislation. For example, Eesti Radio and Estonian Television both established by the Estonian Public Broadcasting Act[132] are legal persons in public law[133]. Legal persons in public law are subject to all of the information publication obligations required by the Act.

Political Parties?

Political parties are not subject to the PIA.

Monopolies or private entities with a dominant position in the market?

S.5(3)1) of the PIA provides that 'undertakings which have a dominant position in the market or special or exclusive rights or which are natural monopolies' are deemed as equal to holders of information 'with regard to information concerning the conditions and prices of the supply of goods and service and changes thereto'.

Monopolies and private entities with a dominant or exclusive position in the market are therefore required to comply with specific obligations under the Act. The inclusion of such bodies in the Act is uncommon. Estonia has privatised a vast amount of previously state owned assets since independence in 1991. The inclusion of such a definition is perhaps reflects this fact and ensures that individual's rights to access information are not lost when a previously public utility is privatised. Further, the purpose of designation appears to

[127] Public Information Act 2000, s.5(1)2)
[128] Public Information Act 2000, s.5(2)
[129] Public Information Act 2000, s.5(3)2)
[130] Public Information Act 2000, s.5(1)2)
[131] Public Information Act 2000, s.5(2)
[132] Estonian Public Broadcasting Act (RT I 2007, 10, 46)
[133] Vutt, A. (1996). ' Legal Persons in Estonian Law', *Juridica International No.1,* Available at https://www.juridicainternational.eu/index.php?id=12446 (Accessed 23/01/19)

be to ensure that such bodies exercise transparency in the setting of prices where the lack of existence of competitors inhibits the individual's ability to opt for an alternative service.

Private entities that hold information that is required for the exercise or protection of any rights?

The PIA does not explicitly deem private entities that hold information that is required for the exercise or protection of any other rights to be holders of information. However, the relatively expansive definition in other areas makes it likely that in many circumstances entities that are capable of affecting the rights of others will already be subject to the Act.

INDIA

History and Summary of FOI Law(s)

Article 19(1)(a) of the Indian Constitution protects the right 'to freedom of speech and expression'. The Indian Supreme Court has interpreted this, along with Article 21, which protects the right to life, to claim that there is implied protection for the 'right to know[134]' in the Constitution. However, freedom of information in India is primarily regulated by the Right to Information Act 2005. The Act applies both at the federal and the state level.

How does the FOI law determine which bodies are subject to the Act?

The RTIA requires that a 'public authority' complies with the provisions of the Act. Section 2 of the Act, which defines the terms used in the legislation, outlines what is meant by a 'public authority'.

There are three broad categories of bodies defined as 'public authorities'. First are bodies established by or under the Constitution[135]. Second, are bodies established by a law made by Parliament[136], State Legislature or by order issued by the appropriate government (federal or state)[137]. Finally the definition 'includes any --- (i) body owned, controlled or substantially financed; (ii) non-Government organisation substantially financed directly or indirectly by funds provided by the appropriate Government[138]'.

The RTIA therefore makes exclusive use of a definition to determine which bodies are subject to the Act.. Where there is a dispute over whether or not a body is a 'public authority' for the purposes of the Act, either body may ask the Central Information Commission, the principal oversight body, to make a decision. If either party is unhappy with this decision, it may be challenged in an appropriate court. Thus, some of the terms used in Section 2 have been subject to further clarification and discussion in the courts. The RTIA also requires bodies to appoint a 'Public Information Officer', charged with the task of principally complying with the body's obligations under the Act[139]. The CIC publishes a list of designated Central Public Information Officers on its website and therefore it is possible for citizens unsure of whether a body is subject to the Act to consult this list[140].

Which bodies are subject to the FOI law?

State-Owned Enterprises?

According to s.2(h)(i) of the RTIA, state-owned enterprises are 'public authorities' and subject to the Acts obligations. The Act does not define what is meant by 'body owned' by

[134] Bennet Coleman & Co. v Union of India, *AIR 1973 SC 783*, see also S.P Gupta v. President of India *AIR 1982 SC 149*
[135] Right to Information Act 2005, s.2(h(a)
[136] Right to Information Act 2005, s.2(h)(b)
[137] Right to Information Act 2005, s.2(h)(c)
[138] Right to Information Act 2005. S.2(h)(d)(i) and (ii)
[139] Right to Information Act 2005, s5
[140] Central Information Commission 'List of Right to Information Nodal Officers 2015/16' Available at https://cic.gov.in/sites/default/files/Rtinodalofficer_0.pdf (Accessed 23/01/19)

the appropriate government. However, the Delhi High Court has established that a 'body owned' by an appropriate government is one in which the appropriate government has more than 50% of the total shares[141].

In some ways, the need to define what is meant by a body owned by an appropriate government is made unnecessary due to the inclusion of bodies that are 'substantially financed' by an appropriate government, as this implies that bodies in which the state has less than a majority shareholding may still be deemed to be public authorities for the purpose of the Act. Indeed this was found to have been the case in Tamil Nadu Newsprint & Papers Ltd v State Information Commission[142].

However, in Indubala Argawal v. National Commodity & Derivatives Exchange Ltd[143], the Central Information Commissioner decided that the National Commodity and Derivative Exchange Ltd was not a 'public authority' for the purposes of the Act. Although 46% of the equity capital held by the company was held by a public authority, it was not held by an 'appropriate government' as required by section 2(h). Section 2(a) defines 'appropriate government' as either the central government or the state government. Thus bodies created or owned by 'public authorities' apart from federal or state governments are not subject to the Act.

Private entities that perform public functions?

The RTIA makes no mention of public functions when determining which bodies are subject to the Act. This is unusual, especially considering the otherwise broad definition of 'public authority' in the RTIA.

However, despite no mention of 'public functions' in the RTIA, a number of courts appear to have taken into account a body's functions when determining whether the body should be designated as a public authority. In Electronics and Computer Software Export Promotion Council v CIC and Navneet Kaur, the Delhi High Court determined that a 'trade facilitation organization' was a 'public authority' partly due to its public functions[144]. Further, the Delhi High Court appeared to partly base its judgement designating the Indian Stock Exchange as a public authority on the fact that it had 'public functions[145]'.

Thus, while public functions are not mentioned in the RTIA as part of the criteria for designation of public authorities, it is clear that some courts consider a body's public functions as a factor that tends towards designation.

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[141] Delhi Integrated Multi Model Transit System Ltd v/s Rakesh Aggarwal *W.P.(C) 2380-81/2010,* para 41

[142] Tamil Nadu Newsprint & Papers Ltd v/s State Information Commission, *W.P. No.13416/2008*

[143] Indubala Agarwal v/s National Commodity & Derivatives Exchange Ltd, *CIC/LS/C/2009/000575*

[144] Electronic and Computer Software Export Promotion Council v/s Central Information Commission & Navneet Kaur, *High Court of New Delhi & LPA 1801/2006*

[145] National Stock Exchange of India Limited v. Central Information Commission, *WP (C). 4748/2007*

Private entities that receive public funds?

Section 2(h)(i) of the RTIA designates bodies that are 'substantially financed' by an appropriate Government.

The RTIA does not define 'substantially financed' but it has been confirmed that it has the same meaning section 14 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971. Here, 'substantially financed' is defined as a 'grant or loan… not less than rupees twenty-five lahks [about £27000] and the amount of such grant or loan is not less than seventy-five percent of the total expenditure of that body or authority[146]'.

Further, the Delhi High Court has included such benefits as share capital contribution, subsidies and land allotment as examples of financing[147]. Courts have also included private schools, where teaching staff received their salary from government as public authorities under the Act[148]. The Indian Olympic Association was also designated due to the fact, amongst other things, that the central government paid travel expenses and a large percentage of the living expenses of athletes. The Court in that case rejected a rigid definition of what 'substantially financed' means, arguing that it 'cannot be straight-jacketed into rigid formulae, of universal application. Of necessity, each case would have to be examined on its own facts[149].'

Private entities that are controlled by a public authority?

According to s.2(h)(i) of the RTIA, bodies controlled by an appropriate Government are 'public authorities'.

'Control' is not defined by the Act but there has been some attempt at clarification in the courts. In The Hindu Urban Cooperative Bank Ltd v The State Information Commission[150] , the court claimed that a number of factors, including whether the appropriate government has some degree of control of the body 'through the medium of Acts/Rules[151]', would mean that it would 'squarely fall within the ambit and scope of the definition[152]'. However, this concept of 'control' has been disputed elsewhere[153].

