



# **Freedom of Information: Revised Code of Practice for Scottish public authorities: Consultation response**

The UNISON Scotland Response to the consultation by Scottish Ministers on a revised FOI Code of Practice for Scottish public authorities.

**March 2010**

## **Executive Summary**

■ We think that more background detail – particularly about the aims of the Act and its legal provisions, would actually assist authorities more, especially in guiding new staff and training

■ We believe the guidance on the ‘public interest’ test before releasing information, misrepresents the aims of FOISA . The paragraph on p5 does not reflect the strong provisions in the Act to ensure that information should normally be provided except in limited circumstances, often only where substantial imminent harm can be demonstrated.

■ UNISON is pleased that the revised Code makes clear that outsourcing of any functions must not lead to a reduction in the public’s right to know, particularly information about performance and finances

■ Scottish public authorities should ensure there is a clearly established responsibility at a senior level within the organisation for overseeing the implementation of the Act and meeting the challenges and opportunities of a culture supportive of the public’s right to know.

■ We strongly welcome the principles outlined in section 2.4 about transparency in the use of public funds and the importance of the public being able to see how contracts are being managed and monitored.

■ UNISON believes these statements in Principle 3 on p17, are outdated, not in line with current ‘Best Value’ guidance, and are at best a statement of particular political opinion. As such they are challengeable and have no place in a Code of Practice. They should be deleted.

■ We would suggest that Part 2.4.2 includes information about the fact that to withhold information under certain exemptions, e.g. commercial sensitivity, requires that substantial prejudice is demonstrated, whereby it must be shown that real, actual, significant imminent harm would be caused by disclosure.

■ In 7.1 Proactive Publication - we would suggest in the final sentence deleting “consider publishing” and replacing it with “publish” details relating to the financial implications of long term and high value contracts, such as PFI and PPP contracts.

## **Introduction**

This paper constitutes UNISON Scotland's response to the consultation by Scottish Ministers on a revised Code of Practice for Scottish Public Authorities on the discharge of their functions under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

UNISON is Scotland's largest public sector trade union representing more than 160,000 members delivering public services.

UNISON Scotland welcomes the opportunity to respond to this consultation.

## **Background**

UNISON Scotland has been a strong supporter of Freedom of Information legislation. We believe in the principle that transparency is essential to democracy and the public has a right to know what is being done in its name. Openness and accountability are vital to the provision of quality public services.

We largely welcome the revised Code of Practice but would like to comment on a few parts which we have concerns about.

## **Comments on specific parts of the revised Code**

### **Part 1. 2. Main terms of the regimes**

We understand that this Code aims to be more concise than the first Codes and that it is not intended to fully summarise the regimes. Clearly considerable guidance and other material is available from the Scottish Information Commissioner, whose website is listed and public authority staff will use that guidance. However, we wonder whether there is perhaps too little information here for staff who may access this code of practice perhaps without accessing other information and who may not have had full training.

It may well also be the case that authorities will use this code as 'best practice' and/or for staff training. **We think that more detail – particularly about the aims of the Act and its legal provisions, would actually assist authorities more.**

For example, we would suggest including here the fact that public authorities should treat any written request for information as a request under the Freedom of Information (Scotland) Act 2002 (FOISA). FOISA applies to any

recorded information. Requests for information under the Environmental Information (Scotland) Regulations (EISRs) can be verbal.

On **p.5 of this section**, the revised Code states:

*The right of access is not absolute...In some cases the authority must also decide whether it's more in the public interest to withhold the information than to make it available...*

**We believe this misrepresents the aims of FOISA and the balancing of interests in the public interest test which is applied in a number of qualified exemptions in Part 2 of FOISA.**

The 2004 Code of Practice covered the public interest and the issue of 'substantial prejudice' and stressed that, in deciding whether a disclosure is in the public interest, authorities should NOT take into account:

- possible embarrassment of government or other public authority officials;
- the seniority of persons involved in the subject matter;
- the risk of the applicant misinterpreting the information;
- possible loss of confidence in government or other public authority

UNISON believes that at a minimum the paragraph referring to the public interest test should be re-worded to include the fact that there is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information. This should include the information that in applying the public interest test, where competing public interests are evenly balanced, the information should be disclosed. It should also include the information that, where certain exemptions are used in which the public interest test requires that it must be possible to demonstrate substantial prejudice to, for example, the commercial interests of any person or organisation, the authority must show real, actual and significant harm to be able to use the exemption and withhold the requested information.

**In other words, the paragraph at present, in our opinion, does not reflect the strong provisions in FOISA to ensure that information should normally be provided except in limited circumstances, often only where substantial imminent harm can be demonstrated.**

**Part 1. 3. Bodies which are subject to the regimes.**

**UNISON is pleased that the revised Code here makes clear that outsourcing of any functions must not lead to a reduction in the public's right to know, particularly information about performance and finances.**

Also the clarification on defining publicly-owned companies helps to add to the coverage of the Act.

## **Part 2. Best practice**

We would suggest a new 1.1 to be inserted here to state (taken from the Introduction to the 2004 code) that meeting the requirements of the legislation and bringing about a culture of openness depends significantly on leadership from the top. **Scottish public authorities should ensure there is a clearly established responsibility at a senior level within the organisation for overseeing the implementation of the Act and meeting the challenges and opportunities of a culture supportive of the public's right to know.**

## **Part 2. 4. Contracts and the disclosure of information**

**We strongly welcome the principles here about transparency in the use of public funds and the importance of the public being able to see how contracts are being managed and monitored.**

It is essential that this Code states, as it does on p16, that the public "has the right to know the full financial implications of long term and high value contracts, such as PFI/PPP contracts. UNISON has campaigned hard for information about such contracts to be disclosed and not kept secret under the guise of commercial confidentiality or commercial sensitivity.

However, we have serious concerns about **Principle 3, on p17.**

This states:

*It is important to encourage the wider involvement of the private sector in public procurement to increase competition. Value for money can be best obtained through genuine and effective competition...*

**UNISON believes these statements are outdated, not in line with current 'Best Value' guidance, and are at best a statement of particular political opinion. As such they are challengeable and have no place in a Code of Practice. They should be deleted.**

## **Part 2. 4. 2 Including disclosure provisions in the procurement documentation**

**We would suggest that this section includes information about the fact that to withhold information under certain exemptions, e.g. commercial sensitivity, requires that substantial prejudice is demonstrated, whereby it must be shown that real, actual, significant imminent harm would be caused by disclosure.**

#### **Part 2. Section 4**

We welcome the further references in this section to the public's right to know the full financial implications of PFI/PPP contracts, to time limits on how long information may be deemed sensitive, and to proactive publication. **However, in 7.1 Proactive Publication we would suggest in the final sentence deleting “consider publishing” and replacing it with “publish”, so that it reads:**

***Authorities should publish information relating to the financial implications of long term and high value contracts, such as PFI and PPP contracts.***

This should also be repeated in **Section 7. on Proactively Publishing Information**, including in the section 7.5 about relevant private bodies. These bodies are covered by the EIRs and we believe that best practice would include them publishing relevant material, including financial information.

#### **For further information please contact:**

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