

SIC Response

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

Scottish Information Commissioner

02 September 2015



Scottish Information
Commissioner

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Introduction

1. This document sets out the Scottish Information Commissioner's response to the Scottish Ministers' consultation: [Consultation on further extension of coverage of the Freedom of Information \(Scotland\) Act 2002 to more organisations](#).
2. The consultation asked for comments about the proposals to extend FOI to cover contractors who run privately-managed prisons; providers of secure accommodation for children; grant-aided schools, and independent special schools (questions 1-7). It also asked for comments on future proposals, particularly registered social landlords (question 8).
3. This response is written so that comments in relation to each question are complete and stand alone. While this has resulted in an element of repetition, it means that someone with a particular interest can read the SIC's complete response to a specific question without having to refer to, and read, other parts of the document.
4. The response contains several references to my "Special Report". This Special Report, *FOI 10 years on: Are the right organisations covered?*, examined and made recommendations about the use of the Scottish Ministers' powers to make organisations delivering "*functions of a public nature*" subject to FOI law. The full report is available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>
5. You are welcome to contact this office if you have any questions or comments.

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Question 1: contractors who run privately managed prisons

*Do you agree with the proposal to extend freedom of information coverage to **contractors who run privately managed prisons**?*

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Introduction

6. **Private prisons** was one of the areas to which my Special Report: *FOI 10 years on: Are the right organisations covered?* asked the Scottish Ministers (the Ministers) to consider extending FOI coverage, and so I welcome this consultation.
7. The Scottish Government asks for views on whether contractors who run privately managed prisons should be covered by the Freedom of Information (Scotland) Act 2002 (FOISA).
8. There are two contractors, Kilmarnock Prison Services Ltd and Addiewell Prison Ltd, plus several sub-contractors which stand to be affected by the extension.
9. My Special Report sets out persuasive arguments in support of extending FOISA to cover contractors who run privately managed prisons. In addition to those arguments (available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>) I would make the following observations.

Consultation factors

10. In the consultation document on pages 4 and 5 the Government sets out its factor based approach to assessing whether functions are of a “public nature”. This includes a list of ten “factors” and “points” comprising the factors the Government considered in its 2010 consultation, plus additional points new to this consultation.
11. As acknowledged in the consultation document, I am in favour of this approach but in addition to identifying factors/ points, suggest that they should be weighted to show their relative importance when it comes to decision making. I give more information about weighting in my Special Report.
12. There is no reference to relative weighting in the consultation, but on page 8, the document refers to the three “key” factors: two contained in the consultation list plus “*access to information*”. This suggests they are considered to have greater “weight” than the other factors and points.
13. For completeness, this response makes reference to all ten factors/ points, referring to them as factors 1-10) and highlighting which the Government considered to be “key”.
14. Extending the coverage of FOISA to contractors who run privately managed prisons would meet many of factors set out in the consultation paper. This response has commented on the factors, but makes no recommendations about the relative weightings that should apply, recognising that is a matter for the Ministers to determine based on their views and priorities.
15. **Factor 1: (public) statutory function or responsibility of the state** (Government key factor). As the Government recognises, the provision of prison services by the Scottish Government is required by the Prisons (Scotland) Act 1989. It is not only a statutory function; it is also clearly a function for which responsibility lies squarely with the state.

16. **Factor 2: public funding** (Government key factor). It is a matter of fact that both Kilmarnock Prison Services Ltd and Addiewell Prison Ltd are in receipt of significant long-term public funding: £16m and £30m respectively: both contracts run for 25 years.
17. **Factor 3: taking the place of a public authority**. The two private prisons are run by the two consortia, which take the place of the Government to provide the services. They perform similar functions to the Scottish Prison Service (a Scottish Public Authority) which runs the thirteen other prisons in Scotland.
18. **Factor 4: activities enmeshed with the relevant public authority**. Activities are enmeshed to the extent that the consortia must deliver services as set out and directed in the contracts they have with the Government.
19. **Factor 5: extensive or monopolistic powers**. The provision of prison services, arguably more than many other public services, relies on exercising extensive monopolistic powers, which the consortia and their subcontractors have only because they have been contracted to provide the service on behalf of the Government.
20. **Factor 6: collective benefit**. Prison services are clearly provided for the collective benefit of society as a whole. For the general populous they contribute to safety and the criminal justice system. For prisoners they provide care and development, and implement education and rehabilitation programmes. For families of prisoners they care for loved ones and are an important part of their lives.
21. **Factor 7: core function of state**. As acknowledged in the consultation paper, the provision of prison services is a core function of the state.
22. **Factor 8: length of contract (practicality and proportionality)**. The nature of prison services is such that contracts are generally of sufficient length and value that it is difficult to see how it would be impractical or disproportionate for FOISA to cover the consortia. They are engaged in providing long term public functions and the scale of their operation is such that they should have the flexibility to resource the FOISA function and embed it in their operational activities.
23. **Factor 9: loss of rights**. I would urge the Government to consider making this a key consideration. In my Special Report I discuss in more detail the importance of taking a “rights based approach”. Prisoners can be transferred between prisons in Scotland, and where a prisoner is transferred to one of the private prisons the right to information is lost. Although some or all of the information may be available from other sources, this does not compensate for what would be lost as it does not give an *enforceable* right.
24. **Factor 10: administrative burden on smaller authorities**. There is no reason to suggest that the impact of coverage would place an administrative burden on the consortia that could not be managed effectively.
25. Not all aspects of FOISA would be new or additional to the consortia. For example, they already communicate with a range of stakeholders and, presumably, respond to enquiries. The experience of culture and leisure trusts that were designated in April 2014 suggests that the additional work generated was minimal, and the impact was mitigated by preparing for FOISA coverage. That preparation included training and support provided by my office.

Other factors

26. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider those other factors to be relevant to the proposals, and have commented on them below.

State regulation, supervision or inspection

27. The private prisons are subject to inspection by Her Majesty's Inspectorate of Prisons for Scotland. The last full inspection of HMP Kilmarnock, according to the Serco website, was in 2011. HMP Addiewell was inspected in 2010. The state is therefore clearly regulating and inspecting the performance of the function, strengthening the argument that the function carried out is a public one in terms of s5 of FOISA.

Appointment of decision makers

28. Where the state either directly or indirectly appoints an organisation's decision makers, that is an indication that the function carried out by the organisation is public in nature.

29. Section 107 of the Criminal Justice and Public Order Act 1994 provides that instead of a governor, every contracted out prison shall have

- (i) a director appointed by the contractor but specially approved by the Scottish Ministers, and
- (ii) a controller, who is a member of the Scottish Administration, and appointed by the Scottish Ministers.

30. The director has the same functions as a governor, with some exceptions set out in the 1994 Act: e.g. the director cannot order the removal of a prisoner from association with other prisoners, or conduct a hearing into a disciplinary charge brought against a prisoner.

31. Given the requirement for Scottish Ministers to approve the appointment of the director of the prison (indirect appointment), and the fact that the controller is a member of the Scottish Administration and appointed by the Scottish Ministers (direct appointment), it would appear the state has a significant, deciding role in the appointment of private prisons' key decision makers. This suggests the functions being carried out by the consortia are public in nature.

