

Extending the scope of FOISA? The Commissioner's view 2010



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On 28 July 2010, Scottish Ministers published a consultation on extending the coverage of the Freedom of Information (Scotland) Act 2002 to certain private contractors, leisure trusts, the Glasgow Housing Association and the Association of Chief Police Officers in Scotland. This is the Scottish Information Commissioner's response, submitted on 2 November 2010.

I welcome the Scottish Ministers' consultation on extending the coverage of the Freedom of Information (Scotland) Act 2002 ('the Act'), and provide this submission. This consultation follows an earlier discussion paper published by the Scottish Ministers in November 2008, my response ('discussion paper response') to which might usefully be read in conjunction with this submission. It is available on my website¹.

Summary of key points

2. Coverage of the Act should be extended to all the categories of body in the Scottish Ministers' consultation and I agree with the case which the Scottish Ministers have made in support of this.
3. Extension does not represent an undue burden in difficult economic times. The volumes of requests are likely to be manageable, and costs of implementation appropriately affordable. There are public benefits, including potential cost savings, from extension.
4. While some issues with the Scottish Ministers' approach to designation and the draft section 5 order remain to be addressed, these should not cause the order to be delayed or prevented.
5. Given that the section 5 order must be laid by early February 2011, if it is to be passed in the current Scottish Parliamentary session, I hope Ministers will proceed with designation without delay.

1.0 Powers to extend coverage of the Act

6. Section 5 of the Act makes provision for Ministers to designate bodies as public authorities *for the purpose of the Act* who either:
 - appear to the Scottish Ministers to exercise functions of a public nature; or
 - are providing, under contract made with a Scottish public authority, any service whose provision is a function of that authority.
7. To date, the Scottish Ministers have not exercised their powers under section 5, although, as I set out in my discussion paper response, it is clear that the Scottish Parliament expected that these provisions would be actively used.

¹ http://www.itspublicknowledge.info/uploadedfiles/Designation_submission_final.pdf



2.0 FOI in Scotland today

8. The prospect of adding bodies under section 5 was first debated in Parliament during the passage of the Act, in 2002, and it was always expected that the Scottish Ministers would use section 5 to designate additional bodies under the Act. At that time, Deputy First Minister Jim Wallace told the Scottish Parliament that “Provisions allow providers of services to the public to be added to the bill case-by-case and I reassure Parliament that that power will be exercised.”²
9. I expressed my view that these powers should be exercised in my response to the Scottish Ministers’ ‘FOISA One Year On’ consultation in March 2006³.
10. I publicly raised this issue again in October 2007⁴, as it became clear to me that changes in the delivery of public services, for example outsourcing them to arms’ length organisations or contractors, posed a real threat to information rights in Scotland.
11. I therefore welcomed the Scottish Ministers’ decision to publish a discussion paper in November 2008, to which I formally submitted my views, and the subsequent announcement, in December 2009, of the Minister’s intention to progress to formal consultation on extension.
12. I believe that changes in the political and economic environment, and in public policy, have placed an even greater emphasis on the need for extension.
13. In the current climate of reduced budgets and changes to public services, the need for openness and transparency around public spending is greater than ever. Access to information will help the public to understand the tough choices that authorities are having to make. The public may rely upon FOI rights even more, to find out how changes will directly affect them and their communities.
14. This is particularly relevant to the extension debate given the outsourcing of public services. An ever-growing number of bodies outside the scope of the Act are becoming responsible for spending the public pound.
15. In short, the Scottish public sector landscape, and the environment in which it operates, have changed significantly since FOISA was enacted.

3.0 The principles behind extending FOISA

16. I agree with the tests set out by Ministers when considering whether extension to the seven categories of bodies may be appropriate. These are:
 - criteria to determine whether bodies are delivering public functions; and
 - measurement of the extent/significance of that function, and potential burden/benefits of coverage.
17. For each of the seven categories, the Scottish Ministers set out the case for designation in two parts, following the tests above. For each category, the Scottish Ministers find in favour of designation *in principle*, to a greater or lesser degree.

