19 August 2015

Dear Mr Martin

AUDITOR GENERAL FOR SCOTLAND (AGS) SECTION 23 REPORT – ‘SCOTLAND'S COLLEGES 2015’

Thank you for your letter of 29 June 2015 in which you sought the Scottish Government’s view on the extension of Freedom of Information (FOI) legislation to Arms-Length Foundations (ALFs) and the additional information I offered to provide on efficiencies. I will respond to the two matters, separately, below.

In reaching a view on FOI, we have looked specifically at the applicability to ALFs of the current SG consultation on extending FoI legislation, the Public Audit Committee’s concerns around openness and transparency, and mechanisms already in place that allow scrutiny of funding. We have also sought advice on the issue from the Scottish Government’s FOI Unit which is responsible for policy on which bodies are subject to FOI legislation.

FOI Determining Factors

I have set out in Annex A each of the determining factors set out in the Scottish Government’s current consultation and our view of the extent to which ALFs meet those factors.

Overall, it is clear that ALFs do not fall within the scope of most of these determining factors. Of note are the key functions of ALFs and the extent of public funding. On the former, ALFs are not delivering functions for which the state is responsible. On the latter, the SG FOI Unit advises that this relates to a level of public subsidy, such as in the form of a grant, or contractual payment for services. College donations to ALFs are voluntary and constitute neither a grant, nor contractual payment for services. Additionally, whilst it is likely that public funding did form part of the initial transfer into ALFs, since Academic Year 2012-13, funding allocated to colleges has been linked to targets for volumes of learning, negotiated by the SFC through the outcome agreement process. The SFC does not therefore expect colleges to routinely have surpluses of public funding to donate to ALFs in the future.
Existing Monitoring Arrangements

I acknowledge the Committee’s concerns around the transparency of, and accountability for, funds into and out of ALFs. The Committee will therefore want to be reassured about the mechanisms and processes in place that allow for proper scrutiny. As you know, the Scottish Funding Council will monitor the flow of funds between Colleges and ALFs throughout the year as part of its regular monitoring processes. In addition, ALFs are required, under company and charity law, to produce annual accounts which the SFC will scrutinise and question should there be any gaps in the information available.

Given that ALFs have only just completed their first full year of operation, and that accounts are not expected until later this year, together with SFC monitoring information, our view is that we should reserve judgement on the case for additional measures such as the extension of FOI legislation. Should any specific concerns about transparency arise that cannot be addressed through the processes described above, we would wish to reconsider this position.

ALEOs

During the evidence session on 24 June, it was suggested that the extension of FOI legislation to include leisure trusts had set a precedent which the ALFs should follow. I have sought advice on this specific point from the FOI Unit and understand that the situation is not comparable. The key difference is that local authority arm’s-length culture, sport and leisure trusts provide public services on behalf of local authorities. These are services which used to be provided by the local authorities themselves and the trusts generally receive a significant proportion of their funding through local authority grants. ALFs do not deliver a similar public service, nor are they funded through grants or on the basis of contractual arrangements with colleges. Therefore we do not consider that a precedent has been set in this area.

Merger efficiencies

Finally, I offered further detail on the projected efficiencies of around £50 million p.a, resulting from regionalisation. As a result of the economies of scale created by merger, SFC has been able to agree with colleges reduced unit costs of provision while at the same time asking colleges to deliver increased levels of activity. And colleges have been able to do this while securing improved outcomes for learners, with successful outcomes for both HE and FE level full time students having improved every years since the beginning of the reform programme. SFC calculates these changes to price and volume yield real-term efficiencies of around £50m each year from 2015-16 compared to 2012-13.

I hope this additional information is helpful.

Yours sincerely

AILEEN MCKECHNIE
Director of Advanced Learning & Science
ANNEX A

ARMS-LENGTH FOUNDATIONS – EXTENSION OF FOI LEGISLATION

We have taken account of the following factors considered by the Scottish Government’s FOI Unit in developing its consultation proposals (and which is similar to the list of factors used by the Scottish Information Commissioner):

- the extent to which particular functions are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities.

