

Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations

June 2015

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Introduction

The Freedom of Information (Scotland) Act 2002 ('the Act')

The Act 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.

Requested information must be provided unless it is subject to one or more exemptions, as set out in the Act. If a requester is dissatisfied with the response received to a request or does not receive a response, he or she can ask the authority to review its decision or handling of the request.

The Scottish Information Commissioner both promotes and enforces the Act. Requesters who remain dissatisfied with the conclusions of an authority's review of their request can appeal to the Commissioner for a decision.

The Act came into effect on 1 January 2005.

Extending coverage of the Act

The provisions of the Act can be extended to 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 an order under section 5 of the Act, which designates those bodies as a Scottish public authority for the purposes of the Act. They are then subject to the full requirements of the Act and must therefore respond to written requests for information and proactively publish information described in their Publication Scheme. They would also automatically become subject to the requirements of the Environmental Information (Scotland) Regulations 2004 (EIRs).

In accordance with section 7(3) of the Act, bodies proposed for coverage would only be covered in respect of the 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.

Background to the consultation

The Scottish Government brought forward Scotland's first order under section 5(1) of the Act in September 2013. Following consideration by the Parliament the order came into effect on 1 April 2014.

The order extended coverage of the Act to certain trusts which have been created by local authorities to deliver sporting, cultural and leisure facilities and/or activities on behalf of the local authority(ies).

At the time the order was debated by the lead Parliamentary Committee the then Deputy First Minister made clear that it was seen as an initial order and that consultation on further extension would follow once we had had an opportunity to see how the Act impacted on the trusts covered by the first order.

In line with this commitment, we are now consulting on options for further extension of coverage. We are proposing to lay an order in the Scottish Parliament in autumn 2015. Subject to the Scottish Parliament supporting the order, we would expect the bodies covered to become subject to FOI legislation and the EIRs from spring 2016, although we would welcome any comments on the timing of this in responses.

In addition to the organisations discussed in this paper, we would welcome suggestions as to what other bodies – whether individually or collectively - should be considered in any future consultation.

Factors to be considered when assessing options to extend coverage of the Act

In the previous consultation in 2010 the Scottish Government adopted a factor-based approach in determining the extent to which a function of an organisation could be described as being 'of a public nature'.

We continue to believe that a factor-based approach is appropriate – and that a range of factors should be considered in assessing the 'public nature' of particular functions undertaken by certain organisations.

Factors previously considered have included:

- 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 extent of public funding of the activity;
- 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;
- the degree to which the activities of the body are enmeshed with those of the relevant Scottish public authority;

- whether the body exercises extensive or monopolistic powers which it would not otherwise have; and
- 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.

These factors largely remain relevant and have been considered in developing our consultation proposals. We have also taken account of the following points:

- 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;
- for contractors and those receiving grants from the public sector, the length and value of the contract. It would be impractical and disproportionate to cover bodies holding short term or low value grants or contracts;
- whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;
- whether coverage would impose a significant administrative burden that may be disproportionate for smaller bodies to comply with.

We note that a factor-based approach is also favoured by the Scottish Information Commissioner - as set out in her Report to the Scottish Parliament '[Are the right organisations covered?](#)' published in January 2015.

The factors identified by the Commissioner (see page 18 of her report) draw heavily on those previously identified by the Scottish Government.

Housing associations and other non-local authority Registered Social Landlords (RSLs)

We note that the Commissioner has called for the extension of FOI coverage to social housing owned by RSLs.

For a number of reasons, briefly summarised below, we are not currently persuaded of the merits of extending coverage to housing associations.

1) In taking a 'function-led' approach to extension of coverage (as required by the legislation) we note the wide range of functions undertaken by RSLs. In addition to providing social housing, RSL functions and those of their subsidiaries can include: shared equity housing, mid-market/intermediate rent, shared ownership, factoring services, commercial property lets and a range of initiatives to support community or employment projects in local areas.

While some functions undertaken by RSLs satisfy some of the factors identified above, others do not. For example, many RSLs, or their subsidiaries, undertake essentially 'private' activities, often on an entirely commercial basis, rather than activities which would generally be considered to be of a 'public' nature.

