

Despite the uphill battle in extending Freedom of Information to companies doing public work, the open data movement is already beginning to hold many of them to account.

Despite initial opposition, Freedom of Information is one of the more successful government policies of the last decade. Now, many believe that it is time for the Act to be extended to private companies doing work for public bodies. [Ben Worthy](#) argues that while this is not proving to be easy, many Open Data initiatives are already allowing the public greater ability to hold contractors to account.



Should the Freedom of Information Act (FOI) be extended to include private bodies doing public work? The Public Accounts Committee (PAC) argued it should in [a recent report on PFI projects](#):

Transparency on the full costs and benefits of PFI projects to both the public and private sectors has been obscured... commercial confidentiality should not restrict the ability of the public, Parliament and decision makers to access information. Freedom of information should be extended to private companies providing public services.

This is not the first time the PAC has called for private companies to be subject to FOI. In July it recommended that Network Rail, currently outside of FOI, should be [covered](#). Nor are they alone. The [Local Public Data Panel](#), a group of experts overseeing transparency and Open Data reform across local government, warned of an [erosion of public access](#) due to the contracting out of services: 'Public rights of access to information should not disappear as a result of increasingly porous boundaries between public and private bodies delivering services.'

Extending coverage to private companies running public services, such as rail or road providers, is on the face of it logical and popular. However, the devil lies in the detail and in the persuading of companies to do it, particularly now. But, while politicians prevaricate, some information is creeping out by the back door.

Most laws cover only information held by authorities, which can include some information held about work done by private bodies. Many companies are happy to provide information but not all, as our research [on FOI and local government shows](#). Yet, willing or not, FOI only reaches so far and large 'gaps' in transparency appear with, for example, public prisons covered by FOI laws but private prisons not. Big society reforms and more contracting out of public services raises the possibility that these gaps will widen further.

Only one FOI law in the world currently wholly covers private bodies, South Africa's [Promotion of Access to Information Act 2000](#), though it's not clear if or how it works. The [Indian Right to Information Act 2005](#) also extends to previously public utility bodies now in private hands, though this was due to a ruling by its appeal body rather than by government action.

In the UK, Gordon Brown was the first to suggest extension of FOI to private providers in 2007. After several years of consideration it was decided to cautiously [extend it to only a limited number of bodies](#). In 2010, the issue of extension surfaced again when new Deputy Prime Minister Nick Clegg aired the possibility that FOI [could cover a wide variety](#) of new bodies from Network Rail to utility companies. The Conservatives had also pressured the previous government to cover the nationalised bank Northern Rock.

Meanwhile, over the border in Scotland, the Scottish government began to consult on its own extension to selection of private bodies under its separate FOI Act. Again, following a long process, the final decision was to [not do so](#).

Why have so few governments tried to extend coverage? As the UK and Scottish experience shows, even discussing extension can be a time consuming business, requiring a great deal of consultation and consideration.

More importantly, the arguments against extending FOI can be persuasive ones. Businesses argue that they can't afford it ('it's too expensive') and don't need to ('it's unnecessary as we publish most of this already').

Here is the list of reasons for *not* extending FOI cited by the Scottish government, which would probably be enough to give even the most pro-openness politician pause for thought:

- 'No compelling evidence of a problem or of unmet demand for information.
- Considerable information is already available through the relevant public authority – as well as by various statutory and regulatory means.
- Wide concern about the potential resource implications and administrative burden of extension – particularly in the current economic climate
- Most contracts stipulate co-operation between contractor and authority regarding information requests. Extension to contractors could be deemed to be a 'discriminatory change in law' – with costs passed to the public sector
- Potential issues arising from differing regimes operating within the UK – including competitive disadvantage
- Concerns that coverage would impact on private business engaging with the public sector and that resulting costs would be passed on to public authorities
- That extension would be contrary to Scottish Government's aim of reducing unnecessary regulation'

Interestingly, other developments and innovations may mean some level of transparency, through FOI and now Open Data reforms, may slowly 'creep up' on private companies. In Ireland, for example, it was recently decided that [the Anglo-Irish bank could be subject to Environmental Information Regulation requests](#) (an equivalent FOI for environmental matters). In the UK the Ministry of Defence has begun '[naming and shaming](#)' apparently poorly performing contractors. At local government level, one high profile joint venture between IBM and a set of public bodies has [explicitly committed itself to FOI](#) and many authorities are determined to make FOI access part of future contracts. In parallel, sites such as [Openly Local](#) allow the public to find out more about, for example, councils and their suppliers.

This 'creep' is no replacement for full FOI coverage but the whole issue of extension leaves politicians in a dilemma. They wish to hand the public more power to hold public services to account but are reluctant to upset business or add any regulatory burden, especially now. Will the onward move of transparency and Open Data leave them with no choice?

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On Thursday, 20 October Dr Ben Worthy will be speaking at the Westminster Legal Policy Forum Seminar, The future of Freedom of Information – challenges for expansion. [More details.](#)