

Freedom of Information (Scotland) Act 2002: Consultation on Extension of Coverage

November 2010

Introduction

The FSB is Scotland's largest direct-member business organisation, representing over 20,000 members. The FSB campaigns for an economic and social environment which allows small businesses to grow and prosper.

The FSB supports continued work towards even fairer and more transparent use of public funds in Scotland as the principles enshrined in the current legislation encourage and we therefore welcome the review of the list of Scottish Public Authorities (as provided for by Section 5 of the above Act), and the opportunity to submit our response to the above consultation.

General observation

The FSB would seek assurances that using the further powers provided for in Section 5 of the 2002 Act is necessary or even appropriate at this time, given that most bodies in the proposed list already appear to be operating within the spirit of the Act. The initial pre-consultation discussion revealed little evidence of an unmet demand for the information that an extended FOI Act might provide. This may indicate on the one hand that the proposed extension might have minimal impact on the new classes of organisation covered. However, it is also possible that extending the Act might in itself stimulate demand as appears to have been the experience of public bodies currently subject to the Act. While this would indeed promote better transparency, it also risks complicating the current landscape and creating additional burdens and costs to a wider extent than the proposal intends. We would therefore question whether the benefits of extending the Act's reach merit these risks, many of which are untested. There certainly appears to be an absence of evidence to suggest that they are. The extent to which the current legislation is achieving its objectives is also not clear at this time, and the FSB understands that a review of this legislation is only now commencing. It would therefore seem premature to seek to extend legislation that has not been sufficiently reviewed.

Contractors who build and maintain schools and hospitals and contractors operating and maintaining trunk roads

Supposing the Act were extended as proposed, the FSB's main concern regarding the proposed extension to contractors of the above facilities/services is focused on the following clause in the consultation document:

“Whilst operations such as construction and facilities management are usually sub-contracted, the sub-contractors will be holding information on behalf of the main contractor and so the right to request information will extend beyond the information held immediately by the principal contractor.”

Figures released from the Scottish Government Procurement Directorate for 2007-08 and 2008-09 show that only around 7% of the spend on public contracts went directly to businesses with fewer than 10 employees (the size of the majority of our members, and 93% of Scottish businesses). However this does not take into account the far greater proportion of our members (44%¹) involved in supply to the public sector, in many cases as sub-contractors on larger projects. This indicates that a sizeable proportion of small business could potentially be affected by the above clause, while being in receipt of relatively small amounts of public money for their goods and services.

While the proposals suggest that contracts should be worth £20 million or more over 10 years before principal contractors can be brought within the scope of the Act, this would not, in practice, exempt sub-contractors from obligations under the act because of the clause above.

Since the 2002 Act came into effect for public authorities in 2005, the resources required for compliance have been far greater than previously envisaged and the volume of requests has also increased beyond what was envisaged. Resources are not simply required to address the requests received but in the consideration of every piece of information's status in relation to legislation and its subsequent management. While this may represent good document management, it also requires knowledge and understanding of the finer points of the Act. Public bodies with dedicated offices and a large staff to help deal with legal compliance have largely been able to meet the challenge. However, in extending the Act as outlined in the consultation, there is a danger that principal contractors might pass the bulk of the administrative burden involved to small business sub-contractors. These smaller businesses simply do not have access to the infrastructure or resources necessary to cope with ensuring compliance or responding to requests under FOI legislation.

The FSB has been working with the Scottish Government Procurement Directorate to ensure that procurement reform facilitates engagement in public procurement by a large base of suppliers including small, local businesses such as our members. We are also therefore concerned that extending the Act in this way could discourage small businesses from interacting at all with the public sector.

¹ FSB-ICM “Voice of Small Business” Annual Survey 2009

Conclusion

In the absence of more compelling evidence, or the results of a comprehensive review of current legislation, the FSB would therefore favour the development of improved statutory guidance rather than a full extension of the 2002 Act. In our view, this would promote better transparency while minimising the burden on businesses interacting with the public sector.

Should evidence be forthcoming that the benefits of extending the Act outweigh the costs to businesses, the FSB would wish to see a means by which the Act can be applied proportionally to the value of the contract.

The FSB fully supports the need for transparency regarding public expenditure and recognises that this may involve a wider range of organisations than the 2002 Act currently names explicitly. However, given the concerns above which would need to be addressed before any extension of the Act were appropriate, at least from the point of view of our members, we would seek assurance that the option to extend the reach of the Act has been selected with a clear need in mind and that pursuing this course of action would involve taking into consideration the real impact on small businesses.

For further information on any of the points raised in this submission, please contact Mary Goodman, Senior Policy Advisor, e: mary.goodman@fsb.org.uk t: **0141 221 0775**.