2) We would also note that there have so far been few examples of difficulty in obtaining information from RSLs in connection with their functions of a public nature. However, as part of a wider engagement process, we propose to engage with RSLs and registered tenant organisations to identify any specific areas of concern or difficulty.

3) In particular, we would note the introduction of the Scottish Social Housing Charter (developed in conjunction with key stakeholders) which has been in operation since 1 April 2012. The Charter, which is mandatory for all social landlords and is enforced by the Scottish Housing Regulator, has imposed significant additional regulatory obligations.

These obligations include a specific outcome requiring social landlords to manage their business so that:

‘tenants and other customers find it easy to communicate with their landlord and get the information they need about their landlord, how and why it makes decisions and the services it provides’

Initial reporting against key performance indicators in respect of the Charter shows a high level of tenant satisfaction, for example, when asked if they considered their landlord kept them informed about their services and decisions (indicator 3).

Interestingly, RSLs have, so far, received higher satisfaction scores on average in this category than local authority landlords, who are subject to FoI legislation.

We are particularly conscious of the regulatory burdens placed on social landlords by the Charter. We are also conscious that the Charter has yet to complete its initial 5-year period of operation. We therefore suggest that a full assessment of the effectiveness of the Charter should be undertaken before any potential imposition of freedom of information legislation is formally proposed.

The Charter is due to be reviewed next year in advance of any changes coming into effect in April 2017. The review process would be a good time to assess the effectiveness of the Charter in terms of promoting openness and transparency. This will provide evidence to allow us to consider further if the Charter requires strengthening in some respects and/or if extending freedom of information coverage to some or all of RSLs’ social housing functions would be appropriate.

Finally, we would wish to encourage all interested parties to respond to this consultation. RSLs and their tenants, as well as their representative bodies, in particular may wish to provide views in response to question 8.

Our Consultation Proposals

We consider that a number of the factors identified above apply in relation to the functions undertaken, or services provided, by those various organisations highlighted in this consultation paper.

In particular, there is a focus on organisations who, for the purposes of section 5 of the Act, undertake functions of a public nature or provide a service that is a function of a public authority(ies) relating to security, care and education.

However, before developing a draft order, we welcome responses to this consultation both from the bodies themselves and all interested stakeholders and members of the public. Responses to the consultation will clearly be a critical element in developing the terms of any draft order.

The organisations considered for inclusion at this stage are:

- contractors who run privately-managed prisons
- providers of secure accommodation for children
- grant-aided schools
- independent special schools

With all these groups it is envisaged that any order would provide a 'class description' in respect of the particular function undertaken or service provided. Given the potential for contractors or service providers to change over a period of time, a 'class description' gives more flexibility than listing specific bodies or contractors in the order.

Business and Regulatory Impact Assessment (BRIA) and equalities assessment

The consultation paper includes a partial BRIA setting out, as best we can at this stage, the key issues concerning the practical impact of extending coverage of the Act to those organisations discussed below.

As part of the consultation exercise, views on the BRIA are also welcome.

To help us assess whether the proposals may have any impacts on particular equalities groups we would also be grateful for any comments on whether you think the proposals will affect people – either in a positive or negative way – based on their gender, race, religion, age, sexuality or any disabilities they may have.

Contractors who run privately managed prisons

Background

There are two privately operated prisons in Scotland - HMP Kilmarnock and HMP Addiewell. The remaining thirteen prisons are operated directly by the Scottish Prison Service (SPS). As a government agency, SPS is itself subject to the Act.

The SPS has contracts with two consortia, Kilmarnock Prison Services Limited (KPSL) and Addiewell Prison Limited (APL) for the design, construction, management and financing of these prisons, each for a period of 25 years (the HMP Kilmarnock contract expires in 2024 and HMP Addiewell in 2033).

However, in practice, the two consortia sub-contract much of this work, in respect of KPSL, to Serco and, in respect of APL, to Sodexo. The proposed coverage would extend to those contractors undertaking work to meet obligations in respect of these contracts - and for their full duration.

As noted above, it is envisaged that the proposed order would contain a description of the relevant functions rather than naming specific bodies individually. Therefore, if the contractors or sub-contractors providing these services were to change in future, the new contractors would automatically also be covered by the Act.

