



Freedom of Information (Amendment) (Scotland) Bill

Response to the Scottish Parliament Finance Committee's call for evidence

The UNISON Scotland response to the Scottish Parliament Finance Committee's call for evidence on its consideration of the Freedom of Information (Amendment) (Scotland) Bill

August 2012

Introduction

UNISON is Scotland's largest public sector trade union representing more than 165,000 members delivering services across Scotland. UNISON members deliver a wide range of services in the public, community and private sector.

UNISON Scotland welcomes the opportunity to respond to the Finance Committee's call for evidence on its consideration of the Freedom of Information (Amendment) (Scotland) Bill.

Overview

As a longstanding supporter of strong freedom of information legislation, UNISON Scotland is disappointed that the Scottish Government is making only minor changes via this Bill. It should use section 5 of the Freedom of Information (Scotland) Act 2002 (FOISA) to extend FOISA to cover all public services.

The Scottish Government says that its aim is to “add strength and clarity to the existing legislation”. However, failing to ensure that freedom of information rights ‘follow the money’ means the existing legislation is weaker and less clear than it should be for the growing number of public services delivered by private companies and other bodies not currently covered by FOISA.

The public should be able to access information about the public services they use and about public and political decisions that affect them, whatever type of body holds the information or provides the service. The use of section 5 to ensure this is long overdue.

We strongly support the call by the Campaign for Freedom of Information in Scotland for the Scottish Parliament to amend the Bill to extend FOISA in this way¹. As the Committee knows, this (including a rolling programme of active review) was a key recommendation by Kevin Dunion, the first Scottish Information Commissioner, in a Special Report when he finished his final term of office earlier this year². His successor Rosemary Agnew has also called on the Scottish Government to act in her July 2012 response to the Finance Committee on its call for evidence³. We hope that the Finance Committee will agree that it is wrong for Ministers to proclaim their commitment to FOI and its Six Principles and to argue that this Bill tackles weaknesses, while failing to use section 5 to protect the public's FOI rights.

The Finance Committee's questions

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

With the proviso above, about the need for FOISA to be extended to cover all public services, we are supportive of changes to ensure that the order-making power in section (59 (1) is flexible and of doing this retrospectively. However, we do not support the proposal to adopt the UK Government's position in respect of information relating to communications with Her Majesty, the Heir and second in line to the Throne.

¹ <http://www.scotsman.com/news/carole-ewart-freedom-of-information-reform-is-too-limited-1-2341726?>

² 2012 Special Report into the State of Freedom of Information in Scotland.

<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=5266&sID=5972>

³ <http://www.itspublicknowledge.info/uploadedfiles/FOIamendmentBillConsultationResponseJuly2012.pdf>

On the extension of the section 65 time limit, we welcome the revised proposal that prosecution be commenced within six months of sufficient evidence coming to the knowledge of the prosecutor, with a time limit of three years for commencing proceedings.

We approve of the minor amendments (re sections 25 and 38) added to the Bill, amendments that had been proposed by Mr Dunion in his 2012 Special Report, cited above.

We note that while the section 38 amendment brings the Act in line with the Environmental Information Regulations (Scotland) 2004, the Scottish Government has not responded to proposals from Mr Dunion, which we supported, that amendments should be made to the Environmental Information (Scotland) Regulations 2004 (the EIRS) to ensure consistent FOI rights in the two interrelated regimes. We note that Ms Agnew, in her response, cited above, repeats the call for amendments to the EIRS.

2. Did you take part in the Scottish Government's [consultation](#) on the Bill and how have your views been reflected?

We did. Our response is on our website⁴. Ministers have effectively ignored ours and others' calls for action on extending the Act. In one brief paragraph they state that they have deferred a decision until after Parliament has considered the Amendment Bill "and until the economic situation significantly improves." **We do not believe that the economic situation is in any way a valid reason to delay. If anything, it is more important that the public is able to scrutinise how its money is spent.** To give just one example, the fiasco of G4S security staff failings at the 2012 Olympics highlights some of the dangers of allowing information rights to be eroded through outsourcing and privatisation.

3. 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?

