



Freedom of Information (Amendment) (Scotland) Bill – Stage 3 Briefing from the Campaign for Freedom of Information in Scotland

Introduction

The Campaign for Freedom of Information in Scotland (CFoIS) believes the Freedom of Information (Amendment) (Scotland) Bill must be amended to protect the public's right to know in Scotland, during Stage 3 on Wednesday 16th January 2013.

CFoIS believes the Freedom of Information (Scotland) Act 2002 (FoISA) must be reformed to ensure a robust framework so the public enjoy an enforceable right to know. A major cause of the weakening of FoISA is that promises to add named bodies and categories of bodies have not been honoured. The Scottish Government has confirmed that the power under FoISA has never been used and "has yet to be an order under section 5 of the Act"¹. CFoIS is hugely disappointed that the Scottish Government has failed to use this power so far, especially as it has already undertaken a formal consultation process in 2010, as required by FoISA. Further evidence of no action on use of S5 is that the Scottish Government is proposing to delay any report to Parliament on the use of the S5 power until October 2015.

Amending the Bill is also necessary to meet the Scottish Government's own FoI principles one and two: that "the public's right to know remains an essential part of an open, democratic government and responsive public services" and FoISA "will be adjusted where it is necessary and sensible to do so".² Public opinion has been sought on the matter by the Office of the Scottish Information Commissioner which commissioned research in 2011 and revealed strong public support for FOI to cover additional organisations: 88% agreeing that trusts providing services on behalf of local authorities, 82% agreeing housing associations, 83% agreeing private sector companies who build and maintain local authority schools or hospitals and 73% agreeing that prisons which are run by the private sector should be covered.³

Consistently the Scottish Government has assured people of its good intentions, its willingness to act and to listen eg the Deputy First Minister said "Even though I am asking the committee to reject amendments this morning—including amendment 8—for specific reasons, I will continue to consider the scope for introducing amendments at stage 3 that try to encapsulate the views of the campaign and the committee where that is possible."⁴ Clearly it has not been possible for the Scottish Government to accept the detailed arguments made by CFoIS so we urge MSPs to:

- Support amendments: 1 – 9, 12 and 14

¹ Stage 1 debate at Scottish Parliament 16th November 2012

² <http://www.scotland.gov.uk/About/Information/FoI/6principles>

³ News Release 16th December 2011 <http://www.itspublicknowledge.info/home/News/20111612.asp>

⁴ Stage 2 debate at Finance Committee of Scottish Parliament 5th December 2012 col 1936

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7581&mode=pdf>

- Oppose amendments: 10 and 11
- No view: amendment 13 which appears to be of a technical nature.

CFoIS also believes this is a human rights issue which requires MSPs to address.

Stage 1 Report

Extending the range of bodies covered by FoISA was a matter raised by a range of organisations in evidence submitted. In the Finance Committee’s Stage 1 report it was acknowledged, for example, “extending FoI coverage to public contracts with arm’s length organisations featured in a number of submissions including the CFIS, South Lanarkshire Council, Consumer Focus Scotland, SCVO, UNISON Scotland and the STUC”⁵. In oral evidence, extension of coverage was raised by CFoIS and the Office of the Scottish Information Commissioner (OSIC). In evidence a report on ALEOs by Audit Scotland was highlighted including that there are over 130 “major” ALEOs’ and that Audit Scotland was not able to identify all ALEOs that operate⁶. We welcomed the opinion of the Committee to ‘note the report from Audit Scotland which identifies around 130 major ALEOs and shares the concerns of witnesses set out above.’⁷

The Finance Committee’s Stage 1 report concluded that “The Committee also invites the Cabinet Secretary to provide details and timings of how the Scottish Government intends to take forward the issue of extension of coverage and clarify what the options are which she is ‘actively considering’, including the possibility of Stage 2 amendments to section 5 of the 2002 Act.”⁸ We regard the current amendments from the Scottish Government are inadequate: the focus must be on maintaining and extending FoISA rights to ‘public’ services that people receive and timescales on using the S5 power must be precise to protect the public’s enforceable right to know.

Transparency Agenda Undermining FoISA Rights?

It is not a competition – the public’s enforceable right to know can be maintained and extended as well as the public sector proactively disclosing more information under the ‘transparency agenda’. Unfortunately it appears that transparency is being used to undermine FoISA rights eg housing associations are still not covered by FoISA (despite promises in 2002) and instead the Scottish Housing Charter is being promoted. The difference power: under FoISA the public can choose what and when it wants information and can appeal to the OSIC if the information is refused: transparency means the power to withhold and to publish, to decide timelines is held by the public sector, including Government.

