

# Scottish Information Commissioner

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FOI 10 years on:

**Are the right organisations covered?**

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Scottish Information  
Commissioner

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# 10 YEARS

The right to ask for information came into force 1 January 2005

**Commissioner's introduction**  
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# FOI

The right to request and receive information held by Scottish public authorities

**Key findings**  
▶ See page 4

# 94%

of the public think FOI is important to hold public authorities to account

**What does the public think about FOI generally?**  
▶ See page 10

# 1

Section 5 Order designating new authorities in 10 years of FOI

**What are the Commissioner's concerns about Section 5 designation?**  
▶ See page 8

# 15,000

tenants in social housing have lost enforceable FOI rights to information from their landlord

**What are the Commissioner's concerns about Section 5 designation?**  
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# 81%

of the public think bodies building and maintaining schools and hospitals should be subject to FOI

**What does the public think about extending FOI?**  
▶ See page 10

# 63%

of new bodies report no difference in the volume of requests after FOI designation

**Fear of what designation means in practice**  
▶ See page 14

When do organisations...

“ ...exercise functions of a public nature ”

**A factor based approach**  
▶ See page 17

# Information rights should follow functions

**A rights based approach**  
▶ See page 16

# Commissioner's introduction



**10 years ago** the FOI Act<sup>1</sup> came into force. When it was passed in 2002, the FOI Act was heralded as a “unique, distinctive approach that was made in Scotland and specifically tailored to meet the needs of Scotland and the Scottish people”<sup>2</sup>. What Scotland passed was a law that gave Scotland a right to information about Scottish public services. But it went further than that. The FOI Act gave everyone the right to information, whether or not they were Scottish, whether or not they lived in Scotland and whether or not they received public services. The enormity of this cannot be underestimated, because Scotland was saying to the world, we are committed to being open with everyone and happy to be held to account for how we govern, manage and deliver our public services to the people of Scotland.

In my view, FOI has contributed very significantly to wider change that has influenced expectations about access to information, which in turn has helped us engage with public services. Our FOI Act set Scotland apart from many other countries by conferring an enforceable right. It is now so much part of the make-up of our society and embedded to such a degree that to try to go back in time is now unthinkable (and in my view, unachievable).

FOI has played a significant part in the changing expectations in relation to information; how we create it, use it, access and share it. It is a sobering thought that when FOI law was passed we were still running public services, for the most part, in ways derived from paper-based systems and processes. Since FOI law was passed we have seen the emergence of smart phones, Twitter, Facebook, tablets: information access and sharing on the move. “Digital services, big data, open data, transparency” are all now part of a language that has become commonplace in the last 10 years. As are phrases like “alternative delivery models for public services”, “arms-length organisations”, and “third-party delivery”.

At the same time as this change, we have moved into a time of unprecedented civic engagement. How do we maintain, extend and build on that engagement? Access to information has a key part to play.

It is easy to look back and ask did FOI deliver our greatest hopes or worst fears? But that is missing the point. Access to information is now the norm, but in a very different world. I think we need to ask, is FOI flexible enough to meet the challenges of our changing world? I want to consider just one aspect of that question: whether the right organisations are subject to FOI and therefore part of the transparency framework with all the democratic engagement, transparency and accountability benefits that brings?

FOI is not just about requests and enforcement. It recognises the value of publication of information proactively, in the public interest. It has, built into it, the mechanisms for extending the right to access information from a range of different types of organisation, and across a myriad of models of public service delivery. My concern is that the powers that enable this extension of the coverage of FOI have been woefully underused, and if not exercised we run the risk of eroding the impact of one of Scotland's major success stories.

<sup>1</sup> Freedom of Information (Scotland) Act 2002.

<sup>2</sup> Jim Wallace MSP, Minister for Justice, Freedom of Information (Scotland) Bill: Stage 3 debate, Scottish Parliament, Wednesday 24 April 2002.

**We must act to:**

- address the loss of rights as a result of changes in delivery of public functions and services, and
- create access to information rights for the first time, where it is in the public interest to do so.

Parliament was told: “Provisions allow providers of services to the public to be added to the bill case by case, and I reassure the Parliament that that power will be exercised”<sup>3</sup>. I question whether these commitments, made in the early days, have been delivered to the extent that they should have been.

This report is intended to promote debate and action around the need to refresh our approach to designation so that it remains “unique, distinctive... specifically tailored to meet the needs of Scotland and the Scottish people”.

**My key messages are these:**

- FOI is an important component of civic engagement and accountability. To achieve an equitable society, engage openly and transparently and deliver public services in a responsible and effective way, FOI coverage must keep pace with change.
- Extension of FOI is not keeping pace and we need to review and refresh our approach, but in a considered and thoughtful way.
- Designation may be a Ministerial responsibility but it requires a collective and collegiate approach that ensures the Scottish Ministers (the Ministers) have the support and information they need to make decisions about the scope of FOI that are in the best interests of Scotland.
- We are proposing an approach that restores and maintains existing rights to information, and puts in place an effective and thoughtful approach to extending those rights.

<sup>3</sup> Jim Wallace MSP, Minister for Justice, Freedom of Information (Scotland) Bill: Stage 3 debate, Scottish Parliament Wednesday 24 April 2002.

# Key findings

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1. Section 1(1) of the FOI Act says: “A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority”.
2. Section 23 of the FOI Act places a duty on Scottish public authorities to publish information, through an approved publication scheme, which “must have regard to the public interest in...” the provision of public services, decision making, costs and standards attained.
3. This right and duty are an essential part of Scottish life but they can only be effective if they cover the right bodies, and remain flexible and fit for purpose. This report explores these issues, specifically in relation to the use of Section 5 powers to designate, reaching the conclusions that:
  - The scope of FOI has reduced since it came into force on 1 January 2005.
  - Rights to access information have diminished and in some areas, such as some social housing, have been lost.
  - A major contributor to the loss of FOI rights has been the failure to use Section 5 powers to designate bodies as public service delivery models have changed.
  - The early stated intentions to extend FOI to completely new areas have not been delivered. As a result FOI has not been extended, and there has been insufficient associated debate about extension.
  - The power to designate new bodies lies with the Ministers, who have a duty to consult and, since 2013, report on how these powers are used. The use of these powers has been constrained by:
    - lack of focus on loss of rights, and
    - lack of clarity about the approach to extension of FOI, particularly in relation to how the Ministers reach a view on what “functions of a public nature” means.
4. The 10th anniversary of the FOI Act coming into force is a good time to reflect on this. Not to criticise and lay blame, but to consider how these issues can be addressed to build a better future. This report makes a number of recommendations (page 19) for Parliament and the Ministers, but in the context of recognising that they will require a collegiate approach if they are to be delivered effectively.
5. The recommendations ask Parliament to promote debate and push for action, and suggest ways in which the Ministers can take a more constructive and open approach to designation; both to restore lost rights and to extend FOI in a thoughtful and constructive way.