Civic engagement and inequality

32. In my Special Report I discuss in more detail the importance of taking a "rights based approach" to designation. This is especially relevant to private prisons as FOISA extension has an impact on equality and parity in rights of access to information and the benefits that brings.

33. I would argue that there should be the same rights to access information for prisoners in private prisons as there are for state-run prisons.

34. Designating the private prisons would mitigate the effects of inequality caused by the current FOISA coverage. Currently, prisoners, families of prisoners, researchers and those involved in holding prisons to account have an enforceable right to obtain information from the thirteen prisons operated directly by the Scottish Prison Service. There is no right where the prison is privately managed. While there is currently access to a limited amount of contractual information (as explained in the Government's "third factor", access to information, p8), creating a universal right would give access to information that would enable greater accountability and scrutiny within context rather than in isolation of it.

Other matters

35. The focus of the Scottish Government's proposal is the function being delivered by these organisations, not the organisation delivering it. The consultation paper says that *"it is envisaged that the proposed order would contain a description of the relevant functions rather than naming specific bodies individually. Therefore if the contractors or sub-contractors providing these services were to change in future, the new contractors would automatically also be covered by the Act"*.
36. I am in agreement with the intentions and sentiment of this approach but have concerns about the practicalities of both the enforcement of FOISA and the ease of access for requesters who may not know where, who or how to ask for either information or advice and assistance. To ensure that it is possible to enforce FOISA, and for my staff to be able to give clear advice and assistance to organisations which might come within the scope of FOISA in the future, and to people wishing to make requests for information to such organisations, it is essential that I am consulted about the drafting of any order.

Question 2: providers of secure accommodation for children

2) Do you agree with the proposal to extend freedom of information coverage to **providers of secure accommodation for children**?

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Introduction

37. In principle, I favour extension of FOISA, where it is in the public interest and the result of a robust decision, based on assessing and balancing a number of factors. There are strong arguments in favour of the proposed extension of FOISA to cover **providers of secure accommodation for children**.

Consultation factors

38. In the consultation document on pages 4 and 5 the Government sets out its factor based approach to assessing whether functions are of a “public nature”. This includes a list of ten “factors” and “points” comprising the factors the Government considered in its 2010 consultation, plus additional points new to this consultation.

39. As acknowledged in the consultation document, I am in favour of this approach but in addition to identifying factors/ points, suggest that they should be weighted to show their relative importance when it comes to decision making. I give more information about weighting in my Special Report: *FOI 10 years on: Are the right organisations covered?* available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>.

40. There is no reference to relative weighting in the consultation, but on page 10, the document refers to the three “key” factors: two contained in the consultation list plus “access to information”. This suggests they are considered to have greater “weight” than the other factors and points.

41. For completeness, this response makes reference to all ten factors/ points, referring to them as factors 1-10 and highlighting which the Government considered to be “key”. Extending the coverage of FOISA to providers of secure accommodation for children would meet many of the factors set out in the consultation paper. This response has commented on the factors, but makes no recommendations about the relative weightings that should apply, recognising that is a matter for the Ministers to determine based on their views and priorities.

42. Assessment of extension of FOISA to providers of secure accommodation for children shows that it clearly meets several of the factors.

43. **Factor 1: (public) statutory function or responsibility of the state** (Government key factor). There is legislation governing secure accommodation for children, e.g. the Secure Accommodation (Scotland) Regulations 2013, and those functions are generally regarded as being the responsibility of the state.

44. **Factor 2: public funding** (Government key factor). Public money is spent on the provision of secure accommodation. For example, by way of the Scottish Government’s spending under contract, and via the purchasing of beds by the Scottish Government and local authorities. It appears that, either directly or indirectly, the function is one for which the state is by one means or another willing to pay.

45. **Factor 3: taking the place of a public authority.** I agree with the Government that the provision of secure accommodation for children is a function for which the state must take responsibility. Where organisations are providing the service, it is reasonable to say that they are taking the place of the Government in this respect.
46. **Factor 4: activities enmeshed with the relevant public authority.** There are a number of public authorities which might be involved in the care provided to any child: e.g. the local authority, the children's panel, the NHS, and Police Scotland. Providers of secure accommodation for children will engage with each of these. At different stages of a child's or young person's care, the activities of each (or any) body, including the care provider, may become enmeshed.
47. **Factor 5: extensive or monopolistic powers.** The provision of secure accommodation for children involves the use of extensive and monopolistic powers, which the providers would not have if they were not providing the service.
48. **Factor 6: collective benefit.** The provision of secure accommodation for children is a service which is clearly provided for the collective benefit of society as a whole. The accountability and quality of child-centred services is not just a collective benefit in the present, but also an investment in society for the future, aiming as it does to give children in Scotland the care and support they need. Education as a whole is at the heart of the Government's programme, as is the need for information about education. In setting out her programme for Government on 1 September 2015, the First Minister highlighted the importance of attainment information when she said "*But we also need to have better information about attainment so that we measure progress consistently and drive change. We need to be able to see what's working and where we still need to improve*". In FOI terms the duty to publish, which is part of FOI, is crucial to this, while the ability of children and young people and those representing them to seek specific information about their education should be available as a benefit to all.
49. **Factor 7: core function of state.** It is difficult to see how this could not be a core function of the state. The Government itself stated in its consultation on the Children and Young People (Scotland) Act 2014, that it was "*...Scottish Government's ambition for Scotland to be the best place to grow up in by putting children and young people at the heart of planning and services and ensuring their rights are respected across the public sector.*"
50. **Factor 8: length of contract (practicality and proportionality).** Beds in secure accommodation for children are purchased by the Scottish Government and local authorities under the Secure Care contract, which the consultation paper notes is a 3-year award with the option to extend by a further 12 months. Although some might consider this to be of comparatively short duration, I would suggest that the more important consideration, and the one that should carry greater weight than duration, is the public function being delivered.
51. Indeed, as the plan for any order is to describe the relevant functions, rather than naming specific bodies individually, this would presumably allow:
- (i) for any new provider of the services to be covered by the order, AND
 - (ii) that a provider that ceased to carry out the function was no longer covered by the legislation.
52. **Factor 9: loss of rights.** While loss of rights may not be the major focus, the issue of rights is fundamental to the proposal to extend FOISA coverage to providers of secure accommodation. I discuss this further below.

