



Freedom of Information coverage extension: consultation

Response from the Scottish Information Commissioner

3 December 2019

Question 1

Do you think that the Scottish Ministers should extend the Freedom of Information (Scotland) Act 2002 to organisations that provide services on behalf of the public sector?

Yes

1. The further extension of the Freedom of Information (Scotland) Act 2002 (FOISA) to organisations that provide public services on behalf of the public sector is, in my view, long overdue. The extension of FOISA in this way would take a significant step towards ensuring that Scotland keeps pace with international good practice in FOI, bringing the provisions of FOISA more closely in line with those in countries such as Ireland, Mexico and New Zealand. Consequently, the public's right to access information about the public functions delivered – and public services provided – on its behalf would be restored, protected and enhanced.
2. 1 January 2020 will mark the 15th anniversary of the enactment of FOISA. Scotland's public sector landscape has changed considerably over that period. From residential care to mental health services, road maintenance to the management of hospitals and schools, Scotland has seen an expanding number of public services being delivered under contract by third party organisations. The FOI designation of such organisations would ensure that the services provided are transparent and open, and would improve the accountability of service providers in terms of the standards met, the reasons for decisions taken, and the public money spent.
3. Parliament and public have long been reassured that organisations providing vital services on behalf of the public sector would be brought within the scope of FOI law. In April 2002, then Deputy First Minister Lord Wallace informed 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.”¹

¹ Lord Wallace, Scottish Parliament, April 2002; Col: 8112:
www.parliament.scot/parliamentarybusiness/report.aspx?r=4372&mode=pdf

4. Research tells us that public support for the FOI designation of public service contractors is strong. Polling commissioned by my office earlier this year² found that 80% of the public believed that FOI should apply to private sector companies working on contracts for public bodies, while research conducted in 2014³ revealed that the public felt a wide range of factors were important when considering FOI designation, including whether the body:
 - is providing public services paid for with public money
 - delivers a service that could be thought of as a public service
 - builds and maintains public buildings such as schools and hospitals
5. Despite these statements of intent and strong public support, progress over the first ten years of FOI was slow. This changed, however, with the passing of the FOI (Amendment) (Scotland) Act in 2013, which generated new momentum thanks to provisions requiring Ministers to regularly review the use of their power to designate under section 5 of FOISA and to report on the use of this power to Parliament. Consequently, the first ever Section 5 Order brought arms-length trusts providing culture and leisure services on behalf of local authorities under the scope of FOISA in April 2014. Two further designation Orders have since been made, bringing a number of additional organisations under FOISA, including contractors that run privately managed prisons, providers of secure accommodation, grant-aided schools, independent special schools and, since 11 November 2019, registered social landlords and many of their subsidiaries.
6. As a result, the Scottish public was given refreshed rights to information about a range of cultural, health, leisure, penal, education and housing services provided on its behalf. In some cases, this meant the renewal of rights where these had been lost following the outsourcing of public services to third parties.
7. FOI designation has ensured that the public can continue to access vital information from public service providers and, where required, hold them to account. The FOI designation of leisure and cultural trusts, for example, has enabled citizens to access information on a wide range of issues, including the number of lifeguards employed at swimming pools, the data behind library closure decisions, or the use of CCTV in sports centres. Thanks to FOI, these requests must now be responded to within a clear legal framework and information can only be withheld in specific and limited circumstances. Importantly, requesters also have a right of appeal to an independent Commissioner.
8. FOI rights are undoubtedly of clear and significant benefit to service users, supporting organisations to be as open and transparent as possible in their activities, and improving their accountability to the individuals and communities they serve. In addition, FOI designation brings further benefits to individuals and organisations. These include the proactive publication of information in the public interest, improvements in organisational culture, and a reduced risk of poor decision-making or malpractice through enhanced scrutiny.
9. As a result, I hope that Ministers will take this opportunity to extend FOI to other providers of key public services through this consultation exercise.

² Representative survey of 1,392 respondents; at www.itspublicknowledge.info/home/News/20190928.aspx

³ www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2014.aspx

Scope of the current consultation

10. I would, however, make one observation on the scope of the current consultation. Specifically, I am concerned that, by focussing only on the extension of FOI to contracted service providers under section 5(2)(b) of FOISA, Ministers may, while expanding the boundaries of FOI, simultaneously create fresh inequalities in access.
11. Section 5(2)(b) of FOISA enables the designation of persons providing services under contract with a Scottish public authority, where the provision of the service is a function of that authority. Section 5(2)(b) sits alongside section 5(2)(a), which enables Ministers to designate persons who appear to be exercising functions of a public nature. As a whole, section 5 establishes the reach (and limit) of Ministers' power to extend FOI law to organisations beyond the public sector.
12. The concept of "public function" is at the heart of section 5 considerations. Organisations can be designated where either they themselves appear to Ministers to be performing public functions, or where they deliver services under contract, in support of the fulfilment of a public authority's functions.
13. Together, these provisions provide a vital mechanism to protect and enhance FOI rights. In an increasingly fragmented public sector environment, where responsibility for the provision of public functions and services can be outsourced or otherwise migrated to third parties (or where third party organisations can evolve or be established to perform such functions), section 5 ensures that FOI rights can follow suit.
14. Consideration of services which may be brought within the scope of FOISA by means of the current consultation's focus on section 5(2)(b) inevitably raises questions as to whether the designation of similar functions may be equally appropriate under section 5(2)(a).
15. The current consultation's restricted focus risks having the effect of creating fresh divisions and inequality. For example, under the current approach, an organisation which delivers a care home service under contract to a Scottish public authority may be considered for designation, while an equivalent care service, with an equivalent role, function and range of services, but which may instead be significantly grant funded by an authority, will not. The result of this will be that service users and families utilising the former will be granted rights to access information on the standards, quality and conditions of care, while those using the services of the latter will have no equivalent rights.
16. The key consideration, when assessing whether FOI should be extended, should be the nature of the functions and services provided. If a function (or a service undertaken to fulfil a function) is significantly "public" in nature, then that function or service should be considered for designation - regardless of the route or method through which the service is delivered.
17. In order to avoid an approach which risks simply shifting the division in access rights to another (albeit expanded) location, Ministers may, therefore, wish to consider the simultaneous designation of equivalent functions and services under both 5(2)(a) and 5(2)(b) of FOISA as they undertake the next phase of this consultation.