# Why it is important the ‘right’ organisations are covered

- 6.** A universal right to access information from and about public services is a fundamental pillar of democratic engagement. Without information, people cannot participate fully in consultation, understand decisions taken on our behalf about public services or hold public authorities to account for their decisions, spending or actions. This in turn can undermine Scotland’s ability to deliver effective public services that meet people’s needs in the context of the economic environment of the day.
- 7.** Access to information is also fundamental to the concepts and aims of equality; whether to enable someone to exert their human rights effectively, or to challenge the fairness of public services. To demand fair and equitable services people need to know the standards they can expect and have the evidence to demonstrate the extent to which they are being met.
- 8.** Internationally, good access to information law enhances Scotland’s reputation as it demonstrates commitment to wider public service issues such as exposing and combating fraud and corruption.
- 9.** Being subject to FOI is a critical part of the access to information landscape in Scotland because it does more than provide a legally enforceable right to ask for and be provided with information held by public authorities. FOI also confers duties on public authorities to proactively publish information<sup>4</sup>. In short it gives people the right to ask, and requires public authorities to tell; in a number of ways.
- 10.** Public appetite for access to information over the last 10 years has grown, not diminished. This is not simply the result of FOI, but part of the general change in expectations about access to information: what is, or should be, accessible, how it is accessed (particularly using IT), the speed with which it is accessed and what is shared and how. Public support for FOI is at an all-time high as the Commissioner’s most recent poll illustrates:
- (i) 75% strongly agree that it is important for the public to be able to access information held by public authorities (up from 62% in December 2011)
  - (ii) 73% said FOI is important in holding public bodies to account for their spending decisions (66% in December 2011). A further 21% tended to agree (25% in December 2011)
  - (iii) Respondents did not consider costs of FOI to the public purse to be an issue. 86% disagreed with the statement “FOI is a waste of public money” (compared to 77% in December 2011). Only 3% strongly agreed (compared to 6% in December 2011)<sup>5</sup>.

“FOI is an important component of civic engagement and accountability. It contributes to an equitable society and open and transparent engagement.”

<sup>4</sup> Proactive publication means making information available without someone having to ask for it. For more information go to [www.itspubliknowledge.info/YourRights/AboutPublicationSchemes.aspx](http://www.itspubliknowledge.info/YourRights/AboutPublicationSchemes.aspx)

<sup>5</sup> Ipsos MORI poll commissioned by the Scottish Information Commissioner, October 2014.

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**11.** What FOI gives Scotland is something many other nations aspire to:

- (i) an enforceable right to information about public functions
- (ii) a system of appeal that is independent and holds all authorities to account equally
- (iii) a duty to publish information proactively, particularly when it is in the public interest
- (iv) independent monitoring and assessment of FOI practice and performance
- (v) a law that makes it possible to extend the coverage of FOI.

**12.** The fundamental challenges recognised in this report are those of:

- (i) keeping FOI current and relevant to the changing landscape of public service delivery in Scotland so that rights to information are not eroded, and
- (ii) extending FOI to give a right to access to information for the first time.

“It is quite simple really. If FOI law does not cover the right organisations we stand to lose more than access to information rights: we stand to lose the opportunities it gives all of us to have a say in how Scotland is governed and run on our behalf.”

Rosemary Agnew,  
Scottish Information Commissioner,  
December 2012



# How do organisations become subject to FOI?

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**13.** Technically, there are five ways in which an organisation can become subject to the FOI Act. These are:

- (i) by being listed in Schedule 1 of the FOI Act
- (ii) by being added to Schedule 1 by another Act of Parliament
- (iii) by being added to Schedule 1 under an Order made by the Ministers under Section 4 of the FOI Act
- (iv) by an Order made by the Ministers under Section 5 of the FOI Act to designate an organisation “as a Scottish public authority for the purposes of [the] Act”
- (v) by being a “publicly-owned company”.

**14.** Appendix 1 to this report explains these terms in full, but in summary they break down into two broad types of approach:

- (i) A new or existing public body being “added” to FOI law either by being named in an Act of the Scottish Parliament (i.e. primary legislation) or through a Section 4 Order (i.e. secondary legislation)
- (ii) A new organisation being made a public authority and so subject to FOI under a Section 5 Order. This is often referred to as “designation”. This is relevant both to organisations whose information has never been accessible under FOI in any way, and to organisations who take on the delivery of public functions that at some time in the past were covered by FOI. Section 5 powers are essential to ensuring that the scope of FOI law remains relevant.

**15.** This report focuses on designation under a Section 5 Order.

# What are the Commissioner's concerns about Section 5 designation?

**16.** The Commissioner's main concern is that Section 5 powers to designate have been woefully underused over the last 10 years, resulting in an erosion of rights and lost opportunity.

**17.** Section 5 Orders do one of two things. They either:

- (i) address the loss of rights to information and duty to publish, or
- (ii) extend the scope of FOI where FOI never applied.

This report examines each of these.

## Loss of rights and duties

**18.** Rights to access information and the duty to proactively publish information have been lost since the FOI Act came into force. That means people have access to less information than they did 10 years ago. Both the right to ask, and the duty to tell have disappeared in a number of areas.

**19.** This has been gradual erosion, rather than the result of a single action. It is largely the result of the changes to the public sector and occurs when public functions are delivered in a different way, for example through outsourcing, by ALEOs<sup>6</sup> or by private companies under contract to a public authority. A good example of the latter is information about social housing. In the past social housing was administered by councils who were covered by FOI. Now a large proportion of social housing is administered by housing associations which are not covered by FOI. This means that some information about housing that used to be accessible under FOI is no longer accessible either to tenants, factored homeowners or the public at large.

**20.** The impact of this is, according to Scottish Government figures, that since the FOI Act came into force in 2005, 15,000 households have lost FOI rights as a result of the transfer of local authority housing stock. The loss of rights is not only to tenants (etc), it is also to the public at large.

**21.** This issue is more than simply the loss of rights; it is also a matter of timing. Appendix 3 summarises how Section 5 designation powers have been used. As it shows, culture and leisure trusts became subject to the FOI Act for the first time in April 2014<sup>7</sup>. Many of these bodies had been in operation for several years (for example Active Stirling Ltd was established in 2006). This means that information rights were lost for the interim period.

“Regulators should not be a substitute for FOI coverage. They have different functions; have little or no remit (or expertise) in judging the provision of information. This would also mean increasing complexity and potential conflicts and the unavailability of appeal rights to the Commissioner.”

Unison Scotland's response to the Scottish Government Discussion paper on extending the coverage of the FOI Act – Extend Information Coverage to all Public Services, January 2009

**22.** In some areas (e.g. housing) provision has been made for access to some information, by some people (mostly tenants)<sup>8</sup>. But this access falls far short of what used to exist under the FOI Act as it fails to preserve the general rights of any person, and the benefits of enforcement through an independent (free to the user) appeal route if information is withheld or requests ignored.