53. **Factor 10: administrative burden on smaller authorities.** Any concerns about the practicality of designating providers of secure accommodation may be alleviated by the fact that the culture and leisure trusts (which were designated in April 2014) reported that the impact of designation, in terms of request volumes and type of information requested, was low. My Special Report gives more information on this (paragraphs 57-59 <http://www.itspubliknowledge.info/home/SICReports/OtherReports/otherReports.aspx>).
54. 63% of respondents to a survey of culture and leisure trusts said volumes of requests for information had stayed the same since designation. Not one respondent reported a significant increase in information requests. When asked about whether there had been a change in the type of information for which they were receiving requests, comparing requests received before designation and those received since designation, over half said there was no change, with 31% reporting a slight change, and only 6% reporting a significant change.
55. Given the nature of the services provided by these bodies, and their regulation by, e.g. the Care Inspectorate, Education Scotland, the Mental Welfare Commission and the Scottish Social Services Council, there is no reason to suggest that bodies which are accustomed to operating within the requirements of such regulation, and the resulting administrative implications, would have difficulties handling the administrative implications of FOISA coverage.
56. My office would offer advice, support and training to the organisations to help them prepare to meet FOISA obligations, should the Scottish Ministers decide that designation is appropriate.
57. Any concerns about the proportionality of coverage should be balanced against the benefits that FOI would bring in terms of openness and transparency for some of Scotland's most vulnerable children and young people.

Other factors

58. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider those other factors to be relevant to the proposals, and have commented on them below.

State regulation, supervision or inspection

59. In terms of the Secure Accommodation (Scotland) Regulations 2013, no secure accommodation service may be provided unless it has been approved by the Scottish Ministers. The Ministers can attach such terms and considers as they consider appropriate to the approval.
60. The four secure accommodation units which are not currently subject to FOISA (i.e. the Good Shepherd Centre, Kibble Education and Care Centre, Rossie Young People's Trust and St Mary's Kenmure) are subject to inspection and regulation by Education Scotland (and its predecessor, Her Majesty's Inspectorate of Education), the Care Inspectorate, the Mental Welfare Commission. The Scottish Social Services Council also registers and regulates the social service workers who work in secure accommodation for children.
61. There is significant state regulation, supervision and inspection of the performance of the function carried out by providers of secure accommodation for children. This suggests the functions carried out by the providers are public in the way envisaged by s5 of FOISA.

Appointment of decision makers

62. This does not appear to be a relevant factor for this proposal. It does not appear that the state has a role to play in appointing the decision makers of at least two of the providers: Kibble Education and Care Centre and Rossie Young People's Trust which are both trusts governed by boards and trustees. I am not aware of any involvement of the state in appointing decision makers to the two other providers (the Good Shepherd Centre and St Mary's Kenmure) (or removal of the decision makers from the providers) but would urge the Ministers to clarify this for all the providers.

Civic engagement and inequality

63. Extension of FOISA is about creating parity of rights for all children and those who need information in order to exercise other rights on behalf of children.
64. FOI is an enabling right, which allows people to know information that will help them to exercise other rights that they have, e.g. equality rights and human rights. The children and young people residing in secure accommodation are some of the most vulnerable in society. Those children and young people, as well as their families, guardians and carers, and those with an interest in safeguarding children, should be able to access information about the provision of secure accommodation for children. Information is important to improve quality of life and to help remove barriers that may stand in the way of children realising their full potential.

Other matters

65. While I welcome the proposal and the consultation, I have concerns about the practicality and, in particular, the enforceability) of FOISA coverage. The Government's consultation paper focuses on the function being delivered by these organisations, not the organisation delivering it. The consultation paper says that "*it is envisaged that the proposed order would contain a description of the relevant functions rather than naming specific bodies individually. Therefore if the current providers of these secure services were to change in future, any new provider would be automatically covered*".
66. I am in agreement with the intentions and sentiment of this approach but have concerns about the practicalities of both the enforcement of FOISA and the ease of access for requesters who may not know where, who or how to ask for either information or advice and assistance. To ensure that it is possible to enforce FOISA, and for my staff to be able to give clear advice and assistance to organisations which might come within the scope of FOISA in the future, and to people wishing to make requests for information to such organisations, it is essential that I am consulted about the drafting of any order.

Question 3: grant-aided schools

3) Do you agree with the proposal to extend freedom of information coverage to **grant-aided schools**?

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Introduction

67. In principle, I favour extension of FOISA, where it is in the public interest and the result of a robust decision, based on assessing and balancing a number of factors. There are strong arguments in favour of the proposed extension of FOISA to cover **grant-aided schools**.

Consultation factors

68. In the consultation document on pages 4 and 5 the Government sets out its factor based approach to assessing whether functions are of a “public nature”. This includes a list of ten “factors” and “points” comprising the factors the Government considered in its 2010 consultation, plus additional factors points new to this consultation.

69. As acknowledged in the consultation document, I am in favour of this approach but in addition to identifying factors/ points, suggest that they should be weighted to show their relative importance when it comes to decision making. I give more information about weighting in my Special Report: *FOI 10 years on: Are the right organisations covered?* available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

70. There is no reference to relative weighting in the consultation, but on page 12, the document refers to the three “key” factors: two contained in the consultation list plus “*access to information*”. This suggests they are considered to have greater “weight” than the other factors and points.

71. For completeness, this response makes reference to all ten factors/ points, referring to them as factors 1-10 and (highlighting which the Government considered to be “key”). Extending the coverage of FOISA to grant-aided schools would meet many of factors set out in the consultation paper. This response has commented on the factors, but makes no recommendations about the relative weightings that should apply, recognising that is a matter for the Ministers to determine based on their views and priorities.

72. Assessment of extension of FOISA to grant-aided schools shows that it clearly meets several of the factors.

73. **Factor 1: (public) statutory function or responsibility of the state** (Government key factor). Grant-aided schools provide education, which is a function that is the responsibility of the state. The Scottish Government expresses the same view in the consultation paper.

74. **Factor 2: public funding** (Government key factor). Grant-aided schools are supported by public money, via statutory arrangements for funding provided by the Scottish Government, and also the funding provided by local authorities who place children from their area in the schools.

75. **Factor 3: taking the place of a public authority**. In providing education, grant-aided schools take the place of the local authority in providing mainstream education in its area.

76. **Factor 4: activities enmeshed with the relevant public authority.** The activities of grant-aided schools are enmeshed with those of local authorities. Both provide education for some of the children and young people residing in local authorities' areas.
77. **Factor 5: extensive or monopolistic powers.** Not relevant to this proposal.
78. **Factor 6: collective benefit.** The collective benefit is acknowledged by the Government in the consultation paper, and accepted. By carrying out the functions, i.e. providing education, grant-aided schools seek to achieve a collective benefit for the public, and are accepted by the public as being entitled to do so.
79. I would add to this. The accountability and quality of education as part of child-centred services is not just a collective benefit in the present, but also an investment in society for the future, aiming as it does to give children in Scotland the care and support they need.
80. A well-educated society is also a critical element in building and sustaining economic growth. The Government recognises this and states on its website that it *"wants to improve life chances for young people, support economic growth and increase the number of jobs"*.
81. Education as a whole is at the heart of the Government's programme, as is the need for information about education. In setting out her programme for Government on 1 September 2015, the First Minister highlighted the importance of attainment information when she said *"But we also need to have better information about attainment so that we measure progress consistently and drive change. We need to be able to see what's working and where we still need to improve"*. In FOI terms the duty to publish, which is part of FOI, is crucial to this, while the ability of children and young people and those representing them to seek specific information about their education should be available as a benefit to all.
82. **Factor 7: core function of state.** Given the regulatory environment and the recognised functions of government at both national and local level, it is difficult to see how provision of education could not be a core function of the state. The Government recognises this in the consultation and states on its website that *"Children and young people's educational experience should open the doors to opportunities which enable children to become successful learners, confident individuals, responsible citizens and effective contributors to society"*.
83. **Factor 8: length of contract (practicality and proportionality).** Not relevant to this proposal.
84. **Factor 9: loss of rights.** It is easy for rights to information about schooling to be lost to an individual, guardian or organisation providing support to children. If a child moves to a grant-aided school from a local authority school, the right to the same amount and type of information is lost. Whilst some information (as the consultation acknowledges) would be available from other organisations, this in no way compensates for what would be lost.
85. Designation would mitigate the loss of rights.
86. **Factor 10: administrative burden on smaller authorities.** I am not aware of any arguments put forward to the effect that it would be impractical or disproportionate to designate grant-aided schools. But on those issues in particular, it is open to the Scottish Government to consult with Education Scotland, and the schools proposed for coverage, if they have not already contributed to this consultation.

