



# UPR Submission

## - Accessing Information is a Human Right

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<https://www.cfoi.org.uk/scotland/>

## **1. About CFol in S**

1.1 The Campaign for Freedom of Information (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about 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. CFoIS is independent of government and relies on donations and income generated through organising training.

1.2 During the passage of the Freedom of Information (Scotland) Act 2002 (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.

1.3 We welcome opportunities to work with the Scottish Government, public authorities and private sector companies to ensure that the FoISA is implemented effectively and have organised and participated in a number of activities to this effect such as participation in the Scottish Public Information Forum.

For more information on our work go to <https://www.cfoi.org.uk/scotland/>

## **2. Summary of Issues and Solutions**

2.1 FoISA became effective on 1 January 2005<sup>1</sup>. The enforceable right to access information has become progressively weakened due to changes in how public services, and services of a public nature, are delivered. Consequently, there has been a negative impact on transparency and accountability in Scotland.

2.2 FoI is a devolved issue for the Scottish Parliament so recommendations on improving access to information should be directed at the Scottish Government. The Freedom of Information Act 2000 applies to cross border organisations such as the BBC and for organisations that are covered by the reserved powers of the UK Parliament.<sup>2</sup>

2.3 CFoIS proposes ten actions for the Scottish Government and Scottish Parliament:

1. Accept that the right to access information is a human right.
2. Restore the public's right to access information to at least its 2005 status.
3. 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.
4. Extend the right to access information to reflect changes in public service delivery in Scotland.

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<sup>1</sup> For more information on the Act and subsequent amendments see website of the Scottish Information Commissioner <http://www.itspublicknowledge.info/Law/FOISA.aspx>

<sup>2</sup> For more information see <http://www.legislation.gov.uk/ukpga/2000/36/contents>

5. 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.
6. 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.
7. Agree it is the function delivered that requires FoISA coverage. Adopting this principle will ensure consistency in the coverage of FoISA.
8. Maintain the principle that FoISA obligations apply equally to all organisations covered.
9. Reject any introduction of a new category of 'core' public organisations as a way of diluting the effectiveness of FoISA.
10. 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.

### **3. Human Rights and Accessing Information**

3.1 The Campaign for Freedom of Information in Scotland (CFoIS) believes far more bodies should be covered by the Freedom of Information (Scotland) Act (FoISA). Whilst we welcome the commitment of politicians to deliver transparency and accountability<sup>3</sup>, our focus is on practice and impact of current legislation and actions. Therefore we set out the progressive and deliberate steps that require to be taken to ensure that the public continues to enjoy an enforceable right to know in Scotland.

3.2 Scotland, and the UK, came late to freedom of information given that countries such as Sweden are credited with adopting a law 250 years ago.<sup>4</sup> Law goes hand in hand with changes to culture and practice, which remain ongoing areas of concern in Scotland particularly as the focus for reviewing performance, the Scottish Public Information Forum, has been allowed to lapse by the Scottish Government.

3.3 The Scottish Parliament and the Scottish Government have clear obligations in respect of human rights due to the UK's ratification of international human rights law. For example UN Human Rights Committee issued General Comment 34 on Article 19 of ICCPR, freedoms of opinion and expression, which extends the right to include access to information:

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<sup>3</sup> Holyrood Online article "Scotland to sign up to international open government pilot" pub 13<sup>th</sup> April 2016.

<sup>4</sup> See for example <https://www.mysociety.org/2016/09/28/celebrating-250-years-of-foi-in-sweden-with-the-launch-of-fragastaten/>

“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.”

3.4 It is unclear how specific obligations to collect data to enable informed assessment of human rights delivery, fit with FoISA. For example, increasingly services for people with impairments are being delivered by voluntary sector organisations which is a category of body that is not covered by FoISA. So the public’s right to access information, to make informed judgements on the delivery of human rights, are being hampered. It is useful to remember that Article 31 of UNCRPD states:

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention...

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

3.5 Failure to make a specific link between human rights and access to information rights in Scotland is repeated in respect of the European Convention on Human Rights (ECHR). There are explicit legal duties contained within the Scotland Act 1998:

- S29 of Scotland Act 1998 – Members of the Scottish Parliament (MSPs) are required to pass legislation that is ECHR and EU compliant
- S57 of Scotland Act 1998 – Scottish Government Ministers

3.6 It is useful to remember that under article 10 of the ECHR: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”. In addition Section 6 of the UK Human Rights Act 1998 (HRA) requires all public bodies and those delivering services of a public nature to comply with the European Convention on Human Rights. There is no evidence that a connection has been made with jurisprudence at the European Court of Human Rights has kept pace with the delivery of FoISA.<sup>5</sup> It has been ruled that housing associations are covered by the HRA but they are not covered by FoISA. Asserting Article 10 of the ECHR to access housing information is possible but more complicated. It would be better to update FoISA.

