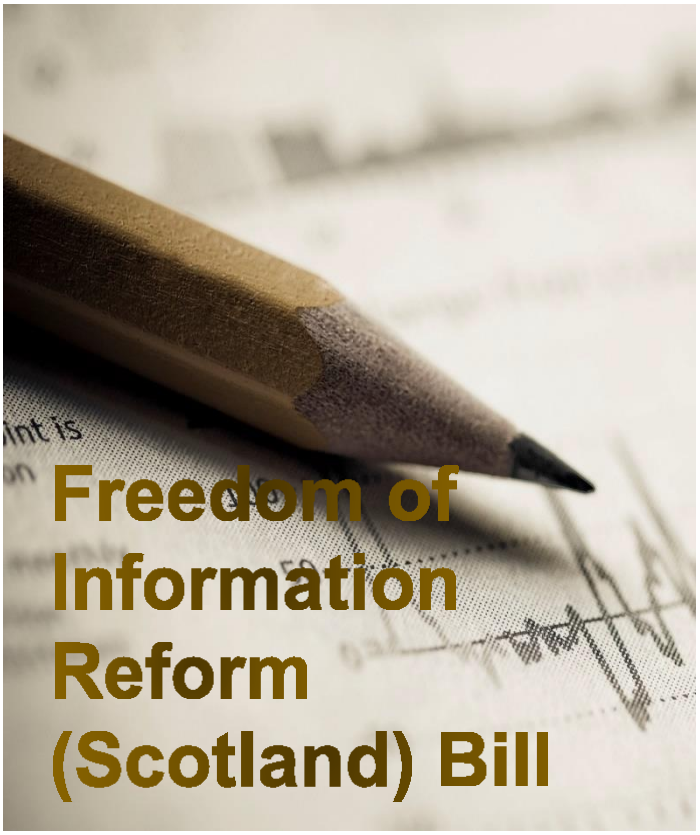


A proposal for a bill to reform Freedom of Information legislation in Scotland including to: extend coverage to all bodies delivering public services, services of a public nature and publicly funded services; create a role of Freedom of Information officer; increase the proactive publication of information; improve enforcement where necessary; and improve compliance with human rights law.

Consultation by
Katy Clark MSP, Member for West Scotland (Scottish Labour)

November 2022

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Foreword



This consultation invites your views on proposals to update and reform freedom of information legislation in Scotland. Campaigners, journalists, members of the public and colleagues have alerted me to the practical deficiencies of current legislation. I am also persuaded by the Scottish Information Commissioner's report in January 2022, which stated: "I look forward to supporting future consultation activity regarding extending the coverage of FoI law, to ensure it keeps up with modern public service delivery models and continues to serve the public interest."[1] My consultation is open for three months and responses are invited by 2nd February.

'An Open Scotland', the 1999 Scottish Executive consultation on the proposal to adopt a freedom of information law in Scotland, stated: "At the heart of our proposals is a presumption of openness and a belief that better government is born of better scrutiny". As a result, the Scottish Parliament passed the Freedom of Information (Scotland) Act 2002 (FoISA) in April 2002. The bill created an architecture for enforcement led by the independent Scottish Information Commissioner. Thousands of people asserted their FoI rights in the first year and that interest has been sustained with 69,519 FoI requests submitted in 2020-21.[2]

There have been repeated calls to strengthen rights and enforce duties, leading to MSPs unanimously voting for post legislative scrutiny of FoISA in June 2017.[3] The Public Audit and Post Legislative Scrutiny Committee subsequently held an inquiry which received 58 written submissions, held five evidence sessions and deliberated. The Committee's report, published in May 2020[4] recommending extensive legal reform, has not been implemented. I am similarly persuaded that FoI legislation requires to be overhauled, so I am reacting to legislative inactivity and publishing this consultation as the first step to delivering a Member's Bill. I am collaborating with MSPs to build support as we all benefit from a law which builds public trust and delivers openness, transparency, accountability and empowerment.

