

POLICY NOTE

THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (DESIGNATION OF PERSONS AS SCOTTISH PUBLIC AUTHORITIES) ORDER 2013

SSI 2013/278

This Order is laid in exercise of powers set out at section 5(1) of the Freedom of Information (Scotland) Act 2002 ('the Act'). The Order is subject to affirmative parliamentary procedure, as set out at section 72(2)(b) of the Act.

Policy Objectives

The Freedom of Information (Scotland) Act 2002 ('the Act') came into force on 1 January 2005. The Act encourages the development of a more open culture across the public sector. It does so by providing a statutory right of access to information held by Scottish public authorities (including, for example, the Scottish Ministers, local authorities, health boards, doctors and dental practitioners).

The provisions of the Act can be extended to bodies that appear to the Scottish Government to carry out functions of a public nature; or which provide, under a contract made with a Scottish public authority, a service whose provision is a function of that authority. This can be done by making an order under section 5 of the Act, which designates those bodies as a Scottish public authority for the purposes of the Act. They are then subject to the full requirements of the Act as summarised above, and must therefore respond to written requests for information and proactively publish information described in their Publication Scheme.

The policy objective of this order is to extend coverage of freedom of information legislation to bodies created or established by local authorities undertaking functions on behalf of those authorities which include developing and/or delivering recreational, sporting, cultural or social facilities and activities.

Such bodies are to a considerable extent publicly funded and undertake functions of a public nature derived from statute. Increasingly, the provision of such services has been out-sourced by local authorities to 'arms-length' organisations. In so doing, there has sometimes been a loss of access to information rights because individuals and organisations previously had a right to request information from the relevant local authority in relation to a service, but no longer have that right once the service has been outsourced.

Therefore, in the interests of transparency and accountability, the Scottish Government considers it right that such culture, sport and leisure bodies should be subject to the provisions of the Act. Designating such bodies as Scottish public authorities for the purposes of the Act would also remove the anomalous situation whereby bodies providing identical services but which are wholly-owned by a local authority/ies are already subject to freedom of information legislation by means of section 6 of the Act (publicly-owned companies).

The changes in this draft order will come into force on 1 April 2014.

Consultation

The Scottish Government initially consulted on extending coverage of the Act in November 2008ⁱ. The discussion paper sought views on the possibility of bringing forward a section 5 order in relation to:

- contractors who provide services which are a function of a public authority;
- registered social landlords; and
- local authority trusts or bodies set up by local authorities.

These categories of organisation were selected due to concerns raised primarily around the loss of rights to access information from such bodies under the Act as a result of changes in how public services were increasingly delivered.

The subsequent summary reportⁱⁱ and conclusions set out the Scottish Government's intention to formally consult (as required by the Act before any order is made) a range of contractors, leisure, sport and cultural trusts and bodies established by local authorities, as well as certain other organisations.

The consultation paperⁱⁱⁱ was published in July 2010 and sought views on the terms of a draft section 5 order. Where groups of bodies (rather than discrete organisations) were proposed for coverage a class-based definition was proposed describing the particular group. This would ensure that when bodies delivering a particular service changed, new ones would automatically be covered (in respect of the relevant public services they were providing) and so the bodies brought under the Act would remain up to date as much as possible.

The Scottish Government's response^{iv} to the consultation paper noted the universal support for the principles of openness, transparency and accountability. However, the report also noted there was no clear consensus on how best to approach the issue of ensuring optimum openness and transparency. Given the various competing factors noted in the report, the Scottish Government was not at that time persuaded of the case to extend coverage.

Significantly, at the time of the response, the Scottish Government had already announced its intention to bring forward a Freedom of Information (Amendment) (Scotland) Bill intended to improve the operation of the Act. In light of this, the Scottish Government agreed to defer a decision on extension of the Act until the Amendment Bill had been considered by the Scottish Parliament; at which point, a section 5 order to extend coverage of the Act could be laid.

Subsequently, during the stage 3 debate on the Freedom of Information (Amendment) (Scotland) Act 2013, the Deputy First Minister announced Scotland's first order extending coverage of the Act and confirmed the Scottish Government's commitment to extend coverage of the Act in a phased approach. Therefore, while this draft Order focuses on culture, sport and leisure trusts, the Scottish Government has committed to consulting on a further extension of coverage of the Act to other arm's length organisations in future.

Impact Assessments

An Equalities Impact Assessment^v (EQIA) accompanied the July 2010 consultation paper. The assessment did not identify any equalities issues regarding extension of coverage and concluded that extension would not have any differential impact on members of any particular social and/or minority group.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) was also published as part of the 2010 consultation. The assessment noted that any extension of coverage would place an additional regulatory and financial burden on the bodies concerned. In particular, the assessment sought to establish whether coverage would place undue financial burdens upon bodies at a time of economic difficulty. It considered that creating additional regulatory or financial requirements must be appropriate and proportionate.

The consultation response paper contained the final BRIA which noted that the consultation produced little hard evidence demonstrating to what extent (if any) extension of coverage might be considered as burdensome. While noting the lack of evidence of unmet demand for information, the final assessment also noted that many of the bodies proposed for coverage already operated to some extent within the scope of the Act, for example, in cooperating with the relevant public authority in handling an information request.

In addition, we note that a considerable body of guidance is now available for bodies subject to the Act and it can be expected that relevant local authorities, as well as the Scottish Information Commissioner and the Scottish Government, would support bodies in preparing for meeting the requirements of the Act.

Finally, the proposed coming into force date of 1 April 2014 should give authorities becoming subject to the legislation sufficient time to prepare for their new responsibilities.

Scottish Government
Strategy and Constitution Directorate
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ⁱ <http://www.scotland.gov.uk/About/Information/FOI/discussionpaper>

ⁱⁱ <http://www.scotland.gov.uk/About/Information/FOI/SummaryReportConclusions>

ⁱⁱⁱ <http://www.scotland.gov.uk/Publications/2010/07/20123725/0>

^{iv} <http://www.scotland.gov.uk/About/Information/FOI/ResponsePaperFOI>

^v <http://vq73eda/systems/EqualityUnit/Assessment/view.asp?ID=311>