**23.** For many people who used to have access both to information and the appeal process under the FOI Act, their only option is to pursue access to information through the courts. This can be a very costly procedure, and for the average person can present a very real barrier to accessing information, and potentially to accessing justice and other rights.

<sup>6</sup> Arm's Length External Organisations.

<sup>7</sup> Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013, SSI 2013/278, [www.legislation.gov.uk/ssi/2013/278/contents/made](http://www.legislation.gov.uk/ssi/2013/278/contents/made)

<sup>8</sup> The Scottish Social Housing Charter (April 2012) provides that tenants and other customers of registered social landlords (RSLs) should be able to get all the information they need about their landlord, how and why it makes decisions and the services it provides. Complaints under the Charter are made to the Scottish Housing Regulator.

## Extension of the FOI Act

**24.** When the FOI Act was passed, the publicly stated intention was that it would be extended to cover new organisations, and that its reach would go beyond what we traditionally think of as “the public sector”.

“Many bodies outside the public sector deliver important public services. There should be no doubt about ministers’ commitment to using the powers in the bill to catch those bodies.”

Jim Wallace MSP, Minister for Justice. Freedom of Information (Scotland) Bill: Stage 3 debate, Scottish Parliament  
Wednesday 24 April 2002

**25.** The very wording of Section 5 was progressive for its time and reflected the intention to extend FOI to support the aims of openness and transparency. Section 5 refers to organisations which either:

- (i) “appear to the Scottish Ministers to exercise functions of a public nature”, or
- (ii) “are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority”.

**26.** What Section 5 does is move thinking away from simply covering organisations, and introduces the matter of public functions. Some might argue that, in hindsight, this was far-sighted, given the way public services have changed and continue to evolve.

**27.** The Commissioner’s concern is that Section 5 powers have not been used to designate organisations that are outside what is traditionally considered to be “the public sector”, and so remain largely untested, in relation to “functions of a public nature”.

## Other concerns about who is covered

**28.** The existence of a right is one thing; making it straightforward to use is something else entirely. As well as gaps in the coverage of FOI, the changing public sector landscape has also resulted in inconsistencies which make it increasingly complex for the average person to know where to go, to get answers to questions and to raise concerns.

**29.** There are now inconsistencies in the law which mean that, e.g. registered social landlords are not covered by the FOI Act, but are listed as “persons liable to investigation” in the Scottish Public Services Ombudsman Act 2002. This means that some organisations are public authorities for the purposes of some regulators, but not others.

**30.** Coverage by FOI simplifies this by providing a universal right. To keep it simple for people, it would be preferable to extend FOI and only use other routes where it is desirable to make specific additional provision for specific individuals or groups. A good example of this is the Procurement Reform (Scotland) Act 2014. This makes provision for a right to specific information for unsuccessful tenderers for public sector contracts. The provision does not remove FOI rights so does not preclude any other person asking for the same information, but means that different considerations have to be given to whether it should be disclosed depending on who is asking.

# What does the public think about...

## ... FOI generally?

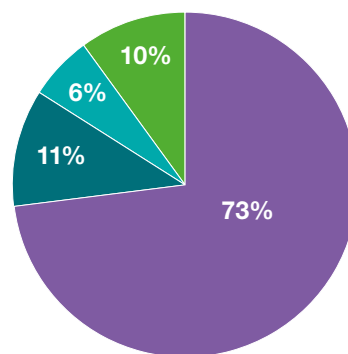
- 31.** Public awareness of, and support for, FOI is high.
- 32.** In the most recent poll commissioned by the Scottish Information Commissioner<sup>9</sup> a record 84% of people had heard of the FOI Act. This compared to 78% in September 2013, and 80% in 2011 and indicates that public awareness is high and increasing.
- 33.** Of course, hearing about FOI is not the same as using it or supporting it. For the first time, we are able to get an indication of its use. Statistical information collected by public authorities and collated by the Commissioner from April 2013 to March 2014 tells us that at least 60,000 information requests were made in Scotland in that period. Even more encouraging is that around 90% of those requests resulted in information being given to requesters, and less than 1% of requests resulted in appeals to the Commissioner.
- 34.** In terms of support for FOI, the poll told us that:
- 95% agreed that it is important for the public to be able to access information held by public authorities
  - 94% agreed FOI is important in holding public authorities to account
  - 86% disagreed that FOI is a waste of public money.
- 35.** FOI is generally alive and well. It is supported and used, but does it go far enough?

## ... extending FOI?

- 36.** In 2013 we asked people for their views about what sort of organisations they thought should be covered by the FOI Act<sup>10</sup>.
- 37.** We asked "To what extent do you agree or disagree with the Act being extended to cover the following organisations?". Support was overwhelming for a range of organisations being covered: from housing associations to private prisons and from care services to school building and maintenance contractors.

## Responses to the question:

Have you ever heard of the Freedom of Information (Scotland) Act?



- Yes, definitely **73%**
- Yes, I think so **11%**
- No, I don't think so **6%**
- No, definitely not **10%**

Ipsos MORI poll commissioned by the Scottish Information Commissioner, October 2014

<sup>9</sup>Ipsos MORI poll commissioned by the Scottish Information Commissioner, October 2014, [www.itpublicknowledge.info/research](http://www.itpublicknowledge.info/research)

<sup>10</sup>Ipsos MORI poll commissioned by the Scottish Information Commissioner, September 2013, [www.itpublicknowledge.info/research](http://www.itpublicknowledge.info/research)

To what extent do you agree or disagree with the (FOI) Act being extended to cover the following organisations?<sup>11</sup>

	Strongly agree	Tend to agree	Neither/nor	Tend to disagree	Strongly disagree	Don't know
Housing associations	47%	32%	5%	6%	5%	5%
Trusts set up by local authorities to provide services, like swimming pools, libraries or care services	55%	31%	4%	4%	3%	2%
Scottish prisons run by the private sector, for example Kilmarnock Prison	49%	27%	4%	6%	7%	7%
Private sector companies contracted to build and maintain local authority schools	54%	27%	4%	5%	5%	5%
Private sector companies contracted to build and maintain NHS hospitals	59%	22%	4%	5%	5%	4%

**38.** What this indicates is that people not only think it is important to have a right to information, but also that the coverage should be wider than it is.

**39.** The specific type of organisation that should be covered is only one aspect. The FOI Act talks about “functions of a public nature”. These may not always be obvious, so in our 2014 poll we asked about the importance people attach to particular factors or types of service<sup>12</sup>. This is what we learned.