I am keen to progress legal reform this year as it is 20 years since FoISA was passed by the Scottish Parliament and it is imperative to extend coverage, update provisions and improve enforcement of FoI law. The public's right to know has proven to be effective on everyday issues such as public safety, hygiene in restaurants and housing provision, and helps prevent fraud, corruption and maladministration. However, reform is essential to strengthen rights and duties and close legal loopholes to ensure the public's enforceable right to access information is robust. Many designated bodies comply with the law and answer information requests diligently and within the timeframe. However, in some organisations

[1] Covid-19 Special Reports | Scottish Information Commissioner (itspublicknowledge.info)
[2] SIC_Annual_Report_and_Accounts_2020-21.pdf (itspublicknowledge.info)
[3] Official Report - Parliamentary Business : Scottish Parliament
[4] Post-legislative Scrutiny : Freedom of Information (Scotland) Act 2002 - Parliamentary Business : Scottish Parliament

practice has been poor and the years of operational practice have alerted us to problems with implementation

I understand support for legal reform outside of Government remains strong, and this consultation will encourage informed debate and action. Support within Parliament is also strong, as evidenced by the recent Motion (ref. S6M-03807) 'Celebrating Freedom of Information (Scotland) Act at 20 Years'. The process of consulting will highlight practice and policy issues which may prompt further amendments so I look forward to the participation of everyone who has an interest in FoI, especially members of the public, MSPs, Ministers, civil society, trade unions and designated bodies.



Katy Clark MSP
November 2022

How The Consultation Process Works

This consultation relates to a draft proposal I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:
http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx

At the end of the consultation period, all the responses will be analysed and published. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose.

Details on how to respond to this consultation are provided at the end of the document. However, I want to emphasise that you may answer all or just a few of the questions. **The only ones which are obligatory are questions 1-5.**

Additional copies of this paper can be requested by contacting me, Katy Clark MSP, at clarkkatyfoi@parliament.scot or at The Scottish Parliament, Edinburgh, EH99 1SP. Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An online copy is available on the Scottish Parliament's website (www.parliament.scot) under Bills and Laws/Proposals for Bills.

List of Abbreviations

Abbreviations are challenging as there are so many and each one refers to an important Act, regulation, organisation or public servant. This list therefore aims to help people understand the proposals. It is designed to be inclusive, especially for those with PMFA (Poor Memory for Acronyms).

• ATI – access to information
• Aarhus Convention – Convention of Access to Information, Public Participation in Decision-Making Procedures and Access to Justice in Environmental Matters
• ALEOs – Arms-length external organisations
• CFoIS – Campaign for Freedom of Information in Scotland
• Commissioner – Scottish Information Commissioner
• CoSLA – Convention of Scottish Local Authorities
• CYPCS – Children and Young People's Commissioner Scotland
• DPA - Data Protection Act
• ECHR – European Convention on Human Rights
• ECtHRs – European Court of Human Rights
• EHRC – Equalities and Human Rights Commission
• EISRs – Environmental Information (Scotland) Regulations 2004
• FoI – Freedom of information
• FoIA – Freedom of Information Act 2000 (UK)
• FoISA – Freedom of Information (Scotland) Act 2002
• GDPR – General Data Protection Regulation
• HRA – Human Rights Act 1998
• ICCPR – International Covenant on Civil and Political Rights
• ICO – Information Commissioner's Office
• MPS – Model Publication Scheme
• NPF – National Performance Framework
• NGBU – Non-Governmental Bills Unit
• OGP – Open Government Partnership
• RTI – Right to information
• RSLs – Registered Social Landlords
• SDGs – Sustainable Development Goals
• SHRC – Scottish Human Rights Commission
• SPICe – Scottish Parliament Information Centre
• SPIF – Scottish Public Information Forum
• UK ICO – UK Information Commissioner's Office
• UNCRC – United Nations' Convention on the Rights of the Child
• UNCRC Bill – United Nations' Convention on the Rights of the Child (Incorporation (Scotland) Bill)
• UNDP – United Nations' Development Programme
• UNGPs – United Nations' Guiding Principles on Business and Human Rights (31 of them)
• UYOD – Use your own device (such as mobile phone, iPad, tablet, laptop etc.)

1. Aim of the Proposed Bill

I am consulting on the detail of reforming FoI law in Scotland to improve and promote transparency, accountability and enable scrutiny. I propose strengthening the rights of requestors, the duties of those bodies designated for compliance and the enforcement powers of the independent Scottish Information Commissioner (Commissioner). This consultation is the first step in the parliamentary process.

2. Why is the Consultation Required?

Freedom of information legislation is overdue for an overhaul as it is 20 years old and covers information processing and public service delivery which have radically changed and continue to do so. The law on rights and duties needs to keep up with everyday operations, so legal reform is urgently needed to update the law, address legal loopholes and introduce duties to prohibit practices which undermine legal rights, and improve implementation. As there are no other suitable solutions other than legal reform, I am consulting on what should be included in my Member's Bill. I have included a lot of evidence and detail in this document to help you form an opinion on how FoI law can be reformed and I look forward to receiving your responses. I would also invite responses from those who do not support the proposal or who have alternative approaches or points that raise practical issues.