Question 2

Which services provided on behalf of the public sector by organisations should be considered for extension?

18. As indicated above, I consider that the nature of the functions and services provided by an organisation is the fundamental consideration when assessing whether or not FOI rights should be extended to apply to an organisation. Where an organisation's functions and / or services are significantly "public" in nature, the application of FOI rights to that organisation should be carefully considered.
19. In her 2015 Special Report '*FOI 10 Years On: Are the Right Organisations Covered?*⁴ my predecessor Rosemary Agnew proposed a factor-based approach to assist considerations of whether a function or service may be public in nature (and therefore appropriate for designation under section 5). The report describes this approach as "an assessment based on applying a set of factors...that lead to a conclusion that, on balance, a function is public in nature", and states that "the number of factors that are met may be relevant to the decision, but number alone will not be determinative. It is the overall balancing of the factors relevant to the function under consideration that will inform the outcome." The ten factors identified by my predecessor are set out in detail on page 18 of her report.
20. I fully support my predecessor's view that a factor-based approach should be taken when considering whether a function or service is "public" in nature, and would commend this approach, and the factors identified, to Ministers during the current consultation exercise. By assessing which functions (and, in relation to section 5(2)(b), which services delivered in the pursuance of functions) are significantly "public" in nature, Ministers will ensure that the public interest in relation to the openness and accountability of those functions is best served.
21. In relation to section 5(2)(b), a service must be provided in pursuance of a public authority's functions for designation to be appropriate. As such, a key question for Ministers will be one of prioritisation – in terms of assessing which of the wide range of contracted out services should be the focus of initial consideration. To support this work, I would suggest that the following additional factors may be relevant:
- i. The extent to which an organisation is delivering (or supporting the delivery of) a public function
 - ii. The degree of public interest in relation to the function being delivered
 - iii. The risk of harm to individuals, communities or the wider public should the service, or elements of the service, fail
 - iv. The risk of harm to public finances should the service, or elements of the service, fail
 - v. The cost to the public purse in delivering the function or service
 - vi. The overall lifespan of the service
22. Consideration of these alongside the factors identified by my predecessor will support Ministers to undertake a measured and proportionate approach when prioritising functions and services for designation. Not every factor will be relevant to each case, of course: a function or service

⁴ www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportsandotherpublications.aspx

may be of low cost, but may also be significantly “public” in nature, with a high risk of harm arising from failure. Such an organisation may therefore be a strong candidate for designation, despite the comparatively low cost of the service.

23. In relation to the consideration of the cost and lifespan of a service, I share my predecessor’s view that applying fixed thresholds for designation is unhelpful and risks diverting focus from more significant considerations of, for example, public function, public interest and public harm. A “fixed threshold” approach may also lead to situations where an organisation’s status under FOI fluctuates from day to day, e.g. where its income hovers around any threshold mark.
24. I therefore take the view that designation considerations should be based on a nuanced assessment of the full range of factors that define a public function or service. Such an approach ensures that public interest considerations around the designation of public functions are central to each and every case.
25. Taking the above approach to designation will inevitably mean that a wide range of organisations, functions and services are appropriate for consideration. As a result, and particularly given the context of the very broad scope of this consultation, I approach the request to list the services or organisations which should be considered for extension with a degree of caution, as such a list will almost inevitably feature significant omissions.
26. Having given some consideration to the range of factors outlined above, I highlight the following four services / types of organisation for consideration at this time:
 - **Health and social care services provided under contract to Scottish public authorities**
 - **Services provided under PFI/PPP/NPD contract arrangements**
 - **HubCos and services provided under contract through the HubCo model**
 - **Transport services provided on behalf of Scottish public authorities**
27. I would stress, however, that these are presented as proposals for initial considerations, and are not intended to be an exhaustive list of the full range of bodies that might be appropriate for designation.
28. In that respect, I look forward to hearing from other respondents to the consultation about the functions, services and organisations which they feel would be appropriate for future designation under FOI law, and contributing my own views on those proposals in due course.