[146] Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971, s.14
[147] Hindu Urban Cooperative Bank Ltd v. State Information Commission (2011) ILR 2 P&H 64
[148] Diamond Jubilee Higher Secondary School v. Union of India [2007] (Mad HC) *36901/2006*
[149] Indian Olympic Association v Veeresh Malik & Others, (New Delhi HC) *WP (c) 876/2007,* para 59
[150] The Hindu Urban Cooperative Bank Limited and Others v. The State Information Commission and Others (Pun & Har HC) *1190/2011*
[151] The Hindu Urban Cooperative Bank Limited and Others v. The State Information Commission and Others (Pun & Har HC) *1190/2011,* para 87
[152] The Hindu Urban Cooperative Bank Limited and Others v. The State Information Commission and Others (Pun & Har HC) *1190/2011,* para 87
[153] Dattaprasad Co-operative Housing Society Ltd v. Karnataka State Chief Information Commissioner [2009] *5 RCR (Civil) 833* (Karc HC)

Entities that exercise administrative authority?

The RTIA does not explicitly mention entities that exercise administrative authority as 'public authorities'. However, such bodies may be included if they receive funding from federal or state government.

Entities that were established by legislation?

Sections 2(h)(a)-(d) cover bodies that have been created either by the constitution, the federal legislature, a state legislature or by an order of an appropriate government. Entities that are established by legislation are clearly therefore subject to the Act.

This initially led to some confusion, as some bodies that were created according to the terms of a statute, for example a cooperative established under the terms of the Multi-State Co-operative Societies Act 2002, were claimed to be public authorities under the Act. However, the Karnatka High court distinguished bodies that are created by legislation, which are subject to the Act and bodies that are established according to the terms of legislation, which are not subject to the Act (at least on the basis of being established by legislation)[154].

Political Parties?

The RTIA makes no explicit mention of political parties as 'public authorities' for the purposes of the Act.

However, in 2013 the Central Information Commission issued an order that designated six major political parties as public authorities[155]. This designation was highly controversial and although it has not been appealed, the designated parties have refused to comply with the ruling[156]. Several individuals have challenged the parties' failure to comply at the Supreme Court but no decision has been made at the time of writing[157].

Monopolies or private entities with a dominant position in the market?

The RTIA does not include monopolies or private entities with a dominant positon in the market as 'public authorities' under the Act.

However, recently privatised companies have been deemed by courts to be a 'public authority' on the basis that they were substantially financed by the government on the basis that the government had provided them with assets[158].

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[154] Thalappalam Ser. Coop. Bank Ltd and others v. State of Kerala and others, *(Ker HC) 9017/2013*
[155] Mr. Anil Bariwal v/s Parliament of India (CIC order) *No CIC/SM/C/ 001386*,
[156] Political parties under RTI: Election Commission contradicts CIC directive' *The Hindu (27/05/18)*, Available at https://www.thehindu.com/news/national/political-parties-under-rti-election-commission-contradicts-cic-directive/article24006404.ece (Accessed 23/01/19)
[157] Political parties under RTI: Election Commission contradicts CIC directive' *The Hindu (27/05/18)*, Available at https://www.thehindu.com/news/national/political-parties-under-rti-election-commission-contradicts-cic-directive/article24006404.ece (Accessed 23/01/19)
[158] See Roberts, A. (2010). 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act', *Public Information Review November/December,* p932; and Right2info. (13/09/13) 'Private

Private entities that hold information that is required for the exercise or protection of any rights?

The RTIA does not require private entities that hold information that is required for the exercise or protection of rights to comply with the Act, unless such bodies have been designated for another purpose.

Bodies and Public Corporations' Available at https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 23/01/19)

IRELAND

History and Summary of FOI Law(s)

The right to access information is not constitutionally guaranteed in Ireland. Access to information is principally governed by the Freedom of Information Act 2014. The 2014 Act replaced the 1997 Act[159], which had been significantly amended in 2003[160]. The Freedom of Information Act applies both to central government and to local authorities.

How does the FOI law determine which bodies are subject to the Act?

Sections 6 and 7 of the FOIA govern which bodies are subject to the Act. If an entity is subject to Act it is referred to as a 'public body'.

Section 6 is divided in three parts. Subsection (1) covers bodies that are required to fully comply with the Act's obligation. Subsection (2) covers bodies, some of which may only comply with specific obligations. Finally, Subsection (3) explicitly excludes certain bodies.

Section 6(1) includes the following bodies: (a) a Department of State; (b) an entity established by or under any enactment (other than Companies Acts); (c) any other entity established (other than under the Companies Acts) or appointed by the Government or a Government Minister, including those established by a Minister established under any scheme; (d) a company (within the meaning of the Companies Acts) in which a majority of shares are held by or behalf a Government Minister; (e) a subsidiary of the entities in (d); (f) an entity that is directly or indirectly controlled by an entity described in (b), (c), (d) or (e); (g) a higher education institution that receives public funding and (h) any entity that was a public body within the meaning of the FOIA 1997 unless it has been specifically excluded by the 2014 Act.

Section 6(2) covers any entity specified in Part of Schedule 1 of the Act, as well as any of their subsidiaries and other entities that they directly or indirectly control. Part 1 of Schedule 1 includes bodies that would traditionally fall within the definitions in Section 6(1) but for which, for whatever reason, it has been decided that they should not be fully subject to the Act's obligations.

Section 6(3) explicitly rules out bodies listed in Part 2 of Schedule 1 as well as their subsidiaries and entities directly or indirectly controlled by them. Part 2 of Schedule 1 lists bodies that would fall within the definitions in Section 6(1) but for whom, for whatever reason, it has been decided that they should be excluded from the Act.

Section 7 gives the power to the Minister to designate other bodies by order. Designation must come only after consultation with the Commissioner, other Ministers of the Government the Minister considers appropriate and a Committee of the House of the Oireachtas the Minister considers appropriate. According to 7(8) the draft order must be laid before and approved by the House of the Oireachtas. When considering designation the Minister should take into account the need to ensure the oversight of entities referred

[159] Freedom of Information Act 1997
[160] Freedom of Information (Amendment) Act 2003

to in 7(6) and the need for entities to adhere to the principles of transparency and accountability in government and public affairs in respect of their relevant activities. Section 7(4) gives the power to require the entity only complies with the Act with respect to prescribed functions as well as the power to specifically exclude certain functions of a designated body from the Act's obligations. Section 7(6) lists the type of body that the Minister may prescribe including (a) (i) companies in pursuance of powers conferred by or under another law (ii) any other entity, whether financed wholly or partly, or directly or indirectly by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or behalf of a Minister of the Government; (b) any other entity with public functions but only in respect of those functions; (c) a subsidiary or an entity directly or indirectly controlled by an entity referred to in 7(6); and (d) an entity (being a body corporate) that directly or indirectly controls any entity referred to in 7(6).

Ireland thus uses a combination of lists and definition to determine which bodies are subject to FOIA. This stands in contrast to the earlier FOIA law that exclusively used lists. The Irish law is comparatively detailed and is unique in that allows for the specific exclusion of bodies as well as designation. Some have questioned the need for such a complex system of designation arguing that if the exemptions in the Irish law were more watertight then there would be no need to specifically exclude certain functions of otherwise public bodies[161].

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Section 6(1)(d) of the FOIA states that a company, the majority of the shares in which are held by or behalf of a Minister of the Government shall be a public body for the purpose of the Act. Further, section 6(1)(e) includes subsidiaries of state-owned companies. State-owned enterprises and their subsidiaries are therefore subject to the FOIA and must usually comply with all of its obligations.

However, part 1 of Schedule 1 of the Act, contains details of certain companies that have had their duties to comply with Act restricted. EirGird Plc, for example, is only required to comply with the Act insofar as 'it relates to records held by it relating to its functions under its transmission system operating licence granted under section 14(1)(e) of the Electricity Regulation Act 1999'.

Further, a number of companies that fall within the definition of Section 6(1)(d) have been specifically exempted from the Act's obligations in part 2 of Schedule 1. Examples include An Post (a state-owned postal services provider), Bus Éireann and Dublin Airport Authority plc.

The number of state-owned enterprises that have been exempted from the Act is relatively extensive and therefore, while such bodies are included within the Act's definition of 'public body' this does not necessarily mean that many are subject to the Act's obligations.

[161] Dowling, R. (2014). 'Irish FOI Proposals Still 'Timid'' *freedominfo.org,* Available at http://www.freedominfo.org/2014/07/irish-foi-proposals-stilltimid/ (Accessed 24/01/19)

Private entities that perform public functions?

Section 6(1) of the FOIA does not designate private entities that perform public functions. However, section 7(6)(a) allows a Minister to designate by order a company that has powers conferred by or under another enactment'. Public function is therefore defined in relation to statutory powers/requirements. In addition, section 7(6)(b) allows ministers to designate by order 'any other entity on which functions in relation to the general public or a class of the general public stand conferred by any enactment (but only in respect of those functions).

Private bodies with public functions are thus not automatically designated under the Act but may be added by a Ministerial order. Few such bodies have been designated by Irish Ministers thus far.

Private entities that receive public funds?

Section 6(1) does not designate private entities as public funds as public bodies subject to the FOIA, apart from higher education institutions in receipt of public funding, which are designated by Section 6(1)(g). Higher education institutions are thus normally required to comply with all of the obligations under the Act.

