

Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations

Response by WhatDoTheyKnow

August 2015

1. Introduction

This is a response by the team responsible for administering the WhatDoTheyKnow website¹ to the Scottish Government's consultation on extending the Freedom of Information (Scotland) Act 2002 ("FOISA") to more bodies.

WhatDoTheyKnow ("WDTK") is a project of the civil society charity, UK Citizens Online Democracy ("UKCOD") as part of its 'mySociety' project². WDTK is a website that enables individuals to make Freedom of Information requests in public to public bodies in the whole of the UK. All correspondence between the requester and public authority is automatically published on the internet on a page specific to the request. The site has been used to make more than 285,000 requests to more than 16,500 public authorities since it was launched in 2008. The site currently has approximately 82,000 registered users, not all of whom will have made requests using the site. WDTK uses software developed by mySociety, Alaveteli³, which is now being used to run similar sites in a number of countries around the world.

WDTK is administered by a small, dedicated team of volunteers who all have an interest in and a passion for Freedom of Information. Our knowledge and experience of the Scottish and UK Acts is called upon regularly to advise users on making requests and on what to do if they are not happy with responses. Equally, we engage regularly with officials within public authorities to provide support in relation to the WDTK website.

As well as providing a service to individuals to make FOI requests to bodies already covered by the Freedom of Information laws in the UK, the site also lists companies, organisations and bodies which we consider ought to be covered by the Acts. We have developed a set of criteria internally to assist us in deciding whether a body or organisation is one that we think ought to be subject to FOI law. As part of this process we consider whether the functions a body carries out are of a public nature. For example, WDTK listed both Network Rail and the Association of Chief Police Officers before the UK Government extended the UK Act to those bodies. In

1 <http://www.whatdotheyknow.com>

2 <http://www.mysociety.org>

3 <http://www.alaveteli.org>

Scotland, the site also listed the Association of Chief Police Officers in Scotland before that company dissolved as a result of the merger of the eight regional Scottish police forces into the Police Service of Scotland. We believe this helps to highlight problems accessing information and also a desire by people to access information from these organisations.

WDTK welcomes the Scottish Government's consultation on extending FOISA to more bodies.

2. Contractors who run privately managed prisons (Consultation Q1)

We agree that there are strong grounds for extending FOISA to contractors who run privately managed prisons and support the proposal to bring them under FOISA in their own right.

The detention of individuals in custody under order or sentence of the courts is undoubtedly a public function. It is also one of the greatest responsibilities of the State. Individuals who are detained in custody are under the full control and responsibility of the State.

At present there is a great disparity between the thirteen establishments operated directly by the Scottish Prison Service (SPS) and the two establishments operated by the private sector under contract with the SPS. At present, those individuals who are detained in those establishments directly operated by the SPS have a much greater legal entitlement to information, which is enforceable by the Scottish Information Commissioner, to those individuals who are detained in establishments operated under contract to the SPS. This disparity also extends to friends, relatives and representatives of those detained.

It is not only those who are detained in the establishments (and those connected to them) who suffer from the current disparity in the law. Imprisonment is partly about protecting the public while the individual is detained and in the longer-term once the individual has been released. It is important that the public are able to obtain information as to how prison establishments are functioning in respect of this key area.

As the Scottish Government rightly states “[b]oth consortia attract significant, long-term public funding.” (Consultation, page 8) It is our view that organisations who obtain funding on the scale that the consortia do to perform functions that are so clearly public in nature ought to be required to comply with information access laws.

We agree that the Order should provide a description of the functions. This will mean that should the organisations that provide these services change, or should the Scottish Government contract out the management and operation of other

establishments in Scotland to private sector bodies, the new bodies concerned would automatically be covered by FOISA.

3. Providers of Secure Accommodation for Children (Consultation Q2)

WDTK agrees that there are strong grounds for bringing these private bodies under FOISA and supports the proposal to do so.

