

FINANCE COMMITTEE

FREEDOM OF INFORMATION (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM THE CAMPAIGN FOR FREEDOM OF INFORMATION IN SCOTLAND

Executive Summary

1. The Campaign for Freedom of Information in Scotland (CFoIS) is pleased to submit evidence at Stage 1 of the Freedom of Information (Amendment) (Scotland) Bill, (the Bill) to the Finance Committee of the Scottish Parliament. We have confined our response to the principal purposes of the Bill and believe:

- Despite the inadequacy of the Bill to extend the public's right to know to a far wider range of organisations, CFoIS can support the general principle behind the Bill – that freedom of information law in Scotland must be reformed.
- The focus of the reform should be to add organisations that are currently exempted from the scope of Freedom of Information (Scotland) Act 2002 (FoISA). As the key principles of the Scottish Parliament are to be 'open, accessible and accountable'¹, progressive reform of FoISA is urgently needed and determining the extent of reform should be the focus of the Committee's work. A purpose clause should be introduced to affirm that FoISA provisions are intended to apply to all public authorities and all other bodies providing public services, carrying out public functions and/or functions of a public nature.
- Consultation has already produced a degree of consensus that is not reflected in the Bill. We believe that the Stage 1 process will enable informed debate about what a majority of people and organisations want: the extension of FoISA to Arm Length Organisations (ALEOs), housing associations and a range of bodies such as CoSLA, the Improvement Service, Association of Chief Police Officers in Scotland, Faculty of Advocates, the Law Society of Scotland and private and voluntary sector organisations only in respect of the services they deliver of a public nature.
- The Finance Committee should consider the impact of the research published by the Office of the Scottish Information Commissioner in association with the University of Strathclyde that concludes Scotland's voluntary sector 'remains cautious about using freedom of information rights to access information, amid continuing concerns that FOI use may harm funding or working relationships with public authorities'.² The ability to exercise our human rights without a "chilling effect" is crucial in our modern democracy.

¹ Principles established by the Consultative Steering Group which was set up in November 1997 by the Secretary of State for Scotland to report on the 'operational needs and working methods' of the Parliament and to make proposals for its standing orders and rules of procedure. Its main report was published in December 1998 www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf

² www.itspublicknowledge.info/home/News/20120706.asp

- The important role of the Office of the Scottish Information Commissioner must be sustained by sufficient resources so it can effectively deliver its responsibilities e.g. on training, advice and information.

2. Reforming FoISA is a devolved matter entirely within the competence of the Scottish Government and the Scottish Parliament. We are therefore very disappointed that the reform which was promised as far back as 2002³ is still not being delivered. CFoIS notes that extension of FoISA has been delayed by successive administrations eg the then Scottish Executive launched a consultation in 2006 but declined to introduce reform in 2007 and instead committed to further consultation and consideration.⁴

Questions

3. CFoIS has read the seven questions published by the Finance Committee and we have decided to focus our comments on several of them in the main body of the response. In summary however our answers are:

What is your general view on the purpose of the Bill and broadly, are you supportive of it?

4. We support reform of FoISA but the content of the Bill is inadequate

Did you take part in the Scottish Government's consultation on the Bill and how have your views been reflected?

5. Yes, but our views have been mainly ignored.

The Scottish Government believes the Bill will add strength and clarity to the Freedom of Information (Scotland) Act 2002. Do you agree? Does the Bill protect the rights to access information?

6. No, especially when public services are increasingly being delivered by non-public organisations.

In response to the Scottish Government's [consultation](#) on the Bill, concerns were expressed about the Royal exemption provision (Bill section 1). What is your response to the [position of the Scottish Government](#) to these concerns?

7. The Scottish Government should not have copied the amendment that applies to reserved matters and was approved by the UK Parliament. Inconsistencies with the Environmental Information (Scotland) Regulations (EISRs) will arise – see below.

