

Extending FOISA? The Commissioner's view



www.itspublicknowledge.info

In November 2008, the Scottish Government issued a discussion paper seeking views on the extension of the Freedom of Information (Scotland) Act 2002, to certain new bodies. This is the submission by the Scottish Information Commissioner, made on 12 January 2009, in response to that discussion paper.

1. I welcome the discussion paper and the opportunity to consider whether additional bodies should be brought within the scope of the Freedom of Information (Scotland) Act 2002 ('the Act').
2. By virtue of section 43(4) of the Act *'The Commissioner may from time to time make proposals to the Scottish Ministers for the exercise by them of their functions under sections 4 and 5 of this Act.'*
3. The Government has indicated that it intends to publish a paper summarising responses received to the discussion paper. This will be useful, but it would also be very informative to have the full responses published as well so that the detailed consideration given by respondents to the many issues raised in the discussion paper can be viewed.

Coverage of the Act and the powers to extend coverage

4. As the discussion paper notes, the Act makes provision for adding bodies under either section 4 or section 5 of the Act. This submission will address designation under section 5 which may be used in respect of a body which:
 - appears to the Scottish Ministers to exercise functions of a public nature; or
 - is providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
5. It is clear that the provisions of section 5 were intended to be used soon after the Act came into effect, and not held in reserve for use only in exceptional or unforeseen circumstances. The Deputy First Minister told the Scottish Parliament as the Bill was being debated 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."*¹
6. Furthermore, he went on to indicate that the Scottish Ministers already had in mind the types of bodies which should be considered for designation and that Ministers intended to initiate the process, saying *"In my earlier remarks I indicated that the power to designate bodies on a case-by-case basis is one that we intend to exercise. As that power requires statutory consultation it would be invidious to name individual companies for fear that at a later stage, we might fall foul of people saying that Ministers had not engaged properly in consultation. We all know the kind of companies and operations that are under consideration. As I said, it is our intention to proceed with consultation with a view to adding bodies to the list."*²
7. However as yet no bodies have been added under section 5, nor has any formal consultation taken place with regard to any bodies being considered for designation. Even if Scottish Ministers were now minded to propose designation after considering responses to the current discussion paper a further formal process of consultation with those bodies would be required.

¹ Scottish Parliament Official Report 24 April 2002, Col 11111/2

² Scottish Parliament Official Report 24 April 2002, Col 11113



8. To my mind the consideration of bodies for designation has to be kept under review on a regular basis, as new organisations are created and new routes for the delivery of public services are utilised. So far experience has shown that some new public authorities which should have been designated under section 4 at the point of their establishment have been overlooked, (such as the Office of the Scottish Charities Regulator) and there remains uncertainty about the basis on which section 5 designation will take place. I hope this discussion will remedy this.

Functions of a public nature and a service whose provision is a function of a Scottish public authority

9. The Government's discussion paper raises concerns as to the legality of bringing any particular activity within the scope of a section 5 order, on two grounds. Firstly, the absence of a definition of what constitutes a function of a public nature for the purposes of the Act (either in formal legal terms or what is commonly understood), and secondly the paucity of case law.
10. It would be highly disturbing if a conclusion was to be drawn that the legal basis on which Ministers could designate bodies under section 5 was in doubt. Clearly Parliament intended that the terms of section 5 should make designation possible - indeed Parliament was assured, as the legislation was being presented and debated, that the legislative provision could and would be used to extend freedom of information (Fol) to bodies which are not public bodies. The Policy Memorandum accompanying the Bill made it clear that *"it is intended that this provision [section 5] will be used to bring within the scope of Fol private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts."*³
11. If there is any doubt about the robustness of the legislative provision to bring this clear intent into effect, then any deficiency in the primary legislation would need to be remedied. It would be highly unsatisfactory for designation to be thwarted or severely inhibited for fear of legal challenge.
12. However I do not believe that the Act is deficient. Under section 5 Ministers may, by order, designate as a public body persons who either (a) appear to them to exercise functions of a public nature or (b) are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority. The Act places a strong emphasis on the judgement of the Ministers. Certainly the Ministers should be able to explain the basis of that judgement and come to a conclusion only after formal consultation. Nevertheless, the decision is based upon whether a person appears, in the view of Ministers, to be exercising functions of a public nature. For the limited purposes of being designated under the Act, it does not depend upon satisfying some existing or otherwise externally determined criteria of functions of a public nature.
13. The pitfalls of depending upon case law from other circumstances to provide definition as to public function have been identified by Professor Janet McLean of the School of Law at Dundee University, who advises caution, especially when decisions have been taken in respect of other legislation (e.g. the Human Rights Act 1998), describing case law *"as sparse, conflicting and increasingly characterised by split decisions."*⁴
14. Instead Professor McLean says of section 5 (2) *"This is primarily a political test. The statute confers a power on the Scottish Ministers to make a political judgement about what is a public function or a service. That decision represents a conclusion about whether the Fol accountability regime ought to apply to a particular service or activity. Public function will be in the eye of the beholder."*⁵

