



# **Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002**

**The UNISON Scotland response to the Scottish  
Government Consultation on Extending the Freedom  
of Information (Scotland) Act 2002**

**November 2010**

## **Executive Summary**

- **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 of the Freedom of Information (Scotland) Act 2002 to bring a range of organisations delivering public services into the definition of public bodies for the purposes of FOI is long overdue.**
- **We welcome these proposals for extending the coverage of the Act as an important first step.**
- **However, the list of organisations to be covered does not go far enough, has arbitrary financial value and length of contract limits, and creates new anomalies, e.g. it does not cover all PFI/PPP contracts and covers Glasgow Housing Association but not other Registered Social Landlords.**
- **We urge the Scottish Government to extend coverage to all the listed organisations, specifying that this includes any catering/cleaning parts of relevant PFI/PPP schools and hospital contracts.**
- **People's right to information on their services should not be defined and restricted by the length and value of the contract.**
- **We welcome the conclusion that the cost of providing information would not be a significant 'burden' to the newly designated bodies and that it is commonly accepted that increased transparency is a key part of working in and with the public sector.**

## Introduction

This paper constitutes UNISON Scotland's response to the Scottish Government Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002. (hereafter referred to as the Act)

UNISON Scotland welcomes the opportunity to respond to this consultation. UNISON is Scotland's largest public service trade union, representing more than 160,000 members working largely in the public sector in Scotland.

This response should be read in conjunction with our response in January 2009 to the Scottish Government Discussion Paper on extending the coverage of the Act.<sup>1</sup>

## Background

UNISON campaigned with many others in Scotland for the Act, believing that strong Freedom of Information (FOI) legislation is essential in any democracy. We pointed out in our Jan 2009 response that the Act was based on the principle that **the public should be able to access information about the public services they use and about public and political decisions that affect them. This information should be available, whatever type of body holds the information or provides the service. Where this occurs, the body concerned should be covered by the Act.**

This principle should be used to extend coverage to all relevant bodies that provide such services, in relation to the provision of those services. There has been increasing change to the way public services are delivered and the FOI regime needs to reflect that. We therefore welcome the proposals in this consultation as an important first step in using Section 5 of the Act to bring a range of organisations delivering public services into the definition of public bodies for the purposes of FOI.

We noted too that, in 2002, Jim Wallace, the then Minister for Justice, gave a commitment at stage 3 of the introduction of the legislation that the government would use Section 5 to bring into coverage appropriate bodies not covered by the existing definitions of public bodies. He said:

*"Many bodies outside the public sector deliver important public services. There should be no doubt about ministers' commitment to using the powers in the bill to catch those bodies."*<sup>2</sup>

UNISON believes the use of Section 5 is long overdue and largely welcomes these proposals for extending the coverage of the Act, while calling for further extension.

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<sup>1</sup> [http://www.unison-scotland.org.uk/response/Jan2009\\_response\\_ExtendingCoverageofFOIAct2002.pdf](http://www.unison-scotland.org.uk/response/Jan2009_response_ExtendingCoverageofFOIAct2002.pdf)

<sup>2</sup> Jim Wallace, MSP, Minister for Justice. FOI (Scotland) Bill: Stage 3 Debate, Scottish Parliament, Wed 24 April 2002. <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-02/sor0424-02.htm>

## Following the public pound

In supporting the proposed candidates for designation under Section 5, we endorse the statement made by Scottish Information Commissioner Kevin Dunion in July 2010. These build on earlier comments he has made about the need for FOI to “follow the public pound.” Welcoming the consultation proposals, he said:

*“At a time when economic circumstances may affect the quality of health, education and leisure services, the public will undoubtedly have questions about spending decisions and performance. The scope of bodies covered by freedom of information laws needs to keep pace with the changing landscape of public spending and so I generally welcome the proposals being made by the Government.”<sup>3</sup>*

UNISON Scotland believes it is appropriate to include all the bodies listed in the Consultation in the proposed amending Order. We particularly welcome the inclusion of private companies building and maintaining schools and hospitals. It is widely recognised that there has been too much secrecy with PFI/PPP contracts.