Key factors

Public function

The provision of prison services by the Scottish Government is required by the Prisons (Scotland) Act 1989 and is generally recognised as being a core function of the state. As such, if no other body was providing prison services, it would be expected that such services would require to be delivered by a public body.

In respect of HMP Kilmarnock and HMP Addiewell, the two consortia managing these prisons do so through a contract with the SPS. We therefore consider these bodies can be covered by the Act under the terms of section 5(2)(b).

Public funding

Both consortia attract significant, long-term public funding. The unitary (annual) charge in 2013-14 for the contract for HMP Addiewell was £30m; the equivalent for HMP Kilmarnock was £16m. Both contracts are for 25 years.

Access to information

The SPS is already required to respond to information requests. As SPS holds information provided by the contractors in accordance with the requirements of the contracts, it is therefore already possible to access some contractual information about these prisons from SPS. The contractors co-operate with SPS in assisting with responses to information requests to SPS.

However, being covered by the Act would require the contractors to not only respond directly to requests but also proactively publish information where possible. While there is currently little evidence of people unable to access information, in part as the two prisons are not currently required to respond to requests, it would ensure that there is an equal right of access to information about all prisons in Scotland, whether public or private.

We therefore feel that there are strong grounds, given the factors set out above, that contractors running privately managed prisons should be subject to FoI legislation.

Question 1

Do you agree with the proposal to extend freedom of information coverage to contractors who run privately managed prisons?

You may wish to provide information to support your views - for example, what do you consider to be the key factors for or against the proposal?

Providers of secure accommodation for children

Background

Scotland's secure care places are currently spread across five dedicated units. All the units provide a full curriculum of care, delivering a range of educational, health and behavioural programmes for young people. In addition, the units undertake tailored programmes of work to prepare young people living there for their transition back into the community.

Currently, only one of the five care units is subject to freedom of information legislation as it is local authority run (Edinburgh Secure Services). The remaining four - Good Shepherd Centre, Kibble Education and Care Centre, Rossie Young People's Trust and St Mary's Kenmure – are independent providers of secure care services and currently not subject to the Act. The four are also subject to consultation in their capacity as independent special schools.

It is envisaged that the proposed order will contain a description of the relevant functions rather than naming specific bodies individually. Therefore, if the current providers of these secure services were to change in future, any new provider would be automatically covered.

Key factors

Public function

Legislation governing secure accommodation for children includes the Secure Accommodation (Scotland) Regulations 2013. The provision of a secure accommodation service must be approved by the Scottish Government.

We consider that the provision of secure accommodation for children would be generally recognised as a 'public service' which, ultimately, the state would need to take responsibility for.

We also note that such services are already subject to significant regulation by various state authorities, including the Care Inspectorate, Education Scotland, the Mental Welfare Commission and the Scottish Social Services Council.

Public funding

The provision of secure accommodation for children is dependent on public funding. There is however no guaranteed public funding provided to the four independent secure care providers. Local authorities and the Scottish Government purchase beds from the independent units as and when they are required through the Secure Care contract.

The contract is managed by Scotland Excel and was first awarded 2011. The current contract is a 3 year award and expires on 30 June 2016, there is a 12 month option to further extend the contract. The annual spend on the contract is estimated

at £20 - £22 million. A small number of places are bought off contract by local authorities from outside Scotland.

Access to information

Information on the provision of independently-run secure accommodation is already publicly available from a variety of sources, including from local authorities and the Scottish Government. Information is also available from the units themselves – though they are not at present obliged to respond to requests.

The contracts between local authorities and each secure unit make specific reference to freedom of information legislation and how the authority's obligations may impact on a unit. Extending coverage of the Act to those units not currently required to respond to requests would place the same obligations on them as local authorities - and all other authorities currently subject to the Act - including the requirement to proactively publish information where possible.

We therefore consider a range of factors – primarily the statutory underpinning of the service, the public funding and the degree of regulation of secure accommodation, clearly indicate that the functions being undertaken are of a public nature for the purposes of a section 5 order. This means there are strong grounds for these private bodies being subject to the requirements of FOI legislation.

Question 2

Do you agree with the proposal to extend freedom of information coverage to providers of secure accommodation for children?