87. That said, it is perfectly understandable that concerns about perceived burden will exist. Figures provided by Fife Council confirm that the numbers of requests received in respect of education services are comparatively low.

| Period | EIRs | | FOISA | |
|-----------------|-----------|--------------|-----------|--------------|
| | Education | All services | Education | All services |
| Jan to Dec 2014 | 2 | 607 | 206 | 1,366 |
| Jan to Aug 2015 | 3 | 380 | 122 | 895 |

88. Fife Council runs 19 secondary schools, 141 primary schools and six special schools. From these figures, it can be expected that the number of requests received per grant-aided school would be low. Given that grant-aided schools are probably already responding to ad hoc requests for information (albeit requests that do not have enforceable FOI rights attached to them), their coverage under FOISA does not necessarily mean that they will suddenly face a flood of requests for information that they cannot cope with. The evidence from the survey of culture and leisure trusts reported in my Special Report also supports my view that request volumes will not change dramatically as a result of designation, nor will the type of information requested.
89. The key to managing the impact is to be prepared. My office works with newly covered bodies to prepare them for FOI coverage, and that would be the same for grant-aided schools, should they be designated. It is foolhardy to think there would be no impact on grant-aided schools from designation. But if they are covered, it will be incumbent upon me as the Scottish Information Commissioner, as well as the Scottish Government, and others, to help to minimise the impact of coverage. As I have said elsewhere in this response, I am happy to provide training and support to any new bodies covered by FOISA.
90. In any assessment of the cost or impact of coverage, once quantified, I would urge the Scottish Ministers to balance the impact against the benefits of FOISA coverage. In particular, FOI rights bring with them improvements in civic engagement and participatory democracy, by empowering citizens to make decisions which affect their lives.

Other factors

91. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider some of those other factors to be relevant to the proposals, and have commented on them below.

State regulation, supervision or inspection

92. Grant-aided schools are subject to Ministerial regulation under regulation 5 of the Special Schools (Scotland) Grant Regulations 1990 and to regulation and inspection by Education Scotland (and its predecessor, Her Majesty's Inspectorate of Education).
93. Regulation 5 provides several conditions which apply to all grants made to grant-aided schools. These conditions give the Scottish Ministers powers of inspection and supervision in respect of the giving of grant funding; e.g. managers (of schools) must give the Ministers estimates of income and expenditure and any other information the Ministers may require, accounts must be prepared and audited to the satisfaction of the Ministers and the books relating to the accounts shall be open to inspection by the Ministers.

Civic engagement and inequality

94. The right to access information for children (and others) from mainstream schools is enforceable through statute. In contrast, those children in grant-aided schools do not have the same rights.
95. The right to access information about the education provided to our children should be the same whether their education is being provided by a local authority or a grant-aided school.
96. Designation would mitigate the existing inequality and lack of parity between children who attend grant-aided schools and those who attend mainstream schools run by local authorities.

Other matters

97. While I welcome the proposal and the consultation, I have concerns about the practicality and, in particular, the enforceability) of FOISA coverage. The Government focuses on the function being delivered by these organisations, not the organisation delivering it.
98. As with other organisations proposed for coverage, the focus of the proposal is the function being delivered by these organisations, not the organisation delivering it. The consultation paper says that "*the proposed order is likely to contain a description covering all grant-aided schools, without naming specific schools individually*".
99. I am in agreement with the intentions and sentiment of this approach but have concerns about the practicalities of both the enforcement of FOISA and the ease of access for requesters who may not know where, who or how to ask for either information or advice and assistance. To ensure that it is possible to enforce FOISA, and for my staff to be able to give clear advice and assistance to organisations which might come within the scope of FOISA in the future, and to people wishing to make requests for information to such organisations, it is essential that I am consulted about the drafting of any order.

Question 4: independent special schools

4) Do you agree with the proposal to extend freedom of information coverage to **independent special schools**?

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Introduction

100. In principle, I favour extension of FOISA, where it is in the public interest and the result of a robust decision, based on assessing and balancing a number of factors. There are strong arguments in favour of the proposed extension of FOISA to **independent special schools**.

Consultation factors

101. In the consultation document on pages 4 and 5 the Government sets out its factor based approach to assessing whether functions are of a “public nature”. This includes a list of ten “factors” and “points” comprising the factors the Government considered in its 2010 consultation, plus additional factors points new to this consultation.
102. As acknowledged in the consultation document, I am in favour of this approach but in addition to identifying factors/ points, suggest that they should be weighted to show their relative importance when it comes to decision making. I give more information about weighting in my Special Report: *FOI 10 years on: Are the right organisations covered?* available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>
103. There is no reference to relative weighting in the consultation, but on pages 14-15, the document refers to the three “key” factors: two contained in the consultation list plus “access to information”. This suggests they are considered to have greater “weight” than the other factors and points.
104. For completeness, this response makes reference to all ten factors/ points, referring to them as factors 1-10 and (highlighting which the Government considered to be “key”). Extending the coverage of FOISA to independent special schools would meet many of factors set out in the consultation paper. This response has commented on the factors, but makes no recommendations about the relative weightings that should apply, recognising that is a matter for the Ministers to determine based on their views and priorities.
105. Assessment of extension of FOISA to independent special schools shows that it clearly meets several of the factors.
106. **Factor 1: (public) statutory function or responsibility of the state** (Government key factor). Independent special schools are front line providers of education, and in some cases, residential care for children and young people. Both functions are public in nature, and are the responsibility of the state to provide.
107. **Factor 2: public funding** (Government key factor). Funding for independent special schools comes from local authorities which pay for the cost of a young person’s education and care at an independent special school if the young person’s needs cannot be met in mainstream education.
108. **Factor 3: taking the place of a public authority**. If independent special schools did not provide the services they do, the obligation would revert to the state.