Health and social care services provided under contract to Scottish public authorities

29. Organisations that provide health and social care services to the public under contract to public authorities will clearly be carrying out essential public functions on behalf of those authorities, so should be prioritised for consideration. In the majority of cases, these services are provided for the collective benefit of the Scottish population, and have a significant impact on the quality of life, health and life expectancy of the people that use them, as well as that of carers and dependants.
30. The provision of such services is intrinsically linked to the tasks and functions of public bodies. In many – or indeed most – cases, these will be functions and services which have previously been the responsibility of public bodies, or where responsibility would otherwise fall to a public body where such contractual arrangements did not exist.

31. A wide range of health and social care services are currently provided under contract to public authorities across Scotland, with a substantial amount of public money spent on these services. A brief review of published 2018/19 procurement data for a small number of Scottish local authorities and NHS Boards reveals that this includes:

Glasgow City Council⁵

- A £425m framework contract for the provision of a variety of social care services
- A £3m contract to deliver criminal justice, community and residential services

City of Edinburgh Council⁶

- A wide range of social care contracts covering a variety of services in the following areas: housing support for older people, respite care, care home services, childcare, street outreach, support for young people, supported accommodation, residential care, homelessness services, offender recovery and foster care services. The combined value of these contracts exceeds £70m, and includes a street outreach contract with a value of £7.1m over three years and a temporary accommodation and shared housing framework contract worth £40m over two years.

NHS Greater Glasgow & Clyde⁷

- A range of contracts included services for: counselling, patient accommodation, offender medical services, mental health, specialist conditions, aftercare, older people, and addiction support.

32. While smaller local authorities and NHS Boards will engage in fewer contracting exercises than the larger bodies reviewed above, it is nevertheless clear that a wide range of functions and services which can be considered to be “public” in nature are being delivered under contract by third parties across Scotland.

33. As has been expressed in previous designation consultations by my predecessors and others, the delivery of such services by third parties under contract inevitably creates inequalities in relation to information rights. This includes regional and structural variations in the rights that citizens have to access information about the public services provided on their behalf. Citizens in one local authority area, for example, may retain rights of access while those in another are disenfranchised. Likewise, citizens within an area may lose access rights in relation to one specific service which is outsourced, while rights remain in relation to other similar services that continue to be delivered “in-house”. The resultant patchwork approach to information access rights is confused and confusing, and clearly frustrates the interests of service-users and the wider public.

34. In terms of considering the manner in which such services can be brought within the scope of FOI law, Ministers may wish to consider the FOI designation of the functions and services which fall within the regulatory role of the Care Inspectorate and Healthcare Improvement Scotland. Indeed, the Public Services Reform (Scotland) Act 2010 (PSRA), which established

⁵ Glasgow City Council 2018/19 Annual Procurement Report:
www.glasgow.gov.uk/councillorsandcommittees/viewSelectedDocument.asp?c=P62AFQDN0GZ30GDXUT

⁶ City of Edinburgh Council Procurement Annual Report 2019:
www.edinburgh.gov.uk/downloads/file/12683/procurement_annual_report_2019

⁷ NHS Greater Glasgow and Clyde 2018/19 Procurement Annual Report:
www.nhsggc.org.uk/media/255831/nhsggc_procurement_annual_report_2018-2019.pdf

these two regulatory bodies, provides helpful definitions of a range of functions and services which Ministers may wish to consider as part of this designation exercise.

35. Section 46 of the PSRA defines “social services” as “care services” and “social work services”. “Care services” are further defined under section 47 of the PSRA as:

- (a) a support service
- (b) a care home service
- (c) a school care accommodation service
- (d) a nurse agency
- (e) a child care agency
- (f) a secure accommodation service
- (g) an offender accommodation service
- (h) an adoption service
- (i) a fostering service
- (j) an adult placement service
- (k) child minding
- (l) day care of children
- (m) a housing support service

These care services are further defined in Schedule 12 to the PSRA. It is worth noting that it was the definition contained in paragraph 6 of Schedule 12 to the PSRA which was used to bring secure accommodation services providing residential care for children under the scope of FOI law in 2016.

36. Similarly, “social work services” are further defined in section 48(b) of the PSRA to include “services which are provided by another person pursuant to arrangements made by a local authority in the exercise of its social work services functions.” This definition may likewise be used to inform the preparation of any future order under section 5(2)(b) of FOISA.

37. The National Health Service (Scotland) Act 1978 may also serve as a useful starting point for defining health services provided by third parties which may be considered in relation to future designation orders.

38. The Care Inspectorate reports that it received almost 4,700 complaints about care services in 2017/18. The designation of related services under FOI would enable those people to access information about the services to which their concerns related, helping them to better understand the policies followed, services provided and decisions made.

39. It is also worth noting that any organisation considered for coverage will already be subject to regulation under data protection law in relation to the personal data they hold. The FOI designation of such organisations would serve to paint a fuller picture, giving individuals a right to information about services provided in general, alongside existing rights to information about their own personal circumstances.

