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Public Petitions Committee
The Scottish Parliament
Edinburgh
EH99 1SP



2 November 2015

Dear Mr Nairn

PE1539 – HOUSING ASSOCIATIONS TO COME UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (FOISA)

Thank you for your letter of 17 July in respect of petition PE1539 calling for the Scottish Government to make an order under section 5 of FOISA to housing associations.

As you will be aware, the Scottish Government consulted earlier this year on further extending coverage of FOISA to a range of organisations undertaking a variety of what we consider to be 'public functions'.

As part of the consultation, proposals were welcomed in respect of other organisations or types of body which should be considered in future for inclusion. In particular, housing associations, their tenants, and representative bodies were encouraged to provide their views.

Approximately half the responses made reference to extending coverage to housing associations. We anticipate formally responding to the consultation towards the end of the year – and will write to you again when this is available.

As you will also be aware, under the terms of the Freedom of Information (Scotland) Act 2002 (as amended) the Scottish Ministers are required to lay a report every two years 'about the exercise of the section 5 power'. The Committee noted in its letter that it would like to see this report.

The first report has now been laid (a copy accompanies this letter) and acknowledges the interest in extending coverage of FOISA to housing associations. Given this, and as stated in the report, we consider that review of the Scottish Social Housing Charter provides the opportune time to formally consult the sector with a view to extending the Act in tandem with complementary changes to the Charter.



I hope you find this update of interest.

Yours sincerely

Andrew Gunn
Freedom of Information Unit
Scottish Government

**Scottish Government Report on the use of the Section 5
power under the Freedom of Information (Scotland) Act
2002 (as amended)**

Laid before the Scottish Parliament by the Scottish Ministers under section 7A
of the Freedom of Information (Scotland) Act 2002 (as amended)

October 2015

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Purpose

Under the terms of the Freedom of Information (Scotland) Act 2002 (as amended) the Scottish Ministers are required to lay a report before the Scottish Parliament every two years about the exercise of the 'section 5 order-making' power. This is the first of these reports.

The section 5 order-making power

Section 5 of the Freedom of Information (Scotland) Act 2002 ('the Act') provides the Scottish Government with the power to designate as a Scottish public authority any organisation which:

- "appears to the Scottish Ministers to exercise functions of a public nature; or
- provides, under a contract made with a Scottish public authority, any service whose provision is a function of the authority."

One order has been made during the current reporting period (which covers 31 May 2013 to the date of this report).

Scotland's first order in terms of section 5 of the Act brought within scope of Scotland's freedom of information legislation any body:

- established or created solely by one or more local authorities;
- whose functions on behalf of any of those authorities include developing and/or delivering recreational, sporting, cultural or social facilities and activities; and
- which in carrying out those functions is financed wholly or in part by any of those authorities.

The order came into effect on 1 April 2014.

Objective of the order

The order extended freedom of information legislation to increase transparency and accountability among certain culture, sport and leisure trusts.

Increasingly, the provision of leisure, sporting and cultural services has been outsourced by local authorities to arms-length organisations. In so doing, there has sometimes been a loss of access to information rights because individuals and organisations previously had a right to request information from the relevant local authority in relation to a service, but may no longer have that right once the service has been outsourced.

Designating these bodies as Scottish public authorities for the purposes of the Act also removes the anomalous situation whereby some bodies providing similar services, but which were wholly-owned by a local authority/ies, were already subject

to freedom of information legislation by means of section 6 of the Act (which covers 'publicly-owned companies').

Those bodies brought within scope of the Act are considered to be undertaking 'functions of a public nature', for example, they receive considerable public funding to undertake functions underpinned by statute and which are widely recognised as being for the collective good.

Consultation

The Scottish Government has recently concluded a consultation on a further section 5 order. The consultation proposed extending the Act to:

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

Separately, the Scottish Government also consulted Scottish Health Innovations Limited on bringing them within the scope of the Act.