However, we believe this list does not go far enough and creates new anomalies, while supposedly trying to correct anomalies - such as including Glasgow Housing Association, but not other Registered Social Landlords. The criteria over length and value of contract to trigger coverage also seem arbitrary.

UNISON Scotland would extend coverage to all bodies receiving taxpayers’ money to provide public services. They should be subject to the same scrutiny and accountability checks about those services as public sector bodies. Small GP surgeries comply with FOI legislation, so any other bodies providing public services should also be deemed to be capable of complying and should be covered under the Act.

We recognise that the decision at the end of this Consultation will be whether or not to proceed with extending coverage to the organisations listed and will not look at this stage at the inclusion of other bodies. We are pleased, therefore, that the Scottish Government has said it would keep under review which bodies might be considered for inclusion in subsequent orders. We would support the further use of Section 5 as soon as possible to extend coverage to more bodies. Our comments on Sections A-G below will make brief reference to those bodies.

## Extension of coverage

The Consultation paper provides a number of factors on pp4-5 that it has considered in determining which bodies are candidates for designation and the appropriateness of extending coverage.

UNISON has concerns about these and made detailed comment about such criteria in our Jan 2009 response, including that **people’s right to information on their services should not be defined and restricted by the length and value of the contract**. The financial and contract length limits used here are arbitrary, e.g. £100,000 per annum for leisure trusts but roads contracts are £90m and 30 yrs length.

We will limit our comments here to warning that the attempt to assess whether a body is providing a ‘core function’ of the state, involved in “significant work of a

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<sup>3</sup> [http://www.itspublicknowledge.info/home/News/20100729\\_1.asp](http://www.itspublicknowledge.info/home/News/20100729_1.asp)

public nature”, e.g. “front line services in respect of education, health, transport etc.” creates further anomalies and could lead to endless legal argument. FOI legislation should cover ALL parts of the public services and there is an implication in some of the Government’s comments on this that, for example, they do not see cleaning and catering services in schools and hospitals as front line or core. That is absolute nonsense when we consider things like infection control in hospitals or the health of our children and public health action on obesity etc.

Clarity is needed here or there is the risk of legal nitpicking. The Consultation wording says that contractors who “build and maintain” hospitals and those who “build and/or maintain schools” are being considered for coverage. In the draft Order, the definitions of services to be covered are:

- Provision of hospital accommodation or other premises (including maintenance of such accommodation or premises) or the control and management of such accommodation or premises
- Building, altering or improving or maintaining accommodation for schools or other establishments

We are not clear whether this is an attempt to specifically rule out cleaning/catering and anything other than ‘building and maintenance’, although the ‘control and management’ with regard to hospital accommodation could perhaps include cleaning services.

While these class-based descriptions rightly will include more traditional contracts as well as PFI/PPP contracts, we think there should be clarification that, at least in the PFI/PPP cases, all parts of these complex contracts are included, such as cleaning/catering etc. where relevant. The intention is surely not to have cases, for example, of a PFI Special Purpose Vehicle/principle contractor that will answer questions from the public on the building of a hospital but not on the cleaning of that hospital or the meals provided to patients even though that contractor is responsible for the cleaning/catering?

