The national intermediary and network for voluntary health organisations in Scotland

Consultation Response

voluntary health scotland

Access to information rights in Scotland: consultation response
February 2023

The Scottish Government is consulting on the need for future legislative change of the Freedom of Information (Scotland) Act 2002 (FOISA). This follows the post-legislative scrutiny carried out by the Public Audit and Post-legislative Scrutiny Committee in 2020, which found there was a need for further public consultation.

Voluntary Health Scotland is the national intermediary and network for voluntary health organisations across Scotland. VHS exists to create a healthier, fairer Scotland served by a thriving voluntary health sector. We work to improve people's health and wellbeing by providing an effective national network for health charities and other third sector organisations actively supporting people's health and wellbeing. Our members and network include a range of medium and large condition specific organisations, smaller community organisations, as well as social enterprises.

Freedom of Information legislation is not our area of expertise, however, we welcome the opportunity to respond to this consultation as it could have significant implications for our members and the wider third sector. In our response we hope to contextualise the operating environment which third sector and voluntary organisations supporting people's health are in. We support the ambition of maintaining and strengthening people's access to information rights but also have concerns about the impact some of the proposals might have on the sustainability of the voluntary sector. Ultimately, we believe any proposal to extend designation under FOI legislation must be consulted on with the organisations it is likely to affect and impact assessments must be carried out as part of the consultation process.

Significant resources will need to be invested to bring third sector partners up to speed with the legislative duties and additional resource will need to be allocated in future contracts for staff costs and time. The current third sector funding model in relation to public sector funding is short-term, with organisations existing on one-to-three-year contracts, service level agreements or grants. We believe an impact assessment needs to be carried out to better understand how the legislation would operate within these short-term funding cycles. Additionally, we need to better understand the demands this would place on third sector organisations, as we note from the committee's report that information requests have been significantly increasing for public sector organisations in recent years. Third sector organisations generally do not have information officers or equivalents in their structures, so even for the larger organisations there could initially be a significant skills gap and resourcing issue.

Our response has been informed by the SCVO's own response and engagement with this topic. This is an area the SCVO has historically engaged with, and we are grateful for their expertise.

Question 2(a)
If seeking information about a public service delivered under contract by an external provider, how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority on whose behalf the service is being delivered?

By 'public service' we mean a service which is delivered directly to members of the public, and whose provision would commonly be understood to be the responsibility of the public authority.

It is our understanding that any third sector organisation that is contracted to provide a public service is required to report back extensively on the service they provide as part of their funding arrangement. Additionally, contracting authorities can request information from third sector providers in response to any freedom of information requests they receive. If a gap has been identified in people's access to information rights, then we believe existing structures and advice should be strengthened to aid in the provision of information. In general, the third sector is already adept at proactively publishing information. We are required to evidence ourselves through work plans, impact reports and other information often required to secure funding, especially from the public sector. Additionally, due to the nature of funding cycles voluntary organisations are well versed in evidencing impact to secure funding. The sector already proactively publishes significant information about service delivery and charities' accounts are publicly available through OSCR. We would suggest training and tools to help align this information with FOISA would be the best first step to bridge any gap in access to information rights.

We would like to clarify the definition of "public service" which the consultation states means "a service which is delivered directly to members of the public, and whose provision would commonly be understood to be the responsibility of the public authority." This is quite a broad and vague definition, which could lead to confusion if FOISA duties are extended to the third sector. For example does this only mean statutory services that the public authority would ordinarily provide or does it encompass services that there isn't a legal requirement for the public authority to provide. The definition of public service is going to be especially important to third sector organisations who provide health and social care services as they may receive some public sector funding but provide a non-statutory service. There would need to be clear definitions and guidance about what constitutes a public service to avoid potential confusion or a dilution of the legislation.

Question 6(a)
What are your views on the introduction of a Gateway clause as a means of making the Act more 'nimble'?

We would not support a gateway clause.

It is our understanding that a gateway clause would automatically bring bodies within the scope of FOISA on the basis of their functions or receipt of public funding. Operationally we have some concerns about taking a broad-brush approach to a gateway clause option. We echo the concerns expressed in the consultation about having a provision which is sufficiently broad to add meaningfully to the coverage of the Act while also providing clarity about which organisations were covered. We would have significant concerns about the ability of smaller organisations in receipt of public funding to handle FOI duties without reimbursement. There would need to be an arrangement in place to ensure smaller organisations were not locked out of applying for public sector funding due to resource constraints.

If a gateway clause were to be introduced the definitions associated with it would have to be very clear to the organisations brought under the clause and the general public. Any ambiguity could create a barrier for smaller (incomes under £100k) and medium third sector organisations in bidding for public sector contracts due to concerns about the resource implications of duties under FOISA. Any gateway clause that brings third sector organisations into these duties would require significant consultation and engagement with the sector, especially smaller community-based organisations who may not ordinarily engage with the post-legislative process. There would need to be further conversation about the definition of "public sector functions", as we have highlighted in response to question 2A, and the amount of funding that would be considered proportionate and in the public's interest.