³ Freedom of Information (Scotland) Bill Policy Memorandum – paragraph 28

⁴ Janet McLean, Professor of Law and Governance, University of Dundee - Holyrood Conference speech, 10 December 2008

⁵ Janet McLean, Professor of Law and Governance, University of Dundee - Holyrood Conference speech, 10 December 2008



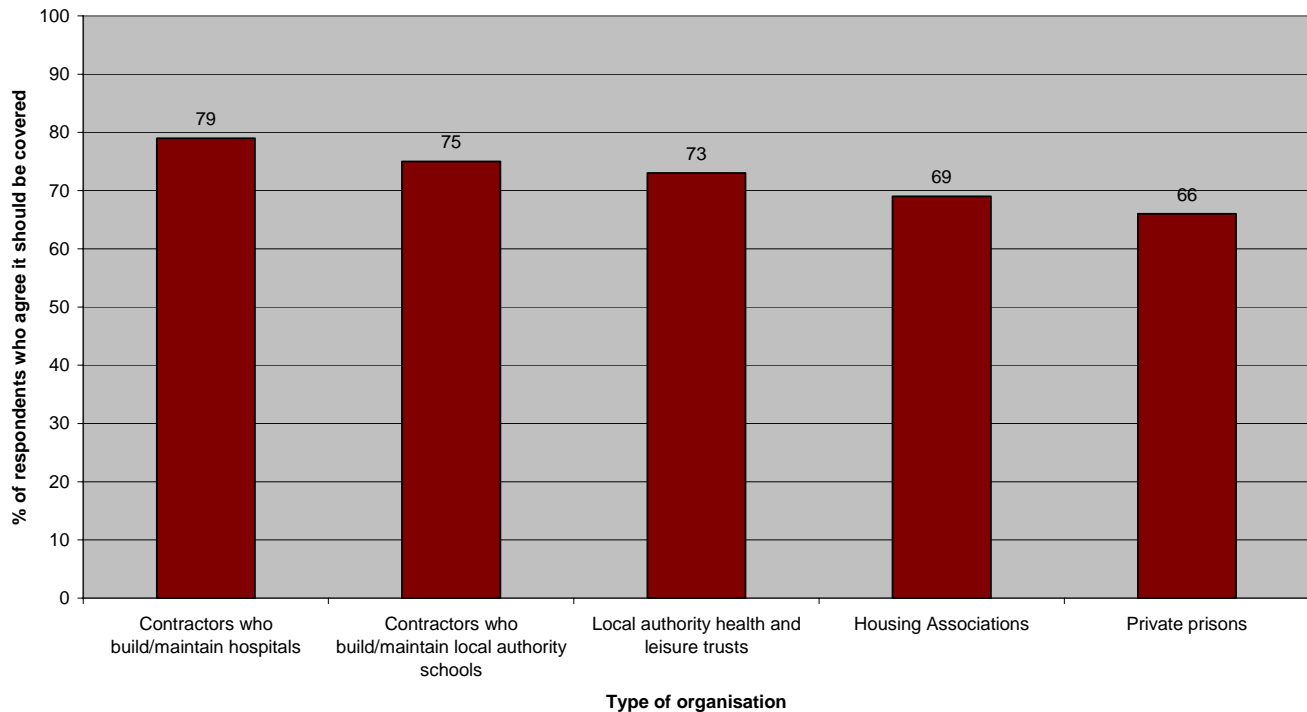
15. I believe that view accords with what Parliament intended when passing the Act and the provisions at section 5.
16. In the discussion paper, the Government identifies the following six possible factors which may be relevant when coming to the view as to whether designation may be appropriate:
- The extent to which the particular functions are derived from or underpinned by statute, or otherwise from part of the functions for which the state has generally assumed responsibilities;
 - The extent of public funding of the activity;
 - Whether the functions are of a nature which would require them to be performed by a public authority if the body did not perform them;
 - The degree to which the activities of the body are enmeshed with those of the relevant Scottish public authority;
 - Whether the body exercises extensive or monopolistic powers which it would not otherwise have; and
 - The extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.
17. As general considerations these may help inform and explain a Ministerial proposal to designate under section 5. Some are objective; others however also require the exercise of political judgement or gauge of public opinion. The development of statutory empowerment, such as is evident in the Local Government in Scotland Act 2003 (which, subject to certain limiting provisions, provides statutory powers for local authorities to do anything they consider is likely to promote or improve the well-being of their area and/or the persons in it) means that many activities may be underpinned by statute. However the discretionary nature of these powers provides less certainty about what will be statutorily provided or the manner of provision.⁶
18. The discussion paper invites views as to additional relevant considerations. I would suggest the following:
- Would failing to designate the body exercising those functions lead to a loss of, or substantial inequality in, FoI rights?
 - Are the functions of a type which would normally otherwise be covered by FoI when provided by another body?
 - Is there a public expectation that the functions being carried out are of a nature that there should be an accompanying right to information?
19. Ministers may care to note that public opinion in Scotland favours designating bodies which are not currently public authorities under the scope of the Act.
20. When asked whether the types of organisations covered by the Scottish Government discussion paper should be subject to freedom of information laws a clear majority of the public agreed in each case as follows⁷:
- **79%**- private sector organisation contracted to build/maintain NHS hospitals
 - **75%**- private sector organisation contracted to build/maintain local authority schools
 - **73%**- trusts providing health and leisure services for local authorities
 - **69%**- housing associations
 - **66%**- prisons run by the private sector

