POLICY NOTE

THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (DESIGNATION OF PERSONS AS SCOTTISH PUBLIC AUTHORITIES) ORDER 2016

SSI 2016/xxx

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 and to those 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. They also become subject to the requirements of the Environmental Information (Scotland) Regulations 2004 in relation to any requests they receive for environmental information and those duties public authorities are required to undertake under the Climate Change (Scotland) Act 2009.

The policy objective of this order is to extend coverage of freedom of information legislation to contractors overseeing and managing private prisons, bodies providing secure accommodation for children and young people, grant-aided schools, independent special schools and Scottish Health Innovations Limited (SHIL).

This is the second order brought forward under section 5(1) of the Act; the first came into force on 1 April 2014 and covers arms-length culture, sport and leisure trusts established by local authorities.

As for the previous order, such bodies are largely or fully publicly funded and undertake functions of a public nature derived from statute. In relation to private prisons, the special purpose vehicles managing the two private prisons in Scotland (HMP Kilmarnock and HMP Addiewell), along with those companies they contract with to run the two prisons, both provide a service under a contract with the Scottish Prison Service (SPS). The provision of this service is a function of the SPS, on behalf of Scottish Ministers, as set out in the Prisons (Scotland) Act 1989.

In relation to secure accommodation providers, the four privately run secure units in Scotland exercise functions of a public nature in providing both secure accommodation and education

for children and young people. Placements are made in relation to children or young people who would otherwise need to be accommodated within prisons, as well as children or young people where a local authority feels that they require secure accommodation for social and/or welfare reasons. All units must be approved by Scottish Ministers before they can provide secure accommodation and the units are subject to a number of statutory requirements, including in particular through the Secure Accommodation (Scotland) Regulations 2013. Placements in the units are funded by local authorities and the Scottish Government.

In relation to grant-aided schools, these schools exercise functions of a public nature by providing education and in some cases also care (in the case of the special schools providing residential accommodation). In the case of Jordanhill school, the school is funded via a Scottish Government grant under the Jordanhill School Grant Regulations 1988 to provide mainstream education for children in the local area. In the case of the seven grant-aided special schools, they receive both Scottish Government grant under the Special Schools (Scotland) Grant Regulations 1990, along with funding from local authorities for individual pupils' placements, in order to provide specialist education and care to children with a range of complex additional support needs.

In relation to independent special schools, these schools also exercise functions of a public nature by providing education for children and young people and in some cases care (where residential accommodation is provided as well as day time schooling). These schools receive funding from local authorities for individual pupils' placements. In order to operate as an independent special school under the Education (Scotland) Act 1980 they must be registered by Education Scotland (on behalf of Scottish Ministers) and are subject to other legislative requirements, such as being subject to school inspections carried out by Education Scotland inspectors.

Finally, in relation to Scottish Health Innovations Limited, the organisation exercises functions of a public nature by promoting research and development within the National Health Service in Scotland. It receives public funding, including from the Scottish Government and Scottish Enterprise to support its work.

Therefore, in the interests of transparency and accountability, the Scottish Government considers it appropriate that such 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 (in the case of a school or secure unit) within a local authority, or, in the case of prisons owned by the Scottish Prison Service, are already subject to freedom of information legislation.

The changes in this draft order will come into force on 1 September 2016.

Consultation

The Scottish Government consulted publicly in Summer 2015 on extending coverage of the Act to contractors running private prisons, secure accommodation providers, grant-aided schools and independent special schools. SHIL were also consulted separately. The consultation made clear that this order is primarily focused on education and security, but that, as part of our incremental approach to increasing coverage, other orders are likely to be brought forward in future to cover other bodies.

One hundred individuals and organisations responded to the consultation. The consultation paper and responses to the consultation (where the consultee gave consent for them to be published) are available on the Scottish Government's Citizen Space website[1]. The Scottish Government's response to the consultation, which summarises the key points raised by consultees, is also published on Citizen Space.

Impact Assessments

The consultation asked for views on any impacts the proposals may have on different equalities groups. The consultation responses did not identify any equalities issues regarding extension of coverage and concluded that extension would not have any significant impact on members of any particular equality group and that, if there were any impacts they would be positive ones in terms of helping people from equalities groups to access further information. An Equalities Impact Assessment (EQIA) has been prepared on the basis of the consultation findings[2].

The Scottish Government also prepared a Privacy Impact Assessment in advance of the consultation, which concluded that making the proposed organisations subject to the Act should not have any significant impact on the privacy of members of the public. While some consultation responses raised concerns that FOI coverage of these bodies might lead to personal data about individual children or young people being released, we are comfortable that the Act has a sufficiently strong exemption for personal data to ensure that no information would need to be released in response to an information request if releasing it would constitute a breach of the requirements of the Data Protection Act 1998.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has also been published[3]. As part of the 2015 consultation, we sought comments on a draft of this BRIA. While a number of the bodies the Scottish Government proposes to bring with the scope of coverage raised concerns about potential administrative burden – and consequent costs to their organisations – the evidence suggests that numbers of requests received by each of the bodies concerned would be small and therefore the impact of coverage should not lead to significant additional costs.

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 the Scottish Information Commissioner would provide training to support bodies in preparing for meeting the requirements of the Act.

Finally, in response to concerns from a number of stakeholders, we have amended the proposed coming into force date from 1 April to 1 September 2016 to give authorities becoming subject to the legislation sufficient time to prepare for their new responsibilities.

Scottish Government
Strategy and Constitution Directorate
January 2016

[1] See https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/consult_view
[2] Available at http://www.gov.scot/About/Information/FOI/Coverage
[3] Also available at http://www.gov.scot/About/Information/FOI/Coverage