Services provided under PFI/PPP/NPD contract arrangements

40. I would also recommend that Ministers direct attention towards consideration of the designation of functions and services delivered under Private Finance Initiative (PFI), Public Private Partnership (PPP) and Non-Profit Distribution (NPD) contractual arrangements.
41. As has been noted in previous consultations, there are a wide range of such projects currently operating across Scotland, with responsibility for delivering a range of functions under contract to the public sector.
42. During the debates which led to the implementation of FOISA over 15 years ago, the Scottish Parliament and the public were given repeated assurances that the FOI designation of companies involved in large scale PFI/PPP contracts would be considered as a priority for future designation. Indeed, Deputy First Minister Lord Wallace reassured the Parliament in 2002 that:
- “It is our intent that [section 5] will be used to bring within the scope of freedom of information legislation private companies that are involved in significant public work, such as private companies that are involved in major PFI contracts.”*
43. Despite these reassurances, and over 15 years later, we have only seen two such contracts brought within the scope of FOI law through the 2017 designation of the provision of prison services under contract.
44. These two contracts are very much the tip of the iceberg. Data published in May 2019 by the UK Treasury⁸ indicates that there were 80 active PFI/PPP projects operating in Scotland in 2018, with responsibility for the construction, management and maintenance of a wide range of public facilities. These include 34 contracts for the building and maintenance of schools, 26 for hospital and healthcare facilities, 11 for waste management facilities and 4 for the development and maintenance of transport systems.
45. The combined capital value across these 80 contracts is stated as £5.636bn, while the lifespan of contracts ranges between 21 and 39 years. The average lifespan across contracts is 29 years, with the last active contract due to be concluded in 2042. During 2019/20, the annual unitary charge⁹ payment to be made across these 80 contracts is estimated to be £1.022bn.
46. Similarly, Scottish Government data¹⁰ indicates that there is a range of additional projects operating under the NPD model (which replaced PFI in 2007). Together, the organisations delivering these contracts are responsible for supporting the efficient and effective delivery of a wide range of public services over a substantial period of time, ensuring, for example, that our hospital wards are clean and free from infection, our transport projects are delivered on time and to budget, and our school buildings are safe, secure and of adequate standard.
47. It has in the past been suggested that the FOI designation of such contracts is not essential, as information relating to the work undertaken through the contract will commonly be accessible under FOI from the contracting public authority. However, experience suggests that access to information through this route is patchy, at best. In their submission to the Scottish Parliament’s

⁸ www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2018-summary-data

⁹ A “unitary charge” can be described as a “fee for the service received from the PFI project...includes the provision of assets and the provision of associated services, such as cleaning, maintenance and security.” [Source: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06007>]

¹⁰ www.gov.scot/policies/government-finance/infrastructure-investment/

Public Audit and Post-Legislative Scrutiny Committee's current scrutiny of FOISA, for example, NHS Lanarkshire noted that:

*"Two of our hospitals are PFI and one is NHS. Currently if we receive any requests for information in relation to these hospitals we consult with the contractors and, where possible, obtain the information from them and respond to the applicant direct... Information is not always given to us to provide the applicant with a full answer. This results in different levels of information being provided... we believe that benefit will be achieved by extending the coverage of the Act to contractors who build and maintain hospitals."*¹¹

48. A similar view was expressed by NHS Greater Glasgow and Clyde during a follow-up oral evidence session on 7 November 2019:

*"...it would be difficult to explain to a member of the public why information about one hospital is available when equivalent information about another hospital is not."*¹²

49. It is also the case that information held by a contracting public body will typically be high-level data relating to service standards or performance, as opposed to information on the day-to-day running of a service; information that will often be at the heart of many service users' requests. Such high-level data might reveal to a requester how many staff *should* be on shift at a particular point in time, or how frequently a ward *should* be cleaned, but information on the *actual* service provision at any point in time may often only be available from a service provider directly. As such, current provisions may only give requesters access to part of the picture.

50. In her May 2017 paper *Public Procurement in Scotland: The case for scrutiny, accountability and transparency*¹³, the economist Margaret Cuthbert cites various examples where information relating to PFI contracts was refused in response to FOI requests to contracting authorities (although it should be noted that refusals may have been legitimate in terms of FOI exemptions). The report nevertheless calls for "much more openness in freedom of information to allow for scrutiny of contracts".

51. The application of FOI law to the services provided under the contracts described above would provide individual citizens with a statutory right of access to information held in relation to those services, while also providing organisations with a statutory framework within which requests should be responded to. It is clear from the evidence from NHS bodies to the Scottish Parliament that information is often, but not always, provided in response to requests under the current system. Information which is not supplied may well be the information which is most deserving of public scrutiny. FOI designation would give the public a direct right of access to this information and, crucially, a right of appeal should information be withheld.

52. I would therefore recommend that Ministers consider the designation of organisations responsible for the wide range of high-value, long-term contracts across Scotland which are delivering, managing and maintaining essential public services.

53. In doing so, I would also recommend that Ministers consider a similar approach to that taken in relation to the two prison contracts designated to date. This Order, made under section 5(2)(b) of FOISA, designated not only the person providing services under contract (for the purposes of that contract), but also persons providing services under a subcontract to that contract,

¹¹ www.parliament.scot/S5_Public_Audit/General%20Documents/04_NHS_Lanarkshire.pdf

¹² www.parliament.scot/parliamentarybusiness/report.aspx?r=12351&mode=pdf

¹³ www.jamcuthbert.co.uk/papers%203/MC%20commonweal%2027%207%202017.pdf

ensuring that FOI rights to essential information were not further lost as a result of key functions and services being further contracted out.