⁶ The Local Government in Scotland Act 2003 – Part 3 Sections 20-22 ‘Power to advance well-being’

⁷ Scottish Information Commissioner Public Awareness Research (5th Wave) – November 2007



% of respondents who agree that following organisations should be covered by FOISA



Appropriateness of extending coverage

21. Part 4 of the discussion paper sets out relevant factors and options when considering the appropriateness of extending coverage, which feed into later consideration of specific areas for extension.
22. I think it is sensible to have regard to the amount of public funding which has been provided to a body. I also agree that it would be impractical and disproportionate to cover bodies holding short-term or low value contracts.
23. I am also strongly of the view that the loss of rights to information as a result of changes in public service delivery should be a significant factor in considering designation, to preserve public accountability.
24. However some of the other factors suggested raise concerns. For instance it is proposed that designation should occur only where bodies are involved in significant work of a public nature e.g. the provision of frontline services in respect of education, health, transport etc. These are described as providing the 'core function' of the state. My concern here is that activities which are integral to the operation of a public service, and which contribute to meeting Government targets, may be regarded as 'non-core' or 'non-front-line' under this definition - even though significant public funds are being spent and public accountability is deserved. For instance, it is suggested that building, maintenance, cleaning etc. would not qualify as core functions or 'front-line' services. Yet these activities are integral to the delivery of health, education, transport etc; involve substantial sums of public money; and have a major impact on Government targets, such as sustainability; energy efficiency; infection control etc., which are also matters that concern the public.



25. I note that by contrast the Scottish Public Services Ombudsman Act 2002 encompasses bodies “*providing services of any kind under arrangements with a health body, not being a health service body.*”⁸
26. It is also suggested that the case for extension is less persuasive where a body is answerable to a regulator, or where information about a service being delivered through a contractor can be obtained from the relevant Scottish public authority.
27. In my experience it should not be assumed that regulation provides an adequate supply or source of information. Often applicants wish information which is specific to their own circumstances or concerns, and which is often at a level of detail not held by a regulator. Where it is held, regulators may be unwilling to release information supplied by a third party, invoking exemptions to protect the supply of that information, or to maintain the integrity of their investigative role. If the third party body was designated under section 5 requests for that information could be made directly to them, and different considerations may apply.
28. The same considerations apply in respect of information held by a contracting authority. Often the information held by the authority is limited to the tendering process, the contract, financial arrangements and certain agreed performance reports. In my experience, the information likely to be sought by applicants is often more specific to certain operational activities, which is held only by the contractor.
29. The discussion paper raises the issue of the burden of coverage. Again I would urge caution here. Extensive and detailed evidence as to the cost of Fol has not been gathered, and what information is available is often an estimate made by individual authorities using widely varying cost elements. There is even less research into the cost savings from Fol; e.g. the benefits from improved record keeping such as increased in-house operational efficiencies which public authority staff have observed⁹. Consistently, the previous Scottish Executive was not prepared to provide additional funding to public authorities for the cost of preparing for and operating within a Fol regime, regarding any net increase in cost as not significant, and ‘*capable of being borne within planned resources.*’¹⁰
30. Research carried out by the University of St Andrews and Caledonian Business School into the impact of the Act on 53 major public bodies in Government, health, police and local authorities showed that fewer than half recruited any additional staff to handle Fol and that only 8 bodies reported recruiting more than 1 additional member of staff.¹¹
31. The volume of requests to authorities can vary greatly. As might be expected, the Government and Parliament report relatively high numbers. But recent research by my office has shown that in the year to 31 March 2008 each of Scotland’s health boards received, on average, only 135 Fol requests and colleges on average only 7 requests each.¹²
32. Much can now be done to reduce the impact on even small organisations e.g. my office has developed template publication schemes, with extensive guidance on usage, and can offer free training to newly designated bodies gearing up for implementation. The Act also includes provisions to protect bodies from excessive burdens e.g. s12 (excessive costs), and the Fees Regulations enable bodies to recover costs under certain circumstances.

