



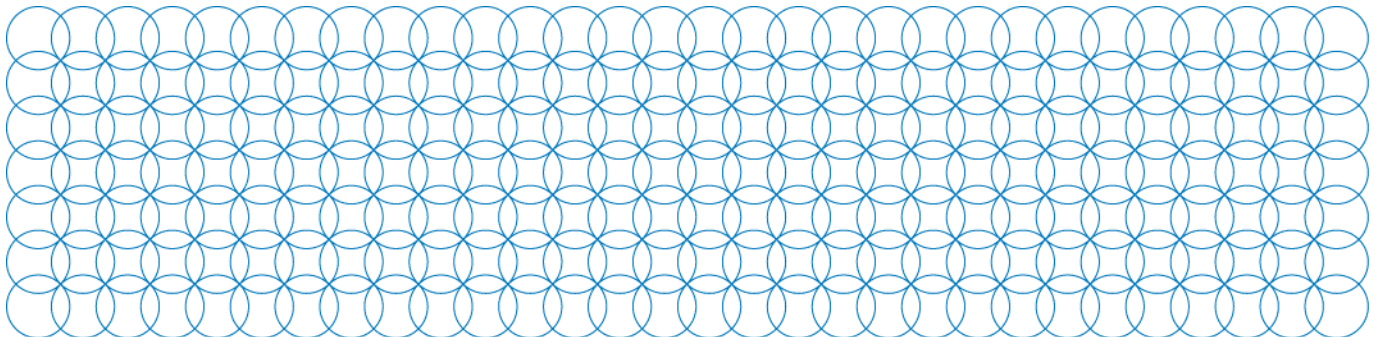
Ministry of
JUSTICE

Freedom of Information Act 2000: Designation of additional public authorities

Consultation Paper CP 27/07

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JUSTICE

Freedom of Information Act 2000: Designation of additional public authorities

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Executive summary

The Freedom of Information Act 2000 (the Act) came into force on 1 January 2005. The Act makes provision for the disclosure of information held by public authorities and aims to enable greater transparency, accountability and engagement, which are key components of the Prime Minister's Parliamentary statement of July 2007 on Constitutional Reform. The Act applies to over 100,000 public authorities. These include central government departments, local authorities, schools, colleges and universities, the health service, the police and a range of other public bodies.

The Act also includes provision to extend its coverage to organisations that carry out functions of a public nature and to contractors who provide services which are a function of that public authority. This can be done through making an order under section 5 of the Act (a section 5 order) whereby such organisations would be designated as public authorities for specified functions for the purposes of the Act.

The aim of the consultation document is to seek views as to whether the Government should look to use the powers under section 5 and extend the coverage of freedom of information (FOI) and if so which organisations it should consider. No organisation will be designated on the basis of this consultation alone. If it were decided to make section 5 orders then a further consultation would occur with those organisations likely to be affected by the order (or their representatives), accompanied by a full impact assessment of the coverage.

This consultation document is in five parts. You may wish to respond only to those parts that are relevant to you.

Part 1 of this paper seeks views as to whether section 5 should be used to extend coverage of the Act. It sets out five possible approaches:

Option 1: take no action at this time. Only the public authorities already covered by the Act would be under a statutory obligation to provide information.

Option 2: self-regulation by relevant organisations. Organisations that meet the conditions of section 5 of the Act would be encouraged – for example by a Code of Practice - to provide information about their public activities on a voluntary basis.

Option 3: build information access obligations into contracts with organisations delivering public services. This would provide for some form of information access, in relation only to services provided under contract.

Option 4: introduce a section 5 order to bring a specified set of organisations within the ambit of the Act. This option would increase public access to information while putting limits on the extent to which section 5 would be used.

Option 5: introduce a series of section 5 orders so as progressively to widen coverage of the Act. This option would allow for the greatest possible extension of coverage through section 5 over time.

Part 2 of the paper discusses possible criteria that it might be appropriate to use to decide whether an organisation should be covered by the Act because it is exercising functions of a public nature.

Part 3 of the paper discusses possible criteria for deciding whether an organisation should be covered by the Act because it provides services under contract with a public authority whose provision is a function of that authority.

Part 4 of the paper discusses the requirement section 7 imposes to specify which functions or services are to be covered by the Act and how this might be implemented in practice.