We note with concern in this regard the fact that in the Scottish Government’s December 2009 Summary Report and Conclusions<sup>4</sup>, which analysed responses to the Discussion Paper it is stated that: *“we will keep under review the possibility of extending coverage in the future to other types of contractor, in particular those who provide services such as cleaning or catering services for schools and hospitals.”*

Is that there because so many responses pointed out the anomaly around ‘core’ services? Yet it was not mentioned in Ministerial announcements. We believe that when the announcements were made in Dec 2009 and at the launch of this Consultation, the impression given was that PFI/PPP contracts would be covered in their entirety, including cleaning/catering/other relevant services, where these are part of the contract. There was certainly no suggestion that only parts might be covered. Hopefully this is not the Scottish Government’s intention. They will have noted that the Scottish Information Commissioner in his January 2009 Response to the Discussion Paper<sup>5</sup> said:

*“...it is proposed that designation should occur only where bodies are involved in significant work of a public nature e.g. the provision of frontline services in respect*

<sup>4</sup> <http://www.scotland.gov.uk/Resource/Doc/43830/0091275.pdf>

<sup>5</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3003&sID=377>

*of education, health, transport etc. These are described as providing the 'core function' of the state. My concern here is that activities which are integral to the operation of a public service, and which contribute to meeting Government targets, may be regarded as 'non-core' or 'non-front-line' under this definition – even though significant public funds are being spent and public accountability is deserved. For instance, it is suggested that building, maintenance, cleaning etc. would not qualify as core functions or 'frontline' services. Yet these activities are integral to the delivery of health, education, transport etc; involve substantial sums of public money; and have a major impact on Government targets, such as sustainability; energy efficiency; infection control etc., which are also matters that concern the public.”*

On pp5-6 we note the instances cited, where other relevant legislation may be applicable. In particular, as a strong campaigner for action on climate change, UNISON Scotland welcomes the fact that bodies designated under Section 5 will be subject to the public bodies duties under the world-leading Climate Change (Scotland) Act 2009. It is important that the public sector leads by example in delivering emissions reductions and action on adaptation and sustainability. Public services should be subject to these duties, regardless of the type of body delivering them.

## **Organisations considered for coverage**

The Consultation paper lists the following organisations or classes of organisations in Sections A to G. We provide comment on each. We also want to record here our dismay that the Scottish Government did not opt to have all PFI/PPP contracts included. There are some significant omissions, including the Scottish Water PFI contracts.

NB: A request for any comments about the partial Business and Regulatory Impact Assessment is included in each Consultation paper section. Rather than repeat our comments about it through these, we have mainly included them all together, after Section G, as they are general and applicable to several if not all sections.

### **Section A: Contractors who run privately managed prisons and provide prisoner escort services**

We agree that of course private prisons and prisoner escort services are public services. These should be covered. We and others have had difficulties obtaining full answers to FOI requests to the Scottish Prison Service about these controversial PFI contracts. We welcome the point made in the Consultation that any degree of cooperation between contractor and public body is no substitute for a uniform right of access to information. There should be an equal right of access to information about all prisons in Scotland, whether public or private.

### **Section B: Contractors who build and/or maintain schools**

UNISON Scotland has had major concerns for many years about the poor value for public money of PFI/PPP contracts for prison, schools and hospitals. It is essential that the provision of these integral parts of the public sector is covered by the Act, so that people can scrutinise how the services are being delivered. We welcome the Scottish Government's comment in the Consultation that increased openness is an accepted part of doing business with the public sector, and ensures there is parity with services delivered through the public sector. We do not agree that there should be financial thresholds for schools or other contracts. The public may

well have legitimate interest in receiving information held by the relevant body, whatever the value or length of the contract. We approve of using a class based description, as demonstrated in the draft Order.

UNISON highlighted in our Jan 2009 response to the Discussion Paper that extension should cover all aspects of the public service and should not, for example, exclude cleaning or laundry for the spurious reasoning that these are not 'core functions'. As noted above, we have concerns about the reference on p5 to "significant work of a public nature e.g. the provision of front line services in respect of education, health, transport etc;". This must not be used to exclude vital services such as cleaning or catering in schools/ hospitals/prisons. These are part of the core functions of the public body.

### **Section C: Contractors who build and maintain hospitals**

The same arguments apply as for schools and prisons. We believe this should be extended to also cover other health facilities such as health centres, which may not currently be covered, to ensure the public has equal access to information about such facilities. It is worth noting, for example, that there are plans to provide many new Scottish health and other facilities through hub schemes using the private sector, schemes similar to the Local Improvement Finance Trust (LIFT) PFI schemes in England.

