

response to Scottish  
Executive consultation:  
Freedom of Information  
(Scotland) Act 2002 – one  
year on

March 2006



Making all consumers matter

## About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

Please check our web site at [www.scotconsumer.org.uk](http://www.scotconsumer.org.uk) for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

### ACCESS

Can consumers actually get the goods or services they need or want?

### CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

### INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

### REDRESS

If something goes wrong, can it be put right?

### SAFETY

Are standards as high as they can reasonably be?

### FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

### REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

Published by the Scottish Consumer Council  
March 2006

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## **1. Introduction**

The Scottish Consumer Council (SCC) welcomes the opportunity to respond to this consultation paper on the Freedom of Information (Scotland) Act 2002. We have a particular interest in how the Act operates from the perspective of individual members of the public who wish to exercise their rights under the Act, and we have previously responded to a number of Scottish Executive consultations on freedom of information.<sup>1</sup>

When the Freedom of Information (Scotland) Act came into force, we very much welcomed it as being in the consumer interest. Over the first year of operation, we have seen many instances where information which was not previously available, and which we consider to be in the public interest, has been released. We have, for example, welcomed the publication of food hygiene reports by some local authorities, and also the publication of information about surgeons' mortality rates.

### **General comments on the consultation paper**

While we welcome the Scottish Executive's commitment to keep the Act under review, we must make clear at the outset that in our view it is far too early at this stage to make a considered assessment as to how the legislation is working in practice, given that it has only been in force for just over a year. Any new regime takes time to bed down, and we are particularly conscious that there has not yet been sufficient time to gather evidence on the views and experiences of users. The Scottish Consumer Council intends to carry out research later this year into whether public authorities are complying with their duties under the Act, which may provide some information on this, but this will be too late to feed into the current review.

We do not intend to respond to all of the questions in the consultation paper, as it appears to us that these are primarily aimed at Scottish public authorities. While we are aware that the Scottish Executive has made efforts to ensure that the consultation is publicised to users, we are concerned that the overall tone of the consultation paper suggests that it is designed primarily to elicit views from public authorities rather than the general public.

### **Fees**

If the Act is to achieve its goal of ensuring greater openness, it is essential that consumers should not be deterred from applying for information by the costs of

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<sup>1</sup> *Response to An Open Scotland: Freedom of Information*, March 2000; *Response to the Scottish Executive Freedom of Information Consultation on Draft Legislation*, September 2001; *Response to Proposals for a new regime on public access to environmental information*, August 2002; *Response to the Scottish Executive consultation on the draft code of practice under section 60 of the Freedom of Information (Scotland) Act 2002*, November 2003; *Response to Freedom of Information (Scotland) Act 2002: A Consultation on Charging Fees*, May 2004

making an application. There is clear evidence from Ireland that, following the introduction in 2003 of fees for requests and appeals, the number of requests made fell by a third,<sup>2</sup> and we would be very concerned were there to be any suggestion that fees should be increased, or introduced where they are not currently charged, in Scotland.

We have noted recent comments by the Scottish Executive which suggest that the Act is being misused by some applicants. We would be very concerned if the provisions on aggregation of costs discussed at Question 16 were to be introduced, and then used as a means of preventing requests which concern a legitimate matter of public interest, because they are made by the same applicant.

While we acknowledge that the responsible use of public funds must be encouraged, there is an important balance to be struck between allowing public funds to be used for purposes that some may not view as legitimate and ensuring that the Act achieves its aim in providing meaningful access to information for the Scottish public. As the Commissioner commented in his recent annual report, use of the Act by the media has increased public awareness of its existence.<sup>3</sup>

Public awareness of the Act has almost doubled within a year,<sup>4</sup> and while we do not know how many requests have been made, more than half of the appeals made to the Commissioner to date came from members of the public.<sup>5</sup> We are very encouraged by these figures, and would be concerned at any attempt to restrict use of the Act by means of fees.

In any case, as we said in the introduction of this response, we think it is much too early at this stage to make an informed assessment as to how the Act is working in practice, and who is likely to use it in the future. As it becomes clear over time which categories of information are of interest to the public, and which require to be disclosed in line with the Commissioner's previous decisions, there should be less need for FOI requests to be made, as such information will be routinely published. If information is made publicly available in the first place, there will be no need to charge anyone for providing that information.

### ***Compliance by public authorities***

We have some general concerns as to how public authorities are applying the Act in practice, based on our own experience as an organisation of making FOI requests to date. While some authorities have responded very quickly and in a helpful manner, our experiences suggest that others are failing to comply with their duties under the Act.