HubCos and services provided under contract through the hubCo model

54. While PFI/PPP and NPD contracts are typically used to facilitate the delivery of large-scale individual projects, smaller infrastructure projects have, since 2012, commonly been delivered under the “hub” programme. This programme, developed by the Scottish Futures Trust, aims to provide a mechanism for public bodies to deliver and manage community infrastructure improvement projects more effectively.
55. Under the hub programme, public sector bodies across a region will join together to appoint private sector development partners to form a joint venture company, known as a hubCo. There are five geographic hubCos in operation, which together cover the whole of Scotland. Through this mechanism, hubCos are used to support the development and maintenance of a wide range of facilities through which public services are provided, including health centres, community services, schools and facilities for police and fire services.
56. Each hubCo is constituted under a contract called a Territory Partnering Agreement, which will have a lifespan of 20 years, with an option to extend for a further five years. For the first 10 years of the agreement, hubCos are given an exclusive right to develop proposals for, and deliver, a range of high profile public sector projects, including:
- All primary and community health facilities with a capital value exceeding £750,000
 - Key local authority, police and fire authority projects
 - Joint NHS / local authority projects with a capital value exceeding £750,000 involving primary / community health facilities where the NHS is the lead procurer.
57. HubCo projects will typically be delivered through one of the following options:
- Design and Build contracts (capital funded)
 - Design, Build, Finance and Maintain contracts (larger revenue-funded projects, which include ongoing management and maintenance as part of the requirement).
58. As of September 2019, the value of the hub programme in Scotland was stated to be £3.2bn, of which just over £2bn was spent on services that are open and operational.¹⁴ The estimated unitary charge payments made for operational hubCo projects in 2019/20 is stated to be £103.5 million.¹⁵ Scottish Government data indicates that there are currently 41 hubCo projects operating in Scotland.¹⁶ These include:
- The development of community health and care villages in Aberdeen and Stirling
 - The development of more than 15 health centres and hospitals across Scotland
 - The provision and maintenance of 30 schools across Scotland
 - The redevelopment of the Royal Edinburgh Hospital campus
 - The provision of pharmaceutical services in Tayside

¹⁴ www.scottishfuturestrust.org.uk/page/hub

¹⁵ www.gov.scot/publications/pipeline-npdhub-projects-unitary-payment-charges/

¹⁶ Ibid.

- The development of mental health facilities in Inverclyde

59. HubCo projects are therefore responsible for the development and delivery of services to support essential public functions, accounting for significant amounts of public money over extensive periods of time.

60. The template hubCo Territory Partnering Agreement¹⁷ published by the Scottish Futures Trust contains a clause relating to FOI provisions which includes a requirement that hubCos:

“assist and cooperate with a [public authority] Participant (at hubco’s expense) to enable the Participant to comply with any Information disclosure requirements”.

The template agreement also sets out that:

“In the event that an Information Request is received by hubco, hubco will transfer the Information Request to the [public authority] Participant as soon as practicable after receipt and in any event within two (2) Business Days of receiving the request”.

61. Despite this, however, concerns have been raised about the lack of openness and transparency around projects operating under the hubCo model. Notably, this issue is considered in an October 2017 report by economists J and M Cuthbert.¹⁸ When seeking information on the percentage and value of contracts awarded to small and medium-sized enterprises, for example, the researchers reported that all five hubCos refused to provide a response, with two of those failing to respond at all to the information request.

62. As FOI does not currently extend to hubCos there is a considerable limitation on the right to access information about their activities, and of the activities of those delivering services on their behalf. This is despite the considerable public money being spent and the clear public interest in relation to a wide range of their activities.

63. I would therefore recommend that Ministers consider the extension of FOI to Scotland’s regional hubCos. I would also suggest Ministers consider the associated extension of FOI to services provided under contract to those hubCos by bodies established to deliver individual projects. It may also be appropriate for Ministers to explore the extension of FOI to any subcontractors which have a significant role in the delivery of public services under contract, such as subcontractors with responsibility for building, managing and maintaining schools, hospitals, care facilities or health centres over the lifespan of the project.

64. In terms of prioritising their considerations, Ministers may wish to focus particularly on Design, Build, Finance and Maintain projects, which will typically include responsibility for the ongoing safety, maintenance and upkeep of public facilities as part of the project’s scope.

Transport services provided on behalf of Scottish public authorities

65. Ministers may also wish to consider the extension of FOI to transport services provided on behalf of Scottish public authorities.

66. Ministers may, for example, wish to explore whether services provided under the contract to operate the ScotRail franchise, or those provided under the separate Caledonian Sleeper franchise, should be subject to the transparency and accountability requirements of FOI law.