The purpose of Secure Accommodation is, in our view, clearly a public function. Some of the children detained in Secure Accommodation will be there having committed a crime while others will be there because of issue around their welfare. In both circumstances, the State is restricting the liberty of the child –albeit in a different way and under different rules to those that apply to the prison system. Making the providers directly subject to FOISA will open up the system to a greater deal of public scrutiny than is currently available. It will enable citizens to require these organisations to release information on request. Furthermore, it should become an extra check in respect of the welfare of the children held in these establishments.

4. Grant-aided Schools (Consultation Q3)

WDTK agrees that there are strong grounds for bringing grant-aided schools under FOISA and supports the proposal to do so.

As the consultation document correctly states, the provision of education is recognised as one of a Government's core functions. These schools currently receive considerable funding from the State to provide those functions, both from central and local government. It is our view that there should be no difference in the right to access information between these schools and schools that are operated by local authorities.

5. Independent Special Schools (Consultation Q4)

WDTK agrees that there are strong grounds for bringing independent special schools under FOISA and supports the proposal to do so.

We consider the level of public funding that they receive and that they are responsible for the provision of education to some of the most vulnerable and

disadvantaged children in Scotland, to be strong factors tending towards their inclusion as Scottish public authorities for the purposes of FOISA.

6. Implementation of the New Order (Consultation Q5)

We are keen to see the proposed bodies brought under FOISA as quickly as is reasonably practicable. We recognise that those organisations which are to become subject to FOISA will need to have time to develop adequate policies and procedures for handling requests under FOISA and the Scottish EIRs, as well as providing training to key members of staff in time for implementation and making arrangements in relation to the information it is to pro-actively publish under its publication scheme.

We agree that a period of 6 months should be sufficient to enable the new designated authorities to undertake the essential preparations and would therefore support the proposal of bringing the order into force on or around 1 April 2016. We also note that this consultation exercise will give advanced warning to those bodies and will allow them to begin making preparations in advance of formal confirmation that an Order will be made to bring them under FOISA.

7. Draft partial Business and Regulatory Impact Assessment (Consultation Q6)

Option 3 is our preferred option. However, we would urge the Scottish Government to also consider amending the section 60 code of practice. While this will not have the effect of extending the coverage of FOISA to bodies that do not fall in scope of the section 5 order, it would ultimately strengthen transparency.

In respect of costs, we agree that it is difficult to quantify. In the short-term request volumes might be low, but as people begin to realise that they can make information requests to these bodies the number of requests might increase. Costs will also depend on internal governance structures in respect of handling FOI requests; costs can increase by involving unnecessary steps in the process (e.g. involving press teams in all requests by default).

We do not consider that FOI will necessarily prevent firms from bidding for public sector contracts. For many organisations, public sector contracts represent a significant income stream for them. Some of the most commercially sensitive

information (e.g. tender bids) is already covered by FOI through the public body that performs the tender exercise.

8. Equalities Impact (Consultation Q7)

This is an area that is outside of our expertise and as such we make no comment in respect of this question.

9. Future Orders (Consultation Q8)

WDTK welcome the opportunity to propose other bodies that should be brought under FOISA.

9.1 Community Councils

We believe that there is an argument for bringing Community Councils within the scope of FOISA. They have certain statutory rights, such as the right to be consulted in respect of planning and liquor licensing applications, and exist to be the voice of the local community to the local authority. Being subject to FOISA would make them much more accountable to the local communities that they serve. Therefore, we would welcome a fuller public consultation on the inclusion of Community Councils in a future Order by the Scottish Ministers.

9.2 The Law Society of Scotland and the Faculty of Advocates

WDTK notes the important regulatory functions that the Law Society of Scotland (LSS) and the Faculty of Advocates (FoA) perform in relation to the Scottish legal profession.

The LSS and FoA are responsible for determining who may be admitted to the professions of Solicitor and Advocate (and in the case of the LSS who may also practice as a Solicitor Advocate). The LSS and FoA are also responsible for regulating those who have been admitted into the legal profession in Scotland.

