



Campaign for Freedom of Information in Scotland (CFoIS)
Promoting the Right to Information in Scotland

Briefing

Names of Publicly-Owned Companies Remain Confidential

Summary

This briefing describes attempts by the Campaign for Freedom of Information in Scotland to **name** 'publicly owned companies', which resulted in an appeal to the Scottish Information Commissioner (SIC). The SIC has issued his judgement and Scottish Ministers do not have to disclose the information.

The result of our FoI requests is that two separate lists now exist: a statistical list of 245 companies (35 + 210) which the Scottish Government has published but refused to provide the names of under FoI law citing a 1947 Act, and a list that was separately provided by the SIC, after an FoI request, that names 146. The fact that the Scottish Government signed a confidentiality agreement with the UK Government to keep the information secret is a problem as is the gap of 99¹ between the two lists. This information should be publicly available.

This briefing is necessary to aid public understanding of why a very simple request for information was unsuccessful and provides useful learning as we consider how we should reform the Freedom of Information (Scotland) Act 2002.²

Barrier to exercising right to information from publicly-owned companies

Under Section 1 and Section 6 of the Freedom of Information (Scotland) Act 2002 (FoISA), a person can ask for information from a publicly-owned company and that information should be provided within 20 working days. 'Publicly-owned companies' are not individually named in FoISA, rather it is a category which results in automatic designation³. The definition of a publicly-owned company is contained in Section 6 of FoISA. If all or part of any information requested from a publicly-owned company is not provided then the 'requestor' can seek an internal review from the publicly-owned company and if still dissatisfied with the response, can appeal to the Scottish Information Commissioner (SIC).

Since FoISA came into force on 1st January 2005, there have been problems in

¹ We understand from the footnotes in the statistical publication that FE College are in the 210 figure.

² Case 036/2020 Campaign for Freedom of Information in Scotland and Scottish Ministers published 20th February 2020 on the SIC website at

<http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2020/201901228.aspx>

³ For more information see website of Scottish Information Commissioner at

http://www.itspubliknowledge.info/YourRights/Whocanlask/Publicly_owned_companies.aspx

finding out the names of publicly-owned companies. As the design and delivery of public services has changed over the last 15 years, interest in such companies, who sets them up and what they do has prompted greater interest. As a requester cannot exercise his/her right to ask for information from a publicly-owned company unless the name is known, the Campaign for Freedom of Information in Scotland (CFoIS) has tried, unsuccessfully, to secure and publish an accurate list. Here we report our latest attempts to make the information public.

Fol request on Government Statistics

On 26th April 2019, a request for information was submitted to Scottish Ministers (the Ministers). A numeric breakdown of publicly-owned companies over the last ten years had been published in the Scottish Government statistical publication 'Business in Scotland 2018'.⁴ For public interest reasons ie to enable people to exercise their Fol rights, a request was made for the names of only the publicly-owned companies included in the statistical analysis. The Ministers responded on 29th April 2019 and advised that disclosure of the publicly-owned company names was prohibited under the UK Statistics of Trade Act 1947 (the 1947 Act). The Ministers did not connect this reason to a lawful exemption permitted under FoISA, as is required under Section 16(1)(c) of FoISA or give notice of the right to seek a review as is required under section 19 FoISA.

On 3rd May 2019, a request was submitted for an internal review of their decision and on 23rd May Ministers confirmed the information was exempt, but the reply was more expansive. Ministers cited section 26(a) of FOISA, which states that information is exempt from publication if its disclosure by a Scottish public authority is (otherwise than under FOISA) prohibited by law ie the 1947 Act. This is an absolute exemption and is not subject to the public interest test which is set out in section 2(1)(b) of FOISA.

CFoIS appealed to the SIC on 22nd July 2019. In a decision issued on 20th February 2020, SIC agreed with Ministers and so the request for the list of names, of what we understand to be wholly owned public companies, listed in the statistical bulletin was refused.

Analysis and Learning

The case provides evidence of the hurdles to accessing information of public interest. The process of making the appeal and the outcome have been very useful and flagged up areas of law and practice in need of reform:

1. A list of publicly-owned companies should be publicly available, centrally, without the need to make Fol requests.
2. The exemption cited by Ministers to justify refusal to disclose the information is not subject to a public interest test.⁵ Had it been, it would be reasonable to

⁴ Pg. 39, published 6th November 2018 at <https://www2.gov.scot/Resource/0054/00543007.pdf> and <https://www2.gov.scot/Topics/Statistics/Browse/Business/Corporate/alltables>

⁵ Under section 26(a) of FOISA, information is exempt information if its disclosure by a Scottish public authority is (otherwise than under FoISA) prohibited by or under an enactment. This is an absolute exemption; in that it is not subject to the public interest test set down in section 2(1)(b) of FoISA.

argue that publishing the names of companies which the public own is in the public interest.