Context

8. CFoIS recognises that reform of FoISA takes place at a time of national discussion on Scotland's constitutional future. As we are a non party political organisation, we have no view on whether Scotland should be independent. However we note that the consultation on independence stated 'We shouldn't have a constitution which constrains us, but one which frees us to build a better society... We must renew democracy and strike a new bond between government and the people

³ Stage 3 Debate Freedom of Information (Scotland) Bill 24th April 2002, columns 8208-8209 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4372&mode=pdf>

⁴ Statement by Minister for Parliamentary Business Margaret Curran. 15th March 2007 <http://www.scotland.gov.uk/About/Information/FoI/foireview2005/foireviewintro>

based on trust and humility.⁵ CFoIS believes that freedom of information has to be progressive to be effective and that the public's right to know, their capacity to make informed decisions about all aspects of their lives, will be curtailed unless the Bill is significantly amended.

9. We note that more progressive reform has already been achieved in the UK legislation which impacts on bodies delivering services in England and Wales as well as nationally. The UK Government has recently extended the FOI Act to the Association of Chief Police Officers, UCAS and the Financial Ombudsman Service. It is also consulting on the inclusion of additional bodies which appear to have public functions such as the Law Society, the Bar Council, the NHS Confederation, the Local Government Association, British Standards Institution, Advertising Standards Authority, Harbour Authorities, Examination Boards and over 150 other award giving bodies. It has also said that it will consult housing associations about bringing them under the UK Act.⁶ CFoIS requests that the Finance Committee establish why similar progress has not been achieved in Scotland. Clearly the Scottish Government is aware of the UK reform agenda as it is copying a regressive reform in the Bill - a new absolute exemption for information relating to communications with the Monarch and the next two in line to the throne. In addition to this step backwards, this creates more inconsistencies in the public's right to know in Scotland. Should the request be for environmental information, the public interest test will still be in place under EIRs but not under FoISA.

10. The Scottish Parliament can only pass legislation that is compliant with the European Convention on Human Rights (ECHR) and Scottish Government Ministers have a positive duty to comply with the ECHR.⁷ Now that FoISA is being amended, the law must be examined through a human rights lens and in particular Article 10(1) of ECHR:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

11. The Scottish Government is committed to complying with human rights law and to internationally ratified treaties eg its recent work on the UN's Universal Periodic Review (UPR) of the UK⁸ and its current consultation on a proposed Children and Young People Bill which will 'embed the rights of children and young people across the public sector in line with the United Nations Convention on the Rights of the Child (UNCRC).⁹ Despite the statement that this Bill complies with the

⁵'Your Scotland, Your Referendum' published Scottish Government 2012 <https://consult.scotland.gov.uk/scotreferendum> Pages 2-3

⁶foia.blogspot.co.uk/search/label/publicly%20owned%20companies; and www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111108/debtext/111108-0001.htm#11110869000509

⁷ Sections 29 and 57 of The Scotland Act 1998

⁸ <http://www.justice.gov.uk/downloads/human-rights/upr-report.pdf>

⁹ <http://www.scotland.gov.uk/Publications/2012/07/7181>

ECHR¹⁰ we urge the Committee to consider this point in more detail given Scotland's wider obligations under international human rights law eg International Covenant on Civil and Political Rights.

12. It is alarming that the voluntary sector in Scotland is reluctant to use freedom of information rights. CFoIS believes the Finance Committee should consider if the Bill can be amended in any way to ensure that just as it is unacceptable for the deliberate destruction of information, so too is it unacceptable that exercising FoISA rights will have adverse consequences for the requester. We urge the Finance Committee to explore why 49% of voluntary sector organisations would be discouraged from requesting information for fear of the implications eg for future funding.¹¹

13. By introducing a purpose clause to the Bill, the law will be updated and the importance of an open culture and good practice in delivering FoISA will be highlighted by the Scottish Parliament. The public value their right to access information and the public want to increase access to information. That requires a robust law and a culture of openness to be mainstreamed across those organisations subject to FoISA.