However, Section 7(6)(a)(ii) allows Ministers to designate by order 'any other entity, whether financed wholly or partly, or directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government.' Ministers are therefore capable of designating bodies that are in receipt of public funding as public bodies for the purpose of the FOIA.

Private entities that are controlled by a public authority?

S.6(1)(f) of the FOIA includes entities that are directly or indirectly controlled by a public body. Such bodies usually are required to fully comply with the Act's obligations.

However, such bodies' obligations may be limited in part 1 of Schedule 1 of the Act or the organisation may be completely excluded if they are included in part 2 of Schedule 1 of the Act.

Entities that exercise administrative authority?

There is no explicit mention of entities that exercise administrative authority as public bodies for the purpose of the FOIA.

However, such bodies may be included in a number of the other definitions. Further, such institutions are certainly capable of being included within the Act, Section 7(6)(b) allows a Minister to designate bodies that 'functions in relation to the general public or a class of the general public'. Interpreted broadly this could include bodies that exercise administrative authority.

Entities that were established by legislation?

Section 6(1)(b) designates 'any entity established by or under any enactment (other than the Companies Acts). All entities established by or under legislation apart from companies are public bodies for the purpose of the FOIA and subject to all obligations.

Again however, certain companies may be only partially subject or completely excluded according to Section 6(2) and Section 6(3).

For example, the Insolvency Service of Ireland, established by the Personal Insolvency Act 2012, only needs to provide access to 'records concerning the general administration of [it's] functions[162]'. And the National Lottery Company, established by the National Lottery Act 1986, is completely exempt[163].

Political Parties?

Political parties are not public bodies for the purpose of the FOIA.

Monopolies or private entities with a dominant position in the market?

Monopolies or private entities with a dominant position in the market cannot be designated under the FOIA. However, it is possible for such bodies to be designated on the basis they are state-owned or have public functions.

Private entities that hold information that is required for the exercise or protection of any rights?

Private entities that hold information that is required for the exercise or protection of any rights cannot be designated under the FOIA, unless the bodies can fit within another of the definitions.

[162] Freedom of Information Act 2014, Schedule 1, Part 1(r)
[163] Freedom of Information Act 2014, Schedule 1, Part 2

KENYA

History and Summary of FOI Law(s)

Article 35 of the Constitution[164] guarantees citizens the right of access to two classes of information; 'a) information held by the state; and b) information held by another person and required for the exercise or protection of any right or fundamental freedom.' The constitutional right is further expounded in the Access to Information Act, which came into force on the 21st September 2016[165]. The Act applies to both central and local government.

How does the FOI law determine which bodies are subject to the Act?

Section 4 of the AIA restates the constitutional guarantee that every citizen has the right of access to information held by the state[166] and any other person where that information is required for the exercise or protection of any right or fundamental freedom[167]. The Act refers to the obligations of 'public entities' and 'private bodies' throughout the Act. The obligations of both appear to be different in terms of when private bodies have to disclose information and public entities have greater responsibilities in terms of the proactive release of information[168]. However, the duty to appoint an 'Information Access Officer', responsible for the body's duties under the Act, is requited of both public entities and private bodies [169].

Section 2 of the Act defines a 'public entity as a) any public office as defined by Article 260 of the Constitution; or b) any entity performing a function within a commission, office, agency or other body established under the Constitution'. Article 260 of the Constitution defines 'public office' as 'an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable from the Consolidated Fund or directly out of money provided by Parliament'.

Section 2 of the Act defines a "private body" as 'any private entity or non-state actor that a) receives public resources and benefits, utilizes public funds, engages in public functions provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources);' or '(b) is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right'. Private entities that fail to comply with their duties may be barred from entering into contracts with the Government[170]. The obligations of private bodies defined above are unclear. It appears that the drafters envisioned that some private bodies, namely those in section 2(a) and (b), should be treated like public bodies but their obligations should be limited to the areas that led to their designation. It appears that such private bodies

[164] Constitution of Kenya, 2010
[165] Access to Information Act (Act 13 of 2016) 2016
[166] Access to Information Act 2016, s.4(1)(a)
[167] Access to Information Act 2016, s.4(1)(b)
[168] Access to Information Act 2016, s8
[169] Access to Information Act 2016, s.7
[170] Access to Information Act 2016, s28(7)

therefore have to provide such information even if it is not required for the protection or exercise of another right or fundamental freedom.

Further, private bodies that do not fall within the definition in section 2(a) and (b) are still required to comply with the Act but only to the extent that they hold information required for the exercise or protection of any other right or fundamental freedom.

The AIA therefore determines which bodies are subject to the Act with a broad definition. It appears there are three main bodies that are required to comply with the legislation. First, are public entities that must fully comply with the Act. Second, are private bodies that are either publicly funded, performing public functions, providing public services or have exclusive contracts to exploit natural resources or otherwise hold information which is of significant public interest who are subject to the Act in relation to such areas. Finally are private bodies that only have to provide information if it is required for the exercise or protection of any other right or fundamental freedom. It should be stressed that this interpretation of the law might be incorrect. The Katiba Institute, a Kenyan NGO dedicated to the promotion and study of the Kenyan Consitution, acknowledges that the legislation is unclear[171]. It may alternatively be the case that all private bodies including those defined in section 2(a) and (b) are only subject to the Act if they hold information that is required for the exercise or protection of another right or fundamental freedom[172].

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Section 2 of AIA states that any public office, as defined by Article 260 of the Constitution, is a public entity for the purpose of the Act. Article 260 of the Constitution defines 'public office' as 'an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable from the Consolidated Fund or directly out of money provided by Parliament'.

It is not immediately clear whether state-owned enterprises fall within this definition. However, in Nairobi Law Monthly Ltd v KENGEN, the High Court of Nairobi found that, KENGEN, an electric power generation company that was 70% owned by the state was a public entity for the purpose of Article 35(a) of the Kenyan Constitution[173]. Although this case was decided before the AIA came into force, the distinction between public and private body appears to be the same under the Act. This suggests that it remains the case that state-owned enterprise are public entities for the purpose of the Act and thus fully required to comply with its obligations.

[171] Katiba Institute (2018) 'Handbook on the Access to Information Act, 2016), Available at http://www.katibainstitute.org/wp-content/uploads/2018/02/Katiba-booklet-31.01.2018-1.pdf (Accessed 24/01/19), p9
[172] Katiba Institute (2018) 'Handbook on the Access to Information Act, 2016), Available at http://www.katibainstitute.org/wp-content/uploads/2018/02/Katiba-booklet-31.01.2018-1.pdf (Accessed 24/01/19), p9
[173] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 56

Private entities that perform public functions?

Private entities that perform functions are clearly fall within the definition of 'private body' in section 2(a) of the Act. Such bodies are required to comply with the Act in respect of their public functions and in the provision of any public services.

Private entities that receive public funds?

Section 2(a) of the AIA prescribes bodies that 'receive public resources and benefits' or 'utilize public funds'. Private entities that receive public funds are therefore required to comply with the Act.

Further, the designation of bodies that receive public funds is not dependant on such funds being for the provision of public services, any form of public funding is sufficient. However private bodies that receive public resources and benefits or utilize public funds are only subject to the Act with regard to such resources or funds.

Private entities that are controlled by a public authority?

Section 2(a) of the AIA states that a 'public entity' is b) any entity performing a function within a commission, office, agency or other body established under the Constitution'. It is likely that this includes arms-length bodies set up by public institutions to perform public functions. If so, bodies controlled by a public authority will be subject to the obligations of a 'public entity', although this is not definitely the case.

If they are not deemed to a be a 'public entity', it is likely that private bodies that are controlled by a public authority will fall within the definition in section 2(a) AIA, According to this section, a private body is any 'private entity or non-state actor that—(a) [r]eceives public resources and benefits, utilizes public funds, engages in public functions, provides public services or has exclusive contracts to exploit natural resources'. Such bodies are required to provide information with regard to their funds, functions, service or resources, whichever is appropriate.

Entities that exercise administrative authority?

Again, the AIA makes no explicit mention of bodies that exercise administrative authority as entities that are subject to the Act.

However, it could definitely by argued that such bodies could be considered to fall within the 'private body' that 'engages in public functions' or 'provides public services' limbs of section 2(a) of the Act. If this was the case, such bodies would be subject to the Act only in respect of such public functions or services.

Entities that were established by legislation?

It is very likely that bodies established by legislation, especially those funded by the Parliament of Kenya, fall within the definition of a 'public office' in Article 260 of the Constitution of Kenya. As such, bodies established by legislation are deemed to be 'public entities' and are required to comply fully with the Act.

Political Parties?

Political parties are not subject to the AIA.

Monopolies or private entities with a dominant position in the market?

