

Freedom of Information extension of coverage

SCVO response to Scottish Government

03 December 2019

Our position

SCVO champions the importance of transparency within Scotland's voluntary sector and supports the overall aim of the FOISA legislation and the human right to information. We do, however, hold concerns around the potential financial and operational implications that might arise from further extension of the legislation to Scotland's voluntary organisations.

We question the robustness of the Scottish Government's engagement with the voluntary sector to date and during the consultation period. SCVO members have expressed that the processes used to facilitate genuine conversation as part of this consultation have been limited.

SCVO is also concerned with the timing of this consultation in a period when the Scottish Parliament is undertaking post-legislative scrutiny of FOISA and when there is no available data to consider the costs and impact on the most recent group of organisations – Registered Social Landlords - that FOI requirements are now applicable to.

Any consideration of extension to the voluntary sector must take into account the public funding challenges for the voluntary sector and the implications for delivering equalities and human rights outcomes, concerns reinforced by the Scottish Parliament Equality and Human Rights Committee's report on 'valuing the third sector.'

The Scottish Government should give greater weight to talking and listening to people and organisations across the voluntary sector to build insight about our experiences and the challenges we foresee with any extension of FOISA legislation, which has not been designed with the voluntary sector in mind, before a commitment to new section 5 orders is made.

Our response

The Scottish Council for Voluntary Organisations (SCVO) champions the importance of transparency and accountability within Scotland's voluntary sector. A key pillar of SCVO's new Strategic Plan 2019-22 is to develop a confident, sustainable voluntary sector in Scotland, and in doing so promote transparency and demonstrate the difference it makes to people's lives. One of our principles is to 'be transparent and easy to understand in everything we do.' In November 2018, our organisation proactively published the funding agreement and the core contribution received from Scottish Government on our website for the first time and we will continue to do so.

SCVO are supporting wider engagement with charities on strengthening current proposals to update charity legislation in Scotland, based on the findings of the consultation carried out earlier in 2019. OSCR is currently seeking changes to primary legislation to increase the transparency and accountability of Scotland's charity sector. SCVO also welcome continued dialogue with the Scottish Government on the prospects of a broader conversation and action around the reputation of charity, the current and future climate that is and will impact on this, and potential solutions to maintain and build trust in the voluntary sector as a whole.

SCVO supports the overall aim of the FOISA legislation and the human right to information. We do, however, share the concerns of our members and the wider voluntary sector around the impact that any extension of the FOISA legislation under section 5 of the act might have on Scotland's voluntary organisations; not only in terms of financial implications, but also in challenging our ability to deliver vital services for communities across Scotland. These concerns are reinforced by the Equality and Human Rights Committee's report on 'valuing the third sector,' which underlined the public funding challenges for the voluntary sector and the implications for delivering equalities and human rights outcomes.

Given that this consultation is not focused towards a specific order at this stage, our response has been developed with our membership to open the sector up to those responsible for the development of policies relating to FOISA legislation. This briefing offers invaluable insight that we hope will lend itself to a genuine two-way conversation about the transparency of Scotland's voluntary sector while listening to the sector's views and concerns.

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Engagement with the voluntary sector

The best consultations deliver meaningful dialogue and open the space for government to listen to its stakeholders. SCVO members have expressed that the processes used to facilitate genuine conversation as part of this consultation have been limited.

The Scottish Government committed to engage with the voluntary sector, and the health and social care sector specifically, on any future extension of coverage of FOISA in its 2017 report on the exercise of section 5 power under the FOI Act:

...we will seek to engage with the third sector, noting the extent that third sector bodies can be publicly funded to exercise functions which may be considered to be of a public nature, or provide services which are functions of an authority.

The Scottish Government laid a similar report about the exercise of the section 5 order-making power before the Scottish Parliament in October 2019, which confirmed engagement had taken place. We understand that the Scottish Government reached out to both OSCR and SCVO over the course of the past year, but that any plans to engage the wider sector were paused. It is unclear to SCVO and to others, including the Coalition of Care and Support Providers in Scotland, what other discussions were held in this time.

...officials have engaged with a range of internal and external stakeholders to build a clearer picture in relation to both health functions and social care functions that might be brought within the scope of FOISA.

...in relation to third sector bodies, our initial discussions have revealed a very diverse landscape across Scotland.

On 20 June 2018, the Scottish Parliament agreed that the Scottish Government should consult on proposals to further extend coverage of FOISA to companies providing services on behalf of the public sector. The Scottish Government's 2019 report states that the consultation paper is not only a response to this request but to also satisfy its 2017 commitment to engage with the voluntary sector:

We consider that this consultation not only responds to the Parliament's motion, but also addresses (at least in part) our stated intention to investigate further extending coverage to those involved in the delivery of health and social care function and third sector bodies.

It is to SCVO's best knowledge that this consultation is the first such engagement to address the government's stated intention back in 2017, more than two years ago. While communication from government has referred to this as a broad scoping consultation with no specific sectors or organisations in mind, it is clear from the Scottish Government's 2019 report and from the consultation document itself that the voluntary sector is a key

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public of interest for any future extensions of FOI coverage. Conversations with our members and indeed with the Scottish Government have revealed confusion around the clarity of this scoping process.