⁸ Scottish Public Services Ombudsman Act 2002. Schedule 2 Part 1(6)

⁹ “The Freedom of Information (Scotland) Act 2002: New Modes of Information Management in Scottish Public Bodies?” Prepared by University of St Andrews and the Caledonian Business School – September 2007, p.29

¹⁰ The Freedom of Information (Scotland) Act 2002 – Financial Memorandum, paragraph 219

¹¹ “The Freedom of Information (Scotland) Act 2002: New Modes of Information Management in Scottish Public Bodies?” Prepared by University of St Andrews and the Caledonian Business School – September 2007, p. 17.

¹² SIC in-house research



33. In my view the cost is not likely to be a significant deterrent to contractors seeking to bid for public contracts involving functions of a public nature which would be accompanied by designation. Designation would only occur where such contracts are of high value and long duration. The relative costs of FoI are unlikely to be significant, and should be recognised as an acceptable part of the price of doing business with the public sector, which requires transparency and public accountability in the provision of such services.
34. The discussion paper canvasses views on self-regulation whereby a voluntary Code of Practice would be adopted by contractors, registered social landlords etc. It is difficult to see the distinct advantage of this course of action, over straightforward designation. A voluntary scheme would still incur most of the operational burden of FoI, such as voluntarily maintaining a publication scheme, and voluntarily replying to requests within a specific time period. However the deficiency, as is acknowledged, is that there would be no right of appeal to the Scottish Information Commissioner, should information not be provided.
35. It is also suggested that whether a body is meeting the terms of the Code would be a matter which would fall under the ambit of an existing regulatory regime. Such a half-way house system would be unlikely to reduce the burden on the body, which may have to respond to complaints made to the regulator, yet the regulator is unlikely to satisfy the applicant. For instance the Scottish Public Services Ombudsman could only deal with complaints about a failure of service, e.g. under a voluntary Code if there was detriment to the applicant, which is not a test applied under FoI in respect of appeals to the Commissioner.
36. Finally the discussion paper offers the prospect of improved statutory guidance. Certainly the Code of Practice under section 60 of the Act could be amended to recommend specific action to increase public accountability, especially with regard to services provided at arms length. However it is not at all clear that authorities have regard to the current guidance, which already makes specific recommendations in respect of contracts.

Extension of coverage to contractors

37. In this Part the discussion paper poses 4 specific questions which I address below.
- 38. Q1. In principle, do you support extending the coverage of the Act to contractors?**
39. In principle yes, although this assumes that designation will apply to contracts where the amounts of public funds expended are significant and the contract is not of short term duration. Public authorities enter into thousands of contracts and are not required to declare individual contracts in their annual accounts, so compiling and maintaining an exhaustive list would be problematic. (I note in passing that it has also been difficult to compile a list of publicly-owned companies to which the Act should apply by virtue of section 3(1)(b) of the Act.) If designation does occur, then it may be appropriate to require authorities entering into contracts which meet the criteria for designation to inform Scottish Ministers and the Scottish Information Commissioner, so that a section 5 order may be made or enforced.
40. The major benefit of designation would be to allow access to information about the operational activities carried out by the contractor when providing the public service. This is often information which will not be held by the contracting public authority, or may not be held in an up-to-date form. Authorities may hold details of how the tendering process was conducted, details of the contract awarded and certain financial and performance reports. Often, however, requests for information are about specific operations in specific locations on specific occasions, which the contracting authority is very unlikely to hold.



