

**Response to Ministry of Justice Consultation on Designation of additional public authorities under the Freedom of Information Act 2000  
Consultation Paper CP 27/07**

**By Privacy Laws & Business  
(www.privacylaws.com)**

The views contained in this document are those of an interested group of individuals and organisations, including:

Bird & Bird, Solicitors	- Hazel Grant	Partner
Capita Business Services Ltd	- Mike Heath	Senior Legal Advisor
Privacy Laws & Business	- Stewart Dresner	Chief Executive
	- Stuart Lynch	Consultant

**Question 1: 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?**

Response: Yes - it is accepted that there are several organisations and categories of organisations that appear to be natural candidates for early designation because of the public functions they perform. These organisations accept that there is logic to being subject to the FOIA when performing “functions of a public nature.”

**Question 2: 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.**

Response: A combination of options 4 and 5 – as stated in the response to question 1, there are some obvious candidates for early designation, and these could be included in an initial Section 5 order relating to specified organisations and/or categories of organisations, without precluding the introduction of further Section 5 orders.

The criteria set out in Part 2 of the consultation document for determining whether an organisation is performing a public function would be crucial here, and it may be useful to conduct a separate consultation exercise with a view to formalising these criteria as the means of establishing the level at which an organisation’s functions make it liable for designation.

In relation to organisations carrying out public functions under contract, an important factor to consider is what happens if and when the contract ends, particularly where an organisation is involved in a series of short-term contracts with public authorities. At what point would the organisation’s designation be revoked?

There would also be a need to ensure that the extension of FOI would stop at some point in the contractual chain. For example, it should not be extended to include sub-contractors, as they are more remote from the service and they are usually smaller entities.

**Question 3: 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?**

Response: Receipt of public funding should be a factor to be considered, but not an essential requirement. Carrying out a statutory function could be a more significant factor. For example, there may be statutory regulatory bodies funded entirely by subscriptions from the organisations or individuals they regulate.

**Question 4: 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.**

Response: No comment

**Question 5: Do you agree that the balance between the public interest and the potential burden of FOI is an appropriate consideration when deciding whether to cover an organisation?**

Response: It is likely that some smaller organisations would incur significant cost overheads if they were required to publish information and deal with requests under FOI. The relative size of the organisation may not be reflected in the level of additional activity FOI would bring.

If dealing with FOI would be likely to, or actually become too great a burden, there could be provision made for the level of responsibility for FOI to move up to the sponsoring public authority, which would already have an FOIA team in place. If an organisation were subject to the FOIA, care would need to be taken to avoid duplication of effort by that organisation and its sponsoring public authority. Such duplication would additionally have the potential for a conflict in responding to a request, where both organisations hold the same information - one organisation could decide to release information that the other organisation would prefer to withhold under an exemption.

**Question 6: To what extent do you think that the factors listed, or any other factors, should be taken into account in determining whether organisations performing public functions should be brought within the ambit of the Act?**

Response: As discussed in the response to question 2, a set of definitive criteria for determining whether an organisation is performing a public function, whether as its *raison d'être* or as part of a contract, is essential for informing the designation process. In particular, organisations providing comparable services would be obvious candidates for designation – the example of maintained schools and academies is a good illustration of this point, although care should be taken to ensure that a designated organisation's ability to compete commercially is not adversely affected.

**Question 7: Do you agree that the coverage of FOI should extend to contractors who provide services under contract with a public authority whose provision is a function of that authority? If you disagree, please give your reasons.**

Response: Yes - we accept it is logical to include such contractors, subject to a definition of what is 'a function', and concerns about duplication and increased costs being addressed.

Good practice guidelines to contractors should emphasise that providing answers to common FOIA requests on their websites would reduce the resources that need to be devoted to handling FOIA requests.

There will be additional ongoing costs in determining who provides information that is on the boundary between the public authority and the contractor.

We believe there will be new contractual issues arising, especially around the time of procurement, if the contractor is to be subject to FOI on taking on the contract.

**Question 8: Do you agree that information relating to an organisation's administration of a public service or function, for example in the areas listed in paragraph 33, should be subject to FOI? If not, please give your reasons.**

Response: Yes – but there could be difficulties in determining whether the information held is information needed to run the company itself, as opposed to information used to run the public service. Designated organisations would need internal mechanisms to enable them to resolve conflicts between their public and private functions. In particular, an organisation involved in multiple contracts with several public authorities would need to be able to 'ring-fence' its information. For example, a board meeting may take a commercial decision to reallocate resources from one public authority contract to another, or to a private sector contract. How would that organisation respond to a FOI request for information relating to one of these contracts? We believe there could be substantial cost

implications for such companies having to set up and run systems to not only provide information but also to provide ring fencing mechanisms.

**Question 9: Which organisations, or types of organisations, do you believe should be considered for inclusion in any extension of FOI under s.5 of the Act, and why?**

Response: There should be competitive neutrality - all relevant providers should be either in or out of the FOI regime.

**General Points:**

**1. Consistency between access regimes**

There should be consistency between access regimes to private companies under both the FOIA and the Environmental Information Regulations. If organisations are designated as public authorities under Section 5, it will be necessary to ensure they are also subject to the Environmental Information Regulations, to avoid the reverse of the current situation where certain bodies, for example, utility companies, are subject to EIR but not FOI.

**2. Retrospective application**

To address fears of access to commercially sensitive information and fears of implementation costs, the issue of retrospective application of the FOIA needs to be considered for organisations operating under contract, in relation to current and expired contracts.

**3. Lead Time**

In order to give the organisations affected sufficient time to put in place the necessary procedures for dealing with FOI, a substantial lead time should be allowed for designated bodies to comply, bearing in mind that the Act itself was not fully implemented for five years, since when a further three years have elapsed.

**For further discussion, contact:**

**Stewart Dresner, Chief Executive (Stewart.Dresner@privacylaws.com)**  
**Stuart Lynch, Consultant (Stuart.Lynch@privacylaws.com)**

**Privacy Laws & Business**  
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Privacy Laws & Business, 2nd Floor, Monument House  
215 Marsh Road, Pinner, Middlesex, HA5 5NE  
Tel: 020 8868 9200, Fax: 020 8868 5215  
Web: [www.privacylaws.com](http://www.privacylaws.com)