Legal professionals in Scotland are placed in a privileged position and provide important public functions. It is our view that both of these bodies should be brought under FOISA.

We recognise that both the LSS and FoA also act as the representative bodies for their respective branches of the legal profession. We recognise the importance of these representative functions to the respective branches of the legal profession in Scotland. For this reason we would support and propose a partial designation of both the LSS and FoA that covers their regulatory function but excludes their representative functions.

We would welcome a fuller public consultation on the inclusion of the LSS and FoA in a future Order by the Scottish Ministers.

9.3 The Scottish Solicitors' Discipline Tribunal

The Scottish Solicitors' Discipline Tribunal (SSDT) is an independent judicial body established by the Solicitors (Scotland) Act 1980. It deals with serious disciplinary issues concerning the conduct of Solicitors in Scotland. It is not currently covered by FOISA nor is the information it holds available through any other Scottish public authority. The functions of the SSDT are clearly of a public nature; it is part of the regulation of the solicitors' profession. Its main function is about protecting the public from individuals who are unfit to practice as solicitors or who have seriously contravened the conduct requirements for solicitors in Scotland.

The public ought to have a right to be able to make use of information access rights to scrutinise the work of this important body, to understand what it does, how it does it and to hold it to account.

We would welcome a fuller public consultation on the inclusion of the SSDT in a future Order by the Scottish Ministers.

9.4 Health and Social Care

It is our view that organisations providing health and social care services under contract to local authorities or NHS boards should be directly covered by FOISA. These organisations often receive and spend significant sums of taxpayers' money and provide services that we believe are of a public nature.

It is our experience that some of these providers can be reluctant to provide information, even to their service users. While it is possible to obtain some information from the public authority that has contracted the service, there is a

disparity between the information available about these services compared to when they are operated directly by local authorities or Health Boards.

We would welcome a fuller public consultation on the inclusion of Health and Social care providers in a future Order by the Scottish Ministers.

9.5 Recreational, Sporting, Cultural or Social Facilities and Activities

The Scottish Ministers have previously made one Order under section 5 of FOISA covering bodies established by one or more local authorities to develop and/or deliver recreational, sporting, cultural or social facilities and activities who were funded wholly or in part by any of those local authorities. WDTK welcomed that order as a move in the right direction to recovering the right to access information that has been lost as a consequence of the way in which the delivery of public services has changed.

However, there are a great many bodies that are responsible for developing and/or delivering recreational, sporting, cultural or social facilities and activities that exist in Scotland which do not fit within the description contained in the previous Order.

Some bodies that are responsible for developing and/or delivering recreational, sporting, cultural or social facilities and activities are established in co-operation with other Scottish public authorities which are not local authorities (e.g. universities); while some include a mixture of local authorities, other Scottish public authorities and other bodies (e.g. sporting governing or representative bodies). We are unsure as to whether this was a deliberate action by the Scottish Government or was as a result of a failure to properly grasp how these services were being delivered on the ground.

We would like to see such bodies covered by FOISA and would welcome an opportunity to participate in a fuller consultation exercise on including such bodies under FOISA.

9.6 Registered Social Landlords

WDTK acknowledges what is said by the Scottish Government in its consultation document with respect to Registered Social Landlords (“RSLs”). While it is the case that RSLs carry out a great number of activities that are wholly private and

commercial in nature, we do not consider this reason enough not to bring RSLs under FOISA.

We suggest that it would be possible to bring RSLs under FOISA by way of a partial-designation. This would ensure that RSLs' public functions are covered by the enforceable right to access information contained within FOISA which relates to their functions of a public nature, whilst protecting the functions they perform that are genuinely of a private nature.

We note that the Scottish Information Commissioner has decided (decision 118/2014) that RSLs are public authorities for the purposes of the Scottish EIRs. WDTK is of the view that this is correct and notes that the RSL concerned did not opt to appeal the finding to the Court of Session. We further note that the Commissioner again determined that RSLs are Scottish public authorities for the purposes of the Scottish EIRs (decision 099/2015).