41. Question 2: What particular activities would you like to see covered?

42. Prime candidates for designation would appear to be PFI/PPP projects. My understanding is that by November 2008 there were some 110 'done deals' with a capital value of c£5.5bn with a further 12 'future' deals (i.e. potential or tender advertised) with capital value of c£1.6bn.¹³
43. These capital costs do not take into account the annual unitary charge, which can be substantial. I understand that, for example, the South Lanarkshire Schools Project has a capital value of £319 million but, with a contract term of 30 years, the estimated unitary cost is a further £1.2bn.
44. Contract terms can range from 7 to 60 years with an average term of 24.6 years.
45. Schools PPP projects account for 34% and hospitals 32% of all done deals.
46. In only 30% of all done deals has the full business plan been published.
47. Given the nature and duration of these contracts and the amounts of public funding involved, PFI/PPP contractors should be regarded as primary candidates for designation.
48. The discussion paper asks specifically whether contractors who operate privately managed prisons or providers of prison escort services should be covered. In my view, they should – by virtue of the nature of the functions for which they are responsible; the value and term of their contracts; and the public interest in having a right to information. In the specific case of prisons, prisoners can lose rights to information if they are transferred to a privately-operated prison. They are no longer entitled to receive information of a type which they would otherwise be able to request from other prison establishments.
49. The burden of designation is not likely to be onerous and would ensure parity for all prisoners, who do use their rights under the Act. (By way of context, as Commissioner I have issued 23 decisions involving the Scottish Prisons Service (SPS), 11 of which concerned applications from prisoners. In addition I have closed 9 SPS cases without decision of which 7 were from prisoners. I have 4 SPS cases currently under investigation, 2 of which are from prisoners.)

50. Question 3: Do you agree that the factors summarised in paragraph 33 are relevant in assessing the appropriateness of extending coverage to contractors?

51. As indicated previously, I accept that, in general, these are sensible considerations. However the consequence of their application rather depends on how they are interpreted. The Government's thinking is set out in paragraphs 34-50 in that respect and does give rise to some concerns.
52. The discussion paper raises the prospect that designation may not take place because the expenditure is not on what has been described as 'core' public functions, and/or that the legal basis of designation of activities which are about building, maintaining or cleaning a facility may not be secure.
53. I have to say that I have some difficulty with this line of thinking. Facilities management of a public facility providing education, health and prison accommodation is integral to meeting the standards of the public service provider in terms health, safety, and environmental performance. Users of these facilities often have limited or no choice about being there. It would be helpful if the Government's justification for distinguishing between a 'core' function of a public nature as opposed to 'non-core' or even 'non-public function services in support of core' was set out. This concept appears to go much further than the distinction between core and non-core public authorities to which human rights jurisprudence has given consideration. If it is derived from that case law

¹³ Latest statistics on PFI/PPP contracts, published on Scottish government website



then as indicated previously I question whether such a transposition of thinking is necessary or appropriate, particularly if such a self-imposed distinction then forms part of the reasoning that designation of these functions under section 5 may be not be legally justifiable.

54. The consequences of maintaining such a distinction need to be better understood, such as which of the public funds provided to and functions covered by PPP projects would fall within the concept of core functions.
55. For example, at a practical level, could relatives of a patient who had contracted MRSA or C. Difficile be able to secure information regarding the cleaning regime in a hospital ward? Could parents concerned about the quality of work or materials used in a school built under PPP receive any of the specific information requested?
56. As the discussion paper makes clear it is not only PFI/PPP contracts which are being considered but also more traditional forms of contracts where they meet the test of 'significance' in term of the nature of the work, the scale of funding and the length of the contract. I welcome that approach.
57. The Government is concerned to ensure that designation is not burdensome, which I have addressed above. I would also wish to raise a potential attraction of designation for contractors – which is that they would have the ability to determine for themselves which information is capable of being released; to directly explain to the applicant why an exemption is being applied and if that decision is appealed then the Commissioner would have to ask the contractor directly to make a submission. Currently where applicants seek to secure information regarding contracts from public authorities, the contractors may be in a less favourable position than if they were dealing with the request directly. They may be wholly unaware that an authority is considering the release of information concerning their commercial interests. They may not be aware or satisfied with the submission by an authority justifying the use of an application (such as section 33) designed to protect their commercial interest. There may well be relevant considerations of which the authority is unaware or which the contractor is unwilling to share with the authority such as details of other tenders which may be compromised by disclosure. Even where the contractor attempts to assist the authority in making its own submission, the obligation under the Act is for the authority to justify why it believes an exemption applies, not what the contractor believes. If the contractor was designated then the contractor's view could be communicated directly to the applicant and to the Commissioner.
- 58. Question 4: 'Of the 4 proposed options given in Part 4 (no action/self regulation/improved statutory guidance/one or a series of section 5 orders) which do you consider the best option?' etc.**
59. I believe that designation under section 5 is the best option. It provides a right to information which the other options do not; it provides access to the type of information which the public are likely to want and which may not be held by the contracting public authorities; it allows contractors to directly come to a judgement about what they can disclose and to directly state their case for withholding information, and certainly in the case of PFI/PPP reflects the intention of Parliament. I do not believe that the burden of FoI will be onerous but, in any case, as the types of contracts being considered are in respect of significant works of a public nature and involve significant public funds, then I believe that the costs associated with designation are justified in achieving public accountability and transparency.
60. As to whether extension of coverage should be incremental rather than a 'big bang' I take a pragmatic view. I think it would be counter-productive to assume a stance of 'all or nothing' which would mean that designation of many bodies which should be designated is delayed while it is established whether some others of that type should be included. It is not unfair or unreasonable to designate the most significant bodies in terms of nature of activity and scale of expenditure of public funds and to later consider whether in the light of experience designation would be suitable for some other bodies of the same type but perhaps with shorter contracts or for less significant amounts. It would make sense to indicate, as appears to be being proposed, the general criteria for selection for extension of designation so that contractors in very similar circumstances are being looked at as part of the same tranche of potential designation. However, as it is likely that designation will be on a case by