Consultation

14. Part of the Stage 1 process is to consider whether there has been sufficient consultation on the Bill. As far back as 2002, in addition to some housing associations, the Minister outlined the range of bodies he expected to be covered by FoI and stated it would happen soon: *We recognise that companies involved in major PPP/PFI contracts are delivering important public services. I assure members that companies that are involved in contracts of that nature—whether those relate to prisons or to matters such as road maintenance—are the sort of bodies that we want to add to schedule 1 after proper consultation.*¹²

15. It is noteworthy that there has been much consultation over the last ten years but it appears that the majority view has been repeatedly ignored. Most recently, despite a majority of people supporting progressive reform, those bodies who were supposed to be added to FoISA opposed the proposal¹³ and their opinion prevails. The Finance Committee should establish why the opinion of these bodies determined government policy when the Scottish Government had concluded that the cost of providing information will not be a significant 'burden' to them as such assumptions run contrary to the principle of transparency and openness. Given that all the bodies listed by the Scottish Government and which we have identified for inclusion (some listed on pages 1-2 of this briefing) are either delivering services of a

¹⁰ 'Policy Memorandum' on the Freedom of Information (Amendment) (Scotland) Bill published by Scottish Government, June 2012 Para 46

¹¹ Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector published by Office of the Scottish Information Commissioner and University of Strathclyde, 6th July 2012.

¹² Stage 3 Debate Freedom of Information (Scotland) Bill 24th April 2002, columns 8208-8209 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4372&mode=pdf>

¹³ Consultation Paper, Extension of Coverage of the Freedom of Information (Scotland) Act 2002 (FOISA), Scottish Government Response Paper, January 2011. <http://www.scotland.gov.uk/Resource/Doc/175356/0112479.pdf>

public nature and/or are receiving public money then we believe that transparency and accountability should be the a result of 'doing business' with the public sector.

16. Also the existing regulation of many bodies requires them to produce statistics and information. The regulation and inspection of Registered Social Landlords (RSLs) (housing associations) is undertaken by the Scottish Housing Regulator on behalf of tenants. RSLs must provide certain standard information regularly including completion of the Annual Performance and Statistical Return (APSR) and data about its private lending profile. RSLs already have to comply with legal duties on compiling information for the regulator so it is reasonable to give an enforceable **right** to tenants (and any individual) to access that information rather than the Regulator and RSLs deciding what and when it publishes.

17. It is useful to remember the 2010 Scottish Government consultation on extending the coverage of FOISA which identified possible additions:

- contractors who run privately managed prisons and provide prisoner escort services;
- leisure, sport and cultural trusts and bodies used by local authorities;
- the Glasgow Housing Association;
- the Association of Chief Police Officers in Scotland;
- contractors who build and maintain schools;
- contractors who build and maintain hospitals; and
- contractors who build, manage and maintain trunk roads under private finance contracts¹⁴.

18. FOI is very popular in Scotland and the public acknowledge its importance in improving the design, delivery and funding of public services. The Scottish Information Commissioner commissioned research in 2011 which revealed that:

- 80% of respondents stated they were aware of the law;
- 89% of respondents agreed that it is important for the public to be able to access information held by public authorities;
- even in straitened times for the public sector, only 14% agreed with the suggestion that FOI was a waste of public money;
- there is strong public support for FOI to be extended to cover additional organisations, with 88% agreeing that trusts providing services on behalf of local authorities should be covered, 82% agreeing that housing associations should be covered, 83% agreeing that private sector companies which build and maintain local authority schools or hospitals should be covered and 73% agreeing that prisons which are run by the private sector should be covered.¹⁵

¹⁴ The Scottish Government's proposals to extend FOISA are available at:
<http://www.scotland.gov.uk/Resource/Doc/319057/0101913.pdf>