In the Stage 1 report the Finance Committee set out the issue: “In addition, the Committee notes the evidence from the Bill team about other —means to access information— Extension is sometimes seen as a be-all and end-all, but there are other means of acquiring information from bodies that are not covered, and the wider transparency agenda is intended to cater for that. For example, —The Scottish

⁵ Stage 1 Report of the Finance Committee published 2nd November 2012 Para 57
http://www.scottish.parliament.uk/S4_FinanceCommittee/Reports/fir-12-06w.pdf

⁶ Arm’s-length external organisations (ALEOs): are you getting it right? How councils work: an improvement series for councillors and officers, pub June 2011 pg 3 Para 4, pg 5, pg 6 Para 19

⁷ Stage 1 Report of the Finance Committee published 2nd November 2012 Para 77

⁸ Ibid, Para 93

Social Housing Charter is opening up routes to information. That is not extension; it is another route through which to access information.”⁹ The civil servant then pointed out “The position is clear—the decision will be deferred.”¹⁰ Therefore the Scottish Government has consistently declined to bring forward prompt use of the S5 power.

Human Rights Compliance

The human rights implications of the Bill must be considered by two sets of civil servants: those working for the Scottish Government to ensure compliance with S57 of the Scotland Act 1998; those working for the Scottish Parliament to ensure compliance with S29 of the Scotland Act 1998. However MSPs will not have any detailed information on compliance – just a standard statement.

CFoIS wants FoISA to provide a robust framework so the public can exercise an enforceable right to know. Human rights law is relevant as we have a fundamental human right to form an opinion and in order to do that you have to receive and impart information. The Universal Declaration on Human Rights includes this right:

Article 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The European Convention on Human Rights (ECHR) is described as a ‘living treaty’ as rights evolve over time and are interpreted by decisions of the European Court of Human Rights (ECtHR). One clear example is Article 10 of the ECHR which states:

1. “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. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society...”

According to S6 of the Human Rights Act 1998, all public authorities and those delivering services of a public nature are covered by ECHR eg Housing Associations. As the right to know can be interpreted as a human right, whatever the Scottish Parliament or the Scottish Government decides, people can exercise their human right to access information. That may be more complex but the result could be the same. Simpler just to reform FoISA via this Bill, add the Glasgow Housing Association immediately and require the Scottish Government to promptly use its S5 powers to bring more named bodies and categories of organisations under FoISA.

The following selection of cases and trends are highlighted to enable informed discussion about the Bill’s compliance with ECHR given that it fails to amend FoISA and bring in a range of ALEOs, housing associations and bodies that deliver services of a public nature: *Tarsasag v. Hungary* 2009¹¹, *Kenedi v. Hungary*¹², *Matky v Czech*

⁹ Ibid Para 75

¹⁰ Meeting of the Finance Committee 5th September 2012. Official Report column 1474
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7438&mode=pdf>

¹¹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171#{"itemid":\["001-92171"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171#{"itemid":["001-92171"]})

Republic¹³, Gillberg v Sweden¹⁴, Hadzhiev v. Bulgaria¹⁵ and Guerra and Others v. Italy¹⁶

Amendments – Explaining Our Views

Section 1A

Elaine Murray

1 In section 1A, page 1, line 11, after <persons,> insert—
<() consult members of the public,>

Support: members of the public have a specific role to play in informing the Government's view of which bodies should be covered by FoISA. Currently there is no specific duty to consult with them and to give their opinion due regard. The last formal consultation (2010) on specific bodies to be added, included a draft Order to be laid before the Scottish Parliament, but resulted in no additions to FoISA so it is crucial to ensure that those who want to exercise their FoI rights are listened to as well as those proposed to be obliged to give information under FoISA.

Elaine Murray

2 In section 1A, page 1, line 17, leave out <2016> and insert <2014>

Support Since 2002, when the then Scottish Executive first promised to add in new bodies, there has been a trail of broken promises to bring named bodies such as ACPOs and categories of bodies such as housing associations, under FoISA. Success was achieved at Stage 2 by accepting the principle of a timeline and reporting to Parliament on the use of the S5 power under FoISA but the first one would not happen in this Parliamentary session so the duty would be inherited by the next administration. At Stage 3 the Scottish Government is amending its own amendment and proposing to marginally bring forward to first report to 31st October 2015. Having to wait even until June 2014 seems long enough.

Elaine Murray

3 In section 1A, page 1, line 18, leave out <3> and insert <2>

Support: By requiring Scottish Ministers to report to Parliament every two years on its use of the S5 power under FoISA, at least there will be a duty to regularly consider action rather than ignoring the potential to extend the public's right to know in Scotland. Two years is sensible and proportionate.