SCVO appreciated the opportunity to meet with the Scottish Government at the beginning of November to discuss the consultation. We also welcomed civil servants' participation in a webinar hosted by SCVO and OSCR in November to raise the profile of the consultation and start a dialogue between the voluntary sector and the Scottish Government. However, the lack of engagement with the sector until this time has been disappointing and risks poorly designed and thought through proposals that could challenge the sector's operating environment.

SCVO and other voluntary organisations requested a three-week extension to the consultation, accompanied with plans for how we would make best use of this time to engage the sector and secure a robust response from voluntary organisations. We were disappointed that the Scottish Government did not use its discretion to extend the consultation period beyond seven working days given that our proposals were feasible and sensible.

Both SCVO and the Office of the Scottish Charity Regulator have proactively sought engagement. However, official engagement has not been clearly targeted at those organisations the consultation is intended to reach. We would have expected the Scottish Government to give greater weight to their role to talk and listen to people and organisations across the voluntary sector to build insight about our experiences.

Consultation timing

SCVO is also concerned with the timing of this consultation and there are important questions to answer as to why this consultation has been opened now.

The Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee (PAPLS) is undertaking post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. SCVO, through its coordination of Scotland's Open Government Network at the time, supported the review of FOI practices in Scotland and participated in a roundtable with the Committee in March 2018. We consider the parallel discussions across the Scottish Government and Scottish Parliament creates confusion, adds to the burden of consultation and does not provide any opportunity to consider the findings of the PAPLS Committee, due to be published in January 2020.

The Scottish Parliament's post-legislative scrutiny of FOISA currently underway reflects the concerns from civil society around problems with the existing regime. This scrutiny of the FOISA legislation was prompted by an open letter from 40 journalists calling for a refresh of Scottish Government FOI legislation and a critical report from Scotland's

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Information Commissioner on the way in which the Scottish Government itself handles compliance and non-compliance with the Act. While we recognise the legal imperative to review and consider the scope of FOISA through section 5 orders and support this, there should be no consideration of extension until improvements are made to the existing regime to ensure the principles of FOI work well and can be complied with in the public sector itself.

The Scottish Government's 2019 report to the Scottish Parliament on the exercise of the section 5 order-making power between 2017-2019 was published on 31 October 2019, only 22 days before the original closing date of the consultation. This document states the government's intention to address the commitment it made in 2017 to investigate further extension of coverage in the delivery of health and social care and third sector bodies, as opposed to this consultation being a 'broad scoping exercise' that might include voluntary organisations. We are concerned that documents of relevance to the consultation have not been clear about what is being proposed and the scope to influence.

Finally, the 2019 order to extend the definition of a 'Scottish public authority' to include Registered Social Landlords (RSLs) came into force during the consultation period, from 11 November 2019. We consider that any further plans to extend the FOISA legislation should be consulted on at a time when there is data available to fully understand the costs, benefits and impact on the most recent group of organisations that FOI requirements are now applicable to. Our conversations with the Scottish Government have highlighted a common issue in using the example of minimal impact that has been felt by private sector providers of services that now fall under FOISA. Robust consultations should be clear on impact and it is impossible to compare Scotland's voluntary sector with organisations that have such significant capacity and resources at their disposal.

State of the voluntary sector

Scotland's voluntary sector is made up of over 40,000 organisations. This includes approximately 24,000 charities, of which more than 52% have an income of less than £25,000 per annum. For many charities and community groups, the outlook remains 'unsettled'. The sector continues to face challenges of increasing demand against a backdrop of limited funding. Shrinking public sector budgets and the direct and knock-on effect of local authority cuts on voluntary organisations and the communities they work in is hitting people and communities hard. Confronting the challenging funding environment and the unpredictable economic forecast requires the government to work with the voluntary sector in innovative ways and engage in dialogue and listening to make sure the impact and unintended consequences of government policies are well understood, including this consultation on FOI extension of coverage.

Our 2019 Sector Forecast Survey revealed that 34% of voluntary organisations think their own organisation's financial situation will deteriorate. 75% believe that the economic

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situation for the sector will worsen, and 82% are worried about the challenges created by funding cuts. 81% of respondents expect demand to increase, up from 72% in 2017. A report from the Scottish Parliament's Equality and Human Rights Committee, published in November 2019, reaffirmed the public funding challenges for the voluntary sector and the implications for delivering equalities and human rights outcomes. The Committee said the work of the voluntary sector is vital in realising equalities and human rights in Scotland, but how it is funded needs reviewed. The Committee heard from a range of voluntary organisations on how reduced and short-term funding has led to job insecurity, loss of talent, and essential services either being reduced or stopped altogether, directly affecting the communities and vulnerable people who rely on them.

