

## **Scottish Government considers FOI extension to private companies**

OUT-LAW News

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The Scottish Government is considering extending freedom of information (FOI) legislation to cover private bodies which perform public functions. One FOI expert says, though, that most of its suggestions would require no change to the law.

The move is intended to take account of the fact that public bodies are increasingly using private companies and commercial agreements to carry out functions that are essentially public. FOI laws were passed in order to open publicly funded bodies up to public scrutiny.

Parliamentary Business Minister Bruce Crawford said that he would be travelling to Wales and England to discuss the move with the Welsh and UK Governments before making a decision about a formal consultation.

He identified three groups who would be targeted by a change in the law: registered social landlords; contractors who provide public services that are a function of a public authority; and local authority trusts or bodies set up by local authorities.

A number of contractors are now involved in work that would previously have been done by local authorities through construction and maintenance deals that are jointly financed by the public purse and private companies.

The third category would include agencies set up to run public facilities. Both Edinburgh and Glasgow have created independent organisations to operate council leisure facilities.

"Discussions will take place before any decision is taken to formally consult. But formal consultation is not a rubber-stamping exercise. Any extension of coverage needs to be measured and appropriate," said Crawford.

"For example, we will look closely at the issue of the proportional impact on smaller organisations particularly in the voluntary sector. I am aware there are differing arguments and there is a need to balance those," he said.

But William Malcolm, an expert in FOI at Pinsent Masons, the law firm behind OUT-LAW.COM, said that the Act already contains provision for Scottish Ministers to add bodies or companies to the Act without actually changing the law.

Others, such as leisure trusts or companies wholly owned by local authorities, are already covered by the Act and need no change at all to be made to FOI arrangements, he said.

"You don't need to amend the Act to do this, so this would be a consultation on existing powers under the Act," said Malcolm.

If joint ventures between public and private bodies were to be included they would need to be added to a schedule attached to the law, but this would not require a change to the law itself.

Under the Act they would need to "appear to the Scottish Ministers to exercise functions of a public nature; or [be] providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority".

Malcolm said that in these cases the Scottish Government would need to ensure they did not interfere with the parts of the organisations dealing only with private business.

"Scottish Ministers would need to be careful to ensure that they only applied this to those parts of the organisation delivering public services and functions," he said. "It might be difficult for companies to separate the operations dedicated to public clients and those for private clients."

The issue of access to information about private companies conducting public functions came to a head in Scotland last year over the £1.2 billion Edinburgh Royal Infirmary (ERI), built and operated under a Private Finance Initiative (PFI) scheme.

The Scottish Information Commissioner ordered that the contract for the building of the hospital be made public under an FOI request despite its involving private companies. NHS Lothian and the companies involved opposed the publication.

Scottish Commissioner Kevin Dunion told OUT-LAW Radio at the time that he believed the public has a right to probe private contracts.

"The FOI Act should follow the money and if the money is being spent on public functions whether it is directly from the public authority or a private contractor then information about that should be made available to people," he said.

Dunion ordered NHS Lothian to publish the contract involving PFI operator Consort for the building and 30-year operation of the ERI.

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