



Submission on ICESCR

- Campaign for Freedom of Information in Scotland

Maintain, Protect and Extend FoI Rights in Scotland

The Campaign for Freedom of Information in Scotland (CFoIS) believes that there must be greater openness and transparency from the public sector in Scotland in order to independently assess whether there is a progressive realisation of the UN's International Covenant on Economic, Social and Cultural Rights (ICESCR) by the State Party. Therefore the State Party should extend the range of organisations covered by the Freedom of Information (Scotland) Act 2002 (FoISA)¹, and ensure its provisions are equally applied to all bodies covered.

Under Article 2 of ICESCR there is an obligation on the State Party to take deliberate steps to achieve progressive realisation and that involves obligations of conduct and obligations of result. However it is more difficult to assess impact if the enforceable right to access information is being weakened and curtailed, which is happening in Scotland. As freedom of information (FoI) is devolved to the Scottish Parliament, questions about adequacy and enforceability should be directed to the Scottish Government eg in respect of the right to adequate housing (Article 11, ICESCR).

CFoIS's primary concerns are two fold, do not arise from funding issues, and relate to current Scottish Government policy:

- CFoIS believes that far more bodies should be covered by FoISA to reflect changes in how public services are being delivered in Scotland. The FoI rights introduced in 2005 in Scotland are now less effective as public services are taken over by different bodies which are not covered by FoISA. For example 15,000 council house tenants lost their FoI rights when their homes moved over to be managed by Registered Social Landlords (RSLs)². In 2002 the government promised that RSLs would be covered by FoISA but that has not happened yet, although another consultation is promised later in 2016. The Scottish Information Commissioner has also called for action to "address the loss of rights as a result of changes in delivery of public functions and

¹ The Freedom of Information (Scotland) Act 2002, as amended, became effective on 1st January 2005 and is available at <http://www.itspublicknowledge.info/Law/FOISA.aspx>

² 'FoI Ten Years On: Are the Right Organisations Covered?' pub by the Scottish Information Commissioner January 2015 pg 1

services; and to create access to information rights for the first time, where it is in the public interest to do so.”³ So far the pace of change and number of organisations added has been piecemeal and slow.

- When the public’s enforceable right to access information was introduced by the Scottish Parliament, an important principle was established: that all bodies covered by FoISA had to follow, equally, the same rules⁴. For example that all information requests should be answered promptly, and within 20 working days. Now that important principle is under threat as the Scottish Government is proposing a two-tier system for a new category of body covered by FoISA: grant-aided schools and independent special schools. The Scottish Government is proposing that all grant-aided schools and independent special schools will have up to 60 days to respond to FoISA requests and the extra time is to cover ‘school holidays’. Yet there is no clear evidence that during all school holidays they are actually closed.

Whilst we welcome the commitment of politicians to deliver transparency and accountability⁵, our focus is ensuring that the public continues to enjoy an enforceable right to know.

Please ask the Scottish Government what steps it is progressively taking to ensure FoI rights remain strong in Scotland. In particular why Arms-Length External Organisations are not automatically included. Also, why is it proposing to introduce a two tier regime for some schools as the impact will be to make the rights of some children weaker eg those who are disabled and attending grant-aided schools and independent special schools?

Issues of Concern and Proposed Actions

FoI Regime Generally

There is longstanding public support for a stronger FOI regime: research commissioned by the Scottish Information Commissioner in 2011 revealed strong public support for FOI to be extended to cover additional organisations, with 88% agreeing that trusts providing services on behalf of local authorities should be covered, 82% agreeing that housing associations (RSLs) should be covered and 83% agreeing that private sector companies who build and maintain local authority schools or hospitals should be covered.⁶ CFoIS has identified nine steps to ensure that FoI rights remain strong and effective in Scotland so that people can hold the government to account for the delivery of human rights. CFoIS believes the Scottish Government should:

1. Restore the public’s right to access information to at least its 2005 status.
2. Restore the operation of the Scottish Public Information Forum to enable effective engagement with stakeholders, and to maintain and develop an enforceable right to access information which meets the public’s expectations. The Forum has not met for many years despite being

³ Pg 3 Ibid

⁴ Although there are special rules in section 10(2) of FOISA for the National Archives of Scotland. See <http://www.nas.gov.uk/foi/foiBasicGuide3.asp#special>

⁵ Holyrood Online article “Scotland to sign up to international open government pilot” pub 13th April 2016.