¹⁷ www.scottishfuturestrust.org.uk/storage/uploads/Standard_Form_-_Territory_Partnering_Agreement.doc

¹⁸ *Some Aspects of Scottish Futures Trust and Hub Activities* by J and M Cuthbert, October 2017: www.jamcuthbert.co.uk/papers%203/final%2010%2010%202017.doc

67. The provision of an effective and efficient transport infrastructure is clearly a vital public function. The ScotRail service for example, operates 2,400 train services every day, and delivers more than 93 million passenger journeys each year. It is described by Transport Scotland as “the single biggest contract let by Scottish Ministers, worth a total value of over £7 billion over 10 years.”¹⁹ The Caledonian Sleeper contract meanwhile has a value of £800 million over its 15 year franchise term.²⁰
68. Such services will typically involve substantial public funding. Indeed, in 2017/18 the operators of the ScotRail franchise received £321m in government funding, while the Caledonian Sleeper franchise operators received £17m²¹.
69. There would undoubtedly be significant harm for the public as a result of a serious failure of service, as well as serious implications for government. Indeed, this was highlighted in the recent development of plans for the Scottish Government to step in as an ‘operator of last resort’ should the performance of the current ScotRail franchise holder fail to improve.²²
70. Similarly, Ministers may wish to explore whether other transport services, such as bus services, should be considered for designation. As with rail, bus services are in receipt of substantial amounts of public money, and there would be a significant impact on individuals and communities as a result of serious service failure. In 2016, for example, 45% of bus operator revenue (£301m) came from the public sector. This funding was provided through concessionary travel reimbursements (£189m), Bus Service Operators Grants (provided to reduce fares, lessen environmental impact and provide services which may not otherwise be commercially viable) (£53m), or payments from local transport authorities for supported services (£59m)²³. Ministers also provide capital funding to assist with the purchase of low carbon transport stock via the Scottish Green Bus Fund, with £3m being made available through this fund in 2017/18²⁴.
71. In common with other services highlighted in this response, it may also be appropriate for Ministers to explore the extension of FOI to subcontractors which have a significant role in the delivery of a related service, to ensure that significant public service elements which are subcontracted to third parties are not brought beyond the scope of FOI law as a result.

¹⁹ www.transport.gov.scot/public-transport/rail/scotrail-franchise/

²⁰ www.transport.gov.scot/public-transport/rail/caledonian-sleeper-franchise/

²¹ Office of Rail and Road (ORR) UK Rail Industry Financial Information 2017-18: <https://orr.gov.uk/rail/publications/economic-regulation-publications/uk-rail-industry-financial-information/uk-rail-industry-financial-information-2017-18>

²² <https://stv.tv/news/scotland/1440685-government-ready-to-take-over-scotrail-if-failings-continue/>

²³ <https://www.transport.gov.scot/media/39681/local-bus-services-in-scotland-a-consultation.pdf>

²⁴ Ibid.

Question 3

Are there any services provided on behalf of the public sector by organisations that you think should be excluded from consideration?

No

72. I cannot foresee any circumstances where services provided on behalf of the public sector should automatically be excluded from consideration.
73. While Ministers may wish to take a proportionate approach when considering bodies for designation, e.g. by focussing initial attention on high-value, longer-term services, or those which are of particular public significance, I am not of the view that Ministers should begin this process by automatically excluding certain public services from consideration. Such a decision would ideally be made only after formal consultation, and following full consideration of the impact of any such decisions on service users, communities and the wider public.

Question 4

Are there any conditions that you think should be satisfied before organisations providing services on behalf of the public sector become subject to FOISA?

No (but additional comment is provided below)

74. Given the constraints of section 5 of FOISA, it is my view that organisations providing public services under contract to public bodies should only be covered in relation to those functions, and the scope of any designation order should therefore be clearly defined to limit the functions and services covered accordingly. I note that such an approach has already been taken by Ministers in relation to e.g. the FOI designation of private prison contractors and registered social landlords.
75. This approach ensures that any such FOI designation is lawful, targeted and proportionate; ring-fencing the public functions and services being delivered to ensure appropriate transparency and scrutiny, while enabling other activities with no “public” basis to be appropriately excluded.
76. As noted in my response to Question 2 (paragraph 23), however, I would, caution against the introduction of specified and fixed thresholds for coverage, e.g. in terms of either the cost or lifespan of a project. In this regard, I would agree with the position taken by my predecessor Rosemary Agnew in her special report on FOI designation, when she noted that:
- “Thresholds such as these are unhelpful as they introduce arbitrary cut-off points, and divert attention away from the key issues about what the organisation is doing.”²⁵*
77. Instead, decisions on designation should be driven principally by consideration of the public interest in enabling access to information about the provision of key public functions and services. While considerations around the cost or duration of particular projects may inform

²⁵ www.itspublicknowledge.info/home/SICReports/OtherReports/SpecialReportsandotherpublications.aspx

those decisions, they should not be used as the determining factor. The public interest in ensuring the accountability of public services should always be paramount.

Question 5

Do you have any comments on whether extending FOISA to organisations providing services on behalf of the public sector is likely to impact on those organisations' ability to provide services in this way?