*In considering which new bodies should be subject to FOI law, how important, if at all, is it for the Scottish Government to consider whether...*

	Essential	Very important	Somewhat important	Unimportant	Don't know
The body provides public services paid for with public money	43%	36%	17%	3%	1%
The body receives grants or other benefits from public money	34%	35%	25%	4%	2%
The body delivers a service that could be thought of as a public service, like prisons and housing	38%	39%	19%	2%	2%
The body builds and maintains public buildings like schools and hospitals	42%	41%	14%	2%	1%
The body delivers services that used to be state-owned like railways and energy	33%	36%	24%	6%	2%

**40.** These two questions together told us that people think it is important, if not essential, to be able to hold organisations that spend public money to account. It also tells us that the perception of public services (and hence functions) is wide and what the organisations do for the public is important for reasons other than how money is spent. Put in terms of the FOI Act, the public interest in who should be covered by the FOI Act goes beyond considerations about the public purse.

<sup>11</sup> Topline figures may add up to 1% more or less than 100% due to rounding.

<sup>12</sup> Ipsos MORI poll commissioned by the Scottish Information Commissioner, October 2014, [www.itspublicknowledge.info/research](http://www.itspublicknowledge.info/research)



“ Many have argued that the Section 5 order-making powers were left unused for too long. Be assured, I see this order as an initial order setting the direction of travel.

This first order covers a limited number of arm's-length bodies. But there is clear scope for future orders to cover different functions of a public nature. ”

Nicola Sturgeon, 11th Annual Holyrood Freedom of Information Conference, December 2013

# Why has Section 5 not been used more?

**41.** There is no definitive answer to the question about why Section 5 has not been used more over the last 10 years. In the Commissioner's view, there are a number of factors that may have influenced this, including:

- (i) the approach taken to identifying which organisations should be covered
- (ii) political will
- (iii) failure to consider loss of rights as a matter of course
- (iv) understanding of what is meant by "public function"
- (v) fear of what designation actually means in practice.

## Approach to identification of organisations

**42.** It is human nature to refer to what we already know. In terms of who should be subject to FOI we tend to think in terms of named, existing organisations (or types of organisations). It is natural for us to focus on what we already know about those bodies and what they do, rather than the wider considerations about the services they provide and access to information they hold.

**43.** For example, in 2010, consideration of housing associations for designation fostered considerable debate about their legal structure, charitable status, size and financial resources, rather than the discussion that was actually needed: whether there is a public interest in access to the information they hold and to what extent the Ministers consider the service they provide to be a public function.

**44.** In short, focusing on named organisations can deflect us from the real questions we should be asking, and so it is unsurprising that designation has faltered.

## Political will

**45.** As Appendix 1 sets out, Parliament makes the ultimate decision about who should be covered by FOI through the passing of legislation. The FOI Act, and hence the will of Parliament, is clear in relation to where the responsibility for designation lies: that is with the Ministers. The Ministers also have a duty to report to Parliament how they use their Section 5 powers and to consult before making Section 5 Orders.

**46.** What this means in practice is that the decision to designate an organisation becomes a matter for the Government of the day to act as it sees fit, based on balancing a number of factors and priorities. Ultimately, designation under Section 5 is a political decision, implemented through a legislative route.

**47.** The Commissioner has the power to make proposals to the Ministers about the exercise of their functions under Section 5<sup>13</sup>. Other interested parties such as campaign groups, third-sector organisations, lobbying groups and public authorities have various routes to engage with the Ministers to make their views known.

**48.** The Commissioner understands and respects the democratic and legislative nature of the decision making powers. Her concerns lie in the infrequency with which the powers appear to have been considered and the lack of information about why that is the case.

**49.** While gaps in coverage of FOI law are not intentional, there is a strong imperative to resolve them and it is a positive sign that since the Freedom of Information (Amendment) (Scotland) Act 2013 came into force, culture and leisure trusts have been subject to a Section 5 Order, and the current Government has given a strong public commitment to further designation.

**50.** The challenge for everyone (parliamentarians, the public, public authorities and the Commissioner) is to work together to support the Ministers to make designation under Section 5 workable for all of us.

<sup>13</sup> Section 43(4) of the FOI Act.

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### Failure to consider loss of rights

**51.** By focusing on named bodies, rather than public functions, the most basic considerations appear to have been missed. There is no evidence to suggest that the most fundamental questions have been asked at the point public service delivery changes in a particular location or context:

- Will access to information rights be lost as a result of this change?
- If they will, has adequate provision been made to preserve those rights?

### Public function

**52.** There is no definition in the FOI Act of what a public function actually is and it is easy to take a legalistic approach to trying to identify what the phrase might mean. The Commissioner is of the view that this has held us back.

**53.** Designation under Section 5(2) depends on the Ministers' perceptions of public function ("appear...to exercise functions of a public nature"). There may well be important differences between the Ministers' political view of public functions (and therefore which organisations should be covered by FOI), and others' (including the public's) perception of the same issues.

**54.** As it is the Ministers' perception that is at the heart of the decision, it would be helpful to have a common understanding about how they assess functions (and organisations) to inform their decision about whether a function is "of a public nature".

### Fear of what designation means in practice

**55.** The Commissioner hears many contrasting views about the experience of being subject to FOI from a range of bodies (including from her own organisation, which is also subject to FOI). She is also familiar with concerns expressed during consultation about designation (usually by bodies being considered for designation) including:

- (i) it will cost too much
- (ii) the number of "information requests" will increase significantly
- (iii) "information requests" will become more complex.

**56.** While the Commissioner understands the concerns, she questions whether, in the context of the total cost and scope of service provision, this is always going to be the case. Often the points are made from the perspective of looking at FOI as an "extra function" in isolation from the whole business, rather than as part of an integrated service. They also fail to take into account other benefits afforded by FOI: engagement, accountability, openness, service improvement and more informed decision making.

“But my position is clear. The costs that arise from FOI are outweighed by the increase in transparency and accountability to the citizen that result.”

Nicola Sturgeon, 11th Annual Holyrood Freedom of Information Conference, December 2013



**57.** To gain a better understanding and indication of what the impact is on a newly designated authority, the Commissioner surveyed culture and leisure trusts. The trusts were set up by local authorities to provide culture and leisure services to the public (such as swimming pools, leisure facilities, theatres, museums and libraries). The Ministers used a Section 5 Order to bring them within the scope of FOI from 1 April 2014.

**58.** Appendix 2 sets out the survey results in more detail, but in summary:

- 100% of respondents felt prepared: 38% very and 62% fairly
- 63% said volumes of requests for information had stayed the same since designation
- Not one respondent reported a significant increase in information requests
- Over half said there was no change in the type of information requested, with 31% reporting a slight change. 6% reported a significant change
- All but 6 of the trusts surveyed responded.

**59.** It is still early days for the newly designated trusts, and these results, encouraging as they are, should only be viewed as indicative. But taken in conjunction with the comments received from the trusts it is possible to draw some broad conclusions:

- (i) The impact of designation on the trusts has not been especially problematic or caused any great change in either the volume or complexity of requests for information compared to those trusts received prior to designation
- (ii) Support to prepare for designation is important, particularly the resources, training and support available from the Commissioner's office and other public authorities
- (iii) Becoming subject to the FOI Act has not made responding to information requests more or less difficult.