² Scottish Parliament Official Report 24 April 2002, Col 11111/2

³ <http://www.scotland.gov.uk/Resource/Doc/115300/0028546.pdf>

⁴ <http://www.itpublicknowledge.info/home/News/20071025.asp>



18. I agree with the Scottish Ministers that strong arguments exist to support designation in each of the seven categories. I do not intend to go on here to restate my arguments in favour of designating the bodies being considered. They are a matter of public record and are fully rehearsed in my designation paper submission. My position has not changed. Indeed, as I have already indicated, if anything the arguments I made in 2008 have strengthened in the face of public policy, social and economic change over the intervening 18 months.
19. I will focus my remaining comments on two specific areas which are raised by the consultation paper:
- The proposed approach to extension, including the draft s5 order
 - The question of 'administrative burden', and issues raised in the partial BRIA.

4.0 The proposed approach to extension

4.1 PFI Contracts

Contractors who run privately managed prisons and prison escort services

Contractors who build and maintain schools

Contractors who build and maintain hospitals

Contractors who build, manage and maintain trunk roads under PFI contracts

20. I consider these four categories together as my comments are of relevance to them all. I remain strongly in support of designation of PFI contracts in all these categories, and have set out my arguments for this position in earlier submissions.
21. I welcome a class approach to definitions in each category. However I note that the thresholds proposed deliver varied results. For example, applying the thresholds to PFI data published on the Scottish Government website⁵, 83% of educational PFI projects are captured, but only 29% of health/hospital projects. I note that the threshold generally covers larger acute hospitals but not community hospital projects. I do not wish to prevent or delay the Scottish Ministers from proceeding with designation of larger hospitals, only to note that there may be a case for designating smaller PFI hospitals in the future.
22. I also note that the section 5 order definitions for each of the four categories of PFI are different, and understand that this is because they are underpinned by the relevant statute in order to provide legal certainty of coverage for the bodies affected.
23. Legal certainty should in theory aid enforceability, and give the public comfort over who is covered. However, in practice, the definitions in the draft order may not make it clear to an individual without specialist legal knowledge, what activities or services will be covered.
24. For example, are 'soft' facilities management services, such as cleaning and catering, covered under all the definitions? At first glance it appears that they are covered for prisons and hospitals, but not for schools. The paper also states that PFI contracts are to be covered '*in relation to functions of a public nature only*'. How are these public functions to be defined in practice?
25. This uncertainty may impact on my ability to enforce FOI law, as I must first determine whether the information is being requested from an authority covered by the Act. In addition, where a body does not believe that it is obliged to respond to a request for information, it may also fail to comply with an investigation. This could result in cases being determined in Court as to the extent to which a body is, or is not, designated.

⁵ <http://www.scotland.gov.uk/Topics/Government/Finance/18232/12308>



26. Ministers may wish to produce interpretative guidance to supplement the section 5 order, which may help deal with any ambiguity.
27. Whilst certain contract, financial and performance information is already held by contracting authorities, I remain of the view that specific information of relevance to a particular requester is not accessible from reports submitted by contractors.
28. Whilst the standard contracts used in newer PFI deals are worded to facilitate the sharing of information with authorities dealing with FOI requests, it would appear that these terms do not apply to older contracts, many of which have 20 or more years to run.
29. For each PFI project which meets the definition criteria and threshold, the Scottish Ministers propose designating the Special Purpose Vehicle (SPV), as the legal entity with the direct relationship with the commissioning public authority, for the purposes of the Act.
30. The Scottish Ministers recognise there are practical challenges resulting from designating SPVs, in that they essentially exist for legal purposes only, often without their own staff or premises. The Scottish Ministers suggest resolving this through application of section 3(2)(b) of the Act, i.e. the contractors and subcontractors will hold information *on behalf of* the SPV and such information would be covered by the Act.
31. This reasonable approach could be reinforced by a specific reference in contracts which clarifies that information held by *any* subcontractors in relation to a particular PFI contract is held on behalf of the SPV.