### **Section D: Leisure, sport and cultural trusts and bodies established by local authorities**

We welcome the inclusion of this category of organisations as more than 60% of Scotland's population are in areas where leisure services are provided in this way, depriving them of FoI rights (except for certain anomalies such as Glasgow Life – Culture and Sport Glasgow – set up as a wholly publicly owned company for the purposes of the Act).

However, to include only leisure, sport and cultural trusts excludes some significant other bodies set up by councils to deliver public services. We believe that any body set up by one or more public authorities to deliver public services should be covered by the Act. We would have supported as a first step, as part of this first use of Section 5, the proposal on local authority trusts or bodies made by the Scottish Information Commissioner in his January 2009 response to the Discussion Paper. He noted that leisure trusts comprise about 30% of the total number of organisations he proposes extending the Act to cover. Mr Dunion suggested that Scottish Ministers should designate the bodies "which are reported in the Group Accounts of local authorities, in which they have a material interest, and which are not currently subject to the Act." The Scottish Government says on p19 of the Consultation that there is a strong argument that "for reasons of principle and equity", coverage should be extended to leisure trusts. Our case is that the principle and equity arguments applies across the board to all bodies providing public services and that Ministers should now be working towards providing that equity. Indeed, the Scottish Government notes in its Summary Report and Conclusions, on responses to the Discussion Paper, that there was strong support for local authority trusts and bodies to be covered by the Act, particularly from local authorities themselves.

## **Section E: Glasgow Housing Association**

We support the designation of GHA, bringing the Act into the area of Registered Social Landlords, which clearly do provide public services. However, in doing this just for GHA, Ministers would be creating further anomalies, including that there is no proposal to extend coverage to Local Housing Organisations considering second stage transfers from GHA (nor those that have already transferred). Where is the equity here? The Scottish Information Commissioner in his Jan 2009 response specifically said that in cases of secondary transfer such as GHA, “designation should continue after the transfer to prevent a loss of rights under the Act.” Given that GHA publicly states it operates within the spirit of the Act, we do not see why it should object to being designated. We note there has been concern from RSLs about potential ‘burdens’, but we support the arguments made by Mr Dunion in favour of designating all RSLs. He has also pointed out to the Scottish Government that in June 2009 the English Court of Appeal found that an RSL was subject to the Human Rights Act (the HRA), “finding that its role in allocating, managing and terminating social housing was a public function to which the HRA applied.” (A decision later upheld by the UK Supreme Court.) Mr Dunion said this strengthens the case for extending the Act to cover RSLs. We note that the partial Business and Regulatory Impact Assessment states that GHA handled 12-18 requests each year in the last 3 years. This cannot be said to be burdensome.

## **Section F: The Association of Chief Police Officers in Scotland (ACPOS)**

UNISON welcomes the inclusion of ACPOS. However, we believe other similar bodies with key strategic and advisory roles should also be covered, e.g. the Law Society, the Faculty of Advocates and the Convention of Scottish Local Authorities. CoSLA, comprised of bodies covered under the Act, plays a crucial role in public services. It has also set up the Improvement Service – staffed by secondments from local authorities. This is another anomaly. The Scottish Government must do more to identify a comprehensive list of bodies such as these which should be covered.

## **Section G: Contractors who build, manage and maintain trunk roads under private finance contracts**

While we again support the inclusion of these three privately financed contracts, we are concerned at the arbitrary decision to limit this to only contracts over £90m in value and 30 years in duration. This excludes many important contracts, (including the A92 PFI contract and most of Scotland’s trunk road network maintenance) and is far too high a threshold. An example of a smaller contract that clearly should be covered is the Traffic Scotland Operator Service, worth almost £4m, which includes CCTV cameras, speed signage and traffic signals. We repeat again that people’s right to information on their services should not be defined and restricted by the length and value of the contract.