You may wish to provide information to support your views - for example, what do you consider to be the key factors for or against the proposal?

Grant-aided Schools

Background

Eight schools in Scotland are 'grant-aided', receiving some or all of their funding direct from the Scottish Government. Seven of these schools are special schools, the eighth being Jordanhill. They are charitable organisations and effectively independent but are fully dependent on public funding - and in practice are accountable to the Scottish Government, which can exercise a wide range of regulatory powers over such schools.

While the funding arrangements for grant-aided special schools are under review, it is still likely that these schools will rely on public funding to some extent. The proposed order is likely to contain a description covering all grant-aided schools, without naming specific schools individually.

Key factors

Public function

Grant-aided schools, by definition, provide education – indeed, the provision of school education is recognised as a core function of the state.

The grant funding arrangements for supporting grant-aided schools are set out in legislation, specifically the Special Schools (Scotland) Grant Regulations 1990 and the Jordanhill School Grant Regulations 1988. The Regulations provide for the exercise of a significant range of financial and regulatory powers by the Scottish Government in respect of grant-aided schools.

Public funding

Grant-aided schools currently receive Scottish Government funding of £16.25 million per year. This funding has been in place for an extended period of time. Grant-aided special schools also receive funding from local authorities who place children from their area in the schools.

Access to information

Information on grant-aided schools is available from the Scottish Government and may be available from local authorities as well if they place children in a particular school(s). Indeed, the Regulations referred to above place a variety of conditions on any school in receipt of grant aid, including certain reporting duties.

Information will also be available from the schools themselves. However, while the Scottish Government as a public authority in terms of the Act is required to comply with freedom of information obligations, grant-aided schools are not.

Therefore, extending the Act to grant-aided schools in effect would provide the same right of information access as currently exists for schools under local authority control.

Given the variety of factors above including, in particular, the fact that providing school education is a core public function, the public funding provided and the degree of regulation and oversight, we consider that grant-aided schools are providing a service of a public nature for the purposes of a section 5 order. This means there are strong grounds for these bodies being subject to the requirements of FOI legislation.

Question 3

Do you agree with the proposal to extend freedom of information coverage to grant-aided schools?

You may wish to provide information to support your views - for example, what do you consider to be the key factors for or against the proposal?

Independent Special Schools

Background

There are currently 39 independent special schools on the Register of Independent Schools playing a central role in meeting the needs of approximately 800 of Scotland's most vulnerable children. Four of these schools are also being consulted in their capacity as providers of secure accommodation for children.

The schools provide education and care in residential and day schools for children and young people with complex needs (such as physical disabilities, mental health problems and social, emotional and behavioural challenges). Places at independent special schools are generally funded through local authorities.

Key factors

Public function

We consider that independent special schools exercise functions which are widely recognised as being 'of a public nature' and as core functions of the state.

All independent special schools are subject to registration and regulation by Scottish Ministers in accordance with section 98 to 103B of the Education (Scotland) Act 1980. In line with all other schools, independent special schools are subject to inspection by HMI inspectors of education and those with residential facilities are also regulated and inspected by the Care Inspectorate. In granting an application to register an independent school Scottish Ministers have to be satisfied on a number of grounds including the educational provision, the suitability of the teachers and that appropriate safeguarding measures are in place.

The special school provision in the independent sector supports many of Scotland's most vulnerable young people and if this service was not available the obligation to do so would revert to the state.

Public funding

The vast majority of children and young people in independent special schools have the cost of their care and education met by their local authority. Local authorities will meet the cost of care on the recommendation of professionals including educational psychologists and social workers if it is agreed that the young person's needs cannot be met adequately elsewhere.

Access to information

While independent special schools are not subject to the Act, information is available from the schools themselves and from a variety of other sources. These will include inspection reports published by Education Scotland, which are publicly available.

However, extending the Act to independent special schools will provide the same right of information access as currently exists for schools directly under local authority control.

Therefore, in similar terms to the reasons for extending the Act to grant-aided schools, we consider that given the factors highlighted above, independent special schools should be considered for inclusion within scope of freedom of information legislation.

Question 4

Do you agree with the proposal to extend freedom of information coverage to independent special schools?