3.7 The public know about and approve of freedom of information rights in Scotland. Polling undertaken for the Scottish Information Commissioner in 2015 confirms the positive trend:

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<sup>5</sup> Samples include *Társaság a Szabadságjogokért (the Hungarian Civil Liberties Union) v. Hungary* 2009, *ZORICA JOVANOVIĆ v. SERBIA* 2013 (app21794/08), *Guerra and Others v. Italy* (application no. 14967/89)

- 85%, public awareness of FOI rights in Scotland is at the highest ever recorded level. By contrast, awareness of the separate, but similar, right to access environmental information is just 27%.
- 82% of people don't agree with the statement that FOI is a waste of public money.
- 91% agreed (“strongly” or “tend to”) that it is important for the public to be able to access information. This shows a small fall from 95% in 2014.
- 77% agree that FOI gives them more confidence in the decisions of Scottish public bodies. 13% disagreed with this statement, and 9% felt there was no relationship.<sup>6</sup>

3.8 Conversely, human rights are not so easily understood or appreciated by the general public. Polling undertaken for the Scottish Government in 2015 reveals that:

- one in five Scots believe human rights are for minority groups only
- two in five Scots (44 per cent) say they have no bearing on their everyday life
- two thirds agree they are a positive thing,
- 68% said they'd take action if they felt their rights had been violated. <sup>7</sup>

3.9 FoISA is popular because people understand the benefits, including; requiring data accuracy on stop and search of children by Police Scotland<sup>8</sup>, councillors' and officials' spend on credit cards<sup>9</sup>, accessing letters from Prince Charles to the Scottish Government<sup>10</sup>, updating Glasgow CCTV cameras with facial recognition software<sup>11</sup>. The public clearly supports the right to access information and it has been used effectively for community benefit. Therefore, by connecting human rights with freedom of information rights will help persuade the public of the value of human rights in Scotland.

#### 4. Current Challenges

4.1 It remains surprising is that FoISA has not kept up to date with changes in how public services are being delivered. Persistent problems have not been addressed including:

- Restoring FoISA rights to Arms-Length External Organisations (ALEOs). In a recent report from the Scottish Parliament it was acknowledged that “ALEOs divide opinion. They can be seen as a more efficient and cost effective way of delivering public services on one hand, or, on the other hand, a way of shifting accountability for the delivery of services.”

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<sup>6</sup> Ipsos MORI omnibus poll in November 2015 for Scottish Information Commissioner <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2015.aspx>

<sup>7</sup> YouGov poll during 30 Oct – 03 Nov of 1,026 online interviews & are representative of all adults in Scotland (aged 18+). For more information see Scottish Government News release 18<sup>th</sup> November 2015 <http://news.scotland.gov.uk/News/Fly-the-flag-for-human-rights-1f5a.aspx>

<sup>8</sup> See BBC Scotland website for report <http://www.bbc.co.uk/news/uk-scotland-31462987>

<sup>9</sup> See STV website for report <http://stv.tv/news/tayside/262587-council-leader-in-freedom-of-information-row/>

<sup>10</sup> See Sunday Herald article

[http://www.heraldscotland.com/news/14400609.Ministers\\_rapped\\_for\\_keeping\\_Prince\\_Charles\\_letters\\_secret/](http://www.heraldscotland.com/news/14400609.Ministers_rapped_for_keeping_Prince_Charles_letters_secret/)

<sup>11</sup> In response to an FoI request by The Ferret <https://theferret.scot/>

- Extending FoISA rights to Registered Social Landlords (RSLs) known to many as housing associations. For at least 15,000 tenants this will restore a right they lost when their home was transferred to the RSL from a Council. In 2003, the Scottish Executive promised that housing associations would be included in FoISA but successive governments have failed to do so.

4.2 Research published by the Scottish Information Commissioner in 2011 revealed strong public support for FOI to be extended to additional organisations including: trusts providing services on behalf of local authorities (88%), housing associations (82%) and private sector companies who build and maintain local authority schools or hospitals (83%).<sup>12</sup> It is hoped that the public will for extending FoISA will be respected in this fifth session of the Scottish Parliament.

4.3 The Scottish Government has added to the organisations covered by FoISA, effective from 1st April 2014, but only to certain trusts which have been created by local authorities to deliver sporting, cultural and leisure facilities and/or activities on behalf of the local authority (ies). Some of the Trusts operate across local authorities. After a consultation in 2015, the Scottish Government agreed to extend the range of organisations covered by FoISA, as amended in 2013<sup>13</sup> but only to:

- contractors who run privately-managed prisons
- providers of secure accommodation for children
- grant-aided schools
- independent special school
- Scottish Health Innovations Ltd.<sup>14</sup>

The Scottish Parliament has agreed the order which will come into effect on 1<sup>st</sup> September 2016.