The consultation concluded on 4 September 2015 and we anticipate formally responding to the consultation and laying a further section 5 order towards the end of the year.

Promoting openness and transparency

Also in accordance with the revised legislation, we would wish to take the opportunity provided by this report to highlight wider aspects of the Scottish Government's approach to promoting openness.

As noted in the [Scottish Government FOI Policy Statement](#) the Scottish Government is accountable to the people of Scotland, and their representatives, for all that it does on their behalf. A cornerstone of that accountability is the Government's commitment to being open and transparent across all of its activities.

6 Principles of Freedom of Information

More specifically, the Scottish Government's approach to freedom of information is set out in its [Six Principles of Freedom of Information](#) dating from 2007 (see also Annex).

In brief, the Principles emphasise the importance of freedom of information as an essential part of open democratic government. They also confirm the Government's commitment to the principles of the legislation and that it seeks to encourage behaviour that is open, transparent and increases public participation.

The Principles also commit the Government to adjusting the regime where it is necessary and sensible to do so – and to publish information proactively wherever possible.

Updating Schedule 1 of the Freedom of Information (Scotland) Act 2002

Schedule 1 of the Act identifies all Scottish public authorities subject to freedom of information legislation. In the almost 11 years since the Act came into effect numerous changes - currently over 100 - have been made to the Schedule as new authorities have been added and defunct authorities removed.

These changes – along with the exercise of the section 5 power – ensure that coverage of the Act remains up-to-date reflecting the evolving nature of Scotland's public sector landscape. It is therefore not the case that rights to access information are widely being 'lost' as some campaigners have suggested.

Schedule 1 can be revised by primary legislation or it can also be amended by means of an order under section 4 of the Act – which can add, remove, or amend entries. Three such orders have been made so far. The most recent was earlier this year which brought within scope of the Act bodies including the new health and social care Integration Joint Boards.

Information on coverage of the Act – including an up-to-date Schedule 1 – can be found on the [Scottish Information Commissioner's website](#).

Other Key Legislation

In addition to the Freedom of Information (Scotland) Act 2002, openness and transparency obligations are central to many other recent Acts of the Scottish Parliament (as well as forming part of various orders, codes and regulations, etc.). These include:

Public Services Reform (Scotland) Act 2010

This contains duties for public authorities to provide information on certain expenditure. As soon as is reasonably practicable after the end of each financial year listed public bodies must publish a statement of any expenditure on:

- public relations
- overseas travel
- hospitality and entertainment
- external consultancy

In addition, public bodies must publish a statement about expenditure in excess of £25,000 and one specifying the number of employees receiving remuneration in excess of £150,000 per year.

Housing (Scotland) Act 2010

This requires the Scottish Government to publish a [Scottish Social Housing Charter](#) setting out what social landlords should aim to achieve (outcomes and standards) in performing housing activities. The Charter came into effect on 1 April 2012 and is due for review next year, ahead of renewal.

The Charter, which applies to all social landlords, requires landlords to communicate effectively with their tenants providing information about their decision-making and services, and to also ensure that tenants find it easy to participate and influence their landlord's decisions.

Procurement Reform (Scotland) Act 2014

This requires the Scottish Ministers to establish and maintain a website - [Public Contracts Scotland](#) - for the purpose of publicising, in relation to regulated procurements:

- the seeking of offers, and
- the award of contracts

Via the website a contracting authority must publicise its intention to seek offers and publicise the award of a contract. It also provides a specific process for allowing tenderers to seek more information outwith FOI legislation once a tender process is concluded. In addition, contracting authorities with an annual regulated procurement spend of £5 million or greater are required to prepare and publish a procurement strategy and annual procurement reports. The Act also requires Scottish Ministers to prepare an annual report on procurement activity in Scotland.

Scottish Information Commissioner's Special Report: [*Fol 10 years on: Are the right organisations covered?*](#)

In January, the Scottish Information Commissioner published a report which reflected on the first 10 years on freedom of information legislation being in force in Scotland.