Part 5 of the paper invites you to nominate organisations that you would like the Department to consider for coverage under any increase in information access. It also outlines how the necessary further consultation will be taken forward with any organisations that the Government proposes, as a result of this consultation, to consider for inclusion in a section 5 order.

Introduction

This paper sets out for consultation proposals for increasing (subject to further consultation) the types of public organisations from which the public can access information. The consultation is aimed at:

- public authorities working with organisations that are not covered by the Freedom of Information Act 2000;
- those organisations carrying out public functions that are not currently covered; and the general public and others interested in access to public information in England, Wales and Northern Ireland.
- members of the public

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 26, have been followed.

This paper does not contain an Impact Assessment because the Government has reached no view as yet on the principle or extent of any designation of additional public authorities under the Act. This consultation will inform policy proposals which will be the subject of further consultation with any organisations proposed for inclusion in a section 5 order, or their representatives.

Copies of the consultation paper are being sent to:

The Charity Commission
The National Council for Voluntary Organisations
The National Association of Councils for Voluntary Service
The Association of Chief Executives of Voluntary Organisations
The Northern Ireland Council for Voluntary Action
The Wales Council for Voluntary Action
The Confederation of British Industry
The Federation of Small Businesses
The Forum of Private Business
The Local Government Association
The Consumers' Association
The Audit Commission
The National Archives
The Information Commissioner's Office
The Information Tribunal
The Association of Chief Police Officers
The Office of Government Commerce
The Office of Public Sector Information

The Campaign for Freedom of Information
The Cabinet Office
The Department for Children, Schools and Families
The Department for Environment, Food and Rural Affairs
The Department of Health
The Department for International Development
The Department for Transport
The Department for Work and Pensions
The Department of Culture, Media and Sport
The Department for Innovation, Universities and Skills
The Department for Business, Enterprise and Regulatory Reform
The Foreign and Commonwealth Office
HM Treasury
The Home Office
The Ministry of Defence
The Northern Ireland Office
The Department for Communities and Local Government
The Privy Council Office
Scotland Office
The Scottish Executive
Wales Office
The Welsh Assembly Government

Other organisations and individuals who have previously expressed an interest are also being sent a copy of the paper. A detailed list is available on request.

This list is not meant to be exhaustive or exclusive. Responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

1. The Freedom of Information Act 2000 (the Act) came into force on 1 January 2005. The Act makes provision for the disclosure of information held by public authorities. This contributes to the Government's aim to strengthen the connection between citizens and the state. The Act aims to enable greater transparency, accountability and engagement, for example by providing more information about how taxpayers' money is spent or by providing the context for better informed public debate.
2. The Act applies to over 100,000 public authorities. These include central government departments, local authorities, schools, colleges and universities, the health service, the police and a range of other public authorities. Those to which the Act applies are required to have a publication scheme, which sets out what information they routinely make available and how, and to answer requests for information in a timely manner. There are three categories to which the Act applies:
 - persons or organisations listed in Schedule 1 to the Act, either by name or by a description (such as 'any government department')
 - companies which are wholly-owned by a public authority
 - persons or organisations 'designated' by the Secretary of State as public authorities for the purposes of the Act.

The Act terms these persons or organisations 'public authorities'. This paper uses the term 'public authority' to mean a person or an organisation covered by the Act. In the rest of the paper we discuss the coverage of organisations; however individuals who hold a specific office, for example the Auditor General for Wales, can also be covered in the same way.

3. There are clearly defined criteria for an organisation to be listed in Schedule 1 to the Act. Broadly speaking:
 - the body must be established under the Prerogative, or legislation, or by a Minister, government department, or by the Welsh Ministers; and
 - appointments to the body or office must be made by the Crown, a Minister, a government department or the Welsh Ministers.

Organisations that meet these criteria are periodically brought within the scope of the Act by orders made under section 4. If a company is wholly-owned by a public authority, then it is automatically covered by the Act.

4. No organisation has yet been designated by the Secretary of State for Justice as a public authority for the purposes of the Act (the third category in paragraph 2).
5. The experience of the first years of FOI suggests that the Act is working well and has been successfully implemented across more than 100,000 public authorities. Now is the time to review the coverage of the Act, based on this experience, although the Government recognises that this experience may not directly translate to the private and voluntary sectors.
6. Section 5 of the Act enables the Secretary of State to designate two types of person or organisations as public authorities: those which:
 - appear to the Secretary of State to exercise functions of a public nature, or
 - are providing, under a contract made with a public authority, any service whose provision is a function of that authority.