4.4 A significant problem is now being created by the Scottish Government. State schools, provided by Scotland's 32 local authorities, have been covered by FoISA which was underpinned by the important principle that all bodies covered had to follow, equally, the same rules<sup>15</sup>. 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 will have up to 60 days to respond to cover all 'school holidays'.

4.5 Yet there is no clear evidence that during all school holidays they are actually closed. The consultation itself states "... many of these schools in effect close down for extended periods during the summer."<sup>16</sup> However how schools operate in practice includes: administration during the holidays; school trips leave from the school premises;

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<sup>12</sup> News Release 16<sup>th</sup> December 2011 <http://www.itspublicknowledge.info/home/News/20111612.asp>

<sup>13</sup> The Act, as amended appears on UK Government website at <http://www.legislation.gov.uk/asp/2002/13/contents>

<sup>14</sup> Works in partnership with NHS Scotland and for more information see <http://www.shil.co.uk/>

<sup>15</sup> 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>

<sup>16</sup> Consultation on the Freedom of Information (Scotland) Act 2002 (Time For Compliance) Regulations 2016 pub March 2016 by Scottish Government, pg. 5



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.

4.6 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. CFoIS therefore proposed that the definition of a ‘working day’ be refined to cover situations when these schools are genuinely closed.

4.7 How public services are delivered has changed, with the voluntary sector increasingly delivering services for children and families, private sector carers being contracted under the independent living programme and public sector organisations setting up ALEOs which operate out with the FoISA regime to deliver services previously directly delivered by the public sector. The Office of the Scottish Charity Regulator (OSCR) reviewed ALEOs registered as charities in Scotland - amounting to 64. This will serve as a useful starting point.<sup>17</sup> The Scottish Parliament report on ALEOs should also be noted<sup>18</sup>. It is acknowledged that some ALEOs are already covered due to legislation eg leisure trusts, as well as due to public bodies ensuring they are covered by FoISA.

4.8 The Scottish Government's Six FOI Principles, introduced in 2007, include “We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum.” (SPIF) When there is so much public interest in transparency and accountability, such a forum is key in progressing FoI rights and obligations in Scotland. The SPIF moved to being a ‘virtual’ initiative and has now fallen out of use. The Forum should be restored and resourced to operate effectively providing a unique opportunity for the duty bearers to meet the consumers of FoI rights.

4.9 As new bodies are created by the public sector, either to deliver existing services differently, diversify or to create new businesses ventures, they should be automatically covered by FoISA. Annual reports from Audit Scotland should specifically name new bodies and the Scottish Information Commissioner should publish quarterly reports of new bodies covered by FoISA.

4.10 In the 2015 Scottish Government consultation on a limited extension of FoISA, the concept of ‘core’ public services was introduced. Whilst it is to be welcomed that the objective is to “promote openness and transparency in the delivery of core public functions”<sup>19</sup>, such terminology has a selective and limiting effect. There is no

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<sup>17</sup> As reported in the Local Government and Regeneration Committee Report “Inquiry into arm’s length external organisations” pub March 2016 by Scottish Parliament para 9

<sup>18</sup> The Local Government and Regeneration Committee published its report on 9<sup>th</sup> March 2016 at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92456.aspx>

<sup>19</sup> Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations pub by Scottish Government June 2015 para 4.4

agreement about what constitutes a 'core' public function. People want an enforceable right to access information when bodies are funded by the public purse/ FoISA was passed 14 years ago by the Scottish Parliament so a review of its operation and the experience of its customers, ie you and me, is timely. Within Scotland, how public services are being delivered is changing, and continues to do so. Also what is a public service is evolving as legislation is passed by parliament, public petitions are deliberated on by parliament and inquiries held by Parliament into issues of concern. What FoISA should cover is key to people accessing other rights, as well as being an important right in itself.

## **5. Conclusion**

- 5.1 Scotland needs a simple FoI system so that people can access their right to receive and impart information from public bodies, rather than the current system whereby some bodies are covered and some are not. Transparency and openness should be part of doing business with the public sector.
  
- 5.2 CFoIS believes contractors who build and maintain hospitals and schools, who build and maintain trunk roads or water and sewage facilities should be covered by FoISA. Trusts and other arms-length organisations running public service facilities such as building, parking, transport, property, IT, finance and other support services, health, home, safety and social care should also be covered as should the Convention of Scottish Local Authorities (CoSLA) and other umbrella organisations which make key leadership decisions for the public sector.