**60.** FOI law does much more than provide a legally enforceable right to ask for and be provided with information held by public authorities. FOI also requires public authorities to proactively publish information (through an approved publication scheme). Further designation not only gives the right to ask, it increases the number of bodies under a statutory duty to tell. Bodies are not simply required to publish more information; they must publish information where it is in the public interest to make it available<sup>14</sup>. It is about publishing the information the public needs and wants to see, rather than the information that bodies want to disclose.

“Edinburgh Leisure has always had a policy of being open and transparent in its external communications. In anticipation of the changes to the Freedom of Information legislation, we put suitable measures in place to prepare for this and have not seen a significant increase in the number of requests for information relating to our organisation as a result of these changes.”

Jean Duncan, Edinburgh Leisure, December 2014

**61.** There is an obvious significant and positive synergy between designating more bodies for FOI and the wider political aims of open data and greater civic engagement.

**62.** Of course, being designated is only the first step. Experience over the last 10 years has demonstrated that public authorities, and requesters that ask them for information, periodically need support and advice, both of which the Commissioner's office provides. This can be hampered by not knowing exactly which organisations are covered. Just as Schedule 1 to the FOI Act lists public authorities or types of public authorities, it would be beneficial for a definitive register of ALEOs and Section 5 designees to be created and maintained from the outset to ensure that support can be given and learning shared.

<sup>14</sup> In the Environmental Information (Scotland) Regulations 2004 this is referred to as the “active dissemination” of Environmental Information.

# Is there a better approach to Section 5 designation?

**63.** The Commissioner thinks so! In her view more focus on rights, and an approach that helps the Ministers reach a considered view about what constitutes “functions of a public nature”, both in the context of the public interest, are good starting points for finding a new, more constructive way.

**64.** It should be noted that these proposals are predicated on working more effectively within the FOI Act as it stands. The Commissioner acknowledges that there are other routes to addressing the issue, for example through a purpose clause<sup>15</sup> or designation of classes of bodies<sup>16</sup>. It is unlikely that a purpose clause in particular could be achieved without changes to primary legislation. It could be argued these approaches could provide more automatic future proofing in terms of access to information rights. Instead of applying only to specific types of public bodies, the scope of the law would extend to whatever institutions deliver public services or in which public funds were spent.

**65.** However, these approaches are unlikely to be as transparent as what is proposed in this report and would lack the strength afforded by case-by-case designation decisions, based on consultation in the context of time and place.

## A rights based approach

**66.** The basic principle is that rights should follow functions.

**67.** If a function (or service) is provided by a Scottish public authority already subject to the FOI Act, and changes are made to the way in which that function is to be provided in the future, the right to information should migrate with the change, irrespective of the new delivery model.

**68.** If rights follow functions, then they are less likely to become eroded over time. Had this approach been adopted over the last decade, housing associations established since 2005, for example, would have been subject to FOI from their creation as individual entities.

**69.** This is not to say it should be an automatic process, as it should not remove Ministerial discretion afforded by Section 5. What it would enable is more informed Ministerial decision making, based on the principle of justifying why an existing statutory right should be removed. It would enable the Ministers to focus on where the public interest balance lay in relation to a very clear starting point: an existing right.

## Functions of a public nature

**70.** Determining what constitutes a “function of a public nature” (i.e. a public function) is less straightforward than a simple rights based approach as it is essentially about creating new rights to information under the FOI Act. These rights might be in relation to functions carried out by bodies created since the introduction of the FOI Act, or those which existed but were taken out of the public sector before the FOI Act came into force.

**71.** The lack of an established definition of “function of a public nature” has been one of the challenges faced in the use of Section 5 to date. Different stakeholders, regulators and commentators hold different views about what makes a function “public”. For some it is about the public nature of the service, for others it is about following the public pound, while for others it is about impact or scope of the service provided. These views are pushed to a greater or lesser extent by those who subscribe to them. The point is, they are all valid, they are all important, but none are applicable to all circumstances, and so of themselves cannot usefully be the only reason to designate.

**72.** We must also not lose sight of the wording of the FOI Act itself:

*“...appear to the Scottish Ministers to exercise functions of a public nature.”*

**73.** This suggests that it is ultimately a Ministerial decision as to what constitutes functions of a public nature and open to the Ministers to apply their judgement. The question for the Commissioner is, how do we support the Ministers in doing that?

<sup>15</sup> A purpose clause, as proposed by the Campaign for FOI during the passage of the Freedom of Information (Amendment) (Scotland) Act 2013, would be a simple statement of intent that would have been part of the legislation passed by Parliament, and which would have been used to help the reader interpret the provisions of the FOI Act.

<sup>16</sup> Statutory Orders under Section 4 or 5 of the FOI Act may describe a type or class of body e.g. Regional Transport Partnerships, rather than a list of the names of the organisations to be captured by the Order.

## A factor based approach

- 74.** If it is accepted that there are a number of factors that potentially make a function public in nature, then why not take a factor based approach that enables the Ministers to consider a range of arguments for and against designation, weighted as appropriate to the prevailing conditions of the time?
- 75.** Put simply, a factor based approach is an assessment based on applying a set of factors (reasons or arguments if you like) that lead to a conclusion that, on balance, a function is public in nature. 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.
- 76.** This approach has a number of advantages:
- (i) It would enable more informed balancing of the positive aspects of designation with the perceived negative aspects
  - (ii) It would support more objective and considered decision making by considering which factors are met and to what extent, based on context
  - (iii) The Ministers would be able to provide more explanation for their decisions, which in turn makes the decision making more open and transparent
  - (iv) It would give greater consistency over time
  - (v) It would help the Ministers identify appropriate consultees<sup>17</sup>.
- 77.** The weight to be attributed to each factor may vary from case to case, and will be affected by the particular pressures and priorities of the time in which the factors are being applied. For example, where the Government is focussed on creating and maintaining greater civic engagement, greater weighting may be attributed to factors which enable and support achievement of that goal. Other weightings, for example, the need for transparency and anti-corruption assurance are more likely to be constant issues. The weighting would provide a valuable prompt for informed discussion about the relative benefits of designation.
- 78.** In drafting suggested factors we have deliberately avoided any thresholds, e.g. “the organisation is providing services under a contract with a value of £X” or “the organisation is in receipt of significant public funds”. The focus should be the public interest in designating the organisation. Thresholds such as these are unhelpful as they introduce arbitrary cut-off points, and divert discussion away from the key issues about what the organisation is doing and towards whether or not the funding etc. is “significant” (which is subjective). From experience, thresholds would make it difficult to enforce the provision.
- 79.** Where the economic impact on the administration of the body is used to weight factors, part of that economic impact should be the balancing of costs against the benefits FOI brings to public service.
- 80.** When considering designation in this way, the focus should be on the function or service, not the organisation. The FOI Act already contains precedent for designating (or excluding) specific functions in Section 7, reinforcing the approach.