109. **Factor 4: activities enmeshed with the relevant public authority.** Where a young person's education (and sometimes their care too) is provided by an independent special school, its activities are enmeshed with those of the local authority. Both are providing education, each providing education for some of the children and young people residing in local authorities' areas.
110. **Factor 5: extensive or monopolistic powers.** Not relevant to this proposal.
111. **Factor 6: collective benefit.** By providing education and care to some of Scotland's most vulnerable children and young people, independent special schools carry out a function that seeks to achieve a collective benefit for the public, and are accepted by the public as being entitled to do so.
112. The accountability and quality of the education and, where relevant, care given to this group, as part of child-centred services is both a collective benefit in the present, and an investment in society for the future, aiming as it does to give children in Scotland the care and support they need.
113. A well-educated society is also a critical element in building and sustaining economic growth. The Government recognises this and states on its website that it "*wants to improve life chances for young people, support economic growth and increase the number of jobs*".
114. Education as a whole is at the heart of the Government's programme, as is the need for information about education. In setting out her programme for Government on 1 September 2015, the First Minister highlighted the importance of attainment information when she said "*But we also need to have better information about attainment so that we measure progress consistently and drive change. We need to be able to see what's working and where we still need to improve*". In FOI terms the duty to publish, which is part of FOI, is crucial to this, while the ability of children and young people and those representing them to seek specific information about their education should be available as a benefit to all.
115. **Factor 7: core function of state.** Given the regulatory environment and the recognised functions of government at both national and local level, it is difficult to see how provision of education could not be a core function of the state. The Government recognises this in the consultation and states on its website that "*Children and young people's educational experience should open the doors to opportunities which enable children to become successful learners, confident individuals, responsible citizens and effective contributors to society*".
116. **Factor 8: length of contract (practicality and proportionality).** Not relevant to this proposal.
117. **Factor 9: loss of rights.** Where children or young people move from a mainstream school to an independent special school, they lose rights to information about their schooling and care, and so do their parents, guardians and other carers. Whilst some information (as the consultation acknowledges) would be available from other organisations, this in no way compensates for what would be lost.
118. Designation would restore the lost rights.
119. **Factor 10: administrative burden on smaller authorities.** I am not aware of any arguments put forward to the effect that it would be impractical or disproportionate to designate independent special schools. But on those issues in particular, it is open to the

Scottish Government to consult with Education Scotland, and the schools proposed for coverage, if they have not already contributed to this consultation.

120. That said, it is perfectly understandable that concerns about perceived burden will exist. Figures provided by Fife Council confirm that the numbers of requests received in respect of education services are comparatively low.

| Period | EIRs | | FOISA | |
|-----------------|-----------|--------------|-----------|--------------|
| | Education | All services | Education | All services |
| Jan to Dec 2014 | 2 | 607 | 206 | 1,366 |
| Jan to Aug 2015 | 3 | 380 | 122 | 895 |

121. Fife Council runs 19 secondary schools, 141 primary schools and six special schools. From these figures, it can be expected that the number of requests received per independent special school would be low. Given that independent special schools are probably already responding to ad hoc requests for information (albeit requests that do not have enforceable FOI rights attached to them), their coverage under FOISA does not necessarily mean that they will suddenly face a flood of requests for information that they cannot cope with. The evidence from the survey of culture and leisure trusts reported in my Special Report also supports my view that request volumes will not change dramatically as a result of designation, nor will the type of information requested.
122. The key to managing the impact is to be prepared. As I have said elsewhere in this consultation response, my office already provides training and guidance for new bodies covered by FOISA, and we would be willing to use our resources to help independent special schools to minimise the impact.
123. In any assessment of the cost or impact of coverage, once quantified, I would urge the Scottish Ministers to balance the impact against the benefits of FOISA coverage. In particular, FOI rights bring with them improvements in civic engagement and participatory democracy, by empowering citizens to make decisions which affect their lives.

Other factors

124. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider those other factors to be relevant to the proposals, and have commented on them below.

State regulation, supervision or inspection

125. All of the independent special schools are required to register with the Scottish Ministers and are regulated by them in terms of sections 98-103B of the Education (Scotland) Act 1980. They are inspected by Education Scotland (and were inspected by its predecessor, Her Majesty's Inspectors of Education). Where the schools provide residential facilities, they are also regulated and inspected by the Care Inspectorate.

Appointment of decision makers

126. This does not appear to be a relevant factor for this proposal. I am not aware of any involvement of the state in appointing or removing decision makers to independent special schools but urge Ministers to clarify this.

Civic engagement and inequality

127. Children and young people in mainstream schools are able to obtain information from the local authorities that provide their education; those in independent special schools do not have the same rights to obtain information from their education providers. There are parity issues to take into account, and they are persuasive – why shouldn't children in special schools have the same rights as children in mainstream schools?
128. Designation would mitigate the existing inequality and lack of parity between children who attend independent special schools and those who attend mainstream schools run by local authorities.

Other matters

129. As with other organisations proposed for coverage, the focus of the proposal is the function being delivered by these organisations, not the organisation delivering it. The consultation paper does not make clear whether the independent special schools will be named in any order, or whether they would be covered by way of a description covering all of them.
130. While I welcome the proposal and the consultation, where any order would use a description covering all of the independent special schools, rather than naming them specifically, I have concerns about the practicality and, in particular, the enforceability of FOISA coverage.
131. I am in agreement with the intentions and sentiment of this approach but have concerns about the practicalities of both the enforcement of FOISA and the ease of access for requesters who may not know where, who or how to ask for either information or advice and assistance. To ensure that it is possible to enforce FOISA, and for my staff to be able to give clear advice and assistance to organisations which might come within the scope of FOISA in the future, and to people wishing to make requests for information to such organisations, it is essential that I am consulted about the drafting of any order.

Question 5: timescales

5) *The proposed order would be expected to come into force in spring 2016 – probably on 1 April – so bodies would have to answer FOI requests from that date.*

Do you feel this proposed timescale is reasonable to allow bodies to prepare?

If not, you may wish to provide comments on what timescales you feel would be more appropriate and why.

Response

132. While I welcome the proposal that the order would come into force relatively quickly and the acknowledgement that preparation time is needed, I would raise a word of caution.
133. In terms of preparation, my office's experience is that it takes time for proposed authorities to acquire the knowledge they need and to adjust or set up the systems required for delivery of FOI. We provide advice and guidance but this can take time to set up and deliver. It is our experience that the more prepared an authority is, the less severe the impact of coverage is.
134. My concern lies with the time it may take to draft the order and to lay it, to inform what the preparation is that is needed and by whom, and whether this would allow sufficient preparation time.
135. As stated elsewhere in this submission, the focus of the Scottish Government's proposals is the functions being delivered, not the organisations delivering them. The consultation paper says that *"it is envisaged that the proposed order would contain a description of the relevant functions rather than naming specific bodies individually. Therefore if the contractors or sub-contractors providing these services were to change in future, the new contractors would automatically also be covered by the Act"*.
136. I am in agreement with the intentions and sentiment of this approach, but have concerns about the practicalities of both the enforcement of FOISA and the ease of access for requesters who may not know where, who or how to ask for either information or advice and assistance.
137. Given the potential complexity of the drafting, I would ask Ministers to consider whether they have left sufficient time for the preparation, and to make the relevant date part of the discussion while drafting.