The Secretary of State makes a designation by making what is called a section 5 order. Section 5 is a *residual* category: that is, a section 5 order cannot cover any organisation that could be listed in Schedule 1 to the Act by the making of a section 4 order, or is already covered by virtue of being wholly-owned by a public authority.

7. Section 7 of the Act requires that any section 5 order must state the functions or services provided under contract for which an organisation is designated. The Act will not apply to any other information held and therefore will not necessarily cover all the work carried out by an organisation. There will be some organisations all of whose functions could be designated under section 5 because they perform only functions of a public nature. In other cases the application of section 5 will be more limited.
8. It is possible in some situations for a section 5 order to designate a class of organisations rather than listing individual organisations. For example, it might be considered appropriate to designate as a class those contracted to run prisons under Part IV of the Criminal Justice Act 1991, rather than listing each individual contractor. This would help reduce the number of orders needed and ensure greater consistency of coverage.
9. The Secretary of State must consult with each organisation, or with representative organisations, before designation can take place. In addition, Impact Assessments would have to be carried out before designating any private bodies.

10. Once this consultation period is completed, the responses will be analysed and policy proposals formulated. In accordance with the Act, representatives of the relevant organisations will then be consulted further. Depending on the responses to the consultations, the Government would hope that any initial section 5 order could be brought into effect by the end of the next Parliamentary session.

Part 1: The case for reviewing coverage of the Act

11. The Government believes that there are good reasons for reviewing coverage of the Act:

- some organisations receive large amounts of taxpayers' money to carry out functions of a public nature but are not currently subject to the Act. In fulfilling those functions it would seem appropriate that they be subject to the same scrutiny as public authorities within the scope of the Act. To include such organisations within the scope of the Act would increase transparency in the distribution and expenditure of public funds;
- some organisations have contracts to carry out important work that would otherwise be done by the public authority they contract with. For example, prisons run by HM Prison Service are currently covered by the Act but prisons operated by private contractors are not. The prisons provide similar services and apply similar standards regardless of whether they are run directly by the state or privately under contract;
- access to information about a particular service may vary across the country if in some areas it is provided by a public authority, such as the local authority, and in other areas it is provided under contract by a private company or by a charity or voluntary organisation in receipt of a grant;
- the coverage of the Act is narrower than that of the Environmental Information Regulations 2004 (EIRs). The EIRs apply to almost all the public authorities that are listed in Schedule 1 to the Act, as well as organisations that are under the control of these public authorities and are responsible for developing, managing, regulating or inspecting the environment on behalf of the public. It may be appropriate for some of the organisations that are covered by the EIRs also to be covered by the Act;
- some non-public authorities consider that they carry out work of a public nature and would readily accept that they should be included within the scope of the Act.

12. The Government also believes that in considering how and when to extend coverage of the Act, a balance needs to be struck to ensure that the advantages of openness are considered alongside the potential impact on organisations to be covered. It will need to take account of reasons against

extending coverage of the Act to at least some of the organisations to which section 5 could potentially apply. In particular:

- any review needs to take account of FOI costs and the potential effect on the cost of provision of services and the willingness of businesses to contract to deliver services in the future. The requirements of FOI could have particular implications for smaller organisations as they may have less capacity to absorb extra costs. Evidence from organisations already covered shows that complying with the requirements of the Act places additional financial and administrative burdens on the public authorities. While some costs may be offset, for example by charging for the provision of information through publication schemes and through charging for disbursements, this would not cover the majority of the set-up and running costs of FOI;
- the Government is committed to supporting the voluntary and community sector in its provision of public services and to reducing unnecessary burdens, in particular on small businesses, and so does not wish to regulate unnecessarily.

13. The Government considers it important to balance the potential benefits of increased information access against the impact on the delivery of public services, on businesses and on the voluntary and community sector. Any decisions on section 5 orders will need to be made on a case-by-case basis in the context of the overall policy objectives. The potential impact would be discussed in the required consultation with the suggested organisations or their representatives and analysed in an Impact Assessment.

