

# **Freedom of Information (Scotland) Act 2002**

## **Report on exercise of section 5 power**

**Laid before the Scottish Parliament by the Scottish Ministers under  
section 7A of the Freedom of Information (Scotland) Act 2002**

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## 1. Introduction

### 1.1 Purpose of report

1. The Scottish Government has a longstanding commitment to keep the Freedom of Information (Scotland) Act 2002 (FOISA) under review, and this includes considering extending its coverage where it is appropriate to do so. The Scottish Ministers have powers under FOISA to extend its coverage by making subordinate legislation. The main power to do so is in section 5 of FOISA (the section 5 power).

2. The Scottish Ministers are required to lay a report before the Scottish Parliament every two years about the exercise of the section 5 power, in accordance with section 7A of FOISA. This requirement came into force on 31 May 2013. This is the fifth such report to be laid. The previous report – covering the period 1 November 2019 to 31 October 2021 - was laid on 29 October 2021.

3. This report covers the period from 1 November 2021 to 31 October 2023 (the reporting period).

### 1.2 The Freedom of Information (Scotland) Act 2002

4. FOISA came into force on 1 January 2005. It provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and the Scottish Government to local authorities, NHS boards, higher and further education institutions, doctors and dentists, among others.

5. Requested information must be provided unless it is subject to one or more exemptions, as set out in FOISA. If a requester is dissatisfied with the response received to a request or does not receive a response, they can ask the authority to review its decision or handling of the request.

6. The Scottish Information Commissioner both promotes and enforces FOISA. Requesters who remain dissatisfied with the conclusions of an authority's review of their request can appeal to the Commissioner for a decision.

7. The Scottish Government's longstanding approach to freedom of information law is set out in its [Six Principles of FOI](#). The second principle enshrines the incremental approach adopted by the Scottish Ministers towards reform of FOISA:

[The Scottish Government] operates within the Freedom of Information (Scotland) Act 2002 rather than proposing significant changes to it, but adjusts the regime where it is necessary and sensible to do so. The Act must operate well for both members of the public and Scottish public authorities. We will keep the Act under review by promoting good practice within existing frameworks and considering extending coverage.

8. As part of this principle, the Scottish Government keeps under review the coverage of FOISA.

### 1.3 The section 5 power

9. When the Scottish Ministers make a section 5 order, the order designates a person or body as a Scottish public authority for the purposes of FOISA. A section 5 order can designate persons or bodies that:

- (a) appear to the Scottish Ministers to exercise functions of a public nature; or
- (b) provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority.

10. It is not possible to designate a person or body if it is already listed in schedule 1 or could be added to that schedule instead (section 4 of FOISA explains who can be added to schedule 1) or if it is a public body or the holder of a public office.

11. In other words, designation under section 5 is for persons or bodies that are not themselves public, but either exercise functions of a public nature or have a contract with a Scottish public authority to provide a service which is a function of that authority.

12. In previous reporting periods, section 5 orders have been used to extend FOISA to:

- (a) arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities (2013 Order)
- (b) grant-aided schools and independent special schools (2016 Order)
- (c) providers of secure accommodation (2016 Order)
- (d) Scottish Health Innovations Limited (2016 Order)
- (e) private prison contractors (2016 Order)
- (f) registered social landlords and their subsidiaries (2019 Order)

## 2. Exercise of the section 5 power

13. Section 7A(4) requires the Scottish Government to state whether the section 5 power has been exercised during the reporting period. Where it has not been used, we are also required to give the reason for leaving the power unexercised.

14. The Scottish Ministers have not made any orders using the section 5 power during the reporting period.

### 2.1 Scottish Government position on extension of FOISA

15. Over the course of the reporting period the Scottish Government has developed and run its recent consultation on Access to Information Rights in Scotland. This has considered coverage of the legislation as a central issue – including the future use of the Scottish Ministers’ power under section 5 to extend the legislation to further entities.<sup>1</sup>

16. The Scottish Government will set out its response to that consultation soon. We have delayed bringing forward proposals for the future use of the section 5 power until we have responded formally to the consultation.

17. The Scottish Government is considering how to respond to calls for extension of coverage of FOISA in the context of that wider work and will set out its next steps in due course.

18. Whilst there has not been an order made using the section 5 power within the reporting period, the Scottish Government has nevertheless acted to extend coverage of FOISA in significant ways, which directly address outcomes from the analysis of responses to our 2019 consultation on extension.<sup>2</sup>

19. Both ScotRail Trains and Caledonian Sleeper are now provided within the public sector, by an arm’s length company owned and controlled by the Scottish Government. They are therefore both fully subject to FOISA. This amounts to a substantial extension of access to information rights in relation to a key service and directly addresses the Scottish Information Commissioner’s recommendation that FOI should be extended to transport services provided on behalf of Scottish public authorities.

20. The Scottish Government is also proposing to extend access to information rights in relation to legal services regulation in the Regulation of Legal Services (Scotland) Bill, currently before the Scottish Parliament. The Bill proposes to make legal services regulators designated as ‘category 1’ by that Bill subject to FOISA in relation to regulatory functions, including the Law Society of Scotland.

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<sup>1</sup> See [Access to information rights: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/access-to-information-rights-consultation-analysis)

<sup>2</sup> See [Freedom of information - extension of coverage: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/freedom-of-information-extension-of-coverage-consultation-analysis)

### **3. Conclusion**

21. The Scottish Government remains committed to the active consideration and use of its power under section 5 of FOISA to extend coverage of the legislation to further entities.

22. The approach to this issue is currently being considered in tandem with the development of the Scottish Government's response to the Access to Information Rights in Scotland consultation.

23. The reporting period has seen wider policy changes bringing extension of access to information rights, including to rail services in Scotland.



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The Scottish Government  
St Andrew's House  
Edinburgh  
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ISBN: 978-1-83521-512-8 (web only)

Published by The Scottish Government, October 2023

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS1371114 (10/23)