

**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE**

**POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002**

**SUBMISSION FROM : ERIN C. FERGUSON**

**Question 1. In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?**

The Freedom of Information (Scotland) Act 2002 (FOISA) has had a largely positive effect on access to information held by public bodies. When making requests for information, I feel reassured that there is a system of redress available should my requests not be answered satisfactorily (though I have not yet had cause to make a complaint or request an internal review).

**Question 4. Could the legislation be strengthened or otherwise improved in any way?**

FOISA can be strengthened through the continued extension to private and voluntary body carrying out public services, and the development of a principled approach to legislative extension.

The requirement on Scottish Ministers to report bi-annually on their use of the section 5 powers is a welcome development. And, progress has been made in recent years with the extension of FOISA to, inter alia, culture and leisure trusts, privately managed prisons, and (soon) registered social landlords. Yet, this leaves many private organisations still beyond the scope of FOISA.

The Office of Scottish Information Commissioner recognised this in the 2015 report *FOI 10 Years On: Are the Right Organisations Covered?*. The report provided a list of suggested factors that could be taken into consideration when determining whether a private body performs 'functions of a public nature' and thus should be subject to a s.5 order. The report also indicated that the s.5 powers have been used infrequently and that ministers should be given greater support in deciding what constitutes a 'function of a public nature.'

I suggest that consideration of the definition of 'functions of a public nature' should emphasise functional, rather than institutional characteristics. This would ensure FOISA meets its stated intention of using the s.5 provision 'to bring within the scope of FOI private companies involved in significant work of a public nature (policy memorandum, para 28).'

The emphasis in the policy memorandum was clearly on the public *nature* of the work (or functions) itself, rather than the institutional characteristics of the body carrying out the function. Therefore, I'd suggest that future discussions or consultations on extension of FOISA to private bodies give additional weight to the characteristics that make a public service 'public,' i.e. the users of the service and the social or policy aims that are met in delivering the service.