4.2 Leisure, sport and cultural trusts and bodies established/created by local authorities

32. I support designation of leisure, sport and cultural trusts, and have set out my arguments for this position in my earlier designation discussion submission.
33. While I would have preferred using the group accounting rules method to define trusts to be covered, the alternative approach favoured by the Scottish Ministers appears to capture the key trusts I would wish to see designated.
34. The threshold of £100,000 public funding per annum captures all the major leisure trusts, most of whom appear to receive substantially more than this per annum.
35. However the use of financial thresholds has potential weaknesses e.g.:
 - Fluctuations or reductions in public funding could, in theory, bring bodies in and out of the section 5 order definition.
 - Trusts might agree support packages with local authorities which enable them to avoid coverage.
36. However, unless public funding for trusts drops substantially, these do not seem to be high risk factors at present.

4.3 Glasgow Housing Association and Association of Chief Police Officers in Scotland ('ACPOS')

37. I support the extension of the Act to cover the Glasgow Housing Association (GHA), and I have set out my arguments for this in my earlier designation discussion response.



38. I believe that extending the Act to cover the GHA will demonstrate the benefits of FOI coverage to both to the public and to registered social landlords and other stakeholders generally.
39. I note one concern with extending the Act to cover the GHA. FOI rights will not extend to the 27 second stage transfers (SSTs) planned over the next few years which will reduce GHA's tenant base by about one third.
40. There is the prospect then of many GHA tenants being afforded FOI rights regarding their homes and tenancy, only for these rights to be removed at a later date following second stage transfer.
41. Whilst this eventuality should not prevent or delay the Scottish Ministers from extending the Act to cover the GHA, the case for designating SSTs, and other registered social landlords may be worth revisiting in the future.
42. With respect to ACPOS, I am persuaded by the Scottish Ministers' arguments, set out in their consultation paper, that it is in the public interest to designate them under the Act.

5.0 Partial Business and Regulatory Impact Assessment (BRIA)

43. The Scottish Ministers' consultation paper states that they are particularly mindful of the need to establish whether coverage would place '*undue burden*' on bodies at a time of economic difficulties. This is a concern raised by a number of respondents to the earlier discussion paper in 2008, albeit in general terms with little specific evidence.
44. The Scottish Ministers acknowledge this lack of evidence, and call for consultees to offer their own data, to facilitate a proper assessment of the impact of extension. I support the Government's call for evidence. Any evidence relied upon must be credible and robust if it is to be of value.

5.1 The cost of FOI

45. FOI is not without its resource requirements - public authorities which do not invest in FOI are unlikely to be complying with their statutory obligations. However, it is in the public interest that cost predictions are well-founded and not overinflated.
46. When evaluating the administrative impact of FOI, it is important to recognise that the cost of FOI is not a foregone conclusion – it is affected considerably by the chosen practice and experience of an authority.
47. The phrase '*undue burden*' focuses attention on the cost aspect of FOI – but the impact of FOI cannot be evaluated properly without also considering the benefits.
48. The partial BRIA identifies three key factors which the Scottish Ministers suggest should be considered when estimating the cost of implementing the Act:
 - The numbers of requests received per annum.
 - The costs of establishing FOI procedures.
 - The average resources required to handle an FOI request.
49. I will make some observations against each of these three in turn.