This consultation begins the process of delivering the recommendations of the Public Audit and Post Legislative Scrutiny Committee (PAPLS) Inquiry. Its post-legislative scrutiny of FoISA was prompted by a unanimous motion of the Scottish Parliament on 21st June 2017.[5] Launched in 2019, the PAPLS inquiry resulted in 58 written submissions along with a variety of supplementary evidence in response to five oral evidence sessions that ran from September to December 2019. The cross-party membership of the Committee concluded in its report published in May 2020 that: "… there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication." [6] The Committee continue to be interested in progressing legislative reform.[7]

In correspondence with PAPLS dated 25th November 2020 and 25th February 2021, the Scottish Government agreed there should be a "public consultation exercise"[8] on FoISA, but it noted on 25th February that it "takes no view at the present time on whether future primary legislation will be required to improve the current information rights regime." It added: "However, we are happy to confirm that we agree that a consultation on legislative change should take place early in the new session of the Parliament, taking the recommendations of the Committee's report as its starting

[5] Available at Scottish Parliament Official Report
http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11021&i=100720
For more information go to the Public Audit and Post Legislative Scrutiny Committee at
https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111249.aspx

[6] At Post-legislative Scrutiny : Freedom of Information (Scotland) Act 2002 - Parliamentary Business: Scottish Parliament and at Para 5 at PAPLS052020R2.pdf

[7] https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-public-audit-committee/correspondence/2021/session-5-post-legislative-scrutiny-of-freedom-of-information-and-lobbying-scotland-acts

[8] Correspondence between the Scottish Government and the PAPLS Committee Minister for Parliamentary Business.dot

point. Whether this exercise ultimately leads to new primary legislation will depend in part on the outcomes of the consultation exercise, as well as on the views of the new Parliament."

At the annual Holyrood FoI Conference in November 2021, the Minister for Parliamentary Business announced that there would be no consultation until 2022 and the focus would be on finding out if reform is needed. A parliamentary question tabled by Graham Simpson MSP asking when the consultation on changes to FoI law would happen was answered by the Minister, George Adam, on 4th March 2022: "The Scottish Government is currently developing its consultation exercise, to seek views on future legislative change to the Freedom of Information (Scotland) Act 2002… We will announce further information about the consultation as soon as we are in a position to do so.[9]

3. Current Legislation

The **Freedom of Information (Scotland) Act 2002 (FoISA),** and the **Environmental Information (Scotland) Regulations 2004 (EISRs)** provide the main legal framework for access to information rights on devolved matters in Scotland. There are key differences between between FoISA and the EISRs.[10] FoISA and the EISRs give you the 'right to receive' information and places a duty on the body that holds information to provide it unless there are legal reasons not to, for example if the requested information is subject to one of the numerous FoISA exemptions or subject to an EISR exception which allows the body to withhold it.[11] EISRs can also apply to private bodies if they are under the control of public authorities and have public responsibilities or functions relating to the environment, such as waste disposal. In total, 61,217 FoIs and 8,302 EISRs were submitted in 2020-2021[12].

FoISA has been operational since 1st January 2005, providing people with a freely accessible and enforceable right to ask for and receive, information. People can submit an information request and have the right to receive it 'promptly' or within 20 working days.[13] Currently, over 10,000 bodies are 'designated' under FoISA including local authorities, health boards, Police Scotland, regulators, universities, Colleges and individual GP practices. If you are refused all the information, or in part, you can ask for an internal review, and if that is unsuccessful you have the right to appeal to the Commissioner who enforces rights for free.[14]

FoISA was amended by the **Freedom of Information (Amendment) (Scotland) Act 2013** to close some of the legal loopholes and promote better practice, such as

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[9] Parliamentary question

[10] Differences between EIRs and FOISA (itspublicknowledge.info)

[11] There are key differences between between FoISA and the EISRs & detail at Differences between EIRs and FOISA (itspublicknowledge.info)

[12] FOI and EIRs statistics | Scottish Information Commissioner (itspublicknowledge.info)

[13] Responding to requests | Scottish Information Commissioner (itspublicknowledge.info)

[14] Helpful information about exercising your rights and the rules on charging appear at Freedom of information at a glance (itspublicknowledge.info)

requiring the Scottish Government to provide bi-annual reports to the Scottish Parliament on the use of Section 5 orders which are used to increase the range and number of organisations designated for coverage.

A separate FoI regime applies to reserved matters and to UK-wide public Authorities. The **Freedom of Information Act 2000** and the **Environmental Information Regulations 2004** are enforced by the UK Information Commissioner.