The definition of private bodies in Section 2(a) of the AIA includes any private entity or non-state actor that 'has exclusive contracts to exploit natural resources'. This implies that private bodies with a dominant or privileged position in the exploitation of natural resources are subject to the Act. Such bodies are only required to comply with requests in relation to resources that they are in a privileged position to exploit.

Private entities that hold information that is required for the exercise or protection of any rights?

Both Article 35 of the Constitution of Kenya and section 4 of the AIA state that citizens are entitled to information that is held by 'another person where that information is required for the exercise of any right or fundamental freedom.'

In order to access such information, the person making the request must prove both that the information is held by the private entity and that the information is required for the exercise or protection of another right[174]. Placing this burden of proof on the requester makes this right difficult to realise in practice, as it is extremely difficult for an individual to prove that information is required in the exercise of a right if they do not have access to that information.

In Nairobi Law Monthly Ltd v KENGEN, which pre-dates the AIA, the High Court of Nairobi found that KENGEN, which was 70% owned by the Kenyan Government was a state body, and was thus fully obliged to comply with the right to provide information[175]. However, the court went on to consider whether KENGEN would have had to have provided the information to the applicant, a Kenyan Newspaper if it was a private body under Article 35(1)(b). The Newspaper had alleged that Articles 33 and 34 of the Constitution, which protect the right to freedom of expression and of the media respectively, entitled them to seek information that they deemed to be in the public interest on the basis of Article 35(1)(b). However the court argued that this was not the case. It would be incorrect to assume that Article 35(1)(b) required 'a positive obligation on everyone to give it [the media company] whatever information it sought in order to enable it to publish stories and information.[176]'

[174] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 56
[175] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 52
[176] Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company (KENGEN) & 6 others, *Petition No.278 of 2011,* High Court of Nairobi, para 67

MEXICO

History and Summary of FOI Law(s)

Article 6 of the Political Constitution of the Mexican United States 1917 guarantees the right to information. This protection was first included when the constitution was amended in 2007 and was further updated in 2015. Freedom of Information in Mexico is also governed by the General Act of Transparency and Access to Public Information 2015 (General Transparency Law). The General Transparency Law replaced the Federal Access to Information Law which was first passed in 2002[177]. Before the General Transparency Law came into force, Mexican states were required to adopt their own access to information laws. However, the General Transparency Law applies to all levels of government. All states have retained their own laws however, which have been updated to comply with the General Transparency Law.

How does the FOI law determine which bodies are subject to the Act?

Unlike other constitutional provisions examined, Article 6 of the Mexican Constitution sets out the requirements for protections in a detailed manner. According to Article 6(A)(I), '[a]ll information in custody of any authority, entity or organ of the Executive, Legislative and Judicial powers, autonomous organisms, political parties, public funds or any person or group, such as unions, entitled with public funds or that can exercise authority at the federal level is public'. Further, '[t]he obligated subjects must record every activity that derives from their authority, competence or function'. Article 6 therefore includes a broad definition of bodies that are required to facilitate the right to information including creating an obligation for the recording of activities relating to the body's authority, competence or function.

The General Transparency Law further clarifies the bodies required to comply with the right to information and their obligations.

Article 23 of the Act states that the bodies that are required to ensure effective access to information are 'any authority, entity, body or agency of the Legislative, Executive and Judicial branches, autonomous bodies, political parties, trusts and public funds, as well as any individual, legal entity or union who receives or use public resources or performs acts of authority of the Federation, the States and the municipalities'.

There are three broad categories of bodies subject to General Transparency Law and each have different obligations.

First are those defined in the first part of Article 23 including the Legislature, Executive and the Judiciary and their related entities, autonomous bodies, political parties, trusts and public funds. Such bodies are known as 'regulated entities' and are required to fully comply with the Act's obligations for example those set out in Article 24.

Second are individuals, legal entities and trade unions that receive or use public resources or perform functions that are within the authority of the state. Article 81 of the General

[177] Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental 2002

Transparency Law requires that 'Guarantor Agencies', responsible for the supervision of the Act, shall determine where such bodies 'shall comply with obligations of transparency and access to information'. This can be done either directly or indirectly through the regulated entities. In order for the Guarantor Agencies to determine which bodies should comply with the Act, the regulated entities are required to send a 'list of individuals or legal entities to which, for any reason, they allocated public funds or, in the terms established by the applicable provisions, exercise acts of authority[178].' When considering whether the body should be subject to the Act, 'the Guarantor Agencies will take into account if a governmental function is performed, the level of public funding, the level of regulation and government involvement, and whether the government participated in its creation.[179]' Article 82 states that Guarantor Agencies, after they have received relevant information for the bodies in question, shall determine the extent of that bodies transparency obligations.

Finally, Article 83 of the Act places additional specific obligations on 'regulated entities' in the energy sector. Such obligations are numerous but include 'information relating to contracts, allotments, permits, partnerships, corporations and other acts that the State subscribes or grants'.

The Mexican freedom of information laws designate bodies using a broad definition. The provisions of the Act are extremely detailed an impose on bodies different obligations depending on their nature. The Act gives guarantor agencies the obligation and power to designate private bodies subject to certain criteria. The Instituto Nacional de Transparencia, the body tasked with overall oversight of the Act, publishes a table on its website that outlines the bodies that have been designated and the obligations they are required to fulfil[180].

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Article 23 of the General Act of Transparency requires that 'any authority, entity, body or agency of the… Executive branches' as well as 'trusts and public funds' are regulated entities and required to comply fully with the Act's obligations. It is likely that most state-owned enterprises will be considered to be an entity of the executive branch.

In addition, Article 26 states that trusts and public funds are considered to be government-owned entities and are therefore required to comply with the Act on their own. That trusts and public funds are considered to be government owned entities and therefore 'regulated entities' confirms that government owned entities are also subject to the Act.

Private entities that perform public functions?

The second part of Article 23 states that bodies that 'perform acts of authority of the Federation, the States and the municipalities' are subject to the Act. As mentioned above, Article 81 states that it is the responsibility of 'Guarantor Agencies' to determine which

[178] General Act of Transparency and Access to Public Information 2015, Art 82
[179] General Act of Transparency and Access to Public Information 2015, Art 81
[180] Available at http://www.inai.org.mx/ (Accessed 24/01/19)

bodies are subject to Act and to determine what their obligations are. The criteria that the Guarantor Agency should take into account includes whether ' a governmental function is performed' as well as 'whether the government participated in its creation'. The latter factor appears open the possibility of privatised former state entities being designated under the Act.

Thus private entities that perform public functions are capable of being designated under the Act. The extent to which such bodies are assigned depends on the relevant Guarantor Agency but there Act is clear that such bodies should be subject the Act's requirements at least in relation to their public functions.

Private entities that receive public funds?

The second part of Article 23 of the Act provides that any person or body that 'receives or uses public resources' are required to comply with obligations under the Act. However designation is subject to the decision of the Guarantor Agency, who after receiving a list from 'regulated entities' that outlines individuals or entities that have been allocated public funds, must take into account the level of public funding when deciding whether the body should be made subject to the Act[181]. Private entities that receive public funds do not necessarily have to have received such funds in order to perform public functions.

Private entities that are controlled by a public authority?

The General Act of Transparency does not mention entities that are controlled by a public authority as required to fulfil the Act's obligations.

However, such bodies could fall within the second part of Article 23 as a body that 'receives or uses public resources' or performs public acts. Indeed, that Guarantor Agencies are required by Article 81 to take into account 'the level of regulation and government involvement', when determining whether to assign the body obligations under the Act, confirms that private entities that are controlled by a public authority are capable of being designated.

Such designation is not automatic and depends on the opinion of the Guarantor Agency but the fact that 'designated entities' are required to make Guarantor Agencies aware of such bodies[182] and the criteria for designation such bodies that are subject to a lot of control from designated entities should be included, suggests that most entities controlled by a public authority will be subject to some of the Act's obligations.

Entities that exercise administrative authority?

Article 23 of the Act assigns 'autonomous bodies' as 'regulated entities' for the purpose of the Act. This would seem to cover bodies that do not fall within the traditional three branches of the state but nonetheless assume some public powers and functions. Thus it is likely that entities that exercise administrative authority are fully subject to the Act's obligations.

[181] General Act of Transparency and Access to Public Information 2015, Article 82
[182] General Act of Transparency and Access to Public Information 2015, Article 81

Entities that were established by legislation?

Article 23 of the General Transparency Law states that ‘any authority, entity, body or agency of the Legislative... branch’ as well as ‘autonomous bodies’ are regulated entities. A body established by legislation is likely to be a legislative entity or body or, alternatively, if not considered to have legislative functions, an autonomous body. Such bodies are thus ‘regulated entities’ required to comply with all of the Acts obligations.

Political Parties?

Article 23 of the Act states that political parties are regulated entities. Political parties are therefore fully subject to the Act.

Monopolies or private entities with a dominant position in the market?