The Commissioner's report is intended to promote debate around the issue of 'designation' and specifically focuses on designation in terms of section 5 of the Act. We welcome her contribution to this debate.

Factor-based approach to extending coverage

Key to designation is defining what are 'functions of a public nature' as bodies performing functions of a public nature can be brought within scope of the Act – at least in terms of those functions.

In not defining 'functions of a public nature', the legislation potentially allows for a broad interpretation of what functions, and therefore what kind of organisations, might be brought within scope of the Act. The intention behind a factor-based approach is to provide a degree of clarity to the process of determining which functions – and organisations - should be proposed for inclusion.

The Commissioner proposes a 'factor-based' approach in determining if a particular function is of a public nature. The Scottish Government agrees with the principle of a factor-based approach to designation and has previously identified a number of general criteria considered helpful in defining 'public function'.

These include:

- the extent to which the 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.

We would also assess these criteria against more practical considerations:

- the extent to which the body is providing a 'core function' of the state and whether it is involved in significant work of a public nature e.g. the provision of front line services in respect of education, health, policing, etc.;
- with regard to contractors, the length and value of the contract. It would be impractical and disproportionate to cover bodies holding short-term or low-value contracts;
- whether the public have lost rights to access information under the Act as a result of changes in how public services are now delivered, for example, through the use of particular delivery vehicles.
- the burden of coverage - improved openness comes at a cost and so any extension of coverage needs to be measured and proportionate.

We are of the opinion that much of this earlier discussion remains relevant, though clearly, not all factors will apply in all cases. We also note that the Commissioner, in setting out her own factors explicitly draws on those previously adopted by the Scottish Government.

However, while some of those factors set out by the Commissioner are relatively clearly defined, others are more subjective in judgement. We would agree that an organisation authorised by the state to exercise the regulatory or coercive powers of the state should be both subject to the Act and reasonably straightforward to identify. Equally, the underpinning by statute of a particular function of an organisation will be seen as demonstrating with some certainty that the function is likely to be accepted as being of a public nature.

We would also agree that factors such as the extent of public funding and state regulation as well as the state's involvement in the appointment process could assist in an assessment as to the appropriateness of designation. Even so, considerable subjectivity remains in determining whether coverage is appropriate. For example, we would not necessarily always equate public funding with the service provided being a public function. Equally, we would expect all businesses to be covered by regulation in some form. Therefore, given the breadth of functions that are subject to some form of state regulation, supervision or inspection the scope of functions covered is potentially very broad and we would not anticipate that all would be appropriate for designation.

We would also suggest that the understanding of what constitutes a public rather than a private function – and therefore the kind of organisation expected to provide the service - evolves over a period of time and is by no means straightforward. We would also not necessarily propose that a service previously within the public sector should automatically be subject to the Act in being assumed to be of a public nature. Similarly, while many ostensibly private or third sector services are done for, by, or on behalf of 'the people' as a whole, this does not necessarily equate to the service being of a public nature.

Finally, while the sentiment is clear in respect of the factor referring to whether designation would improve 'civic engagement', this is in practice difficult to know in advance and consequently open to interpretation. Given that demonstrating how civic engagement would be improved by designation is not easily measurable, it is questionable the extent that this factor assists in adding clarity to understanding 'functions of a public nature'.

Any assessment of the appropriateness of designation is likely to be complex and engage a range of the factors highlighted above. The Scottish Government will therefore continue to consider on a case by case basis the extent that the various factors are relevant in helping to determine whether or not particular bodies should be proposed for coverage in future.

Special Report Recommendations

The Scottish Information Commissioner's report makes a number of recommendations. The relevant ones for the Scottish Government are set out below, along with our comments.

