

Ministry of Justice Consultation on the Potential for Including the Local Government Group under Freedom of Information Legislation

Purpose of report

1. For discussion and initial steers on our approach in response to Government proposals to look at the possibility of bringing the Local Government Group under Freedom of Information legislation.

Summary

2. The Local Government Association is not subject to Freedom of Information legislation but we have broadly reflected the spirit of the legislation. Government proposes to extend the scope of the legislation. The Ministry of Justice is consulting on including the Local Government Group as part of the extension.
3. The implications depend on what Group functions are deemed to fall under the legislation. If some or all do, there are administrative and cost implications, and questions about the implications for our political and policy work, and the status of membership services and documents. It is unusual to include a membership organisation under this legislation
4. Action by officers so far has focused on initial conversations with Ministry of Justice officials, and particularly to set in motion work to better understand the implications and legal position for the Group prior to offering advice to the Leaders Board and the Group Executive.

Recommendation

For discussion and Initial steers

Action

Officers to engage on the basis set out in paragraph 6 below and report back.

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Consultation by the Ministry of Justice to Examine Whether the Local Government Group Should Fall Within Freedom of Information Legislation

Issue

1. Government is consulting on whether, and to what extent, the Local Government Group is to be brought under Freedom of Information legislation. This is a first opportunity for the Leaders Board to consider the potential implications and offer early advice and steers on our response.

Background

2. So far, the Local Government Association position is that although we are not subject to Freedom of Information legislation, we broadly reflect the spirit of the legislation in the way that we operate. As a Group, we have committed to Government that will be open and transparent with all local authorities, and the public, and will generally follow the practices applicable to local authorities around disclosure and publication of expenditure above £500, senior salaries, annual accounts and the delivery of outcomes funded by public money.
3. The Coalition Agreement committed government to extending the scope of the legislation in the interests of transparency, with associated suggestions that the Local Government Association should be part of the extension. The background is a wider thrust to transparency in the public sector with, for example, a proposal for a 'recommended' code for local government transparency under the 1980 Local Government Act which presumes that most local government data will be open and published.
4. In January, the Ministry of Justice notified us that they propose to consult on the possibility of including the Local Government Association under the Freedom of Information Act 2000 as a public body under Section 5 of that Act. We subsequently received formal notice on 4th March and then notice to other organisations in the Group at the end of March.
5. This potentially means that the Local Government Group will be designated as a 'Public Authority': i.e. a body that exercises functions of a public nature and is subject to the legislation. The process for deciding this is:
 - 5.1 Fact finding and discussion with the Association, DCLG and interested parties so that Ministry of Justice can review what – if any – of our functions are potentially appropriate to fall under the legislation; then
 - 5.2 Ministry of Justice will propose what – if any - functions they believe fall

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within the legislation: this could be all our functions, some, or none; then

- 5.3 Further discussion, and a decision in principle which would be subject to further consultation;
 - 5.4 Depending on the outcome, preparation and parliamentary process for a Statutory Instrument, which we are advised would be an affirmative resolution requiring debate in committee; after which
 - 5.5 Whatever is proposed would have the force of law with responsibility for scrutiny and oversight falling to the Information Commissioner.
6. The questions asked in establishing the case for inclusion are attached at Annex 1.

Action to Date

7. So far we are:
 - 7.1 Seeking to extend the requested deadline for an initial response from the Local Government Association from 1st April to the end of May to allow the Executive to consider our response. This has now been agreed.;
 - 7.2 Making the case that the Group should be treated as one for this purpose rather than Ministry of Justice conducting parallel but not necessarily synchronised process for individual elements of the Group;
 - 7.3 Conducting an internal review of the likely implications and costs; to be informed by
 - 7.4 Independent legal opinion.

Is the Local Government Association a 'Typical' Organisation in Freedom of Information Terms?

8. To date, the legislation embraces central government departments, local councils including parish councils, fire and rescue, waste disposal authorities, quangos such as advisory boards and commissions, lottery bodies, and scrutiny bodies. Although diverse, these 'Schedule 1' organisations do not generally extend to membership bodies.
9. The legislation applies to most public bodies, and to companies that are wholly owned by what the act defines as public bodies, including companies that are either wholly owned by the Crown, a single public authority; or wholly owned subsidiaries of publicly-owned companies.

How Does the Legislation Work?

10. The legislation and accompanying guidelines are complicated. The base assumption favours transparency with exceptions. A few exceptions are absolute so in general, personal data on citizens is excluded. Mostly though, the legislation operates on a system of checks and balances with qualified exceptions that require justification or are subject to 'tests', the most important being a 'public interest test'. So, for example, a request for information that would cost the respondent organization over £450 (£600 for central government) can be refused on excessive cost grounds: but if the refusal is challenged, an organization with chaotic information management might not sustain the refusal.
11. Organizations covered by the legislation must make information routinely available unless the information is not held, the information is exempt from disclosure or the information isn't easily accessible.
12. Organizations can refuse a request for information where it is vexatious or repeated, the cost of complying exceeds the 'appropriate limit', or falls under complicated exemptions listed in Part II of the Act including trade secrets or that disclosure is likely to prejudice commercial interests.

