

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

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

**SUBMISSION FROM : UNISON Scotland**

**UNISON Scotland response:**

**Public Audit and Post-Legislative Scrutiny Committee's Post Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002**

**Introduction**

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. UNISON's interest in FoI includes our campaigns function, the fact that we make regular use of FOI at Scottish and local levels, and the fact that we are the union that represents most FoI staff in public bodies. UNISON has been campaigning for strong Freedom of Information legislation since before the Scottish Parliament was established. We were among those calling for this post legislative scrutiny and we welcome the opportunity to submit written views to the Committee.

**General overview**

UNISON believes that the right to information is fundamental to a democracy and that it should apply to all public services, however they are delivered. We support the submission from the Campaign for Freedom of Information in Scotland<sup>1</sup> (CFoIS), which does vital work to promote FOI rights, including the importance of the human right to access information.

There should be a universal, statutory, enforceable right to information about **all** public services, regardless of what type of body delivers the service. We have long called for the extension of the Freedom of Information (Scotland) Act 2002 (FOISA) to ensure this. We have raised concerns in particular, along with many others, about the ways in which the right to information has been undermined by the public losing rights through the changing way services are delivered, including some services being outsourced / transferred to different providers. As the Scottish Information Commissioner's Office has been saying for many years, information rights should follow the public pound. The CFoIS are right to describe FOI rights being weakened "through stealth and omission." We believe that the post-legislative scrutiny should address this as a top priority.

**Our responses to the Committee questions:**

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

UNISON believes that FOISA has been crucial in supporting and enabling public scrutiny of key decisions and policies and services that affect us all. This is essential and is now well understood, well used and ingrained in Scotland's political landscape. We pay tribute to the work of the Office of the Scottish Information Commissioner and Kevin Dunion, Scotland's first Information Commissioner, in establishing his role as an effective and respected

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<sup>1</sup> <https://www.cfoi.org.uk/wp-content/uploads/2019/05/CFoIS-post-legislative-scrutiny-FOISA-submission.pdf>

independent Commissioner promoting and enforcing the FOI regime. We welcome work done by his successors Rosemary Agnew and Daren Fitzhenry to continue to stand up for information rights and argue the need for further extension of FOISA coverage, including to recover lost rights in particular.

In our view, a range of significant FOI releases have demonstrated the importance and success of the legislation at a national level – often starting from the local, while numerous campaign groups and other organisations and individuals have found it immensely beneficial at a local and/or personal level that can often ‘go national’. This scrutiny of the work of public bodies benefits society in countless ways. The fact that some politicians have gone to lengths to seek to hold back or limit information from being released through various strategies (including some of the issues highlighted in the criticisms of the Scottish Government’s handling of FOI requests, made in the letter<sup>2</sup> from journalists in May 2017 and updated in a follow up letter this month as a submission<sup>3</sup> to the Committee) and/or to criticise FOI, as former Prime Minister Tony Blair did<sup>4</sup>, saying it was “utterly undermining sensible government”, shows that in fact FOISA and the UK Act are doing what they should, shining a light in areas of public interest. As Daren Fitzhenry, the Scottish Information Commissioner, says in paragraph 1 of his response<sup>5</sup>: “In particular, FOISA’s statutory entitlement to request and receive information, and its duty on public authorities to proactively publish information in which there is a public interest, have made a distinct and crucial contribution by focusing on the importance of ensuring that what is published is what the public actually wants to see, rather than information the public sector thinks the public should see.”

We need more light and the post-legislative scrutiny should focus on ensuring any changes deliver that, reinforcing the public’s right to know.

We do not believe there have been negative effects. We agree with the Commissioner, in the part of his response<sup>6</sup> challenging ‘perceived negatives’, including his support for the case that the costs of FOI are outweighed by the increase in transparency and accountability, and on the importance of requesters’ right to know, therefore it is wrong to label requests as ‘unworthy’, given that something which on the face of it some might see as inconsequential could concern significant matters of public interest. However, we disagree with the example he chose. In our view – and this is at the core of the kind of work UNISON does in representing members and highlighting the impact of austerity cuts – the C-Diff Justice Group’s FOI requests about cleaning rotas and the frequency with which spaces within a public building were cleaned could never have justifiably been seen as trivial, inconsequential or frivolous or a ‘daft question’. However, we agree with the point he was trying to make – that requesters have to be able to ask something that some may see as trivial etc. As the Commissioner says, “labelling requests as unworthy, based on face value, can be detrimental to the right to know, and serve to conceal serious issues.”

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<sup>2</sup> <https://www.commonspace.scot/articles/11072/journalists-open-letter-freedom-information-policy-scotland>

<sup>3</sup> <https://www.commonspace.scot/articles/14311/40-journalists-sign-open-letter-calling-scottish-government-foi-legislation-refresh> <https://www.commonspace.scot/articles/14313/open-letter-expand-and-strengthen-freedom-information-legislation>

<sup>4</sup> <https://www.cfoi.org.uk/2010/10/the-blair-memoirs-and-foi-2/>

<sup>5</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=12718&SID=377>

<sup>6</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=12718&SID=377>

**2. Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.**

UNISON believes that the policy intentions have been failed by the Scottish Government failing to ensure public information rights follow the public pound. As stated above, this must be rectified urgently and we hope the Committee's recommendations will prioritise restoring rights, in particular where public services are delivered by private companies. We urge the Committee to revisit the criticisms on this from successive Scottish Information Commissioners. While some efforts have been made to extend coverage, belatedly (RSLs 17 years after the promise on designation was made), it is still the case that many public services are not covered in the way they should be and was the intention of the legislation. As Kevin Dunion, then Commissioner, said in 2009<sup>7</sup>: "Prime candidates for designation would appear to be PFI/PPP projects." There has been consistently high public support for FOI covering private companies contracted to build and maintain hospitals and private companies contracted to build and maintain local authority schools. UNISON has long argued for PFI contractors to be covered. It is a disgrace that this has not yet been done under Section 5 of FOISA, ten years after the Commissioner made such a strong case.