78. In assessing the potential impact of extending FOISA to organisations providing services on behalf of the public sector, it is important to note the findings of a survey into the impact of previous Section 5 Orders on designated organisations.
79. Organisations designated under the 2014 and 2016 Section 5 Orders did not report significant disruption as a result of being made subject to FOI, when surveyed six months after designation.
80. For arms-length organisations designated under the 2014 Order, no organisation reported a significant increase from the volume of requests for information they were already receiving, with 31% reporting only a slight increase. For the majority (63%), request volumes were reported to have stayed the same. Meanwhile, only 6% reported that the type of requests had changed significantly, with 31% reporting a slight change. Again, the majority (63%) reported that request type had stayed the same.
81. Similar responses were received from those designated under the 2016 Order, with all respondents reporting low request volumes following designation.
82. This should not, of course, be taken to mean that FOI designation for these organisations has had little overall impact. While request type and volume may not have changed, what has changed – and changed significantly – is that those service-users and stakeholders who do request information now have a statutory right to do so. Organisations must respond to requests within a specific timescale, can only withhold information in certain circumstances and must be able to demonstrate that those circumstances apply. Those seeking information can also appeal to the Commissioner if they are unhappy with a response.
83. It is clear from a number of the responses to the Scottish Parliament's Public Audit and Post-Legislative Scrutiny Committee's current consultation on post-legislative scrutiny²⁶ that the duty to respond to FOI requests can have resource implications for some organisations – indeed, related points were particularly common in submissions made by respondents from the local government, health and police sectors. It should, however, be borne in mind that the impact of FOI for these organisations – in terms of the scale, nature and visibility of public functions delivered - is likely to be much greater than for organisations with a significantly lower public profile, which perform clearly-defined and limited services in relation to specific public sector contracts.
84. It is also worth noting that public authority respondents to post-legislative scrutiny almost universally noted positive benefits arising from FOI. These included: the establishment of a

²⁶ FOISA post-legislative scrutiny written submissions:
www.parliament.scot/parliamentarybusiness/CurrentCommittees/112163.aspx

clear framework for request handling; greater accountability; more responsive organisations; and changes to internal organisational cultures.

85. The potential impact of FOI designation and the preparation required should also be placed in the context of other information rights legislation. Some organisations, for example, which are not currently covered by FOI will be subject to the Environmental Information (Scotland) Regulations 2004 (EIRs) in relation to the environmental information they hold. This will be the case where the organisation is “under the control of” a Scottish public authority and has public responsibilities, exercises functions of a public nature, or provides public services relating to the environment. Designation under FOISA may have the effect of simplifying and streamlining some elements of the request-handling process for these organisations, e.g. by removing the need for organisations to assess the extent to which a Scottish public authority exercises “control” in relation to a particular service or function at the heart of a request.
86. In addition, all contracting organisations will be subject to data protection law, which gives individuals rights in relation to the information that organisations hold about them. Organisations across the public and private sectors will have recently taken significant steps to ensure compliance with the new requirements of the General Data Protection Regulation and the Data Protection Act 2018. As such, any organisation which has taken its duties under data protection law seriously should currently have staff with responsibility for information governance in post, and a range of new procedures to support the management and handling of personal data, including responding to subject access requests. Organisations will be able to draw on work done to prepare for the new data protection laws to inform and help manage any impact from FOI designation.
87. I would also note that, when the revised data protection laws were introduced, debate was not focussed to any great extent around whether an organisation’s ability to provide services would be impacted as a result of the new requirements. Instead, the key consideration was correctly focussed on the rights and protections provided by the legislation, e.g. in terms of ensuring that personal data was protected and individual access rights respected. I would suggest that it is equally appropriate to focus principally on the rights afforded to individuals and communities in the case of FOI.
88. While there are likely be some resource implications for organisations, these will fluctuate over time. The impact of FOI may increase, for example, where an incident or issue became the focus of local or national attention, e.g. as a result of a serious failure of service. In such cases the most important consideration must surely be on ensuring openness and transparency around that service or function, in order to enable concerns to be appropriately identified and addressed, and provide the public with important reassurances about the quality and standard of the services being delivered on their behalf.
89. Even where there is a cost for contractors, it’s important to remember that FOI can also bring benefits for organisations. Not least, FOI designation gives contractors themselves the power to make decisions about FOI disclosures on the services they provide. Currently, the only option open to requesters is to ask a contracting authority for information about a service. In these cases, any decision-making power will ultimately lie with staff within that contracting authority. These staff are likely to have less knowledge than the contractor about the nature of particular information and the impact of its release, leading to decisions which the contractor may view as inappropriate or incorrect. In addition, contracting authorities will commonly not hold the full range of information about a contracted-out service, meaning that information which is provided under FOI may present an outdated or incomplete picture. Designation will

ensure that the decision-making in relation to FOI disclosures is directly in the hands of the organisations themselves.

90. There will, of course, also be resource implications for my own organisation as a result of any extension of FOI law. As the organisation responsible for both enforcing and promoting FOI law, my office has a range of responsibilities which arise from extension. These will include:
- i. Supporting organisations as they prepare to meet their FOI duties through the provision of advice, guidance and training
 - ii. Working with partner organisations to support the development of template resources to assist designated organisations
 - iii. Managing the adoption of FOI publication schemes by organisations to support the proactive publication of information
 - iv. Conducting investigations and preparing decisions when a requester is dissatisfied with the response to an information request
 - v. Undertaking interventions (where appropriate) to support underperforming organisations to make improvements to FOI practice.
91. The specific impact on my office from any extension will depend on the nature and number of organisations being considered for designation. Where, for example, extension involves a large number of additional organisations and / or a strong public interest in the accountability of the services provided, then it is likely that I will require additional resource in order to meet my statutory duties effectively. This requirement will be considered further, and taken into account, in responding to specific follow-up consultations in relation to particular organisations and services.
92. I am not aware of any instances in which the implications of FOI have been a factor for organisations in deciding whether or not to contract with a Scottish public authority. Many contractors have been carrying out a range of services on behalf of the public sector – both in Scotland and across the UK – in the period since FOI was first introduced. Many of these have been of significant financial value and accounted for a large proportion of an organisation's overall business. I have seen no credible evidence that the introduction of FOI has been a deterrent to organisations entering into contracts with public authorities.
93. Ultimately, the extent of any impact from FOI requests on individual organisations is likely to depend on a range of factors. This will include the nature of the services provided, the public interest in those services and the quality and standards met. Where an organisation has concerns in this area, they may find some reassurance in a quote that was repeated frequently during the Scottish Parliament's consideration of the original FOI Bill. The quote, which has its origins in a submission from Glasgow City Council and which informed the Parliamentary debate on related matters, makes the case that:
- "Openness is the price of doing business with the public sector."²⁷*
94. I look forward to engaging with organisations to consider and explore the impact and opportunities of FOI during the next phase of this consultation process.