You may wish to provide information to support your views - for example, what do you consider to be the key factors for or against the proposal?

ANNEX A

Partial Business and Regulatory Impact Assessment (BRIA)

This partial Assessment accompanies the public consultation on the proposal to extend coverage of the Freedom of Information (Scotland) Act 2002. We welcome any comments on or contributions to the analysis it contains.

1. TITLE OF PROPOSAL:

1.1 Extension of coverage of the Freedom of Information (Scotland) Act 2002 ('the Act') to the following bodies:

- contractors who run privately managed prisons
- providers of secure accommodation for children
- grant-aided schools
- independent special schools

2. PURPOSE AND INTENDED EFFECT

Objective

2.1 To consider whether certain bodies considered to deliver 'functions of a public nature' should be made subject to the requirements of the Act and the Environmental Information (Scotland) Regulations 2004 (EIRs) and other legislation including those duties public authorities are required to undertake under the Climate Change (Scotland) Act 2009.

2.2 The public's right to access information about these functions currently extends only to information held by Scottish public authorities. Extension of coverage would therefore provide consistent rights of access, regardless of whether the service provider is a public body or not.

Background

2.3 The Act provides a statutory right of access to information held by Scottish public authorities. Under section 5 of the Act, coverage can be extended by order to bodies which appear to the Scottish Government to be exercising functions of a public nature and to contractors who provide services that are a function of a public authority.

2.4 The bodies listed in 1.1 are considered to exercise functions of a public nature – as assessed against a range of factors set out earlier in this consultation paper.

2.5 The Scottish Government is aware however that any extension of coverage may place an additional regulatory and financial burden on the bodies concerned. This Assessment outlines (so far as possible at the pre-consultation phase) the likely costs and benefits of the proposal. Responses to the consultation will help provide evidence on whether extension of coverage is appropriate and proportionate.

Rationale for government intervention

2.6 The Scottish Government is concerned that the provision of public services or services of a public nature by private bodies which are not subject to the requirements of the Act may limit the public's right of access to information about those services. Ministers are committed to promoting increased openness and transparency in the delivery of public services. It is a key 'national outcome' within the Government's performance framework that Scotland's public services are high quality, continually improving, efficient and responsive to local people's needs. The rights afforded by freedom of information legislation can play a key part in achieving this goal, by allowing people to hold their public services fully to account and in promoting increased transparency.

2.7 Enabling the public to make information requests directly to the bodies themselves would address any difficulties the public may have in obtaining information which may result from outsourcing of public functions. It would also in some cases facilitate more consistent disclosure of information about, for example, how a public service is being delivered.

3. CONSULTATION

Within government

3.1 Officials from across the Scottish Government and certain Executive Agencies have contributed to the consideration of whether to extend coverage. Their factual input provided evidence for the Scottish Government to take an initial view about considering the extension of coverage to the bodies listed in 1.1 above.

Public consultation

3.2 The Scottish Government has previously consulted on extending coverage of the Act in 2010 – which included seeking views on extending coverage to contractors operating private prisons. Previous consultation also suggested that secure children's homes be considered for inclusion.

3.3 The Scottish Government has informally notified each of the groups of bodies affected that their FOI coverage was being considered. They now have an opportunity to feed in their views formally.

3.4 The consultation will close on 4 September 2015. Responses received and evidence provided will be considered in detail before the Scottish Government's conclusions are reached. A full BRIA will be developed before any order is laid in the Scottish Parliament.

With Businesses

3.5 Throughout the consultation period, the Scottish Government will meet a number of businesses from the different groups affected by the proposed order so we can better assess the costs and/or benefits to them.

4. OPTIONS

4.1 This section gives consideration to the impact, in terms of costs and benefits, of the various options available. Given the early stage of the consultation process there is limited evidence allowing assessment of the impact of the proposals. Following the consultation process a more detailed assessment can be undertaken.

Option 1: Take no action

4.2 This would mean not proceeding with the proposed section 5 order and therefore not extending coverage of the Act to those organisations at 1.1 above.

4.3 *Sectors and groups affected:* There would be no impact on any of the organisations, or 'class of organisations', listed.

4.4 *Costs and benefits:* This option presents no added costs to the Scottish administration, to public authorities, or to private organisations. However this would not help promote openness and transparency in the delivery of core public functions.