## **The Partial Business and Regulatory Impact Assessment**

This assessment makes some excellent points. It highlights that most equivalent European legislation outside Scotland already applies to private bodies performing public functions. Clearly those countries do not see this as a ‘burden’

and we reject any suggestion that openness and transparency about public services should be seen as burdensome. The partial BaRIA states that it is commonly accepted that increased transparency is a key part of working in and with the public sector. It also notes that good records management, which is key to effective request handling, is an essential business practice.

UNISON disagrees with the comment on the Discussion Paper responses that there was not clear evidence that there was difficulty in obtaining information from these bodies, given that the examples cited in the Scottish Government report were that RSLs and contractors (both groups objecting to being included) stated that much information is already available or can be obtained from the contracting public authority. UNISON and others have had difficulties obtaining information about services delivered by RSLs, PFI/PPP contractors, leisure trusts etc.

We reject Options 1-3 and support Option 4: Making one or a series of section 5 Orders. We also reject the suggestion in 4.16 on p38 that the uncertainty around the scale and number of requests may undermine investor and shareholder confidence. The private sector regularly warns, with no evidence, of dire financial consequences from anything it opposes, such as the National Minimum Wage, which did not lead to the problems predicted by businesses. We do not believe that it should be part of Ministers' concerns to worry, as noted in the same paragraph, that the "release of the information under FOI may not always be compatible with shareholder's best interests, for example." Some politicians may feel that the release of some information, e.g. about Parliamentary expenses, has not been in their best interests, but the public certainly feels that the right to know should be about the public interest and not concerned with preventing political or business 'embarrassment' or exposure of practice that makes them look bad. The Scottish Information Commissioner's Annual Public Awareness Research found again in 2009 that the public strongly favours extending the Act to cover the bodies listed in the Consultation. A total of 81% back the inclusion of private companies contracted to build/maintain NHS hospitals and 77% support the inclusion of companies contracted to build/maintain schools, both figures up on the previous year.<sup>6</sup>

We welcome the conclusion in 4.19, p39, that figures to date suggest "in the long term request handling will not have significant cost implications for most of the bodies proposed to be covered."

## **Conclusion**

The decision about how to proceed on extending coverage should fundamentally be about the public interest, not the interests of private contractors and others. There clearly is no great 'burden' in being brought into the coverage of the Act. The Scottish Information Commissioner said in Dec 2009:

*"There is no evidence of any material damage to commercial interests or public procurement from FOI disclosures in Scotland over the past 5 years."*<sup>7</sup>

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<sup>6</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3429&sID=3763>

<sup>7</sup> <http://www.itspublicknowledge.info/home/News/20091208.asp>

UNISON would argue that politicians ought to be putting the public interest before the interests of those who prefer not to be accountable. Perhaps it is the measure of a government whether it does that. To his credit, former Prime Minister Tony Blair's government did introduce the UK FOI legislation (though with delays). However, his recent memoir, showed him berating himself for it in hindsight.<sup>8</sup> If someone who fought for FOI on principle in opposition can so quickly be 'corrupted' by power enough to now unashamedly say he regrets it, his case demonstrates strongly the need for decisions to be taken on the principles, without allowing vested interests to weaken or block the proposals in this Consultation.

We urge the Scottish Government to strengthen Scotland's Act by extending the coverage to all the listed organisations, **specifying that this includes any catering/cleaning/similar parts of relevant PFI/PPP schools and hospital contracts**. This should be done before the Scottish Parliament elections in 2011, hopefully with the unanimous support of all MSPs. The public right to know in Scotland should be paramount, particularly at a time of major upheaval due to massive public spending cuts. This is a test of the Scottish Government's professed commitment to FOI. The use of Section 5 is long overdue and must not be delayed any further.

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<sup>8</sup> "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it." *Tony Blair, A Journey, Hutchinson, September 2010.*