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<sup>2</sup> Office of the Irish Information Commissioner Annual Report 2004

<sup>3</sup> See Note 2

<sup>4</sup> See Note 2

<sup>5</sup> See Note 2

In relation to two separate pieces of research, we have written to all 32 local authorities in Scotland asking for fairly routine information. Firstly, we have found that some public authorities failed to provide the information requested within the statutory time limit. In May 2005, we wrote to the education departments of all 32 local authorities, asking them for their guidelines on sponsorship in schools. We received responses from only 12 of the 32 authorities within the 20-day period. A further 16 responded only after reminder letters, which made specific reference to the Act, were sent out in July 2005, making a total of 28 responses. Four local authorities did not provide any kind of response to the request.

Thus, 50% of the authorities responded late, while one in eight failed to respond at all. This gives us cause for concern, particularly when it appears to reflect the experience of the Scottish Information Commissioner, that to date 17% of FOI appeals and 27% of appeals relating to the Environmental Information Regulations concern such 'mute and deemed refusals'.<sup>6</sup>

In relation to the second research project, we wrote to a number of randomly selected schools, within each of the 32 local authority areas, asking for copies of their complaints procedure, and the number of complaints which had been made. While schools themselves are not explicitly covered by the Act, the local authorities which run them are Scottish public authorities. An FOI request may, of course, be made to anyone within a Scottish public authority. We found a considerable variation in approach to dealing with the requests. Some head teachers responded individually, while others referred the request to the local authority. It seemed to us from the responses received that, while some head teachers responded quickly and efficiently, others had not been adequately trained in FOI.

Our work also suggests that different authorities may take very different approaches to the same request for information, and that some may not have the necessary referral mechanisms in place within different parts of the organisation to ensure that the request is sent to the appropriate person to deal with. A number of authorities asked us why we wanted the information, which they are not of course entitled to do under the Act. We were also concerned that some local authority contacts, including designated freedom of information officers, were less than courteous to our staff.

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<sup>6</sup> Scottish Information Commissioner Annual Report 2005

## **2. Responses to the consultation questions**

### **Topic 1 –Coverage of the Act**

***Q1: Which bodies do you consider should be brought within the coverage of FOI(S)A? Please explain why you think the body should be covered.***

We do not believe that the list of bodies contained in Schedule 1 is sufficiently exhaustive. We consider that any body that carries out public functions, whether or not it is funded by public money, should be accountable to the public it serves.

We are aware that a number of new public bodies, such as the Children's Commissioner, the Additional Support for Learning Tribunals and the Bus Users' Complaints Tribunal, which were established following the passing of the Act, are not covered by it. We would suggest that it would be sensible to put in place a mechanism whereby the freedom of information implications of every new piece of Scottish Executive legislation are automatically considered when a bill is put forward, as currently happens in relation to human rights, equal opportunities and sustainable development. Such a system should ensure that each new body is covered by the Act when it is created.

It is clear to us that housing associations should be covered by the Act – these are the most glaring omission from Schedule 1. As registered social landlords, housing associations carry out a clear public function. This has become even more crucial following recent housing stock transfers from various local authorities to new housing associations. We currently have a situation where tenants of a local authority can ask for information from that authority, whereas those who happen to be tenants of another registered social landlord, many of whom were previously local authority tenants, are not. This is patently unfair and discriminates against tenants of housing associations.

Registered social landlords (RSLs) were removed from the Bill following an Executive amendment at Stage 3 during its parliamentary progress. During the Stage 3 debate, the then Justice Minister, Jim Wallace, indicated that the reason for this was that RSLs were voluntary sector bodies rather than Scottish public authorities, that making them subject to the Act would be overly burdensome for some of the smaller charitable bodies, and that this might deter those involved with small RSLs from volunteering their time and effort. He went on to say:

'However, the Executive recognises that larger and more formal RSLs might be appropriate for coverage by the Freedom of Information (Scotland) Bill, and they can be added to the bill..... I assure members that we expect the majority of organisations to be covered.'<sup>7</sup>

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<sup>7</sup>Scottish Parliament Official Report, 24 April 2002 at Col 11206

More than a year after the implementation of the Act, RSLs remain outwith the scope of the Act. If public sector tenants are to have any trust in their landlords, they must be added as soon as possible.

We also consider that the Law Society of Scotland should be brought within the scope of the Act. The Society is a statutory body established by the Solicitors (Scotland) Act 1980. Under section 1(2) of that Act, the object of the Society includes the promotion of the interests of both the solicitors' profession in Scotland and the public. While it may not be funded by public money, the Society clearly exercises public functions, including dealing with complaints from the public about solicitors. There is accordingly a clear public interest in its work.