5.1.1 Number of requests received per annum

Predictions of demand

50. The first thing to note is that current levels of information requests which potential designees are reporting are very low. Even the GHA and ACPOS, who are already operating within the spirit of the Act, currently receive relatively few requests.
51. However, a review of responses to the discussion paper in 2008, plus my Office's discussions with potential designees, reveal a concern that designation will lead to an unmanageable surge in requests. Some responses⁶ to the Ministers' previous consultation claim that FOI requests would be so voluminous and administratively burdensome that they would paralyse a body's ability to function, and even in some cases radically undermine the marketplace in which it operates.
52. No specific or empirical evidence has been offered to substantiate these concerns – from Scotland or any other legislature, including those where contractors are already subject to FOI legislation. Without any evidence it is difficult to conclude that extending FOI would have this catastrophic effect.
53. However there is evidence, both in the UK and overseas, of a tendency to overinflate predictions of volumes of FOI, and associated costs:
- A study by the Home Office in 1999⁷ predicted that the annual cost of implementing the Freedom of Information Act 2000 would be 'up to £125M'. A subsequent study in 2006⁸ put the actual cost at nearer £35M.
 - A 2006 Canadian study⁹ found that federal agencies forecast that they would receive 'about 100,000' requests per annum - in fact they received around 25,000. In Australia¹⁰, a prediction of 'over 100,000' requests to the Immigration Department translated into an actual figure of 1,582.
 - My own research in 2003/4¹¹ asked Scottish public authorities to predict how many information requests they anticipated once the Act was in force. Comparing their predictions with a 2006 study¹² reporting actual data showed that some sectors significantly overestimated demand e.g. HE institutions predicted between 1,500 and 4,000 requests each. The 2006 report suggests that they received an average of 71 in 2005.
54. I would suggest caution therefore in relying on the anecdotal concerns expressed. My view is that the evidence does not suggest that newly designated bodies will be 'inundated' with requests.

⁶ Response submitted by CBI Scotland suggests that the cost of complying with FOI requests could deter contractors from tendering for public sector contracts, leading to a decline in productivity and dynamism in the sector, contrary to the public interest.

⁷ *Freedom of Information: preparation of draft legislation: background material: Annex A: the financial consequences of freedom of information*. (The report is no longer available online but its content is quoted a blog post by Steve Wood in 2006.)

⁸ <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/foi/reference/foi-independent-review.pdf>

⁹ Research Studies Vol 2: Public Services and Transparency *Two Challenges in Administration of the Access to Information Act*, Alasdair Roberts 2006

¹⁰ 'FOI in Australia, Canada and New Zealand': Robert Hazell, *Public Administration* Vol 67 Summer 1989

¹¹ 'Study into preparedness of Scottish Public Authorities for FOISA' Craigforth Consultancy and Research, 2003 and 2004

¹² SFOIG minutes August 2006 <http://www.scotland.gov.uk/Resource/Doc/1032/0041393.pdf>



Putting request volumes in context

55. Organisations working with the public do not suddenly start providing information about what they do, or receiving requests from the public and other external sources, solely as a consequence of the Act. They are likely to have been subject to these demands, and to have put resources in place to deal with them, for some time.
56. FOI – type information requests (i.e. those to which authorities apply their FOI procedures) are likely to be a very small proportion of overall enquiries to an authority. Many information requests are ‘business as usual’, and have probably been dealt with routinely by bodies for years.
57. Some illustrative examples:
 - The Scottish Government’s Central Enquiry Unit logged 92,000 enquiries in 2009, and received 1,624 FOI requests in the same period – equivalent of 1.8% of centrally recorded enquiries.
 - The GHA has a dedicated call centre employing 82 staff, handling about 72,000 general enquiries per annum. GHA currently receives 12-18 information requests each year. Even if this number increased substantially, it would still represent a tiny fraction of overall enquiries.
 - Culture and Sport Glasgow logged 4,206 enquirers in 2009-10, and 82 FOI requests. In other words there were 51 times more general enquiries than FOI requests.

5.1.2 Costs of establishing FOI procedures

58. I have already said that investment in preparing for FOI responsibilities will be necessary, but I would argue that it can be appropriately affordable if it is effectively targeted and fairly reported.
59. Measuring the cost of implementing FOI *accurately* should entail focusing on *additional or displaced* cost resulting from designation. Costs which do not relate solely or directly to FOI should not be included, when determining accurately the actual cost of FOI.