Monopolies or private entities are not subject to the Act unless they meet the criteria in the second part of Article 23.

Private entities that hold information that is required for the exercise or protection of any rights?

Private entities that hold information that is required for the exercise or protection of any rights are not subject to the Act unless they meet the criteria in the second part of Article 23.

THE NETHERLANDS

Note: The definition of public bodies in the Dutch law is very general. The specific bodies subject to the Act tend to be clarified in the Explanatory Memorandum or in individual cases. Neither the Explanatory Memorandum or individual cases could be found. Much of the information on the Netherlands therefore comes from secondary material. Readers should be aware of this fact when considering the position of bodies in the Netherlands.

History and Summary of FOI Law(s)

Article 110 of the Constitution of the Kingdom of the Netherlands establishes 'the right of public access to information in accordance with rules to be prescribed by an Act of Parliament[183]'. However, this is not considered to be a judicially enforceable right to information. Freedom of Information in the Netherlands is governed by Public Access Act 1991[184], or the WOB as it is better known. The 1991 Act replaced a previous version, which was first enacted in 1978. There have been a number of attempts[185] to update or replace the WOB but so far these attempts have not come into fruition. The WOB applies to central government as well as to provincial and municipal authorities.

How does the FOI law determine which bodies are subject to the Act?

Section 1a of the WOB states that the Act will apply to the following administrative authorities; Government Ministers[186], provincial and municipal governments[187], water boards[188], regulatory industrial organisations[189] and bodies whose activities are subject to the responsibility of the previous bodies mentioned[190], except those excluded by order in council[191].

According to the explanatory memorandum of the Act, Dutch jurisprudence and disclosure practice not all of these bodies are subject to the same obligations under the Act[192]. There are three broad categories of obligations under the Act.

First, are bodies that must fully comply with the Act's obligations. This includes all public bodies and private bodies that are owned or co-owned by the government[193].

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[183] The Constitution of the Kingdom of the Netherlands 2008, Article 110
[184] Wet openbaarheid van bestuur (Public Access Act) 1991
[185] Groenlinks introduced a Bill to Parliament in 2012 as did Groenlinks and D66 in 2018, See http://www.freedominfo.org/2012/06/dutch-green-party-proposes-revised-foi-law/;
[186] Public Access Act 1991, s.1a(1)(a)
[187] Public Access Act 1991, s.1a(1)(b)
[188] Public Access Act 1991, s.1a(1)(b)
[189] Public Access Act 1991, s.1a(1)(b)
[190] Public Access Act 1991, s.1a(1)(c)
[191] Public Access Act 1991, s.1a(1)(d)
[192] Public Access Act 1991, explanatory memorandum, Discussed by Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[193] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)

Second are bodies that are only required to provide information that is related to their public functions. This includes bodies that fulfil functions required by law and companies that are contracted to provide public services, who must disclose all details related to that contract and the services provided[194].

Third are private bodies in which the government owns shares and private bodes that operate in industries where they compete with public bodies. Here, agencies that have access to the records of such companies must provide certain information on request[195].

The Dutch law therefore designates bodies with a definition. However, the statutory definition is relatively imprecise and reference to the explanatory memorandum and case law is required to get a sense of which bodies are subject to Act and to what degree. The case law and explanatory memorandum could not be located and thus any information found comes from secondary material.

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Section 1a(1)(c) of the WOB states that bodies whose activities are subject to the responsibility of the central or state government are required to comply fully with the Act's obligations. This has been interpreted to included bodies that are owned or co-owned by the government[196].

Private entities that perform public functions?

Private bodies that perform public functions and private bodies that are contracted to perform public functions are both subject to the Act[197]. However, the bodies are only required to release information relating to those public functions.

Private entities that receive public funds?

Entities that receive public funds are not mentioned in the WOB.

[194] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[195] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[196] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[197] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)

However, bodies that are contracted to provide public services are included[198]. Thus bodies that receive public funds to perform public services are subject to the Act in relation to their contract and the services.

Private entities that are controlled by a public authority?

Section 1a(1)(c) of the WOB states that bodies whose activities are subject to the responsibility of the central or state government are required to comply with the Act.

Whilst it is not completely clear, if 'subject to the responsibility' is seen to be equal to 'controlled by' then such bodies will be fully subject to the Act.

Entities that exercise administrative authority?

Section 1a(1)(b) of the WOB states that 'regulatory industrial organisations' are subject to the Act. 'Regulatory' implies that the body exercises some form of administrative authority.

Bodies that exercise administrative authority may also be included within the definition in Section 1(a)(1)(c).

If such bodies are included in such definitions, it appears they are required to fully comply with the Act's obligations.

Entities that were established by legislation?

There is no mention of entities that were established by legislation in the WOB.

However it is possible they would be subject to the Act if, as is presumed due to their establishment by legislation, that they fulfil some public function, then they may be subject to the Act on that basis.

Political Parties?

Political parties are not required to comply with the WOB.

Monopolies or private entities with a dominant position in the market?

Interestingly, under the Dutch regime, private companies that compete with state-owned companies have to comply with a similar degree of transparency[199]. However, requesters may not ask such firms to provide the information directly. Instead, requesters must contact an agency with access to the information, which has a responsibility to comply with the obligations[200]. Further, if a state company is privatised and there remains no

[198] Right2info. (13/09/13) 'Private Bodies and Public Corporations: Netherlands' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[199] Right2info. (13/09/13) 'Private Bodies and Public Corporations' Available at https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 23/01/19)
[200] Right2info. (13/09/13) 'Private Bodies and Public Corporations' Available at https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 23/01/19)

government-owned entities within the particular market, then those companies' records are no longer subject to publication[201].

Private entities that hold information that is required for the exercise or protection of any rights?

Private entities that hold information that is required for the exercise or protection of any rights are not required to provide information under the WOB.

[201] Right2info. (13/09/13) 'Private Bodies and Public Corporations' Available at https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 23/01/19)

NEW ZEALAND

History and Summary of FOI Law(s)

Section 114 of the New Zealand Bill of Rights Act 1990 acknowledges the 'right to seek and receive information.' However, freedom of information in New Zealand is principally governed by the Official Information Act 1982, which was most recently reformed in 2003. The OIA only applies to central government. Local authorities are governed by the Local Government Official Information and Meetings Act 1987, which contains broadly similar obligations to the OIA.

How does the FOI law determine which bodies are subject to the Act?

'Determining whether an agency is subject to the Acts is[,]' according to a 2012 report from the New Zealand Law Commission, 'not a simple question.[202]'

The OIA principally designates bodies by listing them. Section 2 of the Act states that an 'Organisation' means either '[a]n organisation named in Part 2 of Schedule 1 of the Ombudsmen Act 1975 (other than the Parliamentary Service or mortality review committees)[203];' or 'an organisation named in Schedule 1 of this Act[204]'.

Further, a 'State enterprise' is defined as 'an organisation that is a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 and that is named in Schedule 1 of this Act;[205]' or 'an organisation that was a State enterprise within the meaning of schedule 2 of the State-Owned Enterprises Act 1986 but which continues to be named in Schedule 1 of this Act.[206]' The Act also covers companies related to a State enterprise if 'alone or together with any other State enterprise, directly or indirectly owns, or controls the exercise of all voting rights attaching to the issued shares of the company[207].'

The Act also covers 'information… held by an unincorporated body (being a board, council, committee, subcommittee, or body, but not being a mortality review committee)[208]' which is established 'for the purpose of assisting or advising, or performing functions connected with[209]', a department, Minister or organisation and is so established in accordance with legislation or by a department, Minster or organisation[210]. The information

[202] Law Commission of New Zealand (2012) 'The Public's Right to Know: Review of the Official Information Legislation', Available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R125.pdf (Accessed 24/01/19), p333
[203] Official Information Act 1982, s.2(1): Organisation (a)
[204] Official Information Act 1982, s.2(1): Organisation (b)
[205] Official Information Act 1982, s.2(1): State enterprise (a)
[206] Official Information Act 1982, s.2(1): State enterprise (b)
[207] Official Information Act 1982, s.2(1A)
[208] Official Information Act 1982, s.2(2)
[209] Official Information Act 1982, s.2(2)(a)
[210] Official Information Act 1982, s.2(2)(b)

of such bodies is deemed to be information held by either the department, organisation or Minister, (whichever is appropriate)[211].

Finally, the Act covers information held by 'an independent contractor engaged by' any department, Minister or organisation[212]. Such information only extends to the information on the entities capacity as a contractor and should be divulged by the relevant department, Minister or organisation and not the entity itself[213].

The OIA therefore designates bodies using numerous lists and definitions. Several Acts need to be consulted before a person can be sure of whether a body is covered. The New Zealand Law Commission claimed that is 'not very satisfactory', and that the complexity of the Act is bad for public use[214].

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Section 2 of the Act states that bodies that are State enterprises within the meaning of section 2 of the State-Owned Enterprises Act 1986 and named in Schedule 1 of the OIA, as well as those that were subject to the above definition and are still included in Schedule 1 are subject to the Act.