3. The published official statistics state that in 2018, there are 210 'central and local government' Scottish enterprises and that includes Scottish FE colleges. The figures have fluctuated with a high of 245 in 2011. In addition, it should be noted that in 2018 there are 35 public corporations and nationalised bodies, down from 65 in 2010.
4. CFoIS made an FoI request to the SIC to find out how many publicly-owned companies have had a publication scheme approved as required by Section 23 (1)(a) of FoISA. The answer was 146 as of January 2020. However, in providing the information the SIC made clear that it may be incomplete: 'We have provided you with a list of the names of the companies currently listed in our case handling system. This list is not an accurate representation of how many publicly owned bodies under section 6 of FOISA are in existence. Such a list would be constantly evolving as new companies come on and old companies drop off. The list is also only as good as the co-operation this office receives from the bodies involved. Our office does not hold what we can confirm to be a fully accurate list of Scottish publicly owned companies under section 6 of FOISA. The list attached is as close as we can come to providing you with what we believe you are interested in.'⁶
5. In the response to CFoIS of 23rd May 2019, Ministers provided a website link to a directory where a summary of key information on Scotland's national devolved bodies could be found, and was last updated on 18th July 2018.⁷ One of the headings nearly fitted the information request on 'publicly owned companies' but named only five including Scottish Water and Glasgow Prestwick Airport. However, other categories were relevant such as 'significant other national authorities' which included the 'Road Works Commissioner' and 'Justices of the Peace Advisory Committee'. Different official descriptions seem to exist for what could be described as a publicly owned company. Knowing about the existence of such bodies is useful information for the public.
6. Theoretically, the requested information should be otherwise available but appears to be scattered across locations, is incomplete and there is no way of checking if double counting is going on with a publicly-owned company being described as something else too eg an arms'-length external organisation (ALEO), and if some publicly companies are missing altogether. It should be noted that the Model Publication Scheme (MPS) Guidance issued by the SIC states, under Class 1, that organisations should publish the names of 'Subsidiary companies (wholly and part owned) and other significant financial 'interests'. As a result, over 10,000 designated bodies have undertaken to publish the names of companies they have set up but the duty to disclose and the right to see the names do not appear to be enforceable. This apparent legal loophole needs to be closed.

⁶ Letter from Scottish Information Commissioner dated 17th January 2020.

⁷ For more information see <https://www.gov.scot/publications/national-public-bodies-directory/pages/introduction/> .

7. From the evidence available it is impossible to conclude whether all have been declared by those bodies currently designated under FoISA.
8. In practice, the information remains secret, which inhibits people's ability to exercise their right to request information from publicly-owned companies, under Section 6(1) of FoISA: if you don't know they exist you can't request information from them. The absence of a public list exposes problems: it inhibits the ability of the SIC to discharge his responsibilities such as to approve their Publication Scheme, under section 23 of FoISA; exposes the 'voluntary' process of designation in Scotland, ie the onus is on the designated body to declare they have set up a publicly-owned company; and the absence of consequences if bodies do not declare themselves to the SIC and promptly.
9. The case took 10 months from start to finish emphasising that the process can devalue the information's importance and relevance as events may have moved on significantly from when the initial request for information was made. Under Section 49(3)(b) of FoISA, the Commissioner must reach a decision within four months of receiving it, 'or before the expiry of such other period as is reasonable in the circumstances.' In this case, a decision was issued after seven months, raising issues about capacity of the SIC office to deal with the increasing volume of work, especially given the current level of formal interventions by the SIC on the compliance activities of bodies designated under FoISA.
10. The failure to deal with the original FoI request properly happened at a time of heightened awareness in the Scottish Government of its duty to comply with FoISA as it was subject to a statutory intervention by the SIC. This is disappointing.
11. Section 1 of FoISA relates to a 'recordable' request for information and that means a request of 'permanence'. However, during the process of speaking to Ministers, the applicant's wider ambition to secure an accurate list of all publicly-owned companies was confused with the original emailed request for information that related to a specific set of published statistical data. As a phone conversation does not amount to a 'recordable' request, this was also disappointing as it temporarily confused the designated body and the process of dealing with the appeal.
12. Ministers were able to state that 'the footnotes to the data table refers [sic] only to central and local government and so were they to release the names, still there would be no complete list of publicly-owned companies within the meaning of section 6(1) of FOISA.' That is because publicly-owned companies established by another public body such as a health board will not be included. It is useful to note that the list of 146 provided by the SIC names publicly owned companies that have not been set up by central and local government.
13. The tables clearly demonstrate that the number of publicly-owned companies changes annually which means that designations under FoISA will vary each

year but there is a lack of clear information about which ones are no longer covered by FoISA and which ones are new to FoISA.