Option 2: Enhanced statutory guidance

4.5 Under section 60 of the Act a statutory Code of Practice provides guidance to public authorities about their duties under the Act. The Code includes the promotion of transparency with regards to making available contractual and procurement-related information. The Code sets out a series of guiding principles, including transparency in the use of public funds.

4.6 Authorities covered by the Act are expected to adhere to the Code unless they have good reasons for not doing so, which can be justified to the Scottish Information Commissioner.

4.7 It might be possible to amend those sections of the Code concerning contractual relations, or to consider the extent that information is regarded as being held 'on behalf of' the contracting authority (rather than the body providing the service). However, in only applying to public authorities as defined under the Act, the Code is not a substitute for extending coverage to the bodies proposed.

4.8 *Sectors and groups affected:* This option impacts directly on public bodies subject to the Act as they may need to do more to gather information from their contractors if there are requests about a contractor's work. There would also be some impact on the contractors who may have to provide information to public bodies to help them answer requests. Access to information concerning the particular function or service will, in part, be dependent on the extent that the public authority complies with the requirements of the Code.

4.9 *Costs and benefits:* This option may present limited costs to public authorities seeking to comply with the section 60 Code's recommendations. The benefits of compliance with the Code will include increased openness and transparency, for example, increasing the availability of contractual information about outsourced public functions. The Code does not apply to private bodies, but impacts to a limited

extent on them in respect of public authorities' management of information about, for example, contracts they have in place. It would however make little or no difference in relation to bodies such as grant-aided schools who do not have a contract with a public body – their funding is instead received via a grant.

Option 3: Making a further section 5 Order

4.10 The proposal directly affects the bodies listed in 1.1 above who would have to comply with the Act, and also the Scottish Information Commissioner whose promotion and enforcement role would extend to cover the additional bodies. The benefits of the proposal extend to the wider public (within and outwith Scotland) whose legal rights to access information would be enhanced.

4.11 This preferred option would extend coverage of the Act to the bodies in respect of the information they hold concerning their functions of a public nature. The right of access to information from these organisations would therefore be on a par with the statutory right to access information from Scottish public authorities.

4.12 The risks, including costs associated with this option will be more clearly established following the consultation process. However, the costs will remain difficult to accurately quantify as it is not possible to know in advance how many additional requests organisations will receive. In general there will be some additional administrative costs for the private bodies, some of which may be passed directly or indirectly on to the public sector, as described below:

- The bodies made subject to the Act would have to put in place systems to handle information requests, train staff on the requirements of the Act and the EIRs, develop and maintain publication schemes as required by the Act and ensure they maintain adequate records systems.

4.13 There are also risks involved. There may be hidden costs to the public purse if an extension of coverage to contractors or service providers deters future bidders from competing for public contracts and thus hinders competition, ultimately affecting the quality and cost of goods and services provided. There is also a risk that those bidding for contracts subject to FOI and the EIRs may seek to add in costs for administering FOI when they tender for future contracts.

4.14 There are though some general factors mitigating the possible costs and risks involved in proceeding with this option:

- The Act has now been in force for over 10 years and it is commonly accepted that increased transparency is a key part of working in and with the public sector.
- Many of the bodies proposed for coverage will already have reasonable knowledge of the legislation from liaising with public bodies regarding requests made to the public authority for information in which the body has an interest.

- A considerable body of guidance is now available for bodies subject to the Act. Additionally, the Scottish Information Commissioner would support bodies in preparing for meeting the requirements of the Act.
- Good records management is key to effective request handling and should not be a new requirement for the bodies.
- Proactive publication of information that is likely to be of public interest can help reduce the volume of requests received. Those bodies that make more information available up front are likely to receive fewer requests.
- Coverage by the Act would enable these bodies to manage information requests themselves, and judge what, if any, exemptions would be applicable.
- There may be a reduction in the number of requests made to the public sector about the delivery of these functions, leading to some small costs savings for public bodies.
- The proposed order would not be expected to come into force until spring 2016, allowing significant preparation time.