According to the State-Owned Enterprises Act 1986, state enterprises are defined as bodies listed in Schedule 1 of the Act[215]. State-owned enterprises are therefore subject to all of the Act's obligations if they are listed in Schedule 1 of both the OIA and the State-Owned Enterprises Act.

Alternatively, bodies that are no longer listed in Schedule 1 of the State-Owned Enterprises Act, either because they have been fully or partially privatised, but remain in Schedule 1 of the OIA are subject the Act's obligations.

State owned enterprises subject to the Act include Solid Energy New Zealand Limited, a state-owned coal company, Kordia Group Limited, which are government owned broadcasters and New Zealand Post Limited[216]. Further, Schedule 1 includes 'Airport companies' as defined in section 2 of the Airport Authorities Act 1966 in which more than 50% of the shares are owned by a the Crown, a local authority or a combination of the both. However, a number of bodies that were previously subject to the Act, such as Genesis Energy, Mighty River Power and Meridan Energy were removed, when they were partially privatised in accordance with the Public Finance (Mixed Ownership Model) Amendment Act 2012. Further, Air New Zealand, which was privatised and removed from

[211] Official Information Act 1982, s.2(2)(c) and (d)
[212] Official Information Act 1982, s.2(5)
[213] Official Information Act 1982, s.2(5)
[214] Law Commission of New Zealand (2012) 'The Public's Right to Know: Review of the Official Information Legislation', Available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R125.pdf (Accessed 24/01/19), p334
[215] State Owned Enterprises Act 1986, s.2: State Enterprise
[216] Official Information Act 1982, Schedule 1 & State Owned Enterprises Act 1986, Schedule 1

Schedule 1 before the Government bought back a 74% stake, was not re-admitted to the Schedule 1[217].

Private entities that perform public functions?

Section 2(5) of the OIA states that any information held by 'an independent contractor' engaged by a Minister, department or organisation is subject to the Act's obligations. However, information need only be disclosed if it is in relation to the contract and the request must be made to the contracting authority and not the contractor.

It is assumed that the work Ministers, departments and organisations contract out is work of a public nature. Therefore private entities that perform public functions are subject to the Act but only indirectly and only with regard to the services they're contracted to provide.

Private entities that receive public funds?

Section 2(5) of the OIA states that any information held by 'an independent contractor' engaged by a Minister, department or organisation is subject to the Act's obligations. However, information need only be disclosed if it is in relation to the contract and the request must be made to the contracting authority and not the contractor.

Private entities that receive public funds to carry out contracts are therefore subject to the OIA but only indirectly and only in relation to those functions.

Private entities that are controlled by a public authority?

The OIA does not explicitly mention entities that are controlled by a public authority as subject to the Act.

However, if the entity is an unincorporated body (a board, council, committee, subcommittee, or body but not a mortality review committee) that has been established 'for the purpose of assisting, advising or performing functions connected with any minister, department or organisation.[218]' Then that body is deemed to be part of the appropriate parent authority and the information it holds is subject to the Act.

Entities that exercise administrative authority?

The OIA does not explicitly mention entities that exercise administrative authority as bodies subject to the Act.

However, a number of bodies that exercise administrative authority such as the Broadcasting Standards Authority, Financial Markets Authority and the Law Commission are listed in Schedule 1 of the Act, suggesting that this criteria is relevant to designation.

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[217] Law Commission of New Zealand (2012) 'The Public's Right to Know: Review of the Official Information Legislation', Available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R125.pdf (Accessed 24/01/19), p336

[218] Official Information Act 1982 s.2(2)(a)

Entities that were established by legislation?

The OIA does not explicitly mention entities that were established by legislation as criteria for designation.

However, several of the bodies listed in Schedule 1, including the Broadcasting Standards Authority[219] and the Health Research Council of New Zealand[220] were established by legislation. This suggests that being established by legislation is a factor that leads to designation.

Political Parties?

Political parties are not subject to the OIA.

Monopolies or private entities with a dominant position in the market?

Monopolies or private entities with a dominant position in the market are not subject to the OIA, unless they are state-owned enterprises.

Private entities that hold information that is required for the exercise or protection of any rights?

Private entities that hold information that is required for the exercise or protection of any other rights are not subject to the OIA.

[219] Broadcasting Act 1989
[220] Health Research Council Act 1990

NIGERIA

History and Summary of FOI Law(s)

Section 39(1) of the Nigerian Constitution[221] protects the right to freedom of expression. This includes the freedom 'to receive and impart ideas and information without interference'. The freedom to receive information was given effect by the Freedom of Information Act 2011. The Nigerian FOI law was several years in the making and was finally passed 11 years after it was first presented to the legislature[222]. Further, since its initial enactment there has been considerable debate over whether the Act applies to both the Federal and State Governments or exclusively the Federal Government. Some State Legislatures have passed their own FOI legislation[223]. However, a 2018 judgment from the Nigerian Court of Appeal has confirmed that the FOI applies to both the Federal and State Governments[224].

How does the FOI law determine which bodies are subject to the Act?

Bodies that are required to comply with the FOIA are described as 'public institutions.' Public institutions have several duties under the Act, including a requirement to respond to information requests as well as duties to proactively publish specific information[225].

Section 2(7) of the Act states that: "Public institutions are all authorities whether executive, legislative or judicial agencies, ministries or extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest and private companies utilizing public funds, providing public services or performing public functions."

'Public institution' is also defined in the interpretation section of the Act, section 31, as 'any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds.'

Despite Section 31 containing a slightly lengthier definition, it looks to cover the same bodies as those in Section 2(7). Section 31, thus, seems to be a clarification of the bodies covered in the Act. The Nigerian Act therefore designates bodies exclusively using a definition. The Nigerian Law does not have an oversight body, therefore if there is a

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[221] Constitution of the Federal Republic of Nigeria 1999
[222] Freedominfo.org, (03/06/11), 'Nigerian President Signs Freedom of Information Bill', Available at http://www.freedominfo.org/2011/06/nigerian-president-signs-freedom-of-information-bill/ (Accessed 24/01/19)
[223] See for example, Freedominfo.org, (12/11/14) 'Nigerian Judge Says FOI Law Not Applicable to States', Available at http://www.freedominfo.org/2014/11/nigerian-judge-says-foi-law-applicable-states/ (Accessed 24/01/19); Freedominfo.org, (27/06/14), 'Nigerian Courts Upholding FOIA Applications in States', Available at http://www.freedominfo.org/2014/06/nigerian-courts-upholding-foia-application-states/ (Accessed 24/01/19); Freedominfo.org, (17/02/14), 'Application of Nigerian FOI Law to States Contested', Available at http://www.freedominfo.org/2014/02/application-nigerian-foi-law-states-contested/ (Accessed 17/02/14)
[224] Alo v Speaker, Ondo State House of Assembly & Another *(2018) LPELR-45143(CA)*
[225] Freedom of Information Act 2011, s.2

dispute over whether a body is subject to the Act recourse must be made to the Nigerian Courts. There have been a few cases where the terms in the Act have been clarified.

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Section 2(7) of the FOIA states that 'all companies in which government has a controlling interest' are 'public institutions' for the purposes of the Act.

State-owned enterprises are therefore fully subject to the Act's obligations.

Private entities that perform public functions?

Section 2(7) states that 'private companies… proving public services or performing public functions', are public institutions required to comply with the Act's obligations.

The Act does not specify whether such bodies are required to fully comply with the Act's obligations or only in respect of their public functions.

Private entities that receive public funds?

Section 2(7) of the FOIA requires 'private companies utilizing public funds' to comply with the Act's obligations. Private entities are therefore subject to the Act.

Further, it appears that such bodies are not required to perform public functions in order to be subject. Again, it is not clear whether such bodies are required to fully comply or rather merely with regard to the funds received.

Private entities that are controlled by a public authority?

Section 2(7) of the FOIA designates 'all companies in which government has a controlling interest' as 'public institutions'. This covers bodies which are financially controlled by the government.

Further, the Act covers administrative and advisory bodies 'of the government including, boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund[226]'.

This is an extremely broad definition and is likely to cover any bodies that are directly or indirectly controlled by a public authority. It is thus highly likely that bodies that are controlled by a public authority are subject to the FOIA.

Entities that exercise administrative authority?

Section 2(7) designates executive agencies as public institutions required to comply with the Act's obligations. Section 31 clarifies this as 'any… administrative or advisory body of

[226] Freedom of Information Act 2011, section 31

the government, including boards, bureau, committees or commissions of the State.' This definition appears to cover entities that exercise administrative authority.

The Nigerian Bar Association, Nigerian Medical Association and the Nigerian Labour Congress are all subject to the Act[227]. All of these bodies, while technically non-state have certain regulatory functions. That they are included in the Act, confirms that this quality is likely to lead to designation.

