



**UNISON Scotland response:
Scottish Government's Freedom of Information coverage
extension consultation**

December 2019

Introduction

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. UNISON's interest in FOI includes our campaigns function, the fact that we make regular use of FOI at Scottish and local levels, and the fact that we are the union that represents most FOI staff in public bodies. We welcome the opportunity to respond to this consultation. Along with many others, including the Campaign for Freedom of Information in Scotland, we are longstanding campaigners for strong Freedom of Information legislation and for extending the 2002 Act to cover all public services, however they are provided, including in our recent response on post legislative scrutiny¹. We endorse the CFoIS response to this consultation.

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. There should be a universal, statutory, enforceable right to information about all public services, regardless of what type of body delivers the service.

As the Scottish Information Commissioner's Office has been saying for many years, information rights should follow the public pound. Many organisations in Scotland want to see FOISA extended to ensure that there is not a two tier system of information rights.* There is also very high public support for ensuring much wider coverage than at present – including, in the Scottish Information Commissioner's 2019 polling, with, for example, 80% support for private companies providing public services being subject to the Freedom of Information (Scotland) Act 2002 (FOISA).

We very much hope that the Scottish Parliament's Public Audit and Post Legislative Scrutiny Committee (PAPLS), which is currently undertaking post legislative scrutiny of FOISA, will recommend that all public services should be covered, however they are delivered. This should include subcontractors, at a minimum through the principle contractors. However, the Scottish Government could go ahead now and say it will use Section 5 to ensure this.

UNISON's Policy Officer Stephen Low pointed out, in giving oral evidence to the Committee on 19 September 2019:

"If a service is being directly delivered by a public body, FOI can be applied usefully at times. When the service has been outsourced to a private company or a third sector body, that public body is putting itself beyond the accountability of FOI. Billions of pounds are being transferred from accountability and transparency to a much more opaque system."²

*Just one example, from NHS Lanarkshire's evidence to the PAPLS Committee on 7 November 2019:

¹ <https://unison-scotland.org/post-legislative-scrutiny-of-the-freedom-of-information-scotland-act-2002-june-19/>

² <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12271&mode=pdf>

“4. Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

‘Within Lanarkshire the majority of our questions are across all hospitals in Lanarkshire. NHS Lanarkshire has received requests for information in relation to our PFI/PPP hospitals. Members of the public do not see hospitals as being PFI or NHS. They see hospitals as being within Lanarkshire and the responsibility of NHS Lanarkshire, however the PFI contractors are not subject to FOI.

‘Two of our hospitals are PFI hospitals 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. While we have a good partner working relationship with our contractors in respect of FOI, we believe the public should have access to the information about our PFI hospitals. Information is not always given to us to provide the applicant with a full answer. This results in different levels of information being provided to the applicant. We believe that benefit will be achieved by extending the coverage of the Act to contractors who building and maintain hospitals.’”

Question 2

Which services provided on behalf of the public sector by organisations should be considered for extension? For the services that you identify, you may wish to give examples of organisations that provide the service (e.g. “Company X”) or to describe types of organisations that provide it (e.g. “every person who has a contract with Authority Y to provide service Z”)

All public services, however they are provided. The public’s right to know should follow the public pound. The Scottish Government should be ensuring that rights which were lost through contracting out are restored through the use of Section 5 to extend FOISA to cover all public services. This is the opportunity to do this for all services. If there is a practical reason not to bring all under the scope of FOISA in one go, the first services to be covered should be all health contracts and all health and social care contracts, however they are delivered. But all other public services should be covered asap, within a couple of years. There must be no further delays of the type which saw it take 17 years for housing associations to be subject to FOISA.

Question 3

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

No.

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. If an organisation is providing a public service, it should be subject to FOISA. Transparency is a key part of working with the public sector and receiving public funds.

The example given in the consultation document of services being provided only on a temporary or intermittent or emergency basis is far too sweeping and, if adopted, could too easily be applied to situations such as, for example, using a private health company to help reduce NHS waiting lists. It would be entirely inappropriate for such a 'service' (we believe the investment should be in the NHS, not in private companies) not to be covered by FOI legislation.

NB: In our response³ in March 2018 to the consultation on the Draft Order extending FOISA to cover Registered Social Landlords, we raised concerns about funding levels for the Office of the Scottish Information Commissioner. We would urge the Committee to look at resourcing of OSIC, as FOISA cannot work properly for requesters if the Scottish Information Commissioner does not have sufficient resources to fulfil his/her role.

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? It would be helpful if you could provide any examples where you are aware that the impact of FOISA has been a factor for organisations in deciding whether or not to contract with a Scottish public authority.

It should not impact on organisations' ability to provide services. Proper proactive publication of a range of information, much of it already collected, would reduce the need for FOI requests to be made. The procurement budget of the contract can take account of what may be deemed to be reasonable costs for FOI processing, if that is seen as an issue by charities and third sector organisations.

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?

Examples of situations where you have successfully accessed information in this way or where you have experienced barriers to accessing information in this way would be helpful. Examples of authorities' and contractors' experiences of including provisions about the disclosure of information by contractors would also be helpful.

UNISON has experience of asking public authorities for information, only to be told that it is not held by them because a contractor provides the service, or that there is a clause in the contract which prevents them providing the information, or arguing information should be withheld, citing exemptions relating to (what is commonly referred to as) commercial confidentiality, and cost. Our most notable example is from our 2007 At What Cost report⁴, on the costs of PFI/PPP in Scotland. We initially attempted to obtain the Full Business Case and contract for every PFI/PPP scheme in Scotland, covering 190 documents from 95 projects listed at the time on the then Scottish Executive Financial Partnerships's 'done deals' website. A large amount of financial and other information was withheld on grounds of commercial confidentiality. Some documents were withheld in their entirety, with e.g. Dundee City Council refusing to provide any part of the FBC and contract for Baldovie Waste to Energy plant on the grounds of substantial prejudice to the commercial interests of the

³ <https://unison-scotland.org/wp-content/uploads/Response-FOI-Extended-to-RSLs.pdf>

⁴ <http://www.unison-scotland.org.uk/comms/atwhatcostoct07.pdf>

council, the contractors and third parties. Glasgow City Council refused to provide any part of the contracts for their schools PPP, citing commercial confidentiality and cost. See also above, the quoted response from NHS Lanarkshire in our answer to Question 1.

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? It would be helpful if you could set out the key factors that you consider favour the extension of coverage in the way that you propose.

A comprehensive application of FOISA to all public services, however they are delivered, would still need to be reviewed in future in case of any anomalies, to ensure all services that should be covered continue to be covered, and particularly to safeguard against any changes that could deliberately or inadvertently reduce coverage and therefore the public's right to know.

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