We strongly believe that charities and the third sector should be held accountable for the services we provide. Some organisations provide support and services to the most marginalised and vulnerable groups in society. This work should be scrutinised, and organisations should be held accountable. However, we do have questions about whether there is a gap in the information being provided to contracting authorities at present from third sector organisations. If there is a gap, we would like to better understand the solutions which have already been explored by contractors using the existing mechanisms and legislation. We believe that contractual obligations could be strengthened to provide information to support requests under FOISA and additional guidance would support third sector organisations in their response and collection of information.

6 (c). If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations?

We would support the exclusion of third sector organisations**.**

We believe including the third sector in its entirety in a gateway clause could lead to contracts going to more private sector organisations due to their ability to absorb costs. The third sector is incredibly diverse and staff teams vary in size. The majority are direct service providers and often work with public sector partners in the delivery of services. Large charities with incomes over £1m only make up around 3.5% of the sector in Scotland, according to the SCVO's latest state of the sector report.[1] The largest group of charities are smaller, those with an income under £100k, who make up 80% of charities in Scotland. These organisations may only have a handful of staff. The SCVO's latest workforce statistics show 72% of charities do not have any paid employees (including new charities).[2] Without a robust funding model to support new regulations, organisations will have to divert resources away from service delivery. This will be a significant challenge for small organisations with a limited number of staff. This would have a significant impact on the delivery of health and social care services by third sector partners, which are already under crippling pressure to deliver care. Third sector organisations provide a broad range of support in health and social care, from preventative and pro-active care to end of life care and support. For example, Community Link Workers (CLWs) are largely commissioned by GP practices from third sector organisations.

Furthermore, many third sector organisations receive very short-term funding from public sector partners and bolster this with income from multiple other sources. The funding landscape is complicated, and the sector would require significantly more information about

[1]https://app.powerbi.com/view?r=eyJrIjoiMDUzY2ViYTctMzZmYS00NzBhLTkyZWItNzUwNWVkNzkzZTVlIiwidCI6ImMyOTQ5NGY5LTNhY2EtNGE3MS05NWUyLWM4ODBjNWE1ZThmOSIsImMiOjh9

[2]https://app.powerbi.com/view?r=eyJrIjoiMDUzY2ViYTctMzZmYS00NzBhLTkyZWItNzUwNWVkNzkzZTVlIiwidCI6ImMyOTQ5NGY5LTNhY2EtNGE3MS05NWUyLWM4ODBjNWE1ZThmOSIsImMiOjh9

FOISA and the proposed gateway clause before being able to assess its potential impact. We note no impact assessment has been carried out as part of this consultation which significantly hinders our ability to fully understand the impact a gateway clause could have on our sector.

If the case is made for designating a voluntary organisation under FOISA, a sustainable, long-term and increased funding model must be put in place or else third sector organisations will be locked out of bidding. Third sector organisations, by their very nature, direct the majority of their resources into front-line service delivery and may face challenges if forced to absorb additional costs as a result of FOISA.

If a clause were to be introduced, we would support the exclusion of small/medium third sector bodies. This could go some way towards addressing concerns that a gateway clause would deter smaller and medium third sector organisations from bidding for government contracts or grant funding. We believe it is beneficial to have third sector organisations of all sizes bidding/applying for public funding, it encourages diversity in the sector and means smaller and more local organisations have a chance to make a difference in the communities they support in partnership with government. However, we appreciate that including only some organisations in such a clause could create ambiguity around who falls under the duties in the public eye.

At present, most third sector organisations are operating under immense pressure following the pandemic and now the cost-of-living crisis. We continue to hear of voluntary organisations losing funding, struggling to keep the doors open and having to reduce services due to the operating environment. Many have limited resources, no access to legal support or data protection officers and will be unfamiliar with this legislation. Any clauses to include the third sector would need to be coupled with ongoing training and resources to ensure the sector is brought up to speed on the duties. A failure to do so could erode public trust in the sector and the legislation.

7. What are your views on the desirability of broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies?

The Scottish Government holds existing powers to extend FOISA to voluntary organisations in a way that is proportionate and targeted. Registered Social Landlords were recently brought into scope of FOISA for example. It is our understanding that any extension requires secondary legislation and significant consultation and engagement with the bodies being brought into scope.

We would support strengthening section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies. This would allow the existing infrastructure to be used in a targeted way to best strengthen information rights. It would also allow for careful consideration of decisions and reduce the likelihood of any unintended consequences from a more broad-brush approach.

However, if an assessment was made that any third sector organisations were to be designated under FOISA there would need to be further consultation on the details of this. For example, around definitions of “significant funding” and what constitutes a public service. It would be vital that voluntary organisations involved in delivering health and social care services were part of any future consultation on their designation.

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