

**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE****POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002****SUBMISSION FROM** : The Campaign for Freedom of Information in Scotland (CFoIS)**Introduction**

FoI rights are being weakened in Scotland through stealth and omission. Therefore, the Campaign for Freedom of Information in Scotland (CFoIS) welcomes the post legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FoISA) as the beginning of the process of legal reform. CFoIS is committed to working with the Scottish Parliament and the Scottish Government to improve law and practice.

FoISA has met the positive aim of providing people and organisations with a free, enforceable right to access information held by public authorities. Opening up the decision-making process, knowing who and what information informs decisions and how our money is spent are fundamental to ensuring a fair and equal society. That is the good news, but the purpose of this submission is to evidence why FoISA requires radical reform to ensure the right remains robust, questions if its implementation fits with how our democracy actually operates and makes the case for better evidence of a culture of transparency in Scotland.

CFoIS has regularly provided scrutiny of FoISA over the last 14 years and issues of concern have included: the independence and effectiveness of civil society in Scotland to feel confident in using FoI to scrutinise government and the public sector<sup>1</sup>; the inability of Audit Scotland to confirm how many ALEOs exist; the tactics of some designated bodies to circumvent FoISA such as not taking minutes of meetings; the need for designated bodies to improve the gathering of information and publish it in an accessible place/format so people are better informed. Now we set out how FoISA needs to be reformed, to strengthen and improve it.

**1. Human Rights**

Jurisprudence at the European Court of Human Rights regarding Article 10 of the European Convention on Human Rights (ECHR) reflects the view internationally that the right to information is a human right<sup>2</sup>. Therefore, FoISA's purpose and operation need to be understood in the context of the obligations on the Scottish Government and the Scottish Parliament in respect of Section 29 of the Scotland Act 1998 and Section 6 Human Rights Act 1998. Furthermore, UN treaties that have been ratified by the UK, and to which the Scottish Government is committed to delivering, need to be factored into the review of FoISA.

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<sup>1</sup> See research report 'Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector', available on the Scottish Information Commissioner website <http://www.itspublicknowledge.info/home/SICResources/voluntarysectorresearch.aspx>

<sup>2</sup> Decision of the Grand Chamber in Magyar Helsinki Bizottsag v Hungary (Application No. 18030/11)

The First Ministers' Advisory Group on 'Human Rights Leadership Report' made seven recommendations and the Equalities and Human Right Committee report 'Human Rights and the Scottish Parliament' made 40 recommendations. Both need to be factored into the work of the Committee. For example, number 32 in the latter recommended a human rights-based approach to scrutiny. FoISA has significant human rights impact as an individual right and as a tool by which other human rights are realised.

## 2. Public Authorities

The introductory text of FoISA sets out its purpose "An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes."<sup>3</sup> Reform of FoISA must address this purpose. Currently there are mixed messages on what is a public authority<sup>4</sup> and agree who "are providing services for them". CFoIS believes this definition covers voluntary and private organisations that are delivering services under contract. It is also useful to remember that the HRA refers to 'public services and 'services of a public nature' and this would be a helpful clarification in respect of designation under FoISA, The purpose of FoISA is to give people the right to access information when the public purse is paying and that will include services delivered by SCIOs<sup>5</sup>, professional bodies that undertake regulation such as the Law Society of Scotland and bodies which represent the interest of the public sector such as CoSLA which is funded by organisations which are subject to FoISA ie local authorities.

By launching an informed debate about what constitutes a public authority, there will be an opportunity to disentangle the charitable from the public, including in the health service, to ensure consistent rules on designation, transparency and accountability.

## 3. Publicly Owned Companies

Under Section 6 of FoISA, a person can make a section 1 request to a publicly owned company, but this right is ineffective as it is unclear which companies fit with this definition. Therefore, we are unable to say if the definition within FoISA needs to be amended. For example, the statistical publication 'Business in Scotland 2018' provides data on 210 companies although the names are not listed. However that is five down from 2017, which raises the question which companies no longer operate and has the FoI right been lost or taken over by another publicly owned company to which an FoI request can be directed.<sup>6</sup>

<sup>3</sup>FoISA at <https://www.legislation.gov.uk/asp/2002/13/introduction>

<sup>4</sup> See for example analysis of the decision of the ONS to consider RSLs as private non-financial bodies <https://www.tcyoong.co.uk/blog/2018/social-housing/ons-reclassification-rsls-private-bodies>

<sup>5</sup> The Scottish Charitable Incorporated Organisation (SCIO) is a legal form unique to Scottish charities and is able to enter into contracts, employ staff, incur debts, own property, sue and be sued. It also provides a high degree of protection against liability. See OSCR website <https://www.oscr.org.uk/becoming-a-charity/becoming-a-scio/>

<sup>6</sup> 'Number of enterprises in the public sector in Scotland and their total Scottish employment by sectors March 2010 – 2018 'Business in Scotland' Table 12 pub 2018 at <https://www2.gov.scot/Resource/0054/00543007.pdf>

There needs to be a single source for this information, so people are aware of what publicly owned companies exist in Scotland and then decide if they want to make an FoI request.

#### **4. ALEOs**

All ALEOs must be covered by FoISA. Currently there is no precise information about how many actually exist, therefore, practically, it is difficult to designate them. It is noted that Leisure Trusts are already covered. However, a solution would be to designate ALEOs as a designated category.