Records management

60. Records management is a case in point. The Scottish Ministers’ BRIA suggests this is one potential cost of establishing FOI, and the consultation paper reports that ACPOS views their requirement for a temporary records manager as an additional cost of FOI.
61. I do not consider records management to be a cost of FOI. Organisations should be observing sound records management as part of good governance generally. Research at the UCL¹³ found a number of drivers behind investing in records management, other than FOI compliance, including:
 - need to save costs by reducing office space;
 - data security;
 - a governmental emphasis on e-government; and
 - response to audit/performance requirements.

¹³ ‘Reducing the administrative burden of compliance: the importance of good records management’: Dr Elizabeth Shepherd, Department of Information Studies, UCL.



62. World Bank research on the budget implications of FOI in 2009¹⁴, states that management of archives and records “is generally considered an activity that the public sector as a whole should embrace, not just under an access to information regime”.
63. Good records management makes FOI compliance more efficient and effective. However records management is a necessary business requirement and the costs are not entirely a consequence of designation.

Other set-up costs

64. The consultation paper correctly points out that, in my research in 2007¹⁵, more than half (53%) of bodies surveyed absorbed their FOI obligations within their existing staff complement.
65. Staff recruitment is not essential, but there is a need to invest in ensuring staff can identify FOI requests, and know the authority’s obligations and procedures for dealing with them. However, there are extensive resources available on my website to guide authorities. I will provide directed support to newly designated bodies in due course.
66. Good systems and procedures are also critical. However potential designees who deal with public enquiries already are likely to have these in place, to a certain degree, and may be able to manage costs by adapting what they have e.g. call centres, existing enquiry handling procedures.
67. When accurately forecasting the cost of implementing FOI, it is necessary to recognise that some costs are a matter of choice and practice, rather than statutory essentials. Presenting these as absolute costs of FOI is, in my view, misleading.
68. For example, the cost of time spent deliberating on how to respond and what to exempt is determined by the practice of an authority and is within their control. The Scottish Ministers suggest that the cost of legal advice is a potential cost of FOI. This is a form of deliberation, and while it may from time to time be a choice an authority wishes to make, there is no statutory obligation for authorities to seek legal advice prior to responding to an FOI request.

5.1.3 Average resources required to handle an FOI request

69. This is the area which suffers from the patchiest evidence. There has been no methodologically robust, objectively conducted research in this area in Scotland, and very little indeed elsewhere. Attempts to assess costs have ranged from the wildly unsubstantiated, to genuine best estimates, with some authorities concluding it is just too difficult to do.

¹⁴ ‘Budgeting Implications for ATI Legislation – the Mexican Case’ – Alfonso Hernandez-Valdez. World Bank – Access to information working paper series

¹⁵ ‘FOISA: New Modes of Management in Scottish Public Authorities’, University of St Andrews and Caledonian Business School



70. We have gathered together existing information on attempts to evaluate the average cost of dealing with FOI.

| Authority/Country | Date of | Average cost per | Average time per request | Total Annual Cost |
|---|---------|------------------|--------------------------|---|
| United Kingdom ¹⁶ | 2006 | £254 | 7.5 hours | £35.5M |
| Australia ¹⁷ | 1987 | £245 | - | £7.3M |
| Canada | 1987 | £440 | 33 hours | |
| Republic of Ireland ¹⁸ | 2008/9 | £389 | - | £6.1M (2009) |
| Scotland | | | | |
| Scottish Government ¹⁹ | 2010 | £200 | 7.25 hours | £324,800 |
| Scottish Parliament ²⁰ | 2009 | £85 | 2.4 hours | £79,326 |
| East Renfrewshire Council ²¹ | 2009 | £95 | - | £57,475 |
| Dumfries and Galloway Council | 2007 | £75 | 5 hours | £26,940 |
| ACPOS ²² (total for police forces in Scotland) | 2009 | £60 | - | £1.2M (£150K/force) |
| Dundee City Council | 2007 | | | £250,000 (£150k FOI team plus £100K other departments.) |

Note: where costs were originally reported in local currency they have been exchanged to £sterling at the average exchange rate for the relevant year, for the purposes of comparison.