14. In considering whether to extend the application of the Act to organisations with functions of a public nature or to public service contractors, the Government has considered a number of alternatives to using section 5 orders to increase information access. The options considered for the use of section 5 orders and for alternatives are set out below, with some of the considerations needing to be taken into account.

Option 1: take no action at this time. If no changes were made to the scope of the Act, the statutory right of access to information would continue to be limited to information held by those public authorities currently covered by the Act. There would be no new rights of access to information from other organisations providing public services under contract or which have functions of a public nature. As noted above, some such organisations are significantly involved in delivering public services but are under no general obligation to provide information about these activities. This may be thought anomalous and inconsistent with the objectives underlying freedom of information.

Option 2: self-regulation by relevant organisations. Organisations that meet the conditions of section 5 of the Act would be encouraged to provide information about their public activities on a voluntary basis instead of being required by a section 5 order to make information available in accordance with the Act. One possibility would be to draw up a Code of Practice for private organisations that are providing public services. If such a code could be agreed and generally observed, this might provide the benefits of increased access to information while minimising disruption and regulation of private organisations. The key questions that would need to be addressed are how far and how consistently organisations could be expected to abide by any non-statutory guidance and whether any sanctions could be brought to bear on organisations that failed to do so. Anecdotal evidence suggests that while some such organisations are already choosing to make information available, others are unwilling to do so.

Option 3: build information access obligations into contracts with organisations delivering public services. This would provide for some form of information access in relation to services provided under contract, but would not be an option in relation to organisations exercising functions of a public nature in their own right, rather than under contract. Information could be supplied either directly from the contractor or by requiring the contractor to send information to the public authority that would then be accessible from them under the Act. This is likely to be less burdensome to the contractor than being designated as a public authority. Standard clauses could be produced to include conditions and exemptions similar to those found in the Act. These could be adapted to meet the individual needs of the organisation providing the service.

However, there would then be the risk of inconsistency in the level of information access from different contractors. That risk would be exacerbated if it were decided to introduce such obligations only into new contracts (since reviewing all contracts already held by public authorities would be time consuming and costly). We would need to consider whether such contracts should be enforceable not just by the public authority, but also by members of the public seeking access to information. Another disadvantage of this option would be that enforcement would take place ultimately through civil claims for breach of contract, rather than the enforcement machinery contained in the Act.

Option 4: introduce a single section 5 order covering a specified set of organisations. This option would increase public access to information from specific organisations that provide public services while leaving others outside the ambit of FOI. It would allow for FOI coverage to be

extended only to those organisations in respect of which the Government was satisfied that the benefits of information access outweighed any negative impacts. Possible criteria for identifying the most appropriate organisations to be covered by any section 5 orders are discussed in more detail in Parts 2 and 3 of this paper. It would of course be feasible to introduce further section 5 orders in future, but under this Option there would be no specific expectation on the Government to do so in the short term.

Option 5: introduce a series of section 5 orders so as progressively to widen coverage of the Act over time.

This option would provide for progressive extension of the coverage of FOI. Designation of new public authorities could be implemented in waves by means of successive section 5 orders. Organisations could be brought within the ambit of the FOIA in order of priority; this would also allow for evaluation of the benefits of each order before any new order was made. Rigorous impact assessment would be needed to ensure that the benefits of access to the information held by any organisation or class of organisations outweighed any negative impact, for example on their ability to work effectively.

Q1: Do you support extending the coverage of the FOI Act to organisations that carry out functions of a public nature and to contractors who provide services to a public authority whose provision is a function of that public authority?

Q2: Of the five proposed options, which do you consider the best option? Or would some other option, or combination of options, be preferable? Please explain your reasoning.

Part 2: Organisations to be considered for coverage by the Act because they are exercising functions of a public nature

15. When considering whether an organisation should be included in a section 5 order, we need to consider whether the organisation falls within the definition of section 5, that is to say whether it has functions of a public nature, or is providing under contract with a public authority any service whose provision is a function of the authority. We should then confirm at the outset that the organisation is neither already included in nor capable of being added to Schedule 1 (as explained in paragraphs 3 and 6 of this document), nor wholly owned by a public authority and therefore already covered automatically by the Act. Finally we need to consider whether it is appropriate to cover the organisation under the Act.

