

**EXPLANATORY MEMORANDUM TO
THE FREEDOM OF INFORMATION (DESIGNATION AS PUBLIC AUTHORITIES)
ORDER 2011**

2011 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 This Order designates the Association of Chief Police Officers (ACPO), the Financial Ombudsman Service (FOS) and the Universities and Colleges Admissions Service (UCAS) as public authorities for the purposes of the Freedom of Information Act 2000 ("the FOI Act") in relation to their functions that appear to the Secretary of State to be of a public nature.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

4. **Legislative Context**

- 4.1 The FOI Act applies to a public authority, as defined in section 3 of that Act. Included in that definition is a person designated by an order made under section 5 of the Act. Section 5 of the FOI Act enables the Secretary of State to designate a person as a public authority on one of two bases. The first basis is that a person appears to the Secretary of State to exercise functions of a public nature (section 5(1)(a)). The second is that a person under contract to a public authority provides a service the provision of which is a function of that authority (section 5(1)(b)).

- 4.2 This Order designates ACPO, FOS and UCAS as public authorities on the first basis and is made by the Secretary of State in exercise of the powers conferred by sections 5(1)(a), 5(2) and 7(5) of the FOI Act. Where a person is designated as a public authority under section 5 section 7(5) provides that the Order must also specify each of the functions of a public nature that will be covered by this designation. The Schedule to this Order specifies those functions. This is the first time that these powers have been used.

4.3 The inclusion of ACPO was raised in Parliamentary debate in 2009 following a tabled amendment to the Policing and Crime Bill to include ACPO within the FOI Act to increase transparency in policing¹. In that debate the then Parliamentary Under-Secretary of State for the Home Office outlined the Government's proposals to bring forward a section 5 order that would include ACPO. The current Government announced its intention to introduce this Order in a Written Ministerial Statement on 18 January 2011^{2 3}.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Freedom of Information (Designation as Public Authorities) Order 2011 are compatible with the Convention rights

7. Policy background

What is being done and why

7.1 The FOI Act was brought into force on 1 January 2005. The primary objective of the FOI Act is to increase the openness, transparency and accountability of those bodies subject to the FOI Act. The provision of information under the FOI Act enables greater transparency about how public money is spent and greater scrutiny of public services. It allows the public to gain information about services and decisions that affect them and to hold bodies to account for those decisions.

7.2 ACPO, FOS and UCAS were all suggested for inclusion in the FOI Act regime by Order made under section 5(1)(a) in responses to the 2007 consultation 'Freedom of Information Act 2000: designation of additional public authorities'. Since that time there have been a number of additional calls to bring these bodies within the FOI Act⁴.

7.3 The Government believes that bodies who exercise functions of a public nature should be subject to the same scrutiny as other public authorities in relation to those functions and that as a result they will become more open, transparent and accountable. The Government is committed to facilitating greater openness and

¹ HL Deb 3 Nov 2009 cc 180 - 183

² HC Deb 18 January 2011 c34WS ;HL 18 January 2011, c5WS

³ There have also been several parliamentary questions asking about the inclusion of ACPO, FOS and UCAS within the scope of the FOI Act (ACPO: HC Deb, 28 February 2011, c87W; HL Deb, 14 February 2011, c110W; HC Deb, 31 January 2011, c664W; FOS: HL Deb, 9 February 2011, c64W. UCAS: HL Deb, 14 February 2011, c110W; HL Deb, 3 June 2010, c6W).

⁴ There have been several parliamentary questions asking about the inclusion of ACPO, FOS and UCAS outlined at footnote 3, the Ministry of Justice has also received correspondence about the inclusion of ACPO, FOS and UCAS.

transparency in the public sector in order to enable the public to hold politicians and public bodies to account. ‘The Coalition: our programme for government’ set out this intention stating that the Government would ‘extend the scope of the Freedom of Information Act to provide greater transparency’⁵. The Government announced in January that it would be bringing ACPO, FOS and UCAS within the FOI Act as part of a package of proposals to meet this commitment

- 7.4 The following paragraphs set out our rationale for including in the Order the three bodies and their specified functions.