71. My main observations relate to the limitations of this data. Methodologies vary widely, and there is no common, robust approach. It is not always clear, for example, how 'FOI request' has been defined. We know that the Scottish Government's analysis excludes 'business as usual' requests (even though these are technically FOI requests). In fact the costs above may relate only to those deemed complex, likely to be a very small proportion of the total. Therefore the average costs would be reduced if all information requests were included.

72. Cost components included also vary – some look purely at staff time, others add in salaries and overheads such as property costs. Many of the Scottish authorities themselves highlighted the challenges in determining what staff hourly rates to use, as requests may be dealt with by more than one person.

73. Finally, none of these analyses, being 'snapshots', allow for the fact that costs can reduce by adopting better practice, or as skills and experience grow. This point is illustrated by data published by the Scottish Parliament²³ which shows that the cost per request was £233 in 2006, but had reduced to £85 by 2009.

74. Assessing cost is important, but it requires a robust, well-founded and academic approach, the like of which has not yet been attempted in Scotland, or indeed elsewhere.

¹⁶ <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/foi/reference/foi-independent-review.pdf>

¹⁷ 'FOI in Australia, Canada and New Zealand': Robert Hazell, Public Administration Vol 67 Summer 1989

¹⁸ http://issuu.com/tascpublications/docs/an_economic_argument

¹⁹ Scottish Government's consultation on extending the coverage of FOISA, July 2010

²⁰ <http://www.scottish.parliament.uk/apps2/corporate/FOI/reqDetails.aspx?enqID=15643>

²¹ Local authority data taken from reports to council shared with the Commissioner in May 2010

²² http://www.centrefoi.org.uk/portal/images/Thomson_Sem_3.ppt

²³ Ibid



75. For this reason it would be advisable for Scottish Ministers to take care with ‘evidence’ of costs supplied by consultees. As a data gathering exercise it has the potential to provide us with a better picture of attempts to cost FOI than ever before, but I would caution against presenting the data gathered as robust evidence of the costs, without at least carefully examining how it has been calculated.

5.2 Other factors to be taken into consideration

76. There are two additional factors which I recommend that Scottish Ministers take into consideration in their partial BRIA. I believe they will provide a more comprehensive, fair analysis of the impact of extending FOI in the current economic climate.

5.2.1 FOI costs are at the margins

77. FOI costs should not be considered in isolation. Compared with other communications and information governance expenditure, the cost of FOI is likely to be at the margins.
78. For example, the Scottish Government has calculated that the average cost of dealing with a request is £200 – equating to a cost in 2009 of £324,800²⁴. In 2009-2010, the Government’s corporate budget for strategic communications was £10.8M. Staffing levels should also be put into context. For example, GHA has 2,034 staff of whom 82 handle general enquiries and only one deals with information requests.

5.2.2 Costs are not a foregone conclusion

79. I have touched on this already but there is evidence that the cost of complying with FOI can be brought down by good practice. One of the difficulties of predicting cost is that it is influenced by a range of factors, many of which are within the control of the public authority. Recent research²⁵ suggests that bodies with good records management will find compliance with FOI laws easier and cheaper.
80. There is also some evidence that authorities become more efficient and effective as they gain experience - the Scottish Parliament data above suggests this. Data from Australia and Canada²⁶ both of which have had FOI regimes for longer than Scotland, suggests that the average cost of dealing with requests falls over time.
81. My programme of practice assessments of Scottish public authorities indicates that observing good practice helps manage costs. We have identified a number of factors that drive more efficient FOI practice e.g. maintaining a single universal logging system, good records management, and training FOI specialists within departments, who combine this with sound knowledge of records held.
82. Some illustrative examples from the practice visits undertaken to date:
- The University of Glasgow has nominated a relevant contact within each department. This allows for the retrieval of information as efficiently and effectively as possible.
 - Perth and Kinross Council has introduced a similar approach with a network of ‘Information Providers’ and ‘Service Co-ordinators’ who ensure information is located, retrieved and provided efficiently.