Cost estimates

4.15 The costs of implementing the Act for the bodies concerned are difficult to quantify. We set out below some key factors:

(a) The numbers of requests received per year

4.16 It is not possible to predict with certainty the number or scope of requests that a body will receive. However the estimates below are based on the evidence currently available. During the first year of coverage it is likely that bodies will incur higher costs as the bodies adapt to comply with the requirements of the legislation. They may also receive larger numbers of requests in the first year as requesters make use of their new rights for the first time. However, the figures below suggest that in the long term request handling will not have significant cost implications.

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| <i>Prisons</i> | Based on historical data, we estimate about 50 requests per year in respect of each of the two private prisons. |
| <i>Providers of secure accommodation for children</i> | Given the very few FoI requests made to the Scottish Government on secure care in recent years, it is anticipated the annual figure for all FoI requests regarding secure care would be less than 10 between the four current providers. |
| <i>Grant-aided schools</i> | Numbers anticipated to be very low. |
| <i>Independent special</i> | Numbers anticipated to be very low. |

| | |
|----------------|--|
| <i>schools</i> | |
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(b) The costs of establishing FOI procedures

4.17 Some of the bodies proposed for coverage will already be familiar with the FOI process through assisting public authorities with request handling. However, it would not be reasonable to expect the various bodies to have a detailed knowledge or understanding of the legislation or familiarity with request handling procedures. Given the different starting positions of the various bodies it is difficult to estimate the extent a body will have to devote resources to implement the Act.

4.18 We would therefore anticipate there to be costs in bodies providing training for their staff, in ensuring there are proper systems in place and in developing Publication Schemes as required by the Act.

(c) The average resources required to handle a FOI request

4.19 There has been limited research undertaken into the costs of handling FOI requests to the authorities subject to the Act.

4.20 In [research undertaken in 2012](#) the Scottish Government estimated that the average time spent in responding to a request we received was approximately 7 hours, at an average cost in staff time of £231. However average cost figures would vary significantly depending on the organisation and the type of requests it received.

Sectors and groups affected

4.21 Option 3 would impact on those bodies proposed for coverage. It would also affect the Scottish Information Commissioner, whose oversight and enforcement duties would extend to these additional bodies. Importantly, it would also impact on the public, whose information rights would be extended.

5. SCOTTISH FIRMS IMPACT TEST

5.1 This section will be informed by the evidence gathered during the consultation and completed in the final BRIA. In addition to the written consultation process, we will meet a number of organisations affected by the proposals.

Competition assessment

5.2 We welcome views and evidence as to whether extension of coverage is likely to impact on organisations' ability or willingness to tender for public service contracts. This will help a full assessment to be made, which will inform Ministers' final decision. Our initial view is that the proposals in options 2 or 3 would not be expected to have any significant impact on competition given that the costs of handling FOI and EIR requests would be likely to be relatively small. In addition, given that, in most cases, these proposals would also extend coverage to others who

would be their direct competitors this will ensure a level playing field amongst similar types of contractors/organisations within Scotland.

5.3 While some bodies may have concerns about being forced to release commercially sensitive information, there are FOI and EIR exemptions and exceptions to enable information which is genuinely commercially sensitive to be withheld. Works for the public sector are a vital part of the private sector's operations, and we would not expect coverage to deter private bodies from bidding for this work.

5.4 Using the Competition & Markets Authority Competition Filter questions we have concluded that the proposals will neither directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

Test run of business forms

5.5 There are no new business forms required.

6. LEGAL AID IMPACT TEST

6.1 These proposals would not have any impact on legal aid. No legal advice is required in order for a requester to seek information under FOI.

7. ENFORCEMENT, SANCTIONS AND MONITORING

7.1 Option 1 (do nothing) presents no enforcement or monitoring issues. The current enforcement regime (provided by the Scottish Information Commissioner) would remain the same, with no additional bodies brought within its scope.

7.2 Option 2 (improved statutory guidance) would require the Scottish Information Commissioner to promote observance of the statutory Code of Practice by public authorities. Whilst it does not apply to the private sector, the Code recommends that authorities improve the transparency of their contracts with the private sector.