(a) ACPO

- 7.5 It appears to the Secretary of State that ACPO exercises functions of a public nature in relation to all of its functions. Since ACPO has no statutory functions the functions set out in the Order reflect ACPO’s objects as described in paragraph 4 of its Memorandum of Association of 1 April 1997⁶.
- 7.6 The Secretary of State considers that each of the functions specified in the Order makes a fundamental contribution to the policing of the state in such a way that they are, together and individually, functions of a public nature that are eligible for inclusion in an order made under section 5 of the FOI Act. The Secretary of State also had regard to the fact that the individual chief police officers who comprise ACPO are already covered by the FOI Act, and that ACPO does not operate for profit.
- 7.7 In addition to ACPO’s other functions, the Secretary of State considers in particular that ACPO’s functions of providing member services and the promotion of the association are functions of a public nature. With respect to its member services function, ACPO is not acting as a staff association but as a professional organisation. Since this work is undertaken on behalf of the Service, rather than its individual members, the provision of member services relates to the improvement of policing and professional development which in turn contributes to the policing of the state. It therefore appears to the Secretary of State that this is a function of a public nature.
- 7.8 Similarly, ACPO’s aim in carrying out its promotional function is to ensure that the ACPO brand is recognised as a mark of excellence in policing, rather than to seek commercial benefits for its members. In pursuing this aim ACPO seeks to ensure that it is recognised as a respected and authoritative voice in strategic policing matters. In this way this function is linked fundamentally to other functions that seek to ensure effective strategic policing thereby contributing to the policing of the state. The Secretary of State therefore considers that this function is also a function of a public nature.

⁵ The Coalition: Our programme for Government (<http://www.cabinetoffice.gov.uk/news/coalition-documents>)

⁶ <http://www.acpo.police.uk/documents/ArticlesofAssociation.pdf>

(b) FOS

- 7.9 It appears to the Secretary of State that FOS exercises functions of a public nature in respect of all of its functions. All of FOS' functions are performed under Part 16 of, and Schedule 17 to, the Financial Services and Markets Act 2000 (FSMA). Under the FSMA the FOS administers an ombudsman scheme in the financial services sector under which certain disputes may be resolved quickly and informally by an independent person. FOS was established to give consumers a quick, informal and alternative method of dealing with such disputes between consumers and providers of financial services, as opposed to having to go through the court system.
- 7.10 FOS does not operate on a commercial basis and does not make a profit. There is a strong public interest and benefit in the provision of impartial, non-profit-making regulation of financial services, such that if FOS did not provide those services then the Government or another body would have to provide them instead. Each of FOS' functions under the FSMA is established to assist in ensuring that financial services are regulated in this way. Accordingly, it appears to the Secretary of State that these are functions of a public nature.

(c) UCAS

- 7.11 It appears to the Secretary of State that UCAS exercises functions of a public nature in respect of some of its functions. UCAS is a registered company and its functions are not conferred by statute. Amongst its functions UCAS provides and maintains a central application and admissions services for higher education and certain further education establishments who themselves or whose governing bodies are already covered by the FOI Act or the Freedom of Information (Scotland) Act 2002 ("the FOI(S) Act"). This function is set out in UCAS' charity registration in England and Wales⁷ and in Scotland⁸. The description of the functions contained in the Order reflects this and has been agreed by UCAS as accurate.
- 7.12 UCAS is a charity and any profits it makes must be used for its charitable objectives. There is a strong public interest and public benefit in the provision of an efficient and fair means of applying for entry into further and higher education institutions of the sort that UCAS provides, such that if these services were not provided by UCAS then the Government or those educational bodies already covered by the FOI Act or the FOI(S) Act would have to provide them instead. Accordingly, it appears to the Secretary of State that these functions are functions of a public nature.

⁷ Registered charity number 1024741

⁸ Registered charity number SC038598

- 7.13 The commercial functions of UCAS, such as the functions of UCAS Media⁹ are considered by the Secretary of State to be distinct from the central applications services that it provides and are not considered to be functions of a public nature.

8. Consultation outcome

- 8.1 Under section 5(3) of the FOI Act the Secretary of State is required to consult 'every person to whom the order relates, or persons appearing to him to represent such persons' before making an order under section 5.
- 8.2 Following a public consultation in 2007 about whether the Government should consider extending the FOI Act and if so which bodies it should consider¹⁰, the Ministry of Justice consulted ACPO, FOS, UCAS and Academy Schools in 2009. Academies have since been brought within the FOI Act via primary legislation¹¹.
- 8.3 As part of the consultation process discussions took place with ACPO, FOS and UCAS and some concerns regarding inclusion within the FOI Act were raised. Those concerns related to the resource burden of complying with requests and the potential release of certain information, such as that which was commercially sensitive. The resource issues are discussed in more detail in the attached impact assessment. Following discussion the bodies concerned were content that the exemptions set out in the FOI Act provided sufficient protection for their information. The Ministry of Justice has also consulted ACPO, FOS and UCAS on the wording of this Order and they are content.
- 8.4 A decision to bring ACPO, FOS and UCAS within the Act under section 5 was made and communicated to each body in March 2010 and was welcomed publicly by ACPO and FOS¹². Following the election, discussions with the bodies continued and the Government announced its decision to include the bodies within the scope of the Act in January 2011.