A major challenge for voluntary organisations is securing core funding for central services that too few funders want to support. Core funding is defined by the Institute of Voluntary Action Research as 'providing voluntary organisations with an opportunity – and the resources – to think, plan, test new things, improve services or just ensure a bit of security.' It is the type of resource needed to fund the infrastructure required by any voluntary organisations expected to comply with the FOISA legislation in the future.

Challenges

SCVO members have expressed several specific challenges the sector would face if voluntary organisations were to be subject to further FOI orders. This is not an exhaustive list but it emphasises the need for genuine conversation with the voluntary sector that cannot be fulfilled by this consultation.

We need more clarification within the sector as to how far reaching any extension might be. There is the potential to capture many voluntary organisations and the impact of this could be substantial, concerns shared by OSCR. Many organisations rely on local authority contracts that make up the bulk of their work and an extension of FOISA coverage to these contracts could have a dramatic impact on those organisations that provide services across social care in an already challenging landscape. We understand that Section 5 orders relate to specific types of services and contracts with an existing public authority and, as such, would not include grant agreements and the organisation as a whole. SCVO has consistently opposed the extension of FOI legislation to individual voluntary sector organisations. In our view this would represent a disproportionate burden on these organisations and would discriminate against them in respect of their non-government and non-public service work. There are also concerns held by our members that it would prove difficult to separate out which information will be subject to FOISA given the unified organisational and management structures that many organisations have.

We have also heard concerns about the possible impact of extension in terms of increased workload. The Scottish Government has provided assurances that the impact of complying with FOISA would be minimal, as evidenced by the extension of FOISA to private prison

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contractors that have received few requests since falling under the legislation. This assumption points to a lack of engagement with the voluntary sector to date, as SCVO members are concerned with the impact any extension could have based on their knowledge and experience of our own sector that differs significantly from the resources and capacity of private prison contractors.

The Scottish Government's written response to the PAPLS Committee's call for evidence acknowledges the general increase in the use of the provisions across the board in relation to several authorities. The Scottish Government alone has seen a 42% increase in FOI requests to 3,400 in 2018 compared to 2,155 in 2015. There is a legal right to access information held by a broad range of Scottish public authorities and it is positive that more people and organisations are accessing their rights to make FOI requests. This does, however, highlight the growing high levels of public awareness of FOI law and in turn the significant impact any extension to the voluntary sector could have not only in terms of financial implications, but also in challenging our ability to deliver vital services for communities across Scotland.

The FOISA legislation was not designed with the voluntary sector in mind and its processes assume public sector levels of resource, capacity and support. For example, requesters can make any size of information request, making it difficult for a small voluntary organisation to plan for the volume of work. Many of the timescales in FOISA are calculated by reference to 'working days', which is any day other than a Saturday, Sunday, Christmas Day or a public holiday. The time limit of 20-working days to respond to a request is simply unworkable across a sector with such a high proportion of part-time and temporary work. As well as responding to requests for information, organisations must publish information proactively by way of the publication scheme. This could have a significant impact along with information requests. Organisations may not have the time to comply with the regime and time spent in dealing with requests and publications will be time not spent providing vital services in the community.

Access to information must be proportionate and necessary. Evidence submitted to the PAPLS Committee shows that several requestors are making use of FOISA for their own personal benefit rather than acting in the public interest. Our members have raised concerns in relation to how FOISA could be misused by perpetrators or organisations with a commercial interest to secure information that threatens to cause harm or slow down and undermine national goals and outcomes that voluntary organisations are working towards. While we understand that FOISA legislation contains provisions around harm and public interest tests, use of these will always be subjective on a case-by-case basis and will require significant training, understanding, confidence and capacity. When used properly, organisations must put in a considerable amount of resources and effort to gather and compile evidence in order to defend their decision if an appeal is made, as has been submitted in evidence by OSCR.

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Conclusion

Given that this consultation is not focused towards a specific order at this stage, we have presented key information that we believe needs to be expressly considered in further conversations around the extension of coverage of the FOISA legislation in Scotland. This includes the state of the voluntary sector for the foreseeable future and the impact that further compliance regimes such as FOISA could have on voluntary organisations tasked with delivering on equalities and human rights outcomes across Scotland. SCVO supports the overall aim of the FOISA legislation and the human right to information. We do, however, hold concerns around the potential financial and operational implications that might arise from further extension of the legislation to Scotland's voluntary organisations. Wider and deeper engagement in the design and delivery of changes to FOISA should come before any commitments to new section 5 orders are made.

About us

The Scottish Council for Voluntary Organisations (SCVO) is the national body representing the voluntary sector. Supporting 45000 voluntary organisations, 2000 members, 100,000+ staff, £1m volunteers. [View the latest sector stats](#)

SCVO's policy works to ensure that the needs and concerns of the voluntary sector in Scotland are represented in the Scottish, United Kingdom and European Parliaments.

By acting as an authoritative and trusted voice for the sector, SCVO's policy and research output is delivered through a strong evidence base and an engaged membership.

Further details about SCVO's policy and research can be found at <https://scvo.org.uk/policy-research>

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