- *The Scottish Ministers develop and adopt a policy that requires automatic consideration of migration of existing rights and duties under the FOI Act to bodies taking over the delivery of functions and services on behalf of, or instead of, public authorities. I consider this to be a priority.*

This policy is already included in the [Code of Practice](#) issued by the Scottish Government in accordance with section 60 of the Act. The Code states that:

Where a public authority is considering outsourcing any of its functions it should take steps to ensure that there is no resulting reduction in the public's rights to access information through requests and proactive publication. This may be by outsourcing to a wholly-owned company which will be subject to the regimes. Where this is not possible, the authority must take steps to ensure public access to information relating to the functions which have been outsourced, as set out in part 2, section 8 of this Code (particularly information about performance and finances). This might be through the provisions of any contract in place.

The Code sets out what the Scottish Government considers 'desirable' in respect of the discharge of an authority's functions under the Act. The Commissioner can investigate if an authority is conforming with the Code – which is subject to periodic revision in consultation with the Commissioner.

Compliance with the Code should therefore mean that authorities outsourcing any of their functions consider the implications for access to information – and the potential for any loss of access to information.

Beyond this, the Scottish Government does consider whether new bodies should be subject to the Act where they are identified and will continue to do so periodically in future – as noted, this has frequently been done through amendments to Schedule 1 of the Act.

- *The Scottish Ministers carry out a review to identify where rights to access information under the FOI Act have been lost, and reinstate those rights using their Section 5 powers. I consider this to be a priority.*

While we understand the principle behind this recommendation, in practice we consider the proposed approach to be difficult and not always necessary. In many cases, functions which have been outsourced may not be functions 'of a public nature'.

In order to identify any loss of information rights from 1 January 2005 onwards, every authority subject to the Act would need to assess what services they were providing

when the Act came into effect – and whether those services had subsequently been outsourced.

This potentially means reviewing every new body, grant or contract entered into post 1 January 2005 and assessing whether the change in service delivery has resulted in a loss of information rights. Following such an assessment, analysis would then be required to determine whether those outsourced functions would satisfy the criteria for inclusion within scope of the Act.

Such an approach would seem to place a significant resource demand on public authorities as it may cover many smaller-scale grants and contracts. This would appear to be a distraction from wider analysis of the issue of extension in the context of the current state of public service delivery. Therefore we believe we should continue to focus on considering coverage where bodies meet the majority of the factors identified by the Scottish Government, rather than focusing instead on where information rights have apparently been ‘lost’.

- *The Scottish Ministers develop and adopt a factor based approach to the extension of FOI to bodies in relation to those functions the Ministers consider to be “of a public nature”. I consider this to be a priority.*

As noted earlier in this report, the Scottish Government has consistently advocated a factor-based approach to the extension of the Act. We welcome the Commissioner’s support for such an approach.

- *The Scottish Ministers consider making Section 5 Orders **immediately** in relation to access to information rights about social housing, administered by housing associations, and private prisons.*

Consultation on extending the Act to contractors operating private prisons has recently ended. The Scottish Government anticipates responding to the consultation towards the end of the year and then laying a further section 5 order.

As set out in the consultation paper, we consider that, on a factor-based approach, there are strong arguments for extending coverage of the Act to contractors operating private prisons. For example, we recognise that the provision of prison services is a core function of the state underpinned by statute which, in the absence of the contractor, the state would be obliged to undertake; that prison services are closely regulated and overseen by the state; that coverage would remove the current anomaly of only state prisons being subject to the Act, and that the managing consortia receive significant amounts of public funding.

However, we consider that the case for extending coverage to Registered Social Landlords (RSLs) is more finely balanced as fewer of the factors are likely to apply to them.

As stated above, the Scottish Social Housing Charter was introduced on 1 April 2012 and applies to *all* RSLs. The Charter is due for review next year and renewal from 2017.

We note the strong opinions, over a considerable period of time, on the issue of freedom of information legislation applying to Registered Social Landlords. In this context, we consider that review of the Charter provides the opportune time to formally consult the sector with a view to extending the Act in tandem with complementary changes to the Charter.