2.1 'Functions of a public nature'

16. In this part of the consultation paper we consider the first type of organisations to which section 5 relates: those that '[appear] to the Secretary of State to exercise functions of a public nature'. Determining conclusively whether or not any given organisation falls within this description can be difficult.

17. There is no single definition of what constitutes a function of a public nature for the purposes of the Act, either in relation to formal legal definitions or commonly accepted terms. Whether an individual organisation may lawfully be included in a section 5 order is something only the courts can determine conclusively, but some of the issues to be taken into account are outlined here in order to give a context for the consideration of appropriateness which follows.

18. What is perceived to be a function of a public nature partly depends on the position and perception of society and is likely to change with time. Certain functions, which may previously not have been seen as a public function, have become clearly public functions in today's society – for example having a National Health Service. Equally some functions, once perceived as public, may today be seen as predominantly private functions.

19. The question of whether a person or organisation exercises 'public functions' or whether a person's activities are of such a nature that they should be subject to public law constraints, has arisen in a number of different contexts and has been the subject of consideration by the courts. An example is in determining whether a person is a 'public authority' for the purposes of the Human Rights Act 1998 because certain of their

functions are 'functions of a public nature' (section 6 of the Human Rights Act 1998). It is anticipated that the courts would be likely to have regard to broadly similar factors in relation to section 5 of the Act as they would when determining the scope of judicial review and the Human Rights Act 1998.

20. Some factors which may be relevant to determining these questions - many of which have been considered by the courts in the contexts mentioned above - are identified below. The presence of one factor in any given case would not act as a reliable guide that the person in question would satisfy the test, as the question needs to be considered in all the circumstances of the particular case at hand.

- The extent to which in carrying out the function in question the body is publicly funded.
- The extent to which the organisation's activities are underpinned by statute. For example, are an organisation's functions recognised by or provided for in legislation? If not, does the organisation nevertheless operate under the authority of the government or of another part of the public sector?
- Whether the organisation exercises extensive or monopolistic powers, for example, by regulating entry to a trade, profession or sport.
- Whether the organisation's source of power is derived from more than voluntary submission to its jurisdiction. For example, where a party has no choice but to submit to its jurisdiction if they wish to take part in a particular activity.
- Whether the organisation seeks to achieve some collective benefit for the public, and is accepted by the public as having the authority to do so.
- Whether the organisation participates in a significant way in the social affairs of the nation, pursuant to the public interest.
- In the case of a regulatory organisation, whether but for the existence of that organisation, the government would inevitably have intervened to regulate the activity in question.

2.2 Appropriateness of coverage

21. Considerations that might be suitable to be taken into account under this heading include whether the organisation concerned receives public funding and whether the benefits of public access to the information held appear to outweigh any negative impacts, for example in terms of additional burdens on resources.

2.2.1 Organisation funding

22. It may be appropriate to extend coverage of the Act only to those organisations that receive funding from the public purse or from fees charged as a consequence of performing a public function. Since only information relating to an organisation's public functions would be covered by the Act, it would seem logical to specify those functions as the ones in respect of which an organisation to be included in a section 5 order should receive public funding.
23. There are a number of different sources of public funding for organisations, including core funding, funding for infrastructure purposes and funding to deliver specified services. Some functions of a public nature are funded by the charging of a levy. For example, the Pensions Ombudsman, who is already covered by the Act, is funded by a levy on pension providers.

Q3: Should some form of public funding be essential in order for an organisation to be considered for inclusion in a section 5 order, or should this be just one of a number of relevant factors to be considered?

Q4: Are there any organisations or categories of organisations that do not receive public funding but that you believe should be covered by the Act? Please explain why.

2.2.2 Balancing access to information against the cost of FOI

24. There is a need to strike a balance between making information available through the use of section 5, and ensuring that organisations are still able to carry out their essential functions. Some of the factors that it might be appropriate to consider in deciding whether to cover an organisation are listed below.
- **Amount of public funding.** There is a public interest in enhancing transparency in the distribution of public funds and in increasing the accountability of organisations that spend public money. There would naturally be a stronger public interest in covering organisations which receive a substantial amount of public funding for providing a function of a public nature than those which receive only a small amount of public money.
 - **The extent to which the function is seen as a core function of the state**
There may be some functions which, although in legal terms they may

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.
