

Proposed restructure of the Commission for Ethical Standards in Public Life in Scotland



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Consultation response

Background

This response was submitted by Rosemary Agnew, Scottish Information Commissioner, to the Scottish Government's consultation on Proposed Restructure of the Commission for Ethical Standards in Public Life in Scotland, 2 April 2013.

Submission

The proposal is to merge the functions of two authorities: the Public Standards Commissioner for Scotland (PSCS) and the Public Appointments Commissioner for Scotland (PACS) into a single, new, authority, the Commissioner for Ethical Standards in Public Life in Scotland (CESPLS).

As Scottish Information Commissioner, I have statutory responsibility for promoting and enforcing Scotland's freedom of information regime. My comments therefore relate solely to whether, and the extent to which, the new authority should be subject to the Freedom of Information (Scotland) Act 2002 (FOISA).

The PACS is currently subject to the FOISA, but the PSCS is not.

The draft Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland, etc.) Order 2013 (the 2013 Order) proposes replacement of the existing paragraph 6ZZA:

The Commission for Ethical Standards in Public Life in Scotland in the performance of its functions under section 1(7) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp12).

with:

The Commissioner for Ethical Standards in Public Life in Scotland in the performance of the Commissioner's functions under the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

and the existing para 75ZA (the PACS) will be removed.



S1 of the 2010, as amended, will grant the CESPLS functions under three separate statutes:

- the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act)
- the Scottish Parliamentary Standards Commissioner Act 2002 (the 2002 Act)
- the Public Appointments and Public Bodies etc. (Scotland) Act 2002.

Only functions under the last of these three statutes is subject to the FOISA. This means that the new single post holder will be subject to FOI law in relation to a specified part of his function and not for the remainder.

As Scottish Information Commissioner, I am concerned that the FOI status of the new authority will not be sufficiently clear, either from the public's perspective, or in the event of an application for decision. I anticipate that significant confusion would arise from the simplest type of request to the new authority, for example, for expenses incurred in conduct of functions. Under the proposed order, the new authority would have to separate out expenses incurred for public appointments work from standards work, by the individual office-holder.

Overall, the inconsistency in FOI status would have a three-fold effect:

- it would create additional and unnecessary administrative burden on the organisation with no discernible benefits to either the organisation or the public;
- it would be difficult, if not near impossible to enforce regulation of FOI Law for the parts of the organisation subject to it;
- it would not support the general aims of openness and transparency that FOI and other public administration laws promote.

The stated objectives of the proposed order are to “improve the exercise of public functions” and to have “regard to efficiency, effectiveness and economy”. I consider these purposes would be better served by designating the whole of the new authority as a Scottish public authority for the purposes of FOISA. That is, to place a statutory obligation on the CESPLS to respond to requests for information which it holds and to publish information proactively.

This suggestion is neither rash nor ill-considered. Both the 2000 and 2002 Acts will have the effect of requiring the new post holder to continue to conduct investigations in private. Indeed, the 2000 Act contains specific prohibitions against disclosure of information gained for the purposes of investigation. The new office-holder would have compelling grounds for withholding such information under the FOISA. Several other bodies, for example, the Scottish Legal Aid Board and the Scottish Public Services Ombudsman, operate under similar rules and yet meet their obligations under the FOISA.

It is notable that both the 2000 and 2002 Acts place emphasis on the importance of the accountability of the office-holder. I consider this demonstrates that there is a public interest in establishing a CESPLS which conducts its functions in as open a manner as possible.