- *The Scottish Ministers (or other suitable body appointed by the Ministers) create, maintain and publish a register of ALEOs and bodies designated under Section 5.*

There is no definition of an arm's length external organisation (ALEO). An Audit Scotland report from 2005 estimated that there were 14,000 ALEOs in receipt of council funding in 2003/04 (though such bodies are not limited to councils). Given the lack of definition of what constitutes an 'ALEO' establishing a list would be problematic.

Assuming the purpose of a register was to consider whether the Act should be extended to certain ALEOs, an assessment would be required both in terms of the ownership of the body ('wholly-owned' ALEOs are subject to the Act under section 6 of the legislation) as well as in respect of whether the function of the ALEO was of a public nature.

We recognise the value of such a list covering all Schedule 1, section 5 and section 6 organisations, which would be of considerable assistance to both authorities and applicants. However, we do not believe that the responsibility for creating and maintaining such a list rests with the Scottish Government. It is the Scottish Information Commissioner who has responsibility for regulating and promoting the legislation. We therefore consider that the Commissioner is best positioned to act on this recommendation.

However, while we consider this is to the role of the Commissioner, we are happy to engage in discussions with her on this proposal if she decides to pursue it. From engagement with Councils it is clear that the majority of 'ALEOs' identified by Councils are already subject to FOI, either because they are wholly owned by public bodies or via the first section 5 order for culture, sport and leisure trusts. Many of the bodies that are not subject to FOI do not seem to be carrying out functions of a public nature in accordance with the factor-based approach. However, we will continue to keep this under review to consider if further ALEOs should be covered in future.

Conclusions

The exercise of the section 5 power is an important aspect of freedom of information legislation, as is the exercise of the section 4 order-making power in ensuring Schedule 1 of the legislation remains up-to-date.

Our conclusions following the recent consultation on further extending coverage of the Act will be set out soon and we plan to lay a further section 5 order in Parliament shortly after that. In due course we will bring forward further proposals for consideration – whether developed from those made as part of the recent consultation or where other bodies are identified which meet a number of the Scottish Government's factors.

However, the approach of the Scottish Government to openness and transparency goes far beyond the legislative mechanisms contained in the Act. As highlighted in this report, the promotion of transparency is key to a wide range of legislation passed by the Scottish Parliament – and we will continually seek more ways of proactively disseminating information wherever possible.

The Scottish Government is committed to being the most open and accessible government Scotland has ever had. We believe that openness and transparency encourages an informed public who are able to engage in the decision-making process.

We look forward to engaging with interested stakeholders as freedom of information legislation continues to develop in its second decade and plays its part in developing an open, engaged, civic society.

Freedom of Information - The Scottish Government's Six Principles

The Scottish Government:

Supports Freedom of Information as an essential part of open democratic government and responsive public services.

The Freedom of Information (Scotland) Act 2002 provides significant and important rights to access information. We support the Act's underpinning principles by encouraging behaviour which is open, transparent and increases public participation.

Operates within the Freedom of Information (Scotland) Act 2002 rather than propose significant changes to it, but adjusts the regime where it is necessary and sensible to do so.

The Act must operate well for both members of the public and Scottish public authorities. We will keep the Act under review by promoting good practice within existing frameworks and considering extending coverage.

Publishes information proactively wherever possible.

We will publicly demonstrate our commitment to open government and Freedom of Information by ensuring as much information as possible is made available without having to be asked.

Maintains the exemptions set out in the Act in particular to protect "private space" for Ministers and others to consider advice and reach decisions.

The Act provides for responsible openness. We will use the exemptions in the Act where appropriate to protect for instance the formulation or development of policy, Ministerial communications, or the uninhibited provision of advice.

Maintains effective relationships with the Scottish Information Commissioner and other key stakeholders.

We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum.

Creates and shares information thoughtfully with regard to the principles above.

To support the effective application of the Act, we create and share information thoughtfully, deliberately and purposefully with a view to upholding the principles above.