It makes some limited improvements, but we reiterate that failing to extend the Act is weakening the Act considerably. The proposals about communications with Her Majesty etc. also weaken the Act. This is a wasted opportunity.

Royal exemption

4. 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?

We stated in our consultation response that we agreed with Mr Dunion, then Scottish Information Commissioner, that it is wrong to copy Westminster and use an absolute exemption for this correspondence. This means that perfectly valid requests for information about any Royal

⁴ <http://www.unison-scotland.org.uk/response/UNISONFOIamendmentcotlandBillconsultationResponse20Mar12.pdf>

attempts to influence policy would be blocked, as would requests for correspondence, for example, between governments and the monarchy about the awarding of honours.

We strongly support the very critical comments made by Ms Agnew about this amendment. In particular, she states that information relating to the Royal Family and Royal Household is already “extremely well protected” under FOISA, and that this amendment, if enacted, would

- be “**in direct conflict**” with the public interest
- have the effect of creating Scotland’s “most wide-ranging absolute exemption”
- create a provision which requires “absolute secrecy in relation to any aspect of communications with senior royals in all circumstances – regardless of how far removed the information is from the content of communications, or of the weight of the public interest in favour of release”
- create inconsistency on this between the FOI Act and the EIRs
- be “inconsistent with international good practice principles”

In addition, she points out that the Westminster amendment, which is argued as the reason for this amendment – to provide consistency with the Constitutional Reform and Governance Act 2010 – was not subject to full scrutiny. We urge the Finance Committee to agree with her comment that, in these circumstances, “it is particularly appropriate that Parliament applies careful scrutiny to the rationale underpinning this amendment, while also examining its impact on both FOI principles in Scotland and the information rights of the Scottish public.”

Historical periods

5. In response to the Scottish Government’s consultation on the Bill, concerns were expressed about reducing the time limit period (in certain circumstances) of what constitutes a historical record (Bill section 4). What is your response to the [position of the Scottish Government](#) to these concerns?

We welcome the reduced time limit period for certain circumstances. **If the Scottish Parliament agrees the proposed amendment to section 59 (1), we will respond to the consultation on the draft order about the specifics proposed. We agree it is helpful to have flexibility about different types of records, although the presumption should always be in favour of release (and early release) without compelling reasons not to release the information. We are pleased that the Bill’s Policy Memorandum states (par 27) that the key aim of the order will be “enabling as much information to be placed in the public domain as early as practicably possible.”**

Again, there should be a similar amendment to the EIRs.

Financial aspects

6. The Scottish Government considers the technical changes brought by the Bill will have no financial implications for the Scottish Administration, local authorities, other bodies, individuals or businesses. What is your response to this?

We do not envisage these changes having any significant financial implications. However, the Finance Committee should be concerned about the financial implications in reducing scrutiny of public spending – the effect of continuing to allow FOI rights to be eroded where public services are delivered by private companies and other bodies not covered by FOISA.

7. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

NA.

Conclusion

We urge the Finance Committee to back Ms Agnew’s important - and damning - criticisms of the proposal to create an absolute exemption on the Royal correspondence and to oppose this amendment.

Strengthening and clarifying the 2002 Act is simple. The Scottish Government should use section 5 to ensure FOI rights follow the money and that the public can find out what they need to know about all public services, however they are delivered. The House of Commons Public Accounts Committee’s May 2012 report on ‘Equity investment in privately financed projects’ is just the latest influential report to call for action on FOI in relation to (but on a wider basis than) the controversy around PPP/PFI contracts⁵. **We urge the Finance Committee to recommend that the Scottish Government give an immediate pledge to extend the Act, or, if the Scottish Government fails to do so, to amend the Bill to make this happen.**

We also urge strong support for the recommendation by the Campaign for Freedom of Information in Scotland (in its briefing to MSPs) for a ‘purpose clause’ to be added to FOISA, via an amendment to this Bill. This would 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.

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⁵ The Committee recommended that the “Treasury and Cabinet Office must also reconsider how private companies providing public services, whether or not in the form of PFI, can be bound by the provisions of the Freedom of Information Act.”
<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1846/184602.htm>