Elaine Murray

4 In section 1A, page 1, line 19, at end insert—

<() The first report must either—

(a) explain how the section 5 power has been exercised during the reporting period (and why), or

¹² [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663#{"itemid":\["001-92663"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663#{)

¹³ 19101/03 ECHR 1205 (10 July 2006)

¹⁴ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144#{"itemid":\["001-110144"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144#{)

¹⁵ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{"itemid":\["001-114076"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076#{)

¹⁶ http://www.hrcr.org/safrica/environmental/guerra_italy.html

(b) state that the Scottish Ministers will, within 3 months after the date the first report is laid, lay before the Parliament a draft of a statutory instrument containing an order exercising the section 5 power.>

Support: Reports to Parliament need to be detailed and set out opinion and analysis from Scottish Ministers as well as factual details. This amendment also recognises that after the report there needs to be action hence the timeline of three months to publish a draft statutory instrument. It would be helpful if MSPs could secure a commitment from Scottish Government Ministers that the Scottish Parliament will be asked to vote for the statutory instrument promptly.

Elaine Murray

5 In section 1A, page 1, line 20, leave out <A> and insert <Each subsequent>

Support: Provides clarity as sets out content in each report after the first one.

Before section 1A

Elaine Murray

6 Before section 1A, insert—

<Scottish public authorities

In section 3 (Scottish public authorities) of the FOI Act, after subsection (1) there is inserted—

“(1A) Subsection (1B) applies where, after the date on which this subsection comes into force, a Scottish public authority makes arrangements for another person (other than another Scottish public authority) to exercise any function of the authority or provide any service whose provision is a function of the authority.

(1B) That person is a Scottish public authority, but only in respect of information relating to the exercise of the function or, as the case may be, provision of the service covered by the arrangements.

(1C) In subsection (1A), “arrangements” includes—

- (a) the establishment of a body for the purpose of exercising any function of the authority or providing any service whose provision is a function of the authority,
- (b) contractual arrangements, but only where the total sum to be paid by the authority under the contract exceeds £1 million.”

Support: Provides legal protection to maintain the public’s right to know. Ensures that the public does not lose its right to access information if a public body chooses a different mechanism to deliver a public service. This is consistent with the original intention of FoISA as its long title states that the act makes provision for “the disclosure of information held by Scottish public authorities or by persons providing services for them”. The amendment provides protection for the provider of the service as only information relating to the exercise of the function or provision of the service is covered.

Elaine Murray

7 Before section 1A, insert—

<Information relating to functions of an authority

In section 3 (Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) Subsection (2B) applies where, after the date on which this subsection comes into force, a Scottish public authority makes arrangements for another person (other than another Scottish public authority) to exercise any function of the authority or provide any service whose provision is a function of the authority.

(2B) Information relating to the exercise of the function or, as the case may be, provision of the service covered by the arrangements, and created by or in the possession of—

(a) the person with whom the arrangements are made, or
(b) any other person sub-contracted to provide the service or exercise the function or any part of it on behalf of the person, is, for the purposes of subsection (2)(b), information held on behalf of the authority.

(2C) The arrangements must include provision to ensure the timely provision to the authority of information within the meaning of subsection (2B) where the authority receives a request for the information under section 1(1) of this Act.

(2D) In subsection (2A), “arrangements” includes—

(a) the establishment of a body for the purpose of exercising any function of the authority or providing any service whose provision is a function of the authority,
(b) contractual arrangements, but only where the total sum to be paid by the authority under the contract exceeds £1 million.”.

Support: Places a duty on contractors to provide public bodies with the information they need to answer FoISA requesters. This is in keeping with the long title of FoISA that the act makes provision for “the disclosure of information held by Scottish public authorities or by persons providing services for them”.

Section 1A

Elaine Murray

8 In section 1A, page 1, line 5, at end insert—

<() In section 5 (further power to designate Scottish public authorities) of the FOI Act, after subsection (2) there is inserted—

“(2A) In considering how to exercise the power under subsection (1) the Scottish Ministers must have particular regard to the desirability of providing access to information held by—

(a) any body that has been established by a Scottish public authority to exercise any functions or provide services on its behalf which is not a Scottish public authority within the meaning of section 3(1), and

(b) any person within the meaning of subsection (2)(b) where the total sum to be paid by the authority under the contract exceeds £1 million.”>

Support: This amendment is designed to ensure that arm’s-length external organisation (ALEO) are not used as a vehicle to deprive the public of their enforceable right to access information. ALEOs is a general term used to describe a range of bodies that have been set up by public bodies eg councils and health boards to deliver a wide range of activities such as leisure services, economic development and property maintenance. Although separate from eg the local authority, each is subject to local authority control or influence.