²⁷ Scottish Parliament Official Report, 17 January 2002:
www.parliament.scot/parliamentarybusiness/report.aspx?r=4350&i=30261

Question 6

Do you have any comments or evidence about the effectiveness of accessing information about a contract to provide services to the public sector by making requests to the Scottish public authority that has contracted out the service?

95. I am unable to comment from a requester's or authority's point of view on the effectiveness of information about public sector contracts only being available through requests to the contracting authority although, as noted in the FOISA post-legislative scrutiny evidence from NHS bodies (referenced in paragraphs 48-49 above), at least two NHS boards report problems in this area.
96. I also regularly see appeals to my office in relation to requests for information regarding to contracted services. These show that some requesters clearly perceive difficulties in accessing information from some contracting authorities.
97. As noted above, it is also the case that detailed information about the day-to-day running of a service – information such as the staffing levels in a care home on a given date – may be unlikely to be accessed from broader management and performance data likely to be reported routinely between a service provider and the contracting authority.
98. This can result in inequalities in access to information, where available information about similar services will vary, depending on the delivery model of that service. FOI designation of organisations carrying out services on behalf of public authorities would serve to resolve this inequality, ensuring that the public can continue to access vital information from public service providers and, where required, hold them to account, irrespective of how the delivery of the service is structured.
99. Examples of this can be taken from the 2014 designation of leisure and cultural trusts, which has supported members of the public in accessing information on a wide range of issues which might otherwise have been inaccessible. FOI and EIRs request reported by leisure trusts have included requests for information on:
- Safety procedures at leisure facilities
 - Reasons behind facility closures
 - The number of lifeguards employed at swimming pools
 - The use of CCTV within leisure facilities
 - Energy consumption on premises
 - The on-site provision of sanitary products
 - Safety inspection reports
 - The use of “mosquito” anti-loitering devices around premises
 - Details of stress-related absences amongst staff
100. Organisations designated in 2016, meanwhile, have reported receiving requests relating to the provision of secure care, the use of CCTV within residential facilities and religious education provided to school pupils.

101. In addition to the duty to respond to requests, bodies subject to FOISA also have a duty to publish information. FOI designation has ensured that each designated organisation proactively publishes a wide range of information to benefit service users and other stakeholders, circumventing the need for the public to submit FOI requests. Information required to be published by organisations will include information on corporate planning and strategies, reports to regulators, access to services, decision-making, minutes of meetings, finance and spending, internal policies and procedures, procurement, remuneration and expenses, organisational performance, etc – all of which is far more difficult to access from contracted service providers that are not directly subject to FOI law.

Question 7

Do you have any comments on the types of person, body or organisation – or on the functions of a public nature – which should be considered as future candidates when further extending the coverage of FOISA?

102. As noted above, it is important to emphasise that there are examples of organisations delivering public services or fulfilling public functions that may not strictly be covered by the scope of an extension that focuses on services delivered under contract to a public authority. I have discussed examples of these, such as hubCos and social care service providers which perform public functions, in response to previous questions.
103. The importance of incorporating these types of organisations can be seen in terms of factors such as the clearly public nature of the service they are carrying out, the financial value of that service, the public interest in ensuring transparency and accountability in the provision of these services, and the potential impact of failings or shortcomings in the delivery of those services.
104. Ministers may wish to consider whether there are functions or services delivered under other models which may also be appropriate for FOI designation (for example, regeneration projects funded through the Tax Incremental Financing (TIF) model).
105. Ministers may also wish to consider the extension of FOISA to apply to arms-length external organisations (ALEOs) which fall beyond the scope of the 2014 designation order, which applied to trusts delivering cultural and leisure services on behalf of Scottish local authorities. ALEOs falling outside this order will include those with responsibility for e.g. economic development, regeneration or the management and maintenance of public authority premises.
106. In addition to this, a number of organisations have been suggested to my office as potential candidates for FOI designation. When I receive suggestions of this type, these are recorded by my office with a view to informing any proposals that I may make to Ministers under section 43(4) of FOISA. Organisations which have been suggested to my office in recent years include:

- The Convention of Scottish Local Authorities (CoSLA)
- The Improvement Service
- The Scottish Police Federation²⁸

107. I look forward to engaging with Ministers on any future designation consultations in due course.

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²⁸ FOI designation of the Scottish Police Federation is currently the subject of a petition to the Scottish Parliament (PE01763)