<sup>17</sup> Section 5(5)(a) and 5(5)(b) require the Ministers, before making a Section 5 Order, to consult with every person to whom the Order relates (or persons appearing to them to represent such persons), and such other persons as they consider appropriate.

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### *Factors*

The Commissioner considers the following to be appropriate factors. They are drawn from the list used by the Ministers in the 2010 consultation<sup>18</sup>, but have been amended and added to as a result of subsequent developments and the research we have conducted since then.

1. The organisation is exercising “public functions” that were previously exercised by a public body, or is responsible for areas of activity which were previously within the public sector, e.g. privatised utilities.
2. The organisation is authorised to exercise the regulatory or coercive powers of the state, e.g. privately run prisons, or has extensive or monopolistic powers which it would not have if it were not carrying out the function.
3. In carrying out the relevant function, the organisation is taking the place of a public authority, i.e. the functions are of a nature that would require them to be performed by a public authority if the organisation did not perform them.
4. The activities or decisions of the organisation affect the public because it is providing a service that is public in the sense of being done for, by or on behalf of the people as a whole, versus “private” in the sense of being done for one’s own purpose.
5. The function carried out is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay.
6. The particular functions carried out are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities.
7. The state (directly or indirectly) regulates, supervises or inspects the performance of the function, or imposes criminal penalties on those who fall below publicly stated standards in performing it.
8. By carrying out the functions, the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.
9. Designating the organisation would improve civic engagement, or remove or mitigate the effects of inequality.
10. The organisation’s decision makers are appointed, directly or indirectly, by the state.

<sup>18</sup> [www.scotland.gov.uk/Publications/2010/07/20123725/0](http://www.scotland.gov.uk/Publications/2010/07/20123725/0)

# Conclusions and recommendations

## Commissioner's conclusions

- 81.** The scope of FOI has reduced since it came into force on 1 January 2005.
- 82.** The rights to access information have diminished and in some areas, such as some social housing, have been lost.
- 83.** A major contributor to the loss of FOI rights has been the failure to use Section 5 powers to designate bodies as public service delivery models have changed.
- 84.** The early stated intentions to extend FOI to completely new areas have not been delivered. As a result FOI has not been extended, and there has been insufficient associated debate about extension.
- 85.** The power to designate new bodies lies with the Ministers, who have a duty to consult and, since 2013, report on how these powers are used. The use of these powers has been constrained by:
- (i) lack of focus on loss of rights, and
  - (ii) lack of clarity about the approach to extension of FOI, particularly in relation to how the Ministers reach a view on what "functions of a public nature" means.

## Commissioner's recommendations

- 86.** The Scottish Parliament considers debating the findings of this report and recommending that the Scottish Ministers take action in line with the following recommendations.
- 87.** The Scottish Ministers develop and adopt a policy that requires automatic consideration of migration of existing rights and duties under the FOI Act to bodies taking over the delivery of functions and services on behalf of, or instead of, public authorities. I consider this to be a priority.
- 88.** The Scottish Ministers carry out a review to identify where rights to access information under the FOI Act have been lost, and reinstate those rights using their Section 5 powers. I consider this to be a priority.
- 89.** The Scottish Ministers develop and adopt a factor based approach to the extension of FOI to bodies in relation to those functions the Ministers consider to be "of a public nature". I consider this to be a priority.
- 90.** The Scottish Ministers consider making Section 5 Orders **immediately** in relation to access to information rights about social housing, administered by housing associations, and private prisons.
- 91.** The Scottish Ministers (or other suitable body appointed by the Ministers) create, maintain and publish a register of ALEOs and bodies designated under Section 5.

“ We propose that all Scottish public authorities and public service providers, including the National Health Service in Scotland, schools and the police will be covered by the Scottish Freedom of Information legislation. [...] It is proposed that the legislation will apply also to information relating to the services performed by contractors working for Scottish public authorities. ”

# Appendix 1: Understanding FOI law

## Who is responsible for making organisations subject to FOI law?

The FOI Act makes it the Ministers' responsibility to ensure that the right organisations (often referred to as "bodies") are covered by FOI law. This includes both the FOI Act which gives a general right to access information and the EIRs<sup>19</sup> which give a right to Environmental Information<sup>20</sup>.

The Scottish Parliament has the ultimate power to make organisations subject to FOI law.

The Scottish Information Commissioner has the power to propose organisations to be brought within the scope of FOI<sup>21</sup>, but does not have any power to make any organisation subject to the FOI right.

## How do organisations become covered by the FOI Act?

There are five ways in which an organisation can become subject to the FOI Act. These are:

- (i) by being listed in Schedule 1 of the FOI Act
- (ii) by being added to Schedule 1 by another Act of Parliament
- (iii) by being added to Schedule 1 under an Order made by the Ministers under Section 4 of the FOI Act
- (iv) by an Order made by the Ministers under Section 5 of the FOI Act to designate an organisation "as a Scottish public authority for the purposes of [the] Act"
- (v) by being a "publicly-owned company".

## Listing in Schedule 1 to the FOI Act

Schedule 1 is part of the FOI Act. It lists the organisations subject to FOI. It is an open list. This means it can be amended to either add new organisations, or remove existing ones. Amendment can be through either primary legislation (an Act of Parliament), or secondary legislation (an Order made by the Ministers under Section 4 of the FOI Act).

A full list of organisations included in Schedule 1 is available on the Commissioner's website at [www.itspublicknowledge.info/YourRights/Whocanask.aspx](http://www.itspublicknowledge.info/YourRights/Whocanask.aspx). The list is updated as needed and includes details of which organisations have been added or removed, when and under what mechanism.

The list includes organisations generally thought of as "the Scottish public sector", for example:

- The Ministers
- The Scottish Parliament
- Local authorities
- NHS Boards
- Police Scotland
- Regulators such as the Scottish Public Services Ombudsman and the Scottish Information Commissioner.

## Adding to Schedule 1 by an Act of Parliament

If an Act of Parliament creates a new organisation, the Act can amend Schedule 1 by adding the name of the new organisation.

A recent example of this was the addition of The Police Investigations and Review Commissioner (PIRC) to Schedule 1.

## Example

PIRC was created by the Police and Fire Reform (Scotland) Act 2012 at the same time as the single police force for the whole of Scotland. The Police and Fire Reform (Scotland) Act included a provision to add a reference to PIRC into Schedule 1 of the FOI Act. This ensured that PIRC was subject to FOI.

<sup>19</sup> Environmental Information (Scotland) Regulations 2004.

<sup>20</sup> As defined in the EIRs.

<sup>21</sup> Section 43(4) of the FOI Act.