⁹ UCAS describes these functions on its website as follows, "UCAS Media supports the core mission of UCAS with income-generating activities and by achieving increasing recognition for the organisation as a first-class supplier of quality goods and services. Activities include events, publishing activities, advertising, sponsorship and other marketing services that aim to provide and promote services for students and their advisers". (http://www.ucas.com/about_us/ucasmedia)

¹⁰ Freedom of Information Act 2000: designation of additional public authorities - <http://www.justice.gov.uk/consultations/cp2707.htm>

¹¹ See paragraph 10 of Schedule 2 to the Academies Act 2010.

¹² ACPO state on their website that "In March 2010 the Ministry of Justice confirmed that ACPO will be included under the Act and legislation to effect the change is expected to come into force in October 2011. In its response to consultation ACPO actively argued to be brought under the Act and the announcement it will be included was welcomed. - <http://www.acpo.police.uk/FreedomofInformation/ACPOpublicationsFoI.aspx>. FOS state on their website that "We are not at present subject to the Freedom of Information Act. But the Justice Minister announced in March 2010 that the Act would be extended to cover us (probably with effect from October 2011) – which is something we welcome." - <http://www.financial-ombudsman.org.uk/about/foi.htm>.

9. Guidance

- 9.1 The Ministry of Justice provides guidance on its website for all bodies and office holders covered by the FOI Act¹³. The guidance covers the obligations of the bodies and offices covered and also procedural matters and enforcement of the Act. The guidance is freely available to all users of the FOI Act.
- 9.2 The Information Commissioner also provides extensive guidance on the FOI Act which is available online¹⁴.

10. Impact

- 10.1 Total transition costs to ACPO, FOS and UCAS are expected to be minimal and ongoing annual costs to ACPO, FOS and UCAS in responding to requests and any internal reviews are estimated to be £0.5m annually. ACPO, FOS and UCAS will also incur costs for setting up a publication scheme, setting up a system to respond to requests and for responding to any appeals to the Information Commissioners Office (ICO), tribunals or to the courts.
- 10.2 Other affected groups include the ICO which will have to consider any increase in numbers of appeals and enforce the proper application of the FOI Act. There will also be costs to the tribunals and higher courts, and to the wider public sector if they receive any additional related FOI requests. However, only a small percentage of cases reach the appeal stages. Consequently, the addition of only three further bodies within the scope of the FOI Act as a result of this Order should have a minimal impact given over 100,000 bodies are currently within the FOI Act's scope.
- 10.3 In terms of non-monetised benefits extending the FOI Act is intended to increase the efficiency, accountability and openness of ACPO, FOS and UCAS, which will in turn benefit society more generally. Increased public access to information could lead to greater scrutiny, increased awareness and greater confidence in ACPO, FOS and UCAS. The public sector may benefit as organisations currently within the scope of the FOI Act may receive fewer requests (if these are instead directed to ACPO, FOS and UCAS).
- 10.4 In order to allow sufficient time to prepare for inclusion within the FOI Act, the bodies were advised in March 2010 that we aimed to commence the legislation, subject to Parliamentary approval, from October 2011 and this intention was confirmed in subsequent discussions. The Order has been drafted to enable it to be made and commenced as close as possible to this date. Accordingly, the Order will be come into force on the day after the day on which it is made. The Ministry of

¹³ <http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/index.htm>.

¹⁴ http://www.ico.gov.uk/for_organisations/freedom_of_information.aspx

Justice is in close contact with each of the bodies to ensure that they will be aware of the date on which the Order comes into force.

10.5 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Order intends to provide the public with an enforceable right of access to information regarding ACPO, FOS and UCAS. This is intended to increase the accountability, transparency and openness of those bodies and to ensure that they are subject to the same level of scrutiny as other public authorities.

12.2 We plan to undertake post-legislative scrutiny of the FOI Act as a whole, to see how well the Act is working in practice and whether there are further changes to be made. A Memorandum will be submitted to the Justice Committee in late 2011. The outcome of the review will be used to assess the success of the policy as the principles underpinning post-legislative scrutiny apply equally to bodies newly subject to the FOI Act as to those already subject to it.

12.3 The Information Commissioner's Office will consider any applications in respect of the decisions of ACPO, FOS and UCAS and enforce the proper application of the FOI Act. The Information Rights Tribunal, Upper Tribunal and higher courts will also consider any appeals.

13. Contact

Jane Sigley at the Ministry of Justice Tel: 020 3334 5442 or email: informationrights@justice.gsi.gov.uk can answer any queries regarding the instruments.