⁶ News Release 16th December 2011 <http://www.itspublicknowledge.info/home/News/20111612.asp>

- included in Principle 5 of the Scottish Government's Six FoI Principles published in 2007.⁷
3. Extend the right to access information to reflect changes in public service delivery in Scotland.
 4. Undertake an audit of all arms-length external organisations (ALEOs) and catalogue their functions, to enable informed decision making about the coverage and operation of FoISA.
 5. Quickly extend the coverage of FoISA to all known ALEOs not already included, all public sector organisations and others delivering services of a public nature.
 6. Agree it is the function delivered that requires FoISA coverage. Adopting this principle will ensure consistency in the coverage of FoISA.
 7. Maintain the principle that FoISA obligations apply equally to all organisations covered.
 8. Reject any introduction of a new category of 'core' public organisations as a way of diluting the effectiveness of FoISA.
 9. Review the operation of FoISA to ensure our enforceable right to access information remains effective in delivering open, transparent and accountable government and public services.

For further information go to the CFoIS news release and Manifesto at <https://www.cfoi.org.uk/2016/04/new-scottish-parliament-must-revive-our-information-rights/>

The Right to Education

The Scottish Government launched a consultation on changing the rules for accessing information from the newly added bodies of grant-aided schools and independent special schools. The proposal is to extend the maximum response period from 20 working days to 60 working days and justifies the change as "... many of these schools in effect close down for extended periods during the summer."⁸ However how schools operate in practice varies and includes: administration during the holidays; school trips leave from the school premises; during the Easter holidays schools are open for long periods as they deliver "catch up" classes before exams; pupils are supported to complete projects; during the summer they are open immediately after the exam results are announced to meet with children and rearrange timetables or choose new subjects.

Disabled children who attend grant-aided schools and independent special schools, and their parents/carers, are being treated less favourably than those attending local authority schools. CFoIS wants all children and their parents/carers to be able to enforce their right to access information in 20 "working" days.

If the information request relates to the environment, the Environmental Information (Scotland) Regulations 2004 (EIRs) apply and the maximum response time will

⁷ For more information see the Scottish Government website <http://www.gov.scot/About/Information/FoI/6principles>

⁸ Consultation on the Freedom of Information (Scotland) Act 2002 (Time For Compliance) Regulations 2016 pub March 2016 by Scottish Government, pg. 5

remain at 20 working days.⁹ The Scottish Government does not have the power to change the EIRs.

The proposed regulation is regressive as the benefit of FoISA is that it establishes a single system which provides clarity for the requester. (The only exception is the National Archives of Scotland which was agreed when the legislation was passed in 2002.) We are not persuaded that the case has been made for any change to the fundamental principle of equal treatment and do not accept that 3 months is a reasonable time to respond to a requester. Changing the timescales to a maximum of 60 days/3 months impacts on the entire enforcement process and may make the information of less use when eventually disclosed.

In the 2015 consultation which proposed extending FoISA to some additional bodies, the Scottish Government admits:

“There are currently 39 independent special schools on the Register of Independent Schools playing a central role in meeting the needs of approximately 800 of Scotland’s most vulnerable children. Four of these schools are also being consulted in their capacity as providers of secure accommodation for children.

“The schools provide education and care in residential and day schools for children and young people with complex needs (such as physical disabilities, mental health problems and social, emotional and behavioral challenges). Places at independent special schools are generally funded through local authorities.”¹⁰

An amendment to the definition of a “working day” under section 73 of FoISA and maintaining the 20 ‘working day’ response time would be the most sensible way to proceed. Given the individuality of schools, introducing a flat rule about closure is unsatisfactory. There needs to be a process of qualification as a ‘closed day’ and an independent verification process for agreeing when and how many “closed days” there are each year. This function could be undertaken by the Scottish Information Commissioner, HMI Inspectors or Education Scotland.

For further information go to the CFoIS briefing at <https://www.cfoi.org.uk/2016/04/consultation-response-foisa-time-for-compliance-regulations-2016/>

About CFoI in S

The Campaign for Freedom of Information (CFoIS) was established in 1984 to secure a legal right of access to information so people could find out how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. During the passage of FoISA and subsequently we have consistently argued that the legislation should cover a much wider section of Scottish society, recognising that our public services are delivered by bodies other than public authorities, though paid for by public money. For further information go to <https://www.cfoi.org.uk/scotland/>

⁹ For more information see Scottish Information Commissioner’s website at <http://www.itspublicknowledge.info/Law/EIRs/EIRs.aspx>

¹⁰ Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations pub by Scottish Government June 2015, pg. 14