case basis, I would not support any notion that there should be no designation of any body until the final decision on all the bodies considered in that review had been taken.

61. If there is to be no 'big bang', then equally there can be no thought of section 5 designation being a once and for all event. Designation under section 5 should now become a regular ongoing process.
 - Firstly to ensure that any new contracts which are of the type and significance to cause existing contractors to be designated are subject to a section 5 order and brought within a freedom of information regime.
 - Secondly to examine the case for other bodies of a similar type but perhaps of a lesser significance being brought within the scope of the FoI regime later in the light of experience. This would apply equally to the other types of bodies such as registered social landlords and local authority trusts.

Extension of coverage to Registered Social Landlords

62. Question 5: In principle do you support extending the coverage of the Act to RSLs?

63. In principle, yes. The activities of RSLs directly impact on the living conditions of thousands of Scottish tenants. RSLs are the recipients of public funding which in the past would have been in the budgets of local authorities to directly provide social housing. The information held by those local authorities about housing matters would have been available when those authorities became subject of the Act. Tenants of local authority provided social housing are entitled to information about their homes which tenants of RSLs are not. Many tenants have lost their rights under the Act as a result of housing stock transfer. Recent government announcements¹⁴ anticipate a growth in social housing in Scotland, and in the role of RSLs in delivering social housing for Scotland.
64. RSLs are not as open with information as local authority landlords. A study conducted by Communities Scotland reported that while 9 out of 10 local authorities published committee minutes or papers on their website only 16% of RSLs did so for their governing body meetings. Local authorities were more likely than RSLs to provide information about service standards (62% compared to 44%).¹⁵ A requirement to maintain a publication scheme under the Act would be likely to improve the proactive publication of material.
65. However the kind of information which Communities Scotland reported was of most interest to tenants – rent collection, anti-social behaviour, repairs, tenant participation and tenant satisfaction may only be available through making a specific request. There is no obligation upon RSLs to respond to such requests and there is no right of appeal to a Commissioner if they refuse to provide the information or fail to reply.
66. The Communities Scotland report notes that since the Act came into effect, the general climate of increased openness and transparency leads people to expect RSLs to be more open about their affairs. This is certainly my experience as Commissioner. 21% of all the enquiries to my Office regarding bodies not covered under the Act concern RSLs.
67. The fact that RSLs are regulated by the Scottish Housing Regulator, (and in some cases the Scottish Commission for the Regulation of Care) as well as subject to scrutiny by the Scottish Public Services Ombudsman is an argument for designation not against it. This degree of scrutiny suggest that RSLs are providing a public service and the public not unnaturally expects that they should be entitled to information and to be able to seek redress to the appropriate authority if they do not get it. This will not happen without designation.

¹⁴ '£100m for affordable housing' – Scottish government press release, 19 August 2008

¹⁵ Communities Scotland – Open and Accessible? A thematic study into how social landlords share information about performance and governance. November 2007



68. Tenants are more likely to be interested in the type of information held by the RSL itself, rather than the type of information held by the Scottish Housing Regulator. A failure to designate may lead to tenants turning to other regulators in an attempt to secure the information by invoking their complaints procedures. (I note in this context that the SPSO received more complaints about housing associations than about the Government and higher and further education combined.) However complaining to a regulator about a failure to provide information may be neither appropriate nor capable of securing information requested. This leads to a waste of time and resources for the RSL, the SPSO and the Care Commission and frustration for the complainant. Instead of being an additional burden, designation would bring efficiency in dealing with disputed cases by more appropriately directing appeals to the Scottish Information Commissioner.
69. It has been argued that this would simply encourage vexatious requests, but experience has shown in Scotland that very few requests are refused on the grounds that they are vexatious. Data gathered by my office has found that only 0.2% of requests were regarded as vexatious by the authorities studied.