### *Adding to Schedule 1 by a Section 4 Order*

Section 4 Orders are secondary legislation: law that is made by executive bodies or individuals, most often by the Ministers, under specific powers set out in primary legislation (Acts of Parliament). Secondary legislation is considered by the Scottish Parliament which, where applicable, approves or rejects it.

Section 4 of the FOI Act sets out the specific powers the Ministers have to add new organisations to Schedule 1. The Section 4 Order is the way in which they do this. Section 4 Orders are used to add organisations that are public authorities.

#### **Examples**

In 2008 an Order under Section 4<sup>22</sup> added, among others, The Drinking Water Quality Regulator, The Office of the Scottish Charity Regulator and The Commissioner for Children and Young People in Scotland to the list in Schedule 1. All of these organisations became subject to the FOI Act when the Order came into force in October 2013.

In 2011 a second Section 4 Order<sup>23</sup> was passed which added Children's Hearings Scotland to the list in Schedule 1.

In 2013, a third Section 4 Order<sup>24</sup> was passed, which brought The Criminal Courts Rules Council, the Mobility and Access Committee for Scotland, and The Scottish Civil Justice Council within the scope of FOI.

### *Designation by a Section 5 Order*

Section 5 Orders are also secondary legislation. They give powers to the Ministers to designate organisations which:

*either*

- (i) appear to the Ministers to exercise functions of a public nature; or
- (ii) provide, under contract, and on behalf of an authority, a public service

*and*

- (iii) are not covered by Schedule 1 and not able to be covered by Schedule 1 (i.e. they are not "public authorities").

The Ministers must consult with a range of people before making a Section 5 order. As a minimum they must consult with the organisation they propose to designate or anyone who appears to represent the organisation.

They must also consult with any other people or organisations they consider appropriate. This could be, for example, people who will be affected by the designation, campaign or interest groups, the Scottish Information Commissioner and other regulators.

#### **Examples**

Section 5 has only been used once since the FOI Act came into force in 2005.

In September 2013, the Ministers passed a Section 5 Order<sup>25</sup> which extended FOI to bodies providing culture and leisure services on behalf of local authorities. It came into force on 1 April 2014.

This designated, for example, Edinburgh Leisure which provides sport and leisure services on behalf of the City of Edinburgh Council. It is a company limited by guarantee. Other leisure trusts include Leisure and Culture Dundee, which provides leisure, sport, cultural and library services to the citizens of Dundee, and the Pickaquoy Centre Trust, which manages the Pickaquoy Centre in Kirkwall (a leisure centre and cinema) on behalf of Orkney Islands Council.

<sup>22</sup> The Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2008, SSI 2008/297, [www.legislation.gov.uk/ssi/2008/297/contents/made](http://www.legislation.gov.uk/ssi/2008/297/contents/made)

<sup>23</sup> The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Devolved Public Bodies and Stipulated Time Limit) and the Freedom of Information (Scotland) Act 2002 Amendment Order 2011, SSI 2011/113, [www.legislation.gov.uk/ssi/2011/113/contents/made](http://www.legislation.gov.uk/ssi/2011/113/contents/made)

<sup>24</sup> The Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2013, SSI 2013/126, [www.legislation.gov.uk/ssi/2013/126/contents/made](http://www.legislation.gov.uk/ssi/2013/126/contents/made)

<sup>25</sup> The Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013, SSI 2013/278, [www.legislation.gov.uk/ssi/2013/278/contents/made](http://www.legislation.gov.uk/ssi/2013/278/contents/made)

# Appendix 1: Understanding FOI law

## Publicly-owned companies

Section 6 of the FOI Act sets out which companies are “publicly-owned companies”. A company is publicly-owned if it is owned wholly by the Ministers or by one or more other organisation listed in Schedule 1.

### Example

David MacBrayne Limited is the parent company of the David MacBrayne Group, which operates the Clyde and Hebrides ferry services through its subsidiary CalMac Ferries Limited, and the Gourock/Dunoon ferry through another subsidiary, Argyll Ferries Limited. David MacBrayne Ltd is wholly owned by the Ministers. It provides these ferry services under contracts with the Scottish Government, and receives a grant for providing them. It is because the company is wholly owned by the Ministers that it is subject to the FOI Act.

## How do organisations become covered by the EIRs?

The EIRs give rights to Environmental Information<sup>26</sup>. They are based on European law so have slightly different provisions to the FOI Act.

There are seven ways in which an organisation can become subject to the EIRs. Organisations which are subject to the FOI Act are automatically subject to the EIRs so the first five ways are the same as the FOI Act; the other two are specific to the EIRs.

### Common to FOI Act and EIRs

Organisations can become covered by the EIRs:

- (i) by being listed in Schedule 1 of the FOI Act;
- (ii) by being added to Schedule 1 by another Act of Parliament
- (iii) by being added to Schedule 1 under an Order made by the Ministers under Section 4 of the FOI Act
- (iv) by an Order made by the Ministers under Section 5 of the FOI Act to designate an organisation “as a Scottish public authority for the purposes of [the] Act”
- (v) by being a “publicly-owned company”.

## Specific to the EIRs

Additionally organisations can be covered to the EIRs if they are:

- (vi) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); or
- (vii) any other person who is neither a public body nor a public office-holder, who is **under the control of** such a body, person, office-holder or publicly-owned company and:
  - i. has public responsibilities relating to the environment;
  - ii. exercises functions of a public nature relating to the environment; or
  - iii. provides public services relating to the environment.

These additional two routes are very different to the first five. There is no requirement for further legislation to designate bodies under these provisions. There is also no test of whether the bodies “appear” to the Ministers to deliver public functions.

The designation test is via the quasi-judicial appeal process to the Scottish Information Commissioner (and there is a further right of appeal to the Court of Session).

This means that establishing whether bodies are subject to the EIRs depends on the public making applications to the Commissioner about the bodies they think should be subject to the law and the legal tests that the Commissioner is required to consider. In practice, the wider definition of public authority means that some organisations which are not covered by the duty to provide information under the FOI Act are required to provide Environmental Information under the EIRs.

### Example

In Decision 118/2014<sup>27</sup> the Scottish Information Commissioner found that Dunbritton Housing Association was covered by the EIRs because it was under the control of the Scottish Housing Regulator.

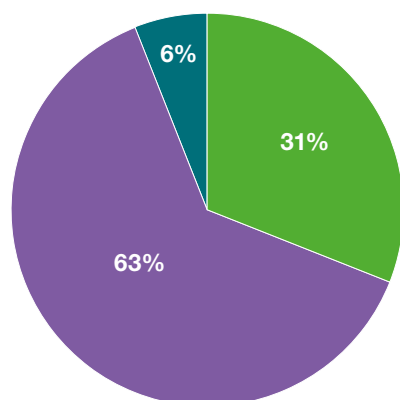
<sup>26</sup> As defined in the EIRs.