The Scottish Ministers have a duty under section 4(1) of the Further and Higher Education (Scotland) Act 2005 to provide support for the provision of further and higher education and research by, among other things, funding the Scottish Funding Council (SFC). The SFC in turn funds colleges, either directly or through a regional strategic body. These publicly funded colleges include colleges with a board of management under part 1 of the Further and Higher Education (Scotland) Act 1992, which are known as “incorporated colleges”. This continues to be the case.

Individual ALFs were established in respect of 14 colleges. One umbrella ALF has been established for use by multiple colleges and is currently used by seven. ALFs have not been established by statute and do not carry out a statutory function, although they are governed by charity and, where appropriate, company law.

ALFs will disburse funds for particular specified educational purposes, consistent with their own individual Articles of Association and based on applications for funding.

While ALFs may provide funding to colleges for specific educational purposes, this does not mean they are assuming responsibilities for functions for which the state remains responsible.

- the extent of public funding of the activity.

This factor envisages the level of public subsidy in the form of grant or contractual payments for services; clearly ALFs are somewhat different in that they invest the funds and ultimately return money to the relevant colleges. Therefore funds received by ALFs are not considered as a public subsidy as such.

- whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them.

There would be no expectation that a public body would step in and undertake this function if ALFs did not exist.

- the degree to which the activities of the body are enmeshed with those of the relevant Scottish public authority.

The relevant public authority in this instance would be the college. ALFs are independent, autonomous bodies and operate as such and therefore their activities are not enmeshed with those of the colleges. All decisions about expenditure remain the preserve of the Trustees, consistent with each ALFs Articles of Association.
• whether the body exercises extensive or monopolistic powers which it would not otherwise have.

We understand this is primarily a criteria to be used in the context of private utility services or potentially other monopolies or near monopolies. As such, it does not apply to ALFs.

• the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

An ALF’s constitution sets out the purposes for which the funds can be used. In its written evidence to the Public Audit Committee [4th June 2015], OSCR indicated that the majority of ALFs have a purpose which specifically mentions the relevant college; a minority have a wider educational purpose. To a large extent, therefore, ALFs seek to achieve some collective benefit for the public. We have no basis on which to judge if the public accepts they are entitled to do so.

We have also taken account of the following:

• the extent to which the body is providing a ‘core’ function of the state, such as education or prison services, and whether most or all of its work is of a public nature.

ALFs cannot be said to provide a ‘core’ function of the state as they are acting as financial investors, which is not an activity the state would normally be expected to undertake (‘core’ functions include activities such as provision of education, healthcare and policing, etc.). The SFC administers core funding to colleges and universities to deliver teaching activity and maintain infrastructure. Whilst ALFs also disburse funds to colleges, they do so for specific time-bound purposes rather than the general running of the institution. The running of colleges is not dependent on the existence of ALFs.

• for contractors and those receiving grants from the public sector, the length and value of the grant / contract. It would be impractical and disproportionate to cover bodies holding short term or low value grants or contracts.

This is not applicable given ALFs are not contracted to the college, nor do they routinely receive public funding or grants.

• whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered.

In this instance, there has not been any outsourcing of public services, only of the investment of funds. While the public can no longer access information about funds transferred to ALFs under the FOI (Scotland) Act, our understanding is the public can access information via the ALFs’ accounts, which must be prepared under charity and company law. The availability of annual accounts provides transparency and accountability; additionally the SFC will scrutinise funding flows into and from ALFs, consistent with their responsibilities for oversight of college finance.

• whether coverage would impose a significant administrative burden that may be disproportionate for smaller bodies to comply with.

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1 Either directly or through funding regional strategic body.
SFC understands that no ALF employs staff in an administrative capacity and that in most, if not all cases, support is provided through a legal adviser or the local college. We understand that ALFs will be charged for such services. They therefore would not have staff available to respond to FOI requests and compliance with FOI would therefore be likely require additional charges to the ALFs to cover the resourcing of handling requests.

Colleges, Young Workforce & SFC Sponsorship Division
August 2015