It is our view that it makes little sense, given the obviously public nature of many of the functions undertaken by RSLs, to not bring them under FOISA while they are subject to the Scottish EIRs.

9.7 Independent Schools

We note that the current proposal is only to cover independent special schools, and not all independent schools. We consider that because the provision of education is considered a core responsibility of the State and the privileged position of independent schools means that there are strong arguments for including all independent schools in Scotland as Scottish public authorities. We would welcome a public consultation on bringing all independent schools under the requirements of FOISA.

9.8 Trust Ports

Trust ports are statutory bodies, governed by their own local legislation and, run by independent boards they manage the assets of the trust for the benefit of stakeholders, including the local community. The trust ports have no legal owner except the state and all profits are reinvested in the ports. In October 2013, the Office of National Statistics announced that "major" trust ports will continue to be treated as Public Corporations and committed to reviewing the status of other Trust

Ports on a case by case basis. The status of trust ports as independent statutory bodies that are state owned is not dissimilar to that of a number of independent regulators that are already subject to FOISA, for example the Standards Commission for Scotland.

We consider that there is a strong case for including all Scottish Trust Ports as Scottish public authorities. We would welcome a public consultation on bringing all Scottish Trust Ports under the requirements of FOISA.

9.9 Companies mainly owned by public bodies

Section 6 of FOISA provides that a company that is wholly-owned by one or more Scottish Public Authorities is subject to FOISA. A company 95% owned by a public with the remaining 5% owned privately would not be subject to FOISA. We consider this be a loophole in the law as it stands. Where a company is majority-owned by one or more Scottish public authorities we consider that there is a case for making the company subject to FOISA. We believe that it is helpful to consider both ownership and control by public authorities when deciding whether or not a company should be subject to FOISA.

We would welcome a public consultation on whether or not the criteria in Section 6 of FOISA should be amended.

10. General Comments

We are of the view that the Order should be descriptive in nature rather than listing the organisations to become subject to FOISA by name. This will ensure that should additional bodies come into existence that undertakes the functions listed in the Order that they are automatically covered. However, we would caution the Government in respect of this mode of designation as well; it is essential that the descriptions are tight enough to cover everyone that ought to be covered and not unintentionally leave bodies out of the scope of FOISA as a consequence of drafting (we refer specifically to our comments made at 9.5 above).

While it is outside of the scope of this consultation, we are of the view that there are other areas of FOISA that might benefit from amendment. To that end we would

welcome a public consultation on a much wider scope than the extension of the bodies covered by FOISA. We acknowledge the changes made as a result of the Freedom of Information (Amendment) (Scotland) Act 2013. In particular we welcomed the changes around the time limits for a prosecution under section 56 of FOISA, the amendments to section 59 of FOISA and the introduction of section 7A to FOISA.

One of the questions that we consider would benefit from public consultation is whether it is appropriate for section 48 of FOISA to remain in force. We note that there is no equivalent provision in the UK FOI Act and are of the view that there is little justification for excluding these public authorities from an application pursuant to section 47(1) of FOISA.

Another of the issues that we consider would benefit from public consultation is whether FOISA should be amended so as to change the appeal rights in respect of decisions from the Scottish Information Commissioner. We note that the current position in Scotland is that an appeal against decisions of the Commissioner is straight to the Inner House of the Court of Session. Our view is that this is likely to be prohibiting individuals and smaller public authorities from appealing decisions of the Scottish Information Commissioner. We would be keen to see research conducted on how the current appeal structure is affecting appeals. We note the position under the UK Act and some of our volunteers have experience in appeals against decisions of the UK Information Commissioner. With the creation of the new Scottish tribunal structure and the Scotland-wide Sheriff Appeal Court, we are of the view that an alternative appeal structure could be available that would be less prohibitive and better aid the development of the law in this area. We would therefore welcome a public consultation on appeals against the Commissioner's decision.