Question 6: business and regulatory impact assessment

6) Do you have any comments on the draft partial Business and Regulatory Impact Assessment provided at Annex A?

Response

138. I note the 3 options put forward by the Scottish Government in respect of the organisations proposed for coverage, i.e.
- (1) take no action,
 - (2) enhance statutory guidance through the section 60 Code of Practice and
 - (3) make an order under section 5 of FOISA.
139. I respect that it is the Ministers' decision which option to take. However, based on our assessment and the information provided by the Ministers in the consultation document my opinion is that the only option that will address the issues raised is (3): make an order under section 5.
140. Options 1 and 2 would not address the parity and equality issues raised in each of my responses to questions 1 to 4. Although option 2 might strengthen the access to information from organisations already covered by FOISA, it would not mitigate the equality and parity issues to the extent designation could. As is recognised in the BRIA, the Code is not a substitute for extending coverage to the bodies proposed.
141. Although it cannot be known before designation how many requests a newly covered organisation will receive, I have provided evidence in my responses which support the Government's view that the numbers of requests received by the organisations proposed are likely to be low.
142. That evidence also demonstrates that the difference between what those organisations do now to respond to enquiries they receive, and what they might be required to do once covered, is not likely to be great.
143. It would be foolhardy to think that organisations could be covered with no impact at all, but in the event that a new organisation is covered, it will be incumbent upon me as the Scottish Information Commissioner, as well as the Scottish Government, and others, to help to minimise the impact of coverage. As I have said elsewhere in this response, I am happy to provide training and support to any new bodies covered by FOISA.
144. Where contractors are minded to bid for public sector work, it is reasonable to assume that they already have an expectation that some information created as a result of that relationship will be available to the public; that is not new for them. The benefit to the contractors of being covered by FOISA in respect of the public functions they carry out would be they would have control over the process, rather than being a third party from whom views may, or may not, be sought by a public authority. It is the organisation that holds information who takes the decision about disclosure.
145. I do not consider that designation would have a significant chilling effect in terms of deterring future bidders from competing for public contracts, nor do I consider it would result in additional costs (hidden or otherwise) being built into the competitive tender process.

146. I am aware of the Scottish Government's 2012 internal research into the costs, in staff time, of responding to requests. While this is helpful in illustrating the benefits in relative cost terms of responding to the requester's satisfaction in the first instance, care should be taken about placing too much reliance on the hard data in this consultation.
147. Valuable as the information is to the Government (and others), it relates to Government's costs to deal with the requests it receives. The average cost figure for other authorities of a different size and with a narrower range of public functions would be very significantly different from the Scottish Government's figures. This makes this an unreliable number in anticipating (as far as is possible) what the cost impact might be on the organisations proposed for coverage.
148. In terms of my own office, there will be an impact both in terms of supporting newly covered bodies in their preparations for coverage, and in enforcement and promotion of FOISA where additional bodies come within scope of the legislation. However, I am confident that the impact can be managed, and leave it to the Scottish Ministers to decide whether designation is appropriate in light of all of the factors.

Question 7: equalities impact

7) *Do you have any comments on the proposals in terms of how they may impact on any particular equalities group i.e. in respect of age, gender, race, religion, disability or sexuality?*

Response

149. I have considered the proposals in terms of all nine of the protected characteristics: age, disability, sex, race, religion or belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment.
150. My general comment would be that the effect of coverage of the bodies proposed would be to remove or mitigate existing inequalities. I have set out in my responses to each of the consultation questions what I consider to be the inequalities with the status quo, and why I take the view that coverage would ensure parity of rights for prisoners, their families, children and young people, and their families, carers, guardians and safe guarders.

Question 8: future orders, registered social landlords

Future orders

8) *This latest consultation on extending coverage is part of the process of regularly assessing the scope of Scotland's Freedom of Information legislation and ensuring coverage remains up-to-date.*

We would welcome proposals in respect of other organisations or types of body which should be considered in future for inclusion within scope of freedom of information legislation.

In taking a 'function-led' approach to extension, as outlined above, we would ask you to support your views by including key factors you consider favour extension of coverage (for example, the nature of the function or service being provided, the level of public funding, the extent of state control or oversight etc.). Evidence of difficulty in obtaining information in respect of a particular organisational function would also be welcome.

Introduction

151. The consultation document states "*We note that the Commissioner has called for the extension of FOI coverage to social housing owned by RSLs.*" In fact, in my Special Report recommendations I asked the Scottish Ministers to **consider** making a section 5 order in relation to social housing and private prisons. See the Special Report: *FOI 10 years on: Are the right organisations covered?* available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>.
152. My Special Report highlighted the loss of rights to information with the changes in the way Social Housing is delivered and run, and set out the arguments for extending FOI to cover Registered Social Landlords (RSLs). As the report explains, the decision about whether to designate any bodies is for Ministers alone. My locus in this issue, as per Section 43 of the Freedom of Information (Scotland) Act 2002, is to make proposals to Ministers. So my call was for consideration of these bodies rather than calling for them to be designated, as suggested by the consultation paper.
153. As I, and my office, have explained, while we believe there are strong arguments for designation, we accept there may be equally strong arguments against. I seek to encourage full and open debate so that Ministers can make their decision, openly, with clear explanations and based on the most comprehensive information available.
154. While I welcome this consultation, I am disappointed that it comes after a view about designating RSLs appears to have been reached (page five of the consultation paper "*we are not currently persuaded of the merits of extending coverage to housing associations*"), and that the Government did not make it clear in the introduction to the consultation on its website that it was actively inviting comments about extension of FOI to RSLs in the future. RSLs are not mentioned on the contents page of the consultation paper. They are first mentioned on page five of the consultation paper and it is only in the text of page six that invitation to comment is made "*... we would wish to encourage all interested parties to respond to this consultation. RSLs and their tenants, as well as their representative bodies, in particular may wish to provide views in response to question 8.*"
155. The case for consideration of designation of RSLs is persuasive. Within the social housing sector, some landlords are subject to FOI law and others are not. Local government housing services, as part of their parent councils, are subject to FOI law, while RSLs, including housing associations and housing co-operatives, have never been subject to FOI law.

156. In my Special Report, I suggested two approaches for extension of FOI:
- (i) Rights based: the restoration of lost rights and for existing rights to follow any losses that are the result of changes to how services are delivered; and
 - (ii) Factor based: considering and weighing a number of weighted factors, particularly in relation to organisations never covered by FOI law.
157. Potential designation of RSLs requires both approaches to be considered. Ministers are aware of my concerns about the loss of rights as a result of housing stock transfers. The issue is wider than just stock transfers; it is about whether all functions of all “social landlords” should be subject to FOI. Put simply, anyone can ask a local authority landlord for information about any aspect of social housing: rents, repairs, allocations, etc. and expect to receive that information. But no-one has the right to receive information held by RSLs.