An Audit Scotland report acknowledges “ALEOs by their nature are one step removed from council control and, as a result, governance and financial arrangements can be complex. There is a risk service users and citizens have less

input and influence over how services are provided.”¹⁷ The report points out that “The principles of openness, integrity and accountability that councils observe apply equally when services are delivered through ALEOs.”¹⁸ Audit Scotland has admitted that it does not know how many ALEOs exist and what they spend and it has chosen not to find out due to “the time and cost to councils and to us” but acknowledges there are “around 130 major ALEOS in total”.¹⁹

Before section 1A

Michael McMahon

9 Before section 1A, insert—

<Purposes of FOI Act

Before section 1 of the FOI Act there is inserted—

“A1 Purposes

The purposes of this Act are, consistent with the Scottish Parliament’s founding principles of openness, accessibility and accountability—

(a) to increase progressively the availability of information held by Scottish public authorities in order—

(i) to enable more effective public participation in the making and administration of laws and policies,

(ii) to promote the accountability of Scottish public authorities, and

(iii) to facilitate the informed discussion of public affairs,

and, in doing so, enhance respect for the law and promote good government, and

(b) to provide an enforceable right of access to information held by Scottish public authorities or persons providing services for them in accordance with the principle that information should be available to any person requesting it.”.>

Support: The most important element of the amendment is "to increase progressively the availability of information held by Scottish public authorities" as that has not happened eg public authorities creating ALEOS that operate outwith FoISA. An added complication is the recent Scottish Government's attention to the 'transparency agenda' whereby the public sector decides what information it releases and when eg in respect of housing and housing associations with the Scottish Housing Charter. Instead the focus should be on extending FoISA rights so individuals and groups can decide when to use their enforceable right to access information.

During Stage 2 the DFM made a very useful statement about why she rejected the purpose clause amendment: "Adding such a clause in that manner would be unpredictable, because it could lead to the act being interpreted in a very different manner from the one in which Parliament originally intended it to be interpreted."²⁰

¹⁷ Arm’s-length external organisations (ALEOs): are you getting it right? How councils work: an improvement series for councillors and officers, pub June 2011 pg 3 Para 4

¹⁸ Ibid pg 5

¹⁹ Ibid pg 6 para 19

²⁰ Meeting of Finance Committee on 5th December 2012, Stage 2, Official Report col 1937 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7581&mode=pdf>

That is precisely why CFoIS wants to insert a purpose clause as already FoISA is not delivering what MSPs intended eg creation of ALEOs which operate outwith FoISA despite the fact that they deliver services 'on behalf of public authorities'.

Ten years after FoISA was passed and eight years since it became operational, current MSPs and the Scottish Government need to explicitly state that they support and will uphold the public exercising an enforceable right to access information. That right needs to apply to those services that we, the public, receive eg bodies delivering public services and services of a public nature. CFoIS wants MSPs to stand up for the public's enforceable right to know – on the record!

Section 1A

Nicola Sturgeon

10 In section 1A, page 1, line 17, leave out <30 June 2016> and insert <31 October 2015>

Oppose: This is an amendment to the amendment already proposed by the Scottish Government and is a very disappointing. Its effect is to ensure that the current administration is not required to produce a report until six months before the elections to the Scottish Parliament in May 2016. The current administration have been in office since May 2007 and could have exercised the S5 power at any time eg to add trusts providing services on behalf of local authorities ,housing associations, private sector companies who build and maintain local authority schools or hospitals and the prison run by the private sector.

Nicola Sturgeon

11 In section 1A, page 2, line 13, leave out <at least 3 years preceding> and insert <time from the date on which section 1A of the Freedom of Information (Amendment) (Scotland) Act 2013 comes into force until>

Oppose: The first report on the use of S5 power needs to be detailed and explain what has happened since 2002. To remove eleven years of detail from the report means that it will be incomplete and fail to provide proper context.

After section 3

Paul Martin

12 After section 3, insert—

<Functions of Commissioner

In section 43 (general functions of Commissioner) of the FOI Act, after subsection (3) there is inserted—

“(3A) The Commissioner must prepare, publish and update as necessary a list comprising those persons or bodies who are Scottish public authorities within the meaning of section 3(1).”.>

Support: This is helpful as the public can check which bodies are covered by FoISA and will assist in identifying gaps that need to be closed by use of the S5 power.

Section 4

Nicola Sturgeon

13 In section 4, page 3, line 1, leave out <rule> and insert <enactment>

No view as this appears a technical amendment

After section 1A

Iain Gray

14 After section 1A, insert—

<Scottish public authorities

In schedule 1 (Scottish public authorities) of the FOI Act, after paragraph 66 there is inserted—

“The Glasgow Housing Association Ltd.”.>

Support: In 2010, the Scottish Government consulted on whether to use the S5 power to add in new bodies including the Glasgow Housing Association. There was and is a lot of support for this addition to FoISA but nothing has happened. By adding the GHA directly into Schedule 1, there is no need to lay an order under S5 so this is a neat route to address an established omission.

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