**3. Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?**

UNISON supports the previously mentioned criticisms made by journalists and the NUJ. We also support the CFoIS criticisms in their response, and proposals for addressing these.

Our own experiences with making FOI requests have certainly found problems both with commercial confidentiality being used too widely, particularly with PPP/PFI projects<sup>8</sup>, and with delays in responding to FOI requests<sup>9</sup>. (Where we acknowledge the impact of austerity cuts on staff concerned, but public bodies have legal obligations under FOISA and should provide sufficient staff. In the case referred to, which we appealed to the Commissioner, Glasgow City Council said in its submissions to the Commissioner that funds for extra FOI staff had been approved. See below also.) We continue to monitor these and will make appeals to the Commissioner where appropriate.

In our view, a major factor in late responses, is the austerity cuts imposed on public bodies by Westminster and Holyrood governments. Understaffing in FOI teams, and severe staffing pressures in other areas, where FOI officers need to find the information requested, can make responding within the FOI legal deadlines difficult. That is not the fault of the staff concerned, but public bodies must make available sufficient resources to comply with the legislation. We hope the Committee would comment on this in their recommendations.

A separate funding issue, is that the Office of the Scottish Information Commissioner may well need increased funding to ensure it can carry out its duties properly. We would support increased funding, including to cover the new bodies being brought into FOISA coverage, as well as for increased work such as the intervention report into the Scottish Government handling of FOI requests.

<sup>7</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=3003&SID=3820>

<sup>8</sup> <http://www.unison-scotland.org.uk/comms/atwhatcostoct07.pdf>

<sup>9</sup> <https://unison-scotland.org/robust-action-promise-unison-public-bodies-poor-foi-practice/>

We note on commercial confidentiality that the Scottish Information Commissioner's submission (paragraph 50) suggests looking at the Irish legislation which has a clause preventing public authorities and bodies providing services to them relying on confidentiality clauses in their contracts to prevent access to information held by the authority. While this may be useful, we still insist that the private companies providing such services should be subject to FOI legislation in respect of those services.

Finally (due to space constraints, although there are many other issues we could raise), we address the question of proper minuting of meetings, highlighted by the CFoIS Get It Minuted campaign<sup>10</sup>. The report, which we supported, raised a range of crucial issues which we would like the Committee to consider, including looking at the possibilities around a duty to record. We think it would be helpful to assess whether the Scottish Government is properly recording meetings. Of course it is not just minute taking, or lack of it, that is a problem, but previous criticisms have noted cases of meetings not even recorded, with the abandonment of keeping diaries<sup>11</sup>.

#### **4. Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.**

UNISON believes that Scotland should be seeking to learn from the best international practice. We supported a small research project by the Campaign for Freedom of Information in Scotland<sup>12</sup> which looked at improving access by examining international practice. We commend the recommendations to the Committee.

We refer to the comments above and the need for bringing all public services under FOISA, however they are delivered – in particular PPP/PFI projects, but also many other services provided by private contractors. We want to see action to address delays in responding/failure to comply with timescales and action on minutes/record keeping as if the information is not recorded, the public cannot find out about it. This means also updating the legislation if/where necessary to ensure that FOI cannot be 'avoided' by use of private email addresses and other communications methods where they are used for conducting the business of public bodies.

The journalists' letters referred to some of the above – indeed they specifically called for, re extending coverage:

“Expanding FoISA to bodies that derive all, or a substantial proportion of, their revenue from the public sector, including regional hubcos which oversee infrastructure contracts under the Scottish Futures Trust's hub programme, Cosla and the Improvement Service”

<sup>10</sup> <https://unison-scotland.org/library/Minute-Taking-report-final-Jan-2018.pdf>

<sup>11</sup> WICS' Directors do not record information as a result of meetings or conversations and take a mental note. If actions are required, the Directors will advise the appropriate staff verbally.

<http://www.itspublicknowledge.info/UploadedFiles/Decision140-2011.pdf>

<sup>12</sup> <https://unison-scotland.org/library/Learning-from-Others-Final-Report.pdf>

**5. Are there any other issues you would like to raise in connection with the operation of FOISA? Please note that it is not necessary to answer every question and you can provide any other information that you consider to be relevant.**

UNISON believes that the proper resourcing of FOI by public bodies is essential to a functioning FOI regime and that this is under threat by continuing austerity cuts impacting severely on public bodies. This must not be used as a reason not to comply with FOISA. However, we would like the Committee to look at this and consider also the impact of cuts on requesters, which can mean that civil society organisations do not have the resources to conduct the proper level of scrutiny, using FOISA, that they would like and which benefits us all. The £600 cost limit and hourly rate for calculating this should not be changed.