Consultation factors

158. In the consultation paper on pages 4 and 5 the Government sets out its factor based approach to assessing whether functions are of a “public nature”. This includes a list of ten “factors” and “points” comprising the factors the Government considered in its 2010 consultation, plus additional factors/ points new to this consultation.
159. For completeness, this response makes reference to all ten factors/ points, referring to them as factors 1-10 and (highlighting which the Government considered to be “key”). Extending the coverage of FOISA to RSLs would appear to meet many of factors set out in the consultation paper. This response has commented on the factors, but makes no recommendations about relative weightings, recognising that is a matter for the Ministers to determine, based on their views and priorities.
160. **Factor 1: (public) statutory function or responsibility of the state** (Government key factor). Local authorities are under a statutory obligation (s31(2) of the Housing (Scotland) Act 1987) to provide accommodation to homeless households. S5 of the Housing (Scotland) Act 2001 imposes a statutory duty on RSLs to comply with local authority requests for support for homeless households in most circumstances. This is explained further in the *Government’s Code of Guidance on Homelessness (May 2005)* and its *Homelessness Update* to local authorities in September 2002. In this respect, RSLs deliver functions derived from and underpinned by statute and form part of the functions for which the state has generally assumed responsibility.
161. **Factor 2: public funding** (Government key factor). This is an area where I would encourage the Ministers to clarify and make available further information about the amount of public funding that RSLs receive, and in what context. This information would enable Ministers to form a view about the extent to which, in fact, RSLs are supported with public funding, and its impact on the public purse.
162. In relation to public funding and how it is accounted for, there is a further issue, not mentioned in the consultation paper, but which has been raised with me by both officials and the Scottish Federation of Housing Associations. There is a concern about whether designation under FOISA would have the inadvertent consequence of changing the Office for National Statistics’ (ONS) classification of RSLs for the National Accounts. The concern expressed is that this might bring such borrowing within the Public Sector Net Cash Requirement.

163. Currently RSLs are treated similarly to local government housing services in many relevant respects, for example, their procurement is “public”, they are subject to the jurisdiction of the Scottish Public Services Ombudsman and they are subject to the EIRs. They are not subject to FOISA.
164. From our reading of ONS’ extensive information about classification, it appears that RSLs are classified as market, not public sector, units for the National Accounts. By contrast, local government housing services are classified as “public sector quasi-corporations”, a more complex definition which recognises their relationship with their parent local authority.
165. ONS information explains that statute is not a relevant consideration in the classification decision. We conclude that designation of non-local government RSLs under FOISA is unlikely to be a material consideration for the classification for the National Accounts.
166. Given the concerns raised, I would urge the Ministers to seek a formal opinion from ONS and to share the response with interested stakeholders.
167. **Factor 3: taking the place of a public authority and Factor 7: core function of state.** I refer back to the comment in relation to provision of accommodation for homeless households made under factor 1. That the Government has issued a *Code of Guidance on Homelessness May 2005* and its *Homelessness Update* to local authorities in September 2002, and given the statutory basis of the obligation to support local authorities in delivery of their function, it is difficult to see how these two factors would not apply.
168. **Factor 4: activities enmeshed with the relevant public authority.** RSLs’ statutory role in providing accommodation to homeless households indicates that they are substantially enmeshed with the activities of local government. That enmeshment is increasing: the Scottish Government’s statistics bulletin, *Operation of the Homeless Persons Legislation in Scotland 2014-15*, observes “*There has been a marked increase in the number of homeless households securing a housing association tenancy – increasing from 1,488 in 2002-03 to a peak of 8,297 in 2009-10 since when it has reduced to 5,891 in 2014-15. The increase in housing association lets to homeless households is partly explained by stock transfers in six local authority areas, where ownership of the local authorities housing stock transferred to housing associations. For these local authorities, what would have been classified as local authority lets are now classed as housing association lets.*” In particular, stock-transfer RSLs are increasingly performing a function that would otherwise have to be delivered by local authorities
169. **Factor 5: extensive or monopolistic powers.** This is an area where I would encourage Ministers to carry out further research. Arguably the existence of a private housing sector suggests RSLs do not have extensive or monopolistic powers, especially in light of the guidance provided by Government. However, this is far from clear in relation to the social housing sector, as for many tenants, and homeless people, they have little option but to seek housing provided by RSLs.
170. **Factor 6: collective benefit.** An organisation applying for registration as a social landlord must meet several criteria, including that it is not-for-profit and that it aims to provide good, low cost accommodation for people who need it (s24(1) Housing (Scotland) Act 2010). Social landlords provide collective benefit for the public and are accepted by the public to be entitled to do so.
171. **Factor 8: length of contract (practicality and proportionality).** As the body responsible for enforcing FOI law, I welcome the focus in the consultation paper on practical issues. Put

bluntly, there would be little value in designating a body or a function if there were practical obstacles to the delivery of the duties and the enforcement of the FOI rights. I am aware that RSLs are, by their nature, continually evolving and developing.

172. The consultation paper suggests that it might be disproportionate to designate bodies or functions where only low value contracts or grants are involved, or where the contract lasts for a short period of time. Financial thresholds would be extremely difficult to enforce as they may change from year to year, they would be challenging to track for the same reason and it would be overly complex for requesters.
173. I would also suggest that the public function being carried out should carry significantly greater weight than the duration of a contract or grant.
174. **Factor 9: loss of rights.** I am concerned about parity of rights to information in the widest sense. Tenants of former local authority housing lost FOI rights when their tenancies transferred to RSLs. But others lost those rights too: communities, interest and political groups and academics no longer have a right of access to the information they need to understand and engage with the RSL sector. That type of engagement is generally recognised to bring benefits to the bodies concerned.
175. The lack of parity is at its most stark for service users: tenants, prospective tenants and factored home-owners of RSLs, but it also applies to wider civil society, political and academic engagement with RSLs. As Frank La Rue, Special Rapporteur to the UN General Assembly observes¹, "*Obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights.*" I would argue that a country committed to all of those rights and to the benefits of community engagement, cannot afford to restrict access to information.
176. Ministers have taken the view that they are not minded to consider designating RSLs. They have also stated that they will, instead, review the Scottish Social Housing Charter. I welcome this, in that could deliver greater parity in what information is accessible, and so contribute to openness and transparency. However, it must be recognised that strengthening the Scottish Housing Charter **cannot** achieve the equality of information rights, and their enforceability, afforded by FOI designation.
177. The Scottish Social Housing Charter sets the framework for relationships between tenants and social landlords. Whilst bringing many benefits, the Charter does not provide equivalent rights to those conferred by FOISA.
- (i) The Charter is focused on communication, part of which is providing information to tenants and other customers. While this approach is very positive it falls short of FOISA which provides a legal right to *any person* to request and receive information.
 - (ii) The Charter encourages proactive communication, but this falls short of the FOISA *duty to proactively publish* information through an approved publication scheme (supported by a guide to information).

¹ Promotion and Protection of the Right to Freedom of Opinion and Expression (Report by Frank La Rue, Special Rapporteur, UN General Assembly, September 2013)

- (iii) The Charter provision is not *enforceable*: under the Charter provisions the SPSO and Scottish Housing Regulator cannot compel an RSL to disclose information. FOISA provides an appellate body which has powers to order disclosure.
- (iv) The Charter provision is limited to the information tenants and other customers “need”; FOISA provides an entitlement to any information held by a body. FOISA is also supported by the Ministers’ Section 60 Code of Practice which sets out the standards of practice public authorities are expected to achieve in relation to information provision.