Implications (Including Financial) for the Local Government Group

13. The implications will significantly depend on the extent to which the functions of the Group are deemed to fall within the legislation. At the very least, there are:
 - 13.1 Implications for our records management: many elements of the organisation are not set up to systematically retain and store information or to make decisions about what might or might not be exempt, and why;
 - 13.2 So some business processes would need re-engineering; and therefore
 - 13.3 There are cost implications both in making necessary changes and then in running the necessary systems.
14. There are key questions around the – at this stage – unquantifiable but potentially substantial implications for our core business, including:
 - 14.1 The extent to which advice to our politicians, and political or policy exchanges are exempt: advice to ministers from civil servants is generally exempt, but we are not quite the same;
 - 14.2 The status of membership services and documents: It is unclear at this stage whether this would be exempt either on grounds that this is third

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party data and should not be exposed, or that an exemption would be justified on commercial grounds. Third party information is generally treated as confidential but this relates more to citizens or businesses. It does not apply if a person has provided consent to disclosure, if there is a legal requirement to disclose information, or if it is in the public interest to disclose information. We would argue that membership services and documents are commercial information, rather than activity of a public body in pursuit of its business.

- 14.3 How far services such as peer review might be caught on the basis that government is pressing transparency in public sector performance;

Options

15. Whilst proposing any option, we will need to consider:

- 15.1 The extent to which we argue from the start that a membership body is not appropriate to the legislation: there may be legitimate grounds for arguing that we are not a public authority as defined by the legislation. Taking such a position would not detract from our starting point of being committed to openness and transparency, and complying with the spirit and intention of FOI.
- 15.2 The converse: that with satisfactory policy on exemptions, we adopt the view that we should be a model of transparency and embrace the legislation.
- 15.3 Whether we are more cautious and seek to persuade Ministry of Justice to take a reasonable stance, but clearly with the ability to oppose if they do not.

Annex 1: Initial Questions Posed by the Ministry of Justice in their Consultation Letter to the Local Government Association on 4th March

Nature:

1. How are you legally constituted?

Are you a private company? Are you a charity? Do you exist purely as a matter of contract? Are you wholly or partially created by statute?

For example, are you a private company limited by guarantee and do you have charitable status?

2. Do you have a statutory basis of any kind?

For example, are your activities underpinned by statute or are your functions recognised by or provided for in legislation?

3. As a body are you exclusively or predominantly motivated by the clear commercial objective of profit? Or alternatively are you, in any way, obliged to conduct your business in a manner that must in some way take account of the public interest or in a manner that seeks to achieve some collective benefit for the public?

For example, information about how any profit is or is required to be reinvested should be provided, whether dividends are paid to shareholders and information about your aims and objectives.

4. How are you funded? Do you receive any public funding?

Please provide details of all your funding sources (Though in relation to individual contributors who are natural persons the only information we need is the total amount your body receives from all such individual personal contributions. Please do not send information identifying the natural person contributors concerned)

5. Do you have special powers or immunities that are different from what you would expect other bodies to have and that distinguish you from private bodies generally?

For example, do others have to submit to your jurisdiction if they wish to take part in certain activities, in practice and/or in reality? Are your powers coercive or regulatory?

Control:

6. Are you accountable to members or shareholders? Do you have some formal accountability to Parliament?

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Please provide information about the ways in which you are accountable for your functions

7. Is there any governmental control (central or local government) over you? If so, to what extent and what form does this take?

8. Is your body's Director (or other posts) appointed subject to Government or public authority influence?

For example, does a Minister have to approve any of your appointments?

Functions:

9. What are your functions?

10. Could some or all of the functions you perform be considered to be governmental or quasi-governmental in nature?

For example, functions such as the provision of State education, the punishment of offenders, and the determination of legal rights and obligations are all indicators that a body may be exercising functions of a public nature

11. If your body did not carry out your particular functions and role, and no similar body did so either as an alternative or as a replacement, would it be likely that the Government would directly or indirectly undertake some or all of those functions?

For example the General Dental Council (a body subject to FOIA) has various functions including: the provision of a system of registration of qualified dental professionals, the setting and enforcement of standards of practice and conduct, the handling of complaints from the public concerning dental professionals, and lastly the audit and quality assurance of both qualifications and education. Each of those listed functions would, if the General Dental Council suddenly ceased to exist, have to be taken on and carried out by the Government or some other public body as they could not be left to simply lapse.

Another example is the "Gas Safe" Register (formerly known as CORGI). This is managed by a private body which runs this accredited certification scheme for private gas installation businesses. If the body running the register (and all other similar bodies) ceased to operate, then for reasons of public safety and public interest amongst other things, the Government would be very likely to undertake the function of operating the register.

12. Do central or local government bodies carry out functions that are the same or similar to your functions?

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13. In carrying out your functions are you in any way exercising statutory powers or carrying out statutory duties?

14. Do you perform a regulatory function? Do some or all of your functions form a part (or whole) of a statutory scheme of regulation?

15. Do all or some of your functions provide a public service or serve the public interest in any way?

For example, do you participate in the social affairs of the nation?

Examples of the sorts of activity we are interested in here are things like the provision of services relating to the education or care of members of society as well as activities relating to the regulation of professional standards.