#### **5. RSLs**

RSLs and all their subsidiaries are supposed to be covered by FoISA effective from 11<sup>th</sup> November 2019, 17 years after the promise on designation was made. The proposed SSI is unclear on which RSL subsidiaries will in practice be covered. It is a general principle that in order for people to have an affective right, they must know which bodies are subject to FoISA. We are disappointed about the lack of clarity. The draft SSI fails to provide clarity on what type of information is covered by the enforceable access right under FoISA. It is important to acknowledge that the Scottish Housing Regulator has repeatedly and promptly answered our FoI requests by providing a detailed list of all the 160 subsidiaries owned by RSLs in Scotland<sup>7</sup>.

#### **6. Pro-active publication of information**

There does not appear to be any quantitative and qualitative evaluations of the pro-active publication of information by designated bodies since 1<sup>st</sup> January 2005.

Authorities have to adopt a publication scheme approved by the Commissioner. All designated authorities have adopted the Scottish Information Commissioner's own Model Publication Scheme, which requires them to publish a Guide to Information that they make available. They have to make available the information they have committed to publish.<sup>8</sup> For example lots of financial and operational information should be pro-actively published under FoISA but no monitoring seems to be undertaken to check if timely publication, and expansion of the range of information, is progressively realised. The system depends on self-action ie people researching the subject. There is a need for a regulatory overview of what is happening in practice on pro-active publication of information.

#### **7. Joined Up Regulation**

FoISA operates within a wider regulatory framework which places a layer of obligations on transparency. There is a need to examine what action regulatory public agencies require on transparency and accountability and analyse the fit with FoISA, such as the Office of the Scottish Charity Regulator, the Scottish Social Services Council and the Scottish Public Services Ombudsman.

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<sup>7</sup> See our commentary on the draft SSI, March 2019, at CFoIS website <https://www.cfoi.org.uk/wp-content/uploads/2019/03/draft-foisa-designation-of-persons-as-scottish-public-authorities-order-2019.pdf>

<sup>8</sup> Scottish Information Commissioner <http://www.itspubliknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesHome.aspx>

It is a matter of good governance for designated bodies to comply with the spirit and detail of FoISA. If the Scottish Information Commissioner issues a decision on a designated body, it should be a matter of routine that this is brought to the attention of senior managers and those in governance roles so they are aware of any issues rather require to be remedied eg in respect of internal procedures, staffing issues especially with the recent focus on GDPR compliance, or what kind of information should be pro-actively published.

### **8. Best Practice**

There is a need to learn from good practice elsewhere such as the considering the adoption of the European Ombudsman's Code of Good Administrative Behaviour.

### **9. Communication**

Making a request and receiving information is something which FoISA sought to make simple however our awareness of the barriers to inclusive communication are now better understood. FoI officers within designated bodies need to be supported to achieve equal outcomes. The process of making an information request, and the information on how to do that must follow the principles of inclusive communication. These principles should be followed when pro-actively publishing information. Free tools and guidance are easy via the Inclusive Communication Hub.<sup>9</sup>

### **10. Operational Issues**

As FoISA became operational, issues emerged which now need to be addressed. For example, when the Scottish Information Commissioner decides a designated body has failed to respond to a requirement for review within the timescale set out in FOISA, he can order it to carry out a review and is required, by law, to give the body at least six weeks to comply. Given that the review should be completed within 20 working days, it is extraordinary that the Commissioner must give an additional 6 weeks and we would suggest it should be no more than a further 20 working days.

Given the rapid change in the nature of communications, it is right that FoISA also considers how the legislation can capture Ministers and civil servants communicating via technology such as personal email accounts, What's App, text and other social media platforms. The law needs to be future proofed so that it keeps up with how human beings communicate.

### **Case Study 1**

The Scottish Parliament has been operational for 20 years and was designed to be open, accessible and accountable. How the Parliament has evolved over that time has indeed been remarkable. Whilst a lot of information is proactively published, it is mainly around the already public fora such as the debating chambers and committee rooms. The more interesting aspects are where else business is done and how transparent are they? For example, Committee chairs are proposed at Committee meetings but what is the actual process of nominations and voting, and are there minutes of meetings where the

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<sup>9</sup> <http://inclusivecommunication.scot/>

discussions and decisions on the selected candidate take place? In respect of how Committee operate, do they have an annual budget to spend on the work they agree to undertake such as on training, research and advice? Who and where are decisions made on internal parliamentary budgets? In respect of the Leadership Group papers, they will be withheld if “The paper contains information which is considered may be exempt under the Freedom of Information (Scotland) Act 2002”.<sup>10</sup> Lots of papers **may** be exempt but the question is **are** they exempt?

## **Case Study 2**

An organisation may say it is publishing meetings of those who govern it but there are repeated delays in making the minutes public due to those attending being ill, off or some further actions needed. Minutes are a record of decisions taken at a meeting and it is routine for them to be presented in ‘draft’ form until approved at the next meeting. This is how an accessible and transparent organisation should work.

## **Conclusion**

The enforceable right to access information has been a game changer in the balance of power between an elected parliament and the people. However, a number of reforms are necessary to restore FoISA’s strength and modernise its operation.

## **About CFoIS**

CFoIS was set up in 1984 and we have built alliances to achieve cultural, organisational and operational change. CFoIS is happy to work with rights holders to ensure the equal enjoyment of rights as well as working with duty bearers so that their compliance is robust. We are an independent, non-party political organisation and assert that access to information rights, transparency and accountability are rooted in international human rights law. For more information, including previous submissions and reports on reforming FoISA, go to <https://www.cfoi.org.uk/scotland/>

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<sup>10</sup> See Scottish Parliament website at <https://www.parliament.scot/abouttheparliament/22721.aspx> accessed on 10th May 2019.