¹⁵ 'Commissioner calls for FOI rights to be strengthened as survey reveals strong public support'
News Release Scottish Information Commissioner 16th December 2011
<http://www.itspublicknowledge.info/home/News/20111612.asp>

Regressive Reform

19. The limited reform of FoISA means that as public services are provided by a wider range of organisations and private sector companies, supported by public funding, the 'public's right to know' does not keep up. For example the public currently cannot exercise FoI rights in relation to most ALEOS (companies, trusts and other bodies that are separate from the local authority but are subject to local authority control or influence) and the problem is going to get worse. According to the Chair of the Accounts Commission 'As budget pressures rise, councils are considering alternative ways of delivering services. This may lead to further and more innovative use of ALEOs.'¹⁶ Already there are 130 major ALEOs in Scotland.

20. The need for information to inform the design and delivery of public services has never been greater for the public as well as elected politicians. In May 2012, The Accounts Commission published a report *Using cost information to improve performance: are you getting it right?*¹⁷ According to its Chair John Baillie 'It can be down to simply asking the right questions of officials and sharing information and best practice with other councils. This is a big challenge but it can deliver real dividends for councils and their communities.' The public helps councils by asking for information and offering their own analysis. Exercising freedom of information rights therefore provides collective gain.

21. The need for the private sector to access information has also been acknowledged by the Scottish Government as part of its reform of public procurement.¹⁸

22. Instead of the Scottish Government crafting transparency and information access around specific issues, it is more reasonable to mainstream the principled approach about ensuring people have the right to access information about public services and those of a public nature.

Conclusion

23. CFoIS welcomes the Scottish Government's specific measure to disclose more information earlier. We also welcome the proposal to toughen the penalties where information is deliberately destroyed as we agree this confirms the importance of the public having the right to access 'official' information. CFoIS agrees with the Scottish Government that 'The Act is widely recognised as playing a significant part in making Scotland a more open, transparent and accountable society'¹⁹. However, that progress will only be sustained if the general principles of the Bill focus on the 'public's right to know'.

24. A principle of the Bill must be to keep up to date with public sector reform and ensure all relevant bodies comply with freedom of information requests from the public and for that right to be enforced by the Scottish Information Commissioner.

¹⁶ 'ALEOs: Accounts Commission highlights importance of clear governance and accountability' Audit Scotland News Release 16th June 2011

¹⁷ http://www.audit-scotland.gov.uk/docs/local/2012/nr_120510_hcw_costs.pdf

¹⁸ 'Public sector procurement reform' Scottish Government News Release 06/02/2012 <http://www.scotland.gov.uk/News/Releases/2012/02/procurement06022012>

¹⁹ Freedom of Information (Amendment) (Scotland) Bill 'Policy Memorandum' published by Scottish Government June 2012 para 2

25. Individuals and communities must have the right to the fullest information to allow them to form an opinion in our modern democracy. The Bill needs to be amended to reflect that principle and the Scottish Government's stated intention that 'freedom of information is an essential part of open democratic government and responsive public services in providing significant and important rights to access information.'²⁰ For reasons cited in this evidence we disagree with the Scottish Government that the effect of the Bill will be "to add strength and clarity and improve"²¹ FoISA's operation. However we acknowledge that the Bill will improve FOISA to some degree (eg by cutting the 30 year rule and strengthening the sanction against shredding requested records) even though it falls well short of what we believe is now required

About the Campaign for Freedom of Information in Scotland

26. The Campaign for Freedom of Information in Scotland was established in 1984, as part of the national organisation, to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. During the passage of FoISA and subsequently we have consistently argued that the legislation should cover a much wider section of Scottish society, recognising that our public services are delivered by bodies other than public authorities, though paid for by public money.

27. We welcome opportunities to work with the Scottish public authorities to ensure that the FoISA is implemented effectively and have organised and participated in a number of activities to this effect such as training and participation in the Scottish Public Information Forum.

²⁰ Para 3 Ibid
²¹ Ibid.