Entities that were established by legislation?

Section 2(7) states that 'corporations established by law' are subject to the Act's obligations.

The phrase 'by law' rather than 'under law' or an equivalent suggests that this only covers bodies directly established by legislation and not those that have been established according to the terms of legislation, for example those established under Companies Acts.

In Boniface Okezie v. Central Bank of Nigeria[228], it was found that the Central Bank of Nigeria was a public institution and therefore required to comply with the obligations of the FOIA. The Central Bank of Nigeria was established by the Central Bank of Nigeria Act 1958.

Political Parties?

There is no mention of political parties as being 'Public Institutions' for the purpose of the Act. Political parties are therefore not required to comply with the Act's obligations.

Monopolies or private entities with a dominant position in the market?

There is no indication that monopolies or private entities with a dominant position in the market are 'public institutions' for the purposes of the FOIA.

Private entities that hold information that is required for the exercise or protection of any rights?

The FOIA or the Nigerian Constitution does not require private entities that hold information that is required for the exercise or protection of any other constitutional rights to release that information. Unless, of course, the body meets another of the criteria in the Act.

[227] Ugwu Chibuike, H. (2018), 'Exploring The Freedom of Information Act 2011, as a Tool for Holding Government and Public Institutions Accountable', Legalnaija Blawg, Available at https://www.legalnaija.com/2018/11/exploring-freedom-of-information-act.html (Accessed 24/01/19)
[228] Boniface Okezie v. Central Bank of Nigeria *CA/L/693/2010*

SOUTH AFRICA

History and Summary of FOI Law(s)

Section 32 of the Constitution of the Republic of South Africa provides that '[e]veryone has the right of access to information' and also requires that national legislation is enacted in order to give effect to the right[229]. This requirement was fulfilled with the enactment of the Promotion of Access to Information Act, (Act 2 of 2000), which came into force on 9 March 2001. The Act applies at the national, provincial and municipal level.

How does the FOI law determine which bodies are subject to the Act?

According to section 32 of the South African constitution, the right to information applies to 'any information held by the state[230]'; and 'any information that is held by another person and that is required for the exercise or protection of any rights[231]'. A constitutional obligation to respond to information requests thus applies to both public bodies and private bodies. The latter, however, are only required to provide information if it is required for the exercise or protection of the requester's rights. As shall be seen, there have been a number of cases which have clarified how this provision operates in practice.

Section 1 of the Promotion of Access to Information Act clarifies what is meant by a 'private body' and what is meant by a 'public body'.

A 'private body' is either a natural person who carries or has carried on any trade, business or profession but only in that capacity[232], a partnership which carries or has carried on any trade, business or profession[233], or any former or existing legal person[234].

A 'public body' is 'any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government[235]'. Alternatively a 'public body' is 'any other functionary or institution when- exercising a power or performing a duty in terms of the Constitution or a provincial constitution[236]; or exercising a public power or performing a public function in terms of any legislation[237]'.

The Act goes on to specifically spell out the duties of public bodies and private bodies under the Act. Part 2 of the Act covers public bodies and Part 3 covers private bodies. Generally, the obligations of public are far more stringent than those imposed on private bodies.

Section 8 of the Act acknowledges that it is possible for a body to be a public body in one instance and a private body in another. The obligations of that authority therefore depends on the type of information held. If it is information that the body holds as a result of

[229] Constitution of the Republic of South Africa, 1996, s.32(2)
[230] Constitution of the Republic of South Africa, 1996, s.32(1)(a)
[231] Constitution of the Republic of South Africa, 1996, s.32(1)(b)
[232] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Private body', (a)
[233] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Private body', (b)
[234] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Private body', (c)
[235] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Public body', (a)
[236] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Public body',(b)(i)
[237] Promotion of Access to Information Act, (Act 2 of 2000), s.1: 'Public body', (b)(ii)

exercising a power or performing a duty in terms of the national or a provincial constitution or due to it performing a public function in terms of legislation, then the body has the obligations of a public body for that information[238]. If the information is that which is required for the exercise or protection of the requester's rights, then the body has the obligations of a private body for that information[239].

South Africa therefore determines which bodies are required to provide information with use of a definition. Further, some of the terms in the legislation have been clarified in case law.

Which bodies are subject to the FOI law?

State-Owned Enterprises?

The definition of 'public body' in the PAIA is relatively imprecise and does not explicitly mention state-owned enterprises.

However, Right to Info, an NGO that monitors the FOI regimes of jurisdictions around the world, states that state-owned enterprises are public bodies for the purpose of the PAIA[240].

This can also be understood from the Mittal steel[241] case. Here, the Court of Appeal found that the respondent company, which was a previously state-owned company that had been privatised, was still a 'public body' under the Act. The court acknowledged that the privatisation of state-owned assets did not necessarily mean that the body was no longer performing a public function:

"In an era in which privatization of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.[242]"

The judgment in the Mittal steel case reveals two things. First, that state-owned enterprises are public bodies for the purpose of the PAIA and are therefore subject to all of its obligations. Second, that state-owned enterprises may remain subject to the Act after they have been privatised, if they remain under the control of the state or perform public functions.

Private entities that perform public functions?

Section 1 clearly states that private entities that perform public functions either as required by legislation or by the national or a provincial constitution are public bodies for the purpose of the Act.

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[238] Promotion of Access to Information Act, (Act 2 of 2000), s.8)(1)(a)
[239] Promotion of Access to Information Act, (Act 2 of 2000), s.8)(1)(b)
[240] Right2info. (13/09/13) 'Private Bodies and Public Corporations: South Africa' Available at https://www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations (Accessed 24/01/19)
[241] Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) *SA 66 (SCA)*
[242] Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) *SA 66 (SCA),* para 22

Private entities that receive public funds?

There is no mention of funding in the PAIA's definition of public bodies.

However, several cases, including M&G Media Ltd and Others v 2010 Fifa World Cup Organising Committee South Africa Ltd and Another[243], has mentioned the receipt and dispensation of public funds as a factor that determines whether the body is exercising a public function.

Private entities that are controlled by a public authority?

The PAIA does not mention 'control by a public authority' as part of the criteria that makes a private body a 'public body' for the purpose of the Act.

However, in M&G Media Ltd and Others v 2010 Fifa World Cup Organising Committee South Africa Ltd and Another[244], it was held that the Fifa World Cup Organising Committee was a public body for the purpose of the Act. The court argued that because the Committee was largely controlled by the state and had received and dispensed public funds it could be said to be performing a public function as required by (b) of the definition of public body in the PAIA. It is clear therefore that public control is a considered as a corollary of public function and is a factor that can lead to designation.

Entities that exercise administrative authority?

The PAIA does not mention 'the exercise of administrative authority' as part of the criteria that makes a private body a 'public body' for the purpose of the Act.

However, according to part (a) of the definition of public body in section 1 of the Act, bodies that are given powers derived from the constitution are public bodies for the purpose of the Act.

It is also likely that, given that the courts have interpreted 'public function' in part (b) relatively broadly in other contexts, that the exercise of administrative authority is also likely to be a factor that could lead an entity to be considered to be a public body and thus required to fully comply with the Act's obligations with regard to those functions.

Entities that were established by legislation?

The PAIA does not mention 'entities that were established by legislation' as part of the criteria that makes an entity a 'public body' for the purpose of the Act.

However, in Mittal Steel, the court emphasised the company's establishment under the Iron and Steel Industry Act (11 of 1928) as proof of its public function[245]. It therefore appears that entities established by legislation are public bodies for the purpose of the Act.

Political Parties?

[243] *2011 (5) SA 163 (GSJ)*
[244] 2011 (5) SA 163 (GSJ), para 241
[245] Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) *SA 66 (SCA),* paras, 23-24

The PAIA does not require political parties to provide information as public bodies.

However, in My Vote Counts NPC v President of the Republic of South Africa and Others[246], the Western Cape High Court found that since section 32(1)(b) of the South African constitution grants citizens access to information of private bodies that is required for the protection or exercise of any other constitutional rights, and the right to be informed about the funding of political parties was crucial to the right to vote, protected by section 19 of the Constitution, then the PAIA had to allow the release of information about substantial funding of political parties. Since the PAIA exempted commercially sensitive information from release, it did not currently allow for the release of the details of political party funding. It was therefore incompatible with section 32 of the constitution and required amendment. Parliament's response has been to enact the Political Party Funding Bill 2017, which is yet to receive Presidential assent[247].

Monopolies or private entities with a dominant position in the market?

Monopolies or private entities with a dominant position in the market are not covered by the PAIA.

However, as was seen in MittalSteel, if the body is a previously state-owned company that has some functions that could be considered public then it may be a public body on that basis.

Private entities that hold information that is required for the exercise or protection of any rights?

Section 32 of the South African Constitution and Section 1 of the PAIA both state that private bodies are subject to the Act with regard to information they hold that is required for the exercise or protection of any of the requester's rights. Subsequent case law has clarified how the right works in practice.

In Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others[248], it was found that in order to make use of the right, 'an applicant has to state what the right is that he wishes to exercise or protect, what the information is required and how that information would assist him in exercising or protecting that right[249]'. This position has been criticised by some for placing a too onerous burden on the requester[250]. Often requesters are asking for information precisely because they do not know it's contents. Asking a requester to demonstrate a link between requested information and a right when they have not seen that information therefore make the use of this right substantially more difficult. Further, in Clutch (Fty) Ltd v Davis[251], the Supreme Court of Appeal interpreted

[246] (*13372/2016) [2017] ZAWCHC 105*
[247] Law, M (14/12/17). 'What the historic party funding Bill means for SA politics' *The Mail and Guardian,* Available at https://mg.co.za/article/2017-12-14-what-the-historic-party-funding-bill-means-for-sa-politics (Accessed 24/01/19)
[248] *2001(3) SA 1013 (SCA)*
[249] Cape Metropolitan Council v Metro Inspections Services (Western Cape) CC and Others, *2001(3) SA 1013 (SCA),* para 28
[250] Peekhaus, W. (2014). 'South Africa's *Promotion of Access to Information Act:* An Analysis of Relevant Jurisprudence' *Journal of Information Policy 4,* p580
[251] *2005 (3) SA (SCA)*, para 13

the term ‘reasonably required’ as ‘understood to connote a substantial advantage or an element of need[252]’. This interpretation of the term restricts the use of Section 32(1)(b) of the Constitution even further. However, use of this Section is not impossible and it has used by citizens to access information from private companies on a number of occasions, for example in the My Vote Counts[253] case where the requester relied on Section 32(1)(b) in conjunction with the right to vote, Section 19, to require political parties to disclose information about the source and details of their funding.

[252] Clutch (Fty) Ltd v Davis, *2005 (3) SA (SCA),* para 13
[253] My Vote Counts NPC v President of the Republic of South Africa and Others, (*13372/2016) [2017] ZAWCHC 105*

SWEDEN

History and Summary of FOI Law(s)

Sweden is widely known for being the first jurisdiction to enact freedom of information legislation, the Freedom of the Press Act 1776[254]. There are several modern laws that regulate access to information in Sweden. The most important are the Freedom of Press Act 1949[255] which has been amended several times, the most significant of which came in 1976, and the Public Access to Information and Secrecy Act 2009[256]. The Freedom of the Press Act 1949, along with three other laws, forms the fundamental laws of the Constitution of Sweden. The second part of the Act sets out the right of access to official documents. The Public Access to Information and Secrecy Act 2009 is extremely detailed, containing more than 400 provisions, and is intended to supplement the Freedom of the Press Act 1949. Both Acts apply to central government and at the municipal level.

How does the FOI law determine which bodies are subject to the Act?

Chapter 2 of the PAISA determines which bodies are subject to Act and the extent of their obligations.

Bodies that are subject to the Act are described as 'authorities'. This is not defined in the legislation, however, an English-language explainer of the law produced by the Swedish Government states that:

"[P]ublic authorities are those bodies included in the state and municipal administration. The Government, the central public authorities, the commercial public agencies, the courts and the municipal boards are examples of such public authorities.[257]"

The PAISA goes on to include further bodies that do not fall within this definition.

First, both the Swedish Parliament and the municipal assemblies are equated with authorities for the purpose of the Act[258].

Second, the Act states that the access to information provisions of the Freedom of the Press Act applies 'mutatis mutandis to documents of public limited companies, commercial companies, economic associations and foundations where municipalities or county councils exercise a controlling influence.' The Act also defines what is meant by a 'controlling influence'. This is where, alone or together, municipalities or county councils have a degree of ownership that supplies them with more than half of votes in the entity[259],

[254] Konglige Majestäts Nådige Förordning, Angående Skrif-och Tryck-friheten 1776 (His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press) [Freedom of the Press Act]
[255] Tryckfrihetsförordning (1949:105) (Freedom of the Press Act 1949)
[256] Offentighets-och sekretesslag (2009:400), (Public Access to Information and Secrecy Act 2009)
[257] Swedish Ministry of Justice (2009) 'Public Access to Information and Secrecy Act: Information concerning public access to information and secrecy legislation, etc' Available at https://www.regeringen.se/49bb7e/contentassets/2c767a1ae4e8469fbfd0fc044998ab78/public-access-to-information-and-secrecy-act (Accessed 24/01/19), p11
[258] Public Access to Information and Secrecy Act 2009, 2 §
[259] Public Access to Information and Secrecy Act 2009, 3 § (1)

have the right to appoint or remove more than half of the members or the board of the entity[260] or they constitute all responsible partners in a corporation[261].

Third, the Act applies to documents of bodies listed in the Annex to the PAISA. However, requesters may only obtain documents if they pertain to the specific activities mentioned. Broadly the organisations listed in the Annex are, universities and colleges, art, music and sport associations, unemployment funds, vehicle institutes, professional associations, the Royal Swedish Aeroclub, the Notary Public, Swedish Post, the State Housing Mortgage Company, research foundations and the Swedish Church.

The Swedish law therefore includes bodies with a mix between a definition and a list. The bodies included in the annex to the Act must only comply with the Act, in respect of the specific activities listed.

Which bodies are subject to the FOI law?

State-Owned Enterprises?

Enterprises owned by municipalities and county councils are subject to the Act, if the relevant municipality or county council owns more than 50% of the shares in the enterprise[262].

Moreover, state-owned enterprises may be included in the Annex to the PAIsA. PostNord Sverige, for example, which is 60% owned by the Swedish Government is subject to the Act but only in relation to its statutory powers in relation to elections, referenda, the special post service, customs control, license release and relocation reports[263].

Private entities that perform public functions?

As private entities can only be designated by being included in the Annex, and bodies that are included in the Annex tend to have obligations specific to their role, there is no mention of the performance of public functions as criteria that leads to designation.

However, depending on how broadly ‘public functions’ are defined, it is arguable that more or less all of the bodies listed in the Annex are private entities that perform public functions. If ‘public functions’ is defined narrowly as ‘providing a public service’ then the inclusion of bodies like the Swedish Church in relation to its duties to provide funeral services demonstrate that the performance of public functions is criteria that leads to designation[264].

Private entities that receive public funds?

There are a few bodies listed in the Annex to PAISA that are required to allow access to documents in relation to their public funding.

[260] Public Access to Information and Secrecy Act 2009, 3 § (2)
[261] Public Access to Information and Secrecy Act 2009, 3 § (3)
[262] Public Access to Information and Secrecy Act 2009, 3 § (1)
[263] Public Access to Information and Secrecy Act 2009, Annex
[264] Public Access to Information and Secrecy Act 2009, Annex

For example, Swedfund International AB which is required to grant access to documents in relation to review of state aid issued for small and medium-sized Swedish companies in Swedfund's partner countries[265].

Private entities that are controlled by a public authority?

Private entities that are controlled by a local authority are required to comply with the principle of access to information and the provisions of the PAISA.

'Controlling influence' is defined as "where, alone or together, municipalities or county councils have a degree of ownership that supplies them with more than half of votes in the entity[266], have the right to appoint or remove more than half of the members or the board of the entity[267] or they constitute all responsible partners in a corporation[268]." Such bodies are required to comply fully with the Act's obligations.

Entities that exercise administrative authority?

Bodies that exercise administrative authority are subject to the principle of access to information and some of the obligations of the PAISA if they are included in the Annex to the Act.

For example, the Royal Swedish Aeroclub is required to allow access to documents related to the 'inspection and supervision of aircraft and issue and renewals of the airworthiness certificate.[269]' The exercise of administrative authority seems clearly to be a criteria that leads to designation of certain bodies.

Entities that were established by legislation?

Entities that were established by legislation are required to comply with the Act if they deemed to be 'authorities'.

If not, they will be subject to the Act if they are included in the Annex. Moreover, a number of bodies that have been given powers under Swedish legislation, but not necessarily established by that legislation, are included in the Annex to the PAISA. Example

Political Parties?

Political parties are not required to comply with the principle of access to information established in the Freedom of the Press Act 1949 and the provisions of the PAISA.

Monopolies or private entities with a dominant position in the market?

Monopolies or private entities with a dominant position in the market are not subject to the Swedish laws on access to information.

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[265] Public Access to Information and Secrecy Act 2009, Annex
[266] Public Access to Information and Secrecy Act 2009, 3 § (1)
[267] Public Access to Information and Secrecy Act 2009, 3 § (2)
[268] Public Access to Information and Secrecy Act 2009, 3 § (3)
[269] Public Access to Information and Secrecy Act 2009, Annex

Private entities that hold information that is required for the exercise or protection of any rights?

Entities that hold information that is required for the exercise or protection of any rights is not criteria that leads to designation in Sweden.

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