178. While strengthening the Charter could reduce the equality and parity gap for some information requesters, it will not eliminate it, or give the same benefits and protections as designation under FOISA. It is in this context that I would encourage Ministers, irrespective of FOI designation, to consider bringing the Charter outcomes and standards as close as possible to FOI law, particularly in relation to information for tenants.

179. There are, in my view, opportunities for sector-wide initiatives such as an information code of good practice and a model publication scheme, which although not enforceable would contribute hugely to equality, transparency, and consistency between providers. My office would be happy to contribute to the review and to share our considerable experience.

180. **Factor 10: administrative burden on smaller authorities.** As the consultation paper indicates, Ministers are particularly concerned about the regulatory burdens placed on RSLs by the Charter.

181. I would encourage Ministers to carry out more research, with both the RSLs and with local authorities. I would also raise a word of caution about giving disproportionate weighting to burden arguments. FOI law is based on principles of universal entitlement: the public should be free to determine what information they want to see. It is almost impossible to estimate demand and the nature of information that people will ask for under FOI. For example, could we have foreseen that bereaved relatives of patients at the Vale of Leven Hospital would have made FOI requests, or that the Scottish Rural Schools Network would seek information to help them engage in local authority decision-making? Both examples indicate the positive benefits that accrue from the universality of the FOI right.

182. Consideration should be given to what the *additional* administration required will be, rather than what the cost of an FOI function created from scratch may be, as some of the functions required by FOI may already be in place, just not recognised as such.

183. For example:

- (i) RSLs already respond to enquiries; how many of these are information requests, in how many cases do they simply provide information, and how many do they not answer or refuse information?
- (ii) How many such enquiries require further communication because the enquirer was dissatisfied?
- (iii) How quickly do they respond to enquiries?
- (iv) What type of information is asked for?
- (v) Is there any correlation between tenant satisfaction with the openness of RSLs and the volume of requests? Many smaller RSLs reported extremely high levels of satisfaction to the Scottish Housing Regulator.

184. In paragraphs 55-62 of my special report. I report the findings of my survey of culture and leisure trusts who were the subject of the first s5 order under FOISA. This concludes that the impact of designation has not been problematic. There is no evidence that designation has resulted in changes to the volume or complexity of requests for information, compared with requests received before designation.
185. I am grateful to Fife Council for providing the following data about requests received by its housing service. This provides insight into the likely impact of FOISA designation.
186. **Requests received by Fife Council housing service**

| Period | FOISA | EIRs |
|-------------------|-------|------|
| Jan – Dec 2014 | 62 | 79 |
| Jan – August 2015 | 37 | 35 |

187. According to its website, Fife Council has just over 30,000 houses, a rental income of approximately £95 million and is Scotland's third largest landlord. Focusing solely on FOISA requests in 2014, Fife Council received approximately 2 requests per annum per 1,000 houses. Of course, a local authority is likely to record requests about wider corporate functions separately.

Other factors

188. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider those other factors to be relevant to RSLs, and have commented on them below.

State regulation, supervision or inspection

189. RSLs are supervised and regulated by a variety of bodies including, OSCR, SPSO and the Scottish Housing Regulator (SHR).
190. Of particular relevance to this consultation is the role of the SHR. The SHR is an independent Non-Ministerial Department, directly accountable to the Scottish Parliament. It operates through a framework agreement with Scottish Ministers. It sets out its approach in detail in <https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Our%20Regulatory%20Framework.pdf>)
191. SHR's powers, responsibilities and activities include monitoring, assessing, comparing and reports on performance of housing activities and RSL's financial well-being and standards of governance. This includes keeping the public register of social landlords, from which it has the powers to remove an organisation, monitoring performance against the standards set out in the Charter and achievement against regulatory standards of governance and financial management.

Appointment of decision makers

192. Under its duties in Part 3 of the Housing (Scotland) Act 2010, the SHR monitors and assesses governance structure and arrangements and can hold the governing body of an RSL to account in meeting those standards.
193. SHR can remove and appoint members of governing bodies, or direct the transfer of assets to another RSL.

Civic engagement and inequality

194. In addition to the need for parity, discussed under factor 9, it is important to remember that extension of FOI to RSLs would give the right to information to more than tenants. It would enable others such as researchers, academics and those with an interest in housing, homelessness and related issues to engage more meaningfully with both the issues and the organisations delivering social housing.
195. This in turn provides the opportunity for more meaningful civic engagement, not only about the homes people live in, but also about their neighbourhoods and how housing is managed to contribute to a happier, healthier and stronger society.

Other matters

Public opinion

196. There is strong public support for extension of FOI to RSLs.
197. In an Ipsos MORI poll commissioned by the Scottish Information Commissioner in 2013, (www.itspublicknowledge.info/research) we asked “*To what extent do you agree or disagree with the (FOI) Act being extended to cover the following organisations?*” In response to housing associations, support was very high:
- (i) 79% agreed: 47% strongly, 32% tended to
 - (ii) 5% neither agreed / nor disagreed
 - (iii) 11% disagreed: 6% tended to, 5% strongly
 - (iv) 5% didn't know

Approach to consultees and information relied on

198. In the consultation document, in relation to question 8, the Government extended the following invitation “... *we would wish to encourage all interested parties to respond to this consultation. RSLs and their tenants, as well as their representative bodies, in particular may wish to provide views in response to question 8.*”
199. I recognise this as a positive approach. However, I urge caution, particularly in any future consultation, about how information in responses is used and relied on in relation to feedback about individual experiences of asking for and receiving information from RSLs under the current arrangements.
200. It might appear logical to seek evidence of individuals' experiences of asking for information from RSLs: both good and bad. We suggest that this could be inadvertently misleading on a number of counts:
- (i) It could result in decisions being based on the experiences of too small a cross-section of tenants (and others with rights under the Housing Charter).
 - (ii) There is a high likelihood that feedback would be skewed. For example it might be skewed negatively, as there is a greater likelihood that those with a poor experience are more likely to speak up. A good parallel to draw is in FOI. If my views on FOI practice in Scotland were based entirely on appeals made to me, it would give a disproportionately negative view. This is because over 62% of decisions find fully or partially in favour of the requester, suggesting practice is universally poor. In reality of the 60,000+ information requests in Scotland each year, fewer than 1% result in

appeals, which suggests that practice and experience is varied, but not predominantly negative or poor. Equally the evidence could be skewed positively, giving a false impression that there are no access to information issues in the social housing sector.

- (iii) This type of evidence is unlikely to take into account those not covered by the charter who may not have sought information up to now because they do not have the "Charter Rights". Their experience will always be an unknown quantity

201. Notwithstanding all of the above points, this type of evidence misses the fundamental point that the decision to designate should be taken on its own merits and not as a reaction to perceived flaws within the current system which, themselves, may be based on a skewed view in the first place. In other words, are there reasons why, based on assessment of weighted factors, designation is desirable in the public interest irrespective of current experience.

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