<sup>27</sup> [www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302209.aspx](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302209.aspx)



## Appendix 2: Results of survey of culture and leisure trusts<sup>28</sup>

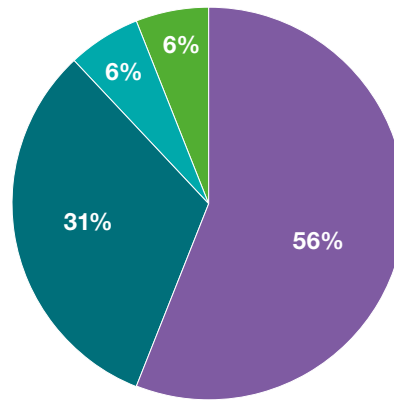
Thinking about the number of requests for information that you received before 1 April 2014, and the number you have received since 1 April 2014, has the number of requests:



### Response

Increased significantly	0%	Decreased slightly	6%
Increased slightly	31%	Decreased significantly	0%
Stayed the same	63%	Don't know	0%

Thinking about the type of information you were asked for before 1 April 2014, and the type of information you have been asked for since 1 April 2014, has the type of information asked for:



### Response

Stayed the same	56%	Changed significantly	6%
Changed slightly	31%	Don't know	6%

How prepared do you feel to respond to FOI requests?

	Response Percent
Very prepared	38%
Fairly prepared	63%

Did anyone from your organisation attend the FOI training event for leisure and cultural trusts, organised by the Scottish Information Commissioner, in Edinburgh on 16 January 2014?

	Response Percent
Yes	82%
No	18%

How helpful was the January training event, in helping your organisation get ready for FOI?

	Response Percent
Very helpful	92%
Fairly helpful	8%

How helpful was the advice from the Commissioner's office in getting your organisation ready for FOI:

	Response Percent
Very helpful	86%
Fairly helpful	14%

When getting ready for FOI, did you use the resources for new authorities on the Commissioner's website?

	Response Percent
Yes	94%
No	0%
Unsure	6%

How helpful to you were the resources on the Commissioner's website?

	Response Percent
Very helpful	67%
Fairly helpful	27%
Not very helpful	7%

How helpful did you find the support you received from other organisations in getting your organisation ready for FOI?

	Response Percent
Very helpful	92%
Fairly helpful	8%

When getting ready for FOI, did you contact the Scottish Information Commissioner's office for advice?

	Response Percent
Yes	88%
No	13%

<sup>28</sup> Figures may add up to 1% more or less than 100% due to rounding.

# Appendix 3: A brief history of use of Section 5 designation powers

<b>2002</b>	
24 April	The Freedom of Information (Scotland) Bill passed by the Scottish Parliament. Assurances given by the Ministers that Section 5 designation powers would be used soon after the FOI Act came into force.
28 May	The Freedom of Information (Scotland) Act 2002 receives Royal Assent.
<b>2004</b>	
2 December	Environmental Information (Scotland) Regulations laid before the Scottish Parliament.
<b>2005</b>	
1 January	The FOI Act came into Force. The EIRs came into force.
<b>2008</b>	
November	Ministers issued a discussion paper on the extension of the FOI Act to: <ul style="list-style-type: none"> <li>• Private prisons and prisoner escort services</li> <li>• Contractors building and/or maintaining schools</li> <li>• Contractors building and/or maintaining hospitals</li> <li>• Local authority trusts</li> <li>• Glasgow Housing Association</li> <li>• The Association of Chief Police Officers in Scotland</li> <li>• Trunk road contractors.</li> </ul> <p>More than 60 submissions were received in response to this discussion paper.</p>
<b>2009</b>	
December	The Ministers announced a formal consultation on designation.
<b>2010</b>	
July	Formal consultation launched.
December	Scottish Government published an initial report on the consultation responses: <ul style="list-style-type: none"> <li>• universal support for the principles of accountability, openness and transparency</li> <li>• partial support for formal extension of FOI law</li> <li>• majority of organisations who would be directly affected by designation were against extension of FOI law</li> <li>• other organisations (such as representative bodies and contracting authorities) were more finely balanced for and against extension of FOI law</li> <li>• almost half of consultees supported extension of FOI law to the bodies identified in the consultation paper</li> <li>• some of the organisations opposed to extension suggested alternative approaches such as improved self-regulation or reliance on the Scottish Ministers' Section 60 Code<sup>29</sup>.</li> </ul>

<sup>29</sup> Scottish Ministers' Section 60 Code of Practice on the Discharge of Functions by Scottish Public Authorities (more information is available at: [www.scotland.gov.uk/About/Information/FOI/Section60Code](http://www.scotland.gov.uk/About/Information/FOI/Section60Code)).

<b>2011</b>	
January	<p>Scottish Government's formal response to the consultation (made at a time when Scotland was in the midst of a global economic downturn and credit crunch on an unprecedented scale) concluded that:</p> <p>"Having considered the various competing factors, the Scottish Government is not persuaded that now would be the appropriate time to lay a Section 5 Order formally extending coverage to those bodies identified in the consultation paper. The Scottish Government notes that alternative approaches are possible – and should be pursued – in further strengthening the open and transparent public service environment."</p> <p>The Scottish Government made reference to the FOI Amendment Bill it intended to bring forward in the next Parliamentary session, and noted that the time of enactment of the Amendment Bill could provide the opportunity for related Orders under Section 5 to come into force.</p>
<b>2012</b>	
30 May	FOI Amendment Bill introduced into the Scottish Parliament. The Bill, as introduced, did not address designation issues.
12 September	<p>Finance Committee took evidence during the Stage 1 scrutiny of the Amendment Bill.</p> <p>The Campaign for Freedom of Information in Scotland (CFoIS) and the Scottish Information Commissioner expressed the view that the failure to include extension of the scope of the FOI Act in the Amendment Bill was a missed opportunity. CFoIS suggested that Section 5 may not be fit for purpose and proposed a new "purpose clause" making it clear that the FOI Act was intended to entrench the public's right to know.</p> <p>The Scottish Information Commissioner was concerned that the powers had not been used to that point and that there was insufficient accountability of Ministers to Parliament.</p> <p>It was generally recognised that Section 5 was not working as planned.</p>
<b>2013</b>	
16 January	FOI Amendment Bill passed by the Scottish Parliament.
19 February	<p>FOI (Amendment) (Scotland) Act 2013 (the Amendment Act) received Royal Assent.</p> <p>The Amendment Act introduced:</p> <ul style="list-style-type: none"> <li>• An amendment to Section 5 requiring the Ministers to consult any other people that the Ministers consider appropriate (e.g. people who stand to be affected by the designation) in addition to the bodies that it is proposed to extend coverage to</li> <li>• A new Section 7A which requires the Ministers to review the use of Section 5 and report on its use to Parliament. The first report is due by 31 October 2015.</li> </ul>
19 September	The first ever Section 5 Order laid by the Ministers.
<b>2014</b>	
1 April	Section 5 Order came into force making culture and leisure trusts subject to FOI.

For further information about this report, please contact  
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