²⁴ Calculated by multiplying £200 average cost by number of requests. Does not account for staff salaries.

²⁵ ‘Reducing the administrative burden of compliance: the importance of good records management’: Dr Elizabeth Shepherd, Department of Information Studies, UCL.

²⁶ ‘FOI in Australia, Canada and New Zealand’: Robert Hazell, Public administration Vol 67 Summer 1989



- Grampian Health Board reduced the time taken to deal with FOI requests by reviewing its procedures, introducing compulsory training, and re-allocating staff and resources to FOI. As a result it improved its compliance with the 20-day timescale from 64.3% to 89.2%.
 - Grampian Health Board has invested in records management, and assessors observed that information searches were undertaken very effectively.
83. Concerns which Scottish public authorities may have about being overwhelmed by the cost of meeting obligations arising from FOI can be addressed by looking to remedies which already exist within the Act. For example, we have seen instances where a public authority could have cited section 14 (vexatious or repeated requests) but in the spirit of public service, have persevered to their cost.
84. Section 12 permits authorities to refuse a request which exceeds the amount prescribed in the Fees Regulations (currently £600). I encourage authorities to make use of the provisions in the Act, where appropriate, to protect themselves from avoidable cost and burden.
85. The quickest, cheapest and best response to a request is often to simply disclose. The costs of dealing with requests will be higher when bodies have to deal with requests for review, and appeals to me. Authorities should not consider whether an exemption can be applied, if disclosure can be accommodated.
86. No assessment is complete without considering the benefits and savings alongside the costs. We should never forget one of the purposes of FOI is to hold public authorities to account. It is a persuasive argument that, through its power to expose poor decisions and wasteful spending, FOI can encourage prudent spending decisions.

6.0 Options

87. Finally, some observations on the four options which the Scottish Ministers set out in their BRIA.
- **Option 1 Take no action** – this would not even preserve the status quo. FOI rights have already been lost and as more services are outsourced to arms' length bodies or contractors, taking no action may lead to further diminution of FOI rights. As a result of legislative and organisational changes, there are already about 70 fewer bodies subject to the Act, than when it came into force in 2005.
 - **Option 2 – Improved self regulation** – I agree with the Scottish Ministers that this is unlikely to improve access to information. Voluntary schemes have not been adequately observed in the past and, by definition, are unenforceable. However if bodies were to adhere to a high quality voluntary code then the costs of responding to FOI-type requests (i.e. those to which the authorities apply their FOI procedures) would be comparable to that from designation, which provides rights not favours.
 - **Option 3 – Improved statutory guidance** – e.g. improved guidance in the section 60 code on disclosure of procurement information. While this may lead to marginal advantage, it is not a sufficient alternative to designation, which gives the public a rights-based access to information.
 - **Option 4 – Designation by one or a series of section 5 orders** – I share the Government's preference for this option. This option also benefits from recognising that section 5 orders should not be a 'one-off'.



7.0 In conclusion

88. I remain strongly supportive of extending the Act to all the categories of body in the Scottish Ministers' consultation and I agree with the case which the Scottish Ministers have made in support of doing that.
89. I argue that extension does not represent an undue burden in difficult economic times. Rather evidence suggests that the costs and volumes of requests are likely to be relatively marginal, and costs of implementation appropriately affordable. I also believe that the public benefit of extension outweighs the costs incurred.
90. I have raised some minor issues with the Scottish Ministers' approach to designation and its draft section 5 order, but I do not believe the order should be delayed or prevented by these matters. Indeed I believe that application of section 5 should be an ongoing process, and there will be opportunities to revisit some of these issues in the future.
91. I am mindful that, in order to be passed before the Scottish Parliament is dissolved for the elections in May 2010, the section 5 order must be laid by early February 2011. I urge Scottish Ministers to proceed without delay, so that extension of coverage of the Freedom of Information (Scotland) Act 2002 can finally happen, in line with the aspirations of the Scottish Parliament when the legislation was passed in 2002.

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