7.3 Option 3 (laying an order) would require those bodies affected to comply with the Act and with the EIRs. Compliance would be monitored and enforced by the Scottish Information Commissioner. The Commissioner can receive appeals from any person who has gone through the request and review stages of the legislation and is dissatisfied with the response from a public authority. She can also investigate a public authority if she believes that it may be failing to comply with the terms of the legislation or the Codes of Practice issued under the legislation.

7.4 At the conclusion of an investigation (if settlement is not reached) the Commissioner will issue a decision notice which sets out her conclusions. Compliance may require the organisation to release the information sought.

7.5 Failure to comply with a decision notice may be treated by the Court of Session as a contempt of court, the penalty for which may be a fine or imprisonment. An organisation may appeal, on a point of law, to the Court of Session against a

decision by the Commissioner. An applicant can also appeal to the Court of Session against a decision by the Commissioner.

8. IMPLEMENTATION AND DELIVERY PLAN

8.1 Depending on the outcome of the consultation we envisage bringing forward an order towards the end of the year, potentially coming into effect on 1 April 2016.

8.2 We would propose to review the impact of an order on organisations brought within scope of the Act once the order has been in effect for a period of 6 months.

Statement by the Minister for Parliamentary Business

I have read the impact assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

ANNEX B

Responding to the consultation

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

Consultation commenced on 12 June 2015 and will run for 12 weeks. If you wish to respond to the consultation, please provide your response by 4 September 2015.

Please send your response by e-mail using the **Respondent Information Form** to:

foi@scotland.gsi.gov.uk

If you do not have access to e-mail, you may still submit your response by post with your completed respondent information form by sending it to:

Freedom of Information Unit (2W)
The Scottish Government
St Andrew's House
Regent Road
Edinburgh EH1 3DG

Handling your response

We need to know how to handle your response and in particular, whether you are happy for it to be made public. Completing the attached **Respondent Information Form** will ensure that we treat your response appropriately. If you ask for your response not to be published we will treat it as confidential.

As the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998 any request made to it relating to the responses will be considered in terms of the appropriate legislation.

Following the closing date, all responses will be analysed and considered along with any other available evidence before a decision is made on the precise terms of any resulting order.

If you have given permission for your response to be made public and after we have checked that it contains no potentially defamatory material, your response will be made available to the public.

Comments and complaints

If you have any queries or comments about this consultation exercise please contact Andrew Gunn on 0131 244 5061 or via the contact details above.

**FREEDOM OF INFORMATION (SCOTLAND) ACT 2002:
EXTENSION OF COVERAGE**



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

| | | |
|----------|-------|-------|
| Postcode | Phone | Email |
|----------|-------|-------|

3. Permissions - I am responding as...

Individual / **Group/Organisation**
Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

CONSULTATION QUESTIONS

1) *Do you agree with the proposal to extend freedom of information coverage to **contractors who run privately managed prisons**?*

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments

2) *Do you agree with the proposal to extend freedom of information coverage to **providers of secure accommodation for children**?*

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments

3) *Do you agree with the proposal to extend freedom of information coverage to **grant-aided schools**?*

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments

4) *Do you agree with the proposal to extend freedom of information coverage to **independent special schools**?*

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments

5) *The proposed order would be expected to come into force in spring 2016 – probably on 1 April – so bodies would have to answer FOI requests from that date. Do you feel this proposed timescale is reasonable to allow bodies to prepare?*

If not, you may wish to provide comments on what timescales you feel would be more appropriate and why.

Comments

6) *Do you have any comments on the draft partial Business and Regulatory Impact Assessment provided at Annex A?*

Comments

7) *Do you have any comments on the proposals in terms of how they may impact on any particular equalities group i.e. in respect of age, gender, race, religion, disability or sexuality?*

Comments

Future Orders

8) *This latest consultation on extending coverage is part of the process of regularly assessing the scope of Scotland's Freedom of Information legislation and ensuring coverage remains up-to-date.*

We would welcome proposals in respect of other organisations or types of body which should be considered in future for inclusion within scope of freedom of information legislation.

In taking a 'function-led' approach to extension, as outlined above, we would ask you to support your views by including key factors you consider favour extension of coverage (for example, the nature of the function or service being provided, the level of public funding, the extent of state control or oversight etc.). Evidence of difficulty in obtaining information in respect of a particular organisational function would also be welcome.

Comments



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