

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

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

SUBMISSION FROM :S KERR

The Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee (PAPLS) is undertaking post-legislative scrutiny of the [Freedom of Information \(Scotland\) Act 2002](#) and I supply my written views to the committee for their consideration.

Scotland's Freedom of Information legislation provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and Government to local authorities, NHS boards, higher and further education bodies, doctors and dental practitioners. The provisions of the Act can be extended to other bodies, including private bodies, that carry out functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

This can be done by making virtue of section 43(4) of the Act under section 5, which designates those bodies as a Scottish public authority for the purposes of the legislation. They are then subject to the full requirements of the Act – as well as becoming automatically subject to the Environmental Information (Scotland) Regulations 2004. Bodies designated under section 5 are subject to the Act in respect of the recorded information they hold about specified public functions or services.

Their duties under the Act would therefore be limited to those functions or services as set out in the order.

Function

'Function' is central for designation – the Act can only be extended to organisations insofar as those bodies undertake functions of a 'public nature' therefore any organisation, subsidiary or private company whom are in receipt of Scottish Government or HM Treasury funding or payment has to agree and adhere to Conditions of Payment or Conditions of Grant.

The Act places a strong emphasis on the judgement of the Ministers. Certainly the Ministers should be able to explain the basis of that judgement and come to a conclusion only after formal consultation. Nevertheless, the decision is based upon whether a person appears, in the view of Ministers, to be exercising functions of a public nature. For the limited purposes of being designated under the Act, it does not depend upon satisfying some existing or otherwise externally determined criteria of functions of a public nature, the argument is simplistic in nature if public funding is being funded to any entity that is not a public body, the function of that entity must by virtue of conditions of payment/grant/funding be undertaking functions of a public nature to qualify or be awarded such payment from the treasury.

Previous Orders under Section 5 of the Act.

Following a [consultation](#) by the Scottish Government, the [Freedom of Information \(Scotland\) Act 2002](#) (FOISA) was recently extended to cover more organisations.

The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016, [S.I. 2016/139](#), came into force on 2nd March 2016. It is made under [Section 5](#) of FOISA. It came into force on 1st September 2016.

The Order extends coverage of FOISA to contractors overseeing and managing private prisons, bodies providing secure accommodation for children and young people, grant-aided schools, independent special schools and [Scottish Health Innovations Limited](#). These bodies also become subject to the [Environmental Information \(Scotland\) Regulations 2004](#) in relation to any requests they receive for environmental information.

This is the second order brought forward under Section 5 of FOISA; the first came into force on [1 April 2014](#) and covers arms-length culture, sport and leisure trusts established by local authorities.

Although progressive we believe the consideration of bodies for designation has to be kept under a strict review on a regular basis, as new organisations are created and diversity in new routes for the delivery of public services are established and introduced.

Parliament intended that the terms of section 5 should make designation possible - and was assured, as the legislation was being presented and debated, that the legislative provision could and would be used to extend freedom of information (Fol) to bodies which are not public bodies. The Policy Memorandum accompanying the Bill made it clear that "it is intended that this provision [section 5] will be used to bring within the scope of Fol private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts."

Any and all entities that are in receipt of funding from the public purse must by the conditions attached to the grant or payment be undertaking a specific function of 'Public Nature' in order to receive such payments or funding from the public purse, Scotland's Freedom of Information legislation provides a statutory right to ask for recorded information contained in: and have this information disclosed, subject to valid exemptions.

I, provide this submission for the Scottish Information Commissioners consideration that all organisations, subsidiary's or private company's whom are in receipt of Scottish Government or HM Treasury funding or payment with conditions of payment and/or grant and/or funding would be undertaking functions of a 'public nature' and that the public have the right to ask for and be given recorded information contained in: which is in the public interest, for example recorded information contained in: information held that would reveal whether a contract or a specific undertaking of 'Public Nature' is providing value for money, and that all lines of accountability and financial and audit purposes are being adhered to in their delivery of public services.

To ensure that public funding is being spent on the specific conditions of payment and that the undertaking of a public function is performed to the required standards in public bodies or achieved successfully, giving due regard to other legislation, ensuring that there are no unlawful conflicts in undertaking the remit of the condition of payment.

It is critical that the legislation should be based on human rights, which is unconditionally rights based. Given that one of the founding principles of the Scottish Parliament is about the

European human rights framework as well as the international human rights framework, Article 10 of the European convention on human rights mentions the jurisprudence of the European Court of Human Rights in that regard.

There is also article 19 of the International Covenant on Civil and Political Rights and the guidance and general comments from the United Nations on how that right should be implemented.

In a response to a Scottish Government discussion paper in 2008, the then Scottish Information Commissioner states:

It is clear that the provisions of section 5 were intended to be used soon after the Act came into effect, and not held in reserve for use only in exceptional or unforeseen circumstances. The Deputy First Minister told the Scottish Parliament as the Bill was being debated that “Provisions allow providers of services to the public to be added to the bill case-by-case and I reassure Parliament that that power will be exercised.”