We believe that there is an equally strong argument that voluntary sector bodies which carry out public functions, whether or not they are funded by public money, should be brought within the scope of the Act. In our view, such bodies should be publicly accountable; yet some publish little public information about their policies and the decisions and meetings of their governing boards.

**Q6: Do you think there should be a threshold in terms of either the size of an organisation, or the levels of public funding received, in order for an organisation to be considered for coverage under the Act?**

As stated above, we do not consider that public funding is a pre-requisite for inclusion within the scope of the Act - the test should be whether the body in question carries out public functions.

With regard to size, we find it difficult to see why there should be an argument that some bodies are too small to be covered by the Act, as was effectively argued by the housing associations, when the Act already applies to GP surgeries, dentists, opticians and pharmacists.

### **Topic 3 - Fees/Charging**

**Q13: A cap is placed on costs in that an authority does not have to comply at all with the request for information if projected costs are above an amount specified by Scottish Ministers. This is referred to in the regulations as the prescribed amount and is currently £600. In your view is this the correct amount? Yes/No**

#### **Any other comments?**

We have previously expressed concern that the regulations prescribe a blanket upper limit of £600 above which level an authority is not obliged to provide the information.<sup>8</sup> We pointed out that an independent review of government communications, commissioned by the UK government in 2004, recommended that in complex cases involving significant issues of public interest, the £600 limit

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<sup>8</sup> *Response to Freedom of Information (Scotland) Act 2002: A Consultation on Charging Fees*, May 2004

on the cost of providing information should be removed.<sup>9</sup> It was suggested that the Information Commissioner could act as the judge as to whether an application involves a significant issue of public interest. We would support the introduction of such a provision in Scotland, with the appropriate authority being given to the Scottish Information Commissioner.

***Q14: Are the elements allowed for in estimating the "projected costs" appropriate? Yes/No***

**Any other comments?**

Yes. We do not think that authorities should be entitled to charge for the time and resources used in determining whether the authority holds the information. It is for authorities to ensure that their records are kept in an efficient manner.

***Q15: Staff time costs which can be charged for are subject to the maximum rate of £15 per hour regardless of the actual costs. In your view is this the correct amount? Yes/No***

***Is this the correct approach? Yes/No***

**Any other comments?**

We consider that this is an appropriate level of charging. We hope that the levels set will have the effect of encouraging public authorities to improve their records management strategies, to make these more efficient, reducing the time taken to search for requested information.

***Q22: Are there any other issues on fees/charging which you wish to raise?***

Please see our comments on the possible introduction of charging in the general comments at the start of this response.

#### **Topic 4 – Timescales**

***Q23: Can you provide us with evidence of any significant difficulties arising from the 20-day response time requirements?***

As already stated, there is to date little evidence available on the experience of individual users under the Act. As noted in our introductory comments, however, our own experience has been that some authorities are failing to comply with the time limits laid down in the Act.

#### **Topic 5 - Prohibitions to disclosure of information**

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<sup>9</sup> *An Independent Review of Government Communications* Chairman, Bob Phillis; Presented to the Minister for the Cabinet Office, January 2004

***Q25: Do you have any examples of occasions where statutory provisions in other legislation are in practice preventing the release of information through FOI(S)A by Scottish public authorities.***

We are aware of difficulties surrounding Part 9 of the Enterprise Act 2002, which is UK legislation. Part 9 provides a general restriction on disclosure of information about specific consumer and competition matters. The Act sets out specific circumstances where such information may be disclosed. It is clear to us from our informal discussions with trading standards departments throughout the UK that they are confused about their legal responsibilities and frustrated by the restrictions that the Act apparently imposes on them. The Enterprise Act appears to force them to withhold information that they could previously release, which is to the detriment of consumers.

Our colleagues at the National Consumer Council recently wrote anonymously to 13 trading standards departments in England requesting information about complaints received about builders and enforcement action taken. Although a minority complied in full or in part with the request, eight refused. The majority of authorities referred to Part 9.

The UK government recently consulted on whether the Act should be amended to allow the release of information to consumers for the purpose of civil court proceedings. We hope that this issue will now be addressed, as the present situation is preventing consumers from obtaining access to justice. However, at present consumers have no means of finding out about the trading history of a business they choose at the pre-shopping stage, which is an important aspect of consumer protection.

We know that a number of appeals are currently with the Scottish Information Commissioner in relation to the refusal by a number of local authorities to release information about traders, and we hope that the position here will soon be clarified.