14. There is disagreement on the interpretation of publicly-owned companies under section 6(1) of FoISA as the Scottish Government's submission on post legislative scrutiny states there is a 'loophole in that a company that is wholly-owned by a combination of authorities does not fall within the definition, and so is not subject to FoISA'⁸. However the official 'Explanatory Notes' that accompany FoISA state that 'for the purposes of section 3(1)(b), a company is a "publicly-owned company" if it is wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities listed in schedule 1...'⁹. Therefore, a publicly-owned company owned by several bodies is covered.
15. FoISA permits cases to be mediated, but the requester decided a reasoned and published decision would be best in this case. It was clear from the Scottish Ministers explanation that they do hold the data and they can extrapolate it to provide a list of the names. However, they chose not to seek permission to vary the legal undertaking with the UK Government/Office of National Statistics (ONS) to keep the information confidential in respect of publicly-owned companies. It is recommended that nationally, there is a change in the rules to enable publication of the names of publicly-owned companies.
16. It is regrettable that accurate and complete information held on publicly-owned companies is still unavailable 15 years after FoISA came into force.
17. Appeals under FoISA should be treated in the name of the organisation appealing not a particular individual within the organisation. This is consistent with decisions of the European Court of Human Rights such as the Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) and Studio Monitori and Others v. Georgia (Applications nos. 44920/09 and 8942/10). Whilst the name of the requester is not now published in appeal decisions by the SIC, nonetheless making the differentiation is important for accuracy, for internal statistical purposes and to aid operational evaluation. If the requestor chooses to go public with the judgement, then they have the right to do so.

Conclusion

The information sought remains confidential. It is odd that the names of publicly-owned companies, set up by central and local government, should be treated as a secret. Although the information remains a secret the process provides huge learning for campaigners and those interested in openness and transparency.

The process of trying to make the information public using FoISA, which is a legal process, proves that appealing is time consuming requiring detailed, evidenced and argued reasoning. It is appreciated that the process makes it an unrealistic option for many people. Only a tiny percentage of information requests are ever appealed

⁸ Pg. 6 of the submission at Public Audit and Post Legislative Scrutiny Committee website at https://www.parliament.scot/S5_Public_Audit/General%20Documents/11_Scottish_Government.pdf

⁹ Para 32 at http://www.legislation.gov.uk/asp/2002/13/pdfs/aspen_20020013_en.pdf

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to the SIC. For example, there were 83,963 reported requests¹⁰ for information in 2018/19, up 8.3% from 2017/18, and there were 560 appeals to the SIC up 10.5% from the previous year. Broken down, that means only 0.7% of requests went to appeal.¹¹ It should be noted that depending on when a request for information was made, it may not be appealed to the SIC until the following 'reporting' year.

Given the small percentage of cases ever appealed, delivering a system of openness and transparency cannot depend on appeal cases to identify problems and generate reform. Therefore, the current post legislative scrutiny of FoISA provides a huge opportunity to close loopholes, improve, update and reform FoISA.

Next Steps

The Public Audit and Post Legislative Scrutiny Committee of the Scottish Parliament (PAPLS) agreed to undertake post-legislative scrutiny of FoISA on 10th January 2019 and issued a call for written evidence on 6th March 2019. After seven months of oral evidence and consideration of submissions, watch out for developments as the publication of its report is imminent. Go to its website for updates

<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111249.aspx>

Once the report is published, it is important that the problems with FoISA **and** the content of the report are debated by the Scottish Parliament and agreement on a way forward for prompt and detailed reform of FoISA is agreed. It is useful to note that post-legislative scrutiny of FoISA was required by a motion nearly three years ago, passed unanimously by the Scottish Parliament, on 21st June 2017.¹²

About CFoIS

The Campaign for Freedom of Information in Scotland (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 in Scotland. CFoIS is independent of government and relies on donations and income from project delivery and training. More information available at www.cfois.scot/

CFoIS organises two meetings per year of the Scottish Public Information Forum (SPIF) to promote the public interest.¹³ SPIF is an opportunity for rights holders and duty bearers to meet and discuss how laws are operating. The next meeting of SPIF is 23rd March 2020 in Edinburgh and its free to attend. Register for a free place, and networking lunch at www.cfois.scot/

CFoIS is independent of government and relies on donations and income generated through project delivery and training. If you would like to commission CFoIS to undertake research, help your campaign to access information or to train your staff or activists then please contact us to discuss. If you or your organisation would like to support CFoIS then please contact us. We particularly encourage annual affiliations which enables us to sustain our work info@cfois.scot Follow @CFoIScot

¹⁰ The duty is on designated bodies to identify and record the number of requests it receives.

¹¹ Annual Report pg. 24 <http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx>

¹² See Scottish Government website at <https://www.gov.scot/publications/foi-17-02907/>

¹³ More information at Scottish Government <http://www.gov.scot/About/Information/FOI/6principles>