Recent Developments

Parliament agreed back in June 2017 to inquire into the Freedom of Information Scotland Act 2002, and on 22nd March 2018 the Public Audit and Post Legislative Scrutiny Committee heard evidence regarding the consideration of post-legislative scrutiny on the Freedom of Information (Scotland) Act 2002 it was noted on the public record that there were numerous examples of the establishment of arm’s-length external organisations that seem to operate outwith FOISA, that changes people’s ability to source information about how decisions are made. The Spirit of FOISA is about the public being able to assert and enforce its right to access information.

Recent developments with the Scottish Governments FOI Practice and performance raised in last year’s letter from a number of journalists to Parliament claiming widespread failures to comply with laws on supply of information that is held by public bodies. That is extremely concerning for many of us, and result of this saw that on 13th June 2018 the Commissioner published his report following the assessment phase of his intervention into the Scottish Government's FOI practice and performance.

While the immediate concentration last year was on the Scottish Government, a number of other problems have led to the erosion of FOI rights for the public. These must also be addressed, to re-establish openness and transparency throughout Scottish public services.

For Example there is no formal submission process to inform the Commissioner's enforcement action for people with concerns about how public bodies and/or other designated departments are dealing with FOI requests, this is an issue that requires to be addressed, and could easily be remediated by an anonymous online digital reporting platform, as the requester is in essence the one who has the most information about how the public/designated body is complying with their statutory duties.

Enforcement

The right to information will not mean anything within itself; enforcement is what makes the difference. The ability of the SIC to enforce the information request will increase the trust the public has in government, public bodies and the private sector: trust in transparency, in the

digital economy and in digital public service delivery, additionally allowing for people to receive free guidance from the office of the Scottish Information Commissioner.

There is an issue with designation and a need to be much more than merely ambitious about what FOISA should be able to do, but what FOISA is 'Required' to do, ambition is well and good, but it requires tangible evidenced action with more legislator powers, as there also an issue with practice.

Practice

The practice is not only about the culture; it is also about whether FOISA is fit for purpose in terms of penalising those who deliberately seek to avoid keeping, or making in the first place, records that might be the subject of FOI requests, including those who will do everything they can to frustrate the process of disclosing information requests that send red alerts across the board, because they absolutely do not want to disclose information that reveals the truth, thus operating in opposition to the principles of openness and transparency throughout Scottish public services.

There should also be more proactive publication of information to show a culture of openness and transparency. The public now require more than ever to be reassured that the Parliament was established to be open, accessible and accountable and that precept is still in force and rigorously defended today.

An enforcement policy and a specific intervention policy—that sets out the system. There are various levels of intervention, and SIC usually allocate different enforcement powers to each of them. They range from level 1, which is very light-touch recommendation of improvements in process, through to level 4, which involves application of enforcement action. That could include an enforcement notice, notifying a breach of part 1 of the act. Failure to comply with an enforcement notice can lead to the matter being referred to the Court of Session, which might consider it as contempt of court under the current legislation. SIC can make practice recommendations in relation to breaches of the code of practice; they have powers of entry and inspection under schedule 3 of the act; and we can issue information notices requiring the provision of information.

We urge finite scrutiny of enforcement powers afresh to see whether they are entirely sufficient. It is known that the powers in relation to proactive publication could be improved upon. An ability to tie some form of stronger enforcement to breaches of the codes of practice would also be an active deterrent to the thwarting tactics that have been seen to have been used to either delay an information disclosure or put the requester off at the first level.

The spirit of the Freedom of Information act was designed to be simplistic in nature for any member of public or young person over the age of 12 to access recorded information contained in: and as such is promoted by the Information Commissioners Office, in reality there are a number of bodies who make this process untenable to many unless you are adept at negotiating semantics and spurious exemptions applied, their intention is to obstruct the requester at the first stage, indeed we have the internal review stage and again many original disclosures are upheld on spurious grounds as they have no intention of taking responsibility nor accountability and wield an unequal balance of power against the lay person who may not have an adept knowledge of the complexities of the act.

A senior manager from a designated body was overheard advising staff NOT to record certain information to ensure avoidance of FOISA,

If a designated body under the act, provides finance in the form of including but not limited to a grant of finance to what they term a technically independent function from themselves the designated body, but the designated body hold recorded information from the independent function is that information disclosable under FOISA? Another way of FOISA avoidance perhaps

Whilst the Scottish Information Commissioner's Office do well in promoting the use of their office for appeal, the generic requester the lay person of the public will have reservations in appealing to the SIC for a decision, as they are asked to supply in some cases academic arguments to counteract the bodies knowledge of working round the system, therefore how well placed is a 12 year old to make a landmark appeal to the SIC and provide robust arguments to be awarded a decision in their favour against a designated body who should be treating the request as applicant blind, but as we have seen from the recent Scottish Government intervention report, there was in the least a two tier system. More emphasis and enforcement of assisting the requester is required.

It is proposed that the Office of the Scottish Information Commissioner establish a full complement of staff and power of enforcement that would allow periodic unannounced spot checks on the premises of designated bodies to ensure proper compliance with the act, and enforcement measures should an on premises check of current or recent disclosures are fully compliant with the act and that accurate information and/or valid exemptions are applied.

The applicant blind principle should be preserved with an unprecedented decision by parliament to allow any member of the public to make an information request anonymously to a designated body should they wish, this would curtail the devious procedure of a two tier system. Should the requester be unsatisfied to the point where they make an appeal to the SIC, at this point they would be required to provide their personal identity which will be protected under the new DPA Act 2018.