70. Question 6: On what basis would you wish to see coverage extended?

71. There is a strong argument in principle that all RSLs should be designated. The burdens of the legislation should not be overstated and volumes of request for information to a small housing association are likely to be small. The Scottish Federation of Housing Associations already recommends that housing associations should follow its voluntary code of practice on openness.
72. If there are specific cases where designation would not be appropriate this should not lead to the conclusion that no RSL should be designated. That would be disproportionate and it is not justified to withhold rights to information from tens of thousands of RSL tenants simply because they will not be extended to all.
73. According to the latest published figures from the Scottish Housing Regulator there were 169 stock-owning RSLs in 2007; of these 36 have received stock transfers from local authorities.
74. The largest 10 RSLs account for 45% of all housing association stock. The smallest 23 associations make up only 1% of the total stock.
75. Given the strength of the argument for designating RSLs, I would recommend that the Government should consider making a section 5 order for all RSLs. The formal consultation process would allow individual RSLs to make their case to the Government why they should not be designated. This should mean that only a small number of RSLs which could for example demonstrate that in their particular circumstances designation would be inappropriate or onerous – would not be designated.
76. The attraction of this approach is that it places the onus on RSLs to justify why they should not be included and does not require the Government to set a qualifying cut off point by virtue of size of stock, number of tenants, scale of turnover. In my view any cut off could result in anomalies over a period of time as any fluctuations in an RSL's size can take it over or below the qualifying line.
77. Nevertheless the alternative course of action is for the Government to indicate in principle that it intends to consider all RSLs for designation over a period of time but that it intends to start with those over a certain size. If so, it should be the case that designation is applied to RSLs which cover a significant majority of tenants in the first instance. (Designating RSLs with 1,000 or more units, for example, would cover 83% of housing association stock units but only 40% of RSLs.)
78. There are practical benefits in designating a large number of RSLs at the same time, such as: the opportunity for development of a model publication scheme which can be adopted by all those designated; and providing common training on the Act where there would be economies of scale in terms of cost.



79. There should not be any provision for designation of an RSL to be revoked, simply because of change in numbers of units (or other relevant criteria used to select the RSL in the first instance) given the declared principle of designating all RSLs. There would need to be a programme of review to progressively designate those not brought within the scope of the Act within the first tranche.
80. Where second stage transfer takes place e.g. in the case of stock held by Glasgow Housing Association then designation should continue after the transfer to prevent a loss of rights under the Act.
- 81. Question 8: ‘Of the 4 proposed options given in Part 4 (no action/self regulation/improved statutory guidance/one or a series of section 5 orders) which do you consider the best option?’ etc.**
82. in the case of RSLs I favour designation under section 5 for the reasons given above and in this case I favour what has been described as a ‘big bang’ which is to designate all RSLs subject to the alternative approaches set out in paragraphs 75-80 above.

Extension of coverage to local authority trusts or bodies set up by local authorities

- 83. Question 9 – In principle do you support extending the coverage of the Act to trusts and bodies set up by local authorities?**
84. The full extent of the relationship between Councils and Arms Length External Organisations (ALEOs) is far from clear - perhaps surprisingly given the substantial public funds involved. A study by Audit Scotland ‘Following the Public Pound: a follow up report’¹⁶ in December 2005 found that councils experienced significant difficulties in providing data to the Accounts Commission for the study, and noted its concern that, where good information is lacking, council members cannot exercise their scrutiny responsibilities effectively. That report used data from 2003/4, finding that councils provided £220 million to 14,000 ALEOs. That may not reflect accurately the total value of support in the face of Audit Scotland’s view that non-cash support such as free or low cost use of Council premises should also be taken into account.
85. In any case it is expected that this figure will have increased significantly given the changes in public service delivery since that time.
86. In light of this it is not possible to take a position that in principle all trusts and bodies set up by local authorities should be covered by the Act. Many of them were established many years ago for purposes which will only be clear when considered on a case by case basis. Some may be relatively inactive; others may be integral to the delivery of public services.
87. However the complex, varied and unclear functions of these myriad bodies does not mean that a process of designation is impossible or unnecessary. A systematic and pragmatic approach, by which the process of designation would focus on those bodies reported as being ‘material’ in Councils’ Group Accounts, would bring within the scope of the Act those bodies to which the factors in Part 4 of the discussion paper apply, as well as remedying the loss of information rights which have occurred with some of the more recent transfers of functions from local authorities to trusts and other bodies established by them.
88. As indicated in response to Question 10 below the most pressing of these are the trusts and bodies established to provide cultural, leisure, sporting and recreational services on behalf of a local authority. In many cases these bodies will appear to the public to be part of the local authority, often using the same facilities such as leisure

¹⁶ Audit Scotland, ‘Following the Public Pound – A Follow Up Report’ – December 2005



centres, galleries, theatres etc as were used to provide the services directly by the authority before the trust was set up, to meet the obligation to provide recreational, sporting and cultural activities under s14 of the Local Government and Planning Act 1982. Many of the personnel providing the service may also be the same, having been transferred from the council to the new body. What has changed however is that the user or council taxpayer no longer has the right to information from those bodies because their new organisational form takes them outside the scope of the Act. (Note: Culture and Sport Glasgow and Fife Sports and Leisure have been established so that they remain wholly publicly owned companies for the purposes of the Act, but it appears to be only a small minority of leisure trusts which are being formed in this way.)

89. Consistent with what I am proposing for those bodies below I believe the Scottish Ministers can take an 'in principle' view that they should designate the bodies which are reported in the Group Accounts of local authorities, in which they have a material interest, and which are not currently subject to the Act.
90. **Question 10: Are there specific local authority trusts or bodies which you would like to see coverage extend to and which meet the criteria for coverage in Part 4?**
91. In terms of identifying which external bodies might be suitable for designation it is worth noting that CIPFA accounting rules for local authorities require that external bodies which are either subsidiaries (where the Council has a controlling interest) or associates (where the Council has a participating interest) are reported in a council's Group Accounts.
92. My office has scrutinised local authority Group Accounts for 2006/7 and has compiled a preliminary list of such external bodies reported, and the scale of the Councils involvement (e.g. funds provided, shares held, voting rights or Board members). More work needs to be done on this, but we have identified some 79 bodies where the Councils' interests are 'material'.
93. About 30% of these are Leisure Trusts. Of these, 17 appear to have been set up specifically with a view to transferring whole council leisure services into trust management, and they cover some 61% of the Scottish population. (The discussion paper records that the figure now stands at 18 according to an Audit Scotland report of April 2008.)
94. In my view it would be a sensible approach to formally consult on designating bodies which appear in Group Accounts, in which the Council has a material interest, and to which the Act does not currently apply. (Not all such bodies need to be designated under section 5. Some will be wholly publicly owned bodies, e.g. Transport Initiatives Edinburgh, to which the Act already applies.)
95. Such an approach is clear, systematic and manageable. It would also form the basis for designating further bodies on the basis of an on-going review.
96. **Question 11: Do you agree that the factors summarized in paragraph 88 are relevant in assessing the appropriateness of extending coverage to local authority trusts and bodies?**
97. As before I have a caveat about the notion of 'core' public functions which I do not think should be the dominant consideration. The types of organisations reported in Group Accounts are those in which the Council has a material interest; are those which the authority has deemed are important enough to establish or support; into which they place public funds and may also provide substantial non-cash support; and over which they have control or exert considerable influence.
98. Designation would increase public accountability and transparency; would be proportionate given the likely size of most of these bodies and in many cases would remedy a loss of freedom of information rights for those bodies established after the Act came into effect.



99. Question 12: Of the proposed options given in Part 4 which do you consider the best option?

100. Given the limited number of bodies which I am proposing should be considered, i.e. those in which the local authority has a material interest, then I believe that designation under section 5 is appropriate.
101. This could be supplemented by instructions or guidance. For instance local authorities could be required or requested to provide information to Scottish Ministers and to the Scottish Information Commissioner for the purpose of consideration for designation under section 5, regarding any bodies in which they will have a material interest, and which they will be reporting in their Group Accounts. This would allow the process of consulting on designation to get under way without a belated scrutiny of published accounts.

Conclusion

102. I am of the view that the recommendations made above safeguard and improve transparency and public accountability in the provision of public services and use of public funds; are proportionate and without undue burden; and are consistent with expectations raised when the Freedom of Information (Act) 2002 was approved.

For more information:

**The Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
KY16 9DS
Tel: 01334 464610
Email: enquiries@itspublicknowledge.info**