Furthermore, accessing information is quite different from processing personal information. The Data Protection Act 2018 (DPA) controls how your personal information is used by organisations, businesses, or the government. The DPA is the UK's implementation of the General Data Protection Regulation (GDPR). The UK Information Commissioner regulates data protection.[15]

4. Changes proposed by key stakeholders

Independent public opinion polling carried out by the Commissioner in 2013, 2014, 2015, 2017, 2018, 2019 and 2022 provides valuable intelligence about the popularity of FoI and how the law can be improved and the extent to which the public supports action.[16] Opinion polling in 2022 by the Commissioner found:

- Over 80% of those surveyed said it's either 'very' or 'extremely' important that privately-run but publicly funded health and social care services are subject to FoI law

- The proportion of people who said they had heard of FoI remains very high, at 89%, while 63% said they were fully or moderately aware of their rights to ask for information from Scottish public bodies[17]

Polling by the Commissioner in 2019 reported 80% of survey respondents agreed that private sector companies that work on contracts for public bodies should be subject to the same FoI laws as public bodies.[18] Therefore, support for reform has clearly been established. In addition, the Commissioner in his report 'Freedom of Information during and after the Covid-19 pandemic' recommended that "steps should be taken to address disparities in access to information between equivalent public services based on how they are owned or managed".[19]

Several reports have identified problems and proposed solutions including the Commissioner's 'Model Publication Scheme Monitoring Report' of 2017[20] and 'FoI 10 years on: Are the right organisations covered?' of 2015. The research report

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[15] Information Commissioner's Office (ICO)
[16] Public awareness of FOI | Scottish Information Commissioner (itspublicknowledge.info) and Young people's awareness of FOI rights is "significantly lower" (itspublicknowledge.info)
[17] 2022-Public-Awareness-Research-summary-of-results.pdf (itspublicknowledge.info)
[18] http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx
[19] FOI_During_and_After_the_Pandemic_Special_Report.pdf (itspublicknowledge.info)
[20] Model Publication Scheme Monitoring Report 2017 (itspublicknowledge.info)

'Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector', published in 2010, is also informative.[21]

In January 2022, the Campaign for Freedom of Information in Scotland (CFoIS) published a draft Bill with extensive 'Explanatory Notes', grounded in the PAPLS' Committee's recommendation to "consult on the detail of the proposed changes before bringing forward the necessary legislation".[22] I may adopt elements of that bill depending on the outcome of this consultation.

The views and recommendations of stakeholders are persuasive:

Scottish Information Commissioner
"The pandemic has brought into sharp focus the differences in how FoI applies to private care homes and those run by a local authority. I look forward to supporting future consultation activity regarding extending the coverage of FoI law, to ensure it keeps up with modern public service delivery models and continues to serve the public interest."[23]

STUC General Secretary Roz Foyer
"Accountability and transparency should be the foundations of our democratic process. The Freedom of Information Scotland Act has played a key role in ensuring public services, bodies and authorities are purposefully scrutinised for the public benefit. As we enter the 20th anniversary of the Act, it is absolutely vital this legislation is reformed to strengthen these foundations. We support the Campaign for Freedom of Information in Scotland to achieve this, ensuring FoI legislation is fit for the modern age, closing legal loopholes that would otherwise restrict transparency and extending access to information to include outsourced organisations and those providing public services."

Patricia Anderson of the Give Them Time Campaign
"Without FoI legislation, there wouldn't have been a Give Them Time Campaign. Our FoIs to local authorities turned parents' individual anecdotes to fact and gave credibility to our claims. They painted an undeniable picture of the widespread postcode lottery of continued nursery funding being allocated to children deferring their p1 start. We wouldn't have successfully changed the law without it."

5. Impact of Proposed Bill

I am consulting on a draft proposal for a bill to improve existing freedom of information legislation including to:

- Deliver on the recommendations of the PAPLS Committee
- Update the law and ensure compliance with human rights law
- Strengthen the enforceable right of access to information

[21] Civil Society Research Project (itspublicknowledge.info)
[22] Bill/Publications – CFoIS
[23] FOI_During_and_After_the_Pandemic_Special_Report.pdf (itspublicknowledge.info)

- Extend FoISA to those bodies delivering public services, services of a public nature and publicly funded services
- Introduce a new statutory role of Freedom of Information Officer (FIO)
- Provide agility and clarity in defining duties however information is stored and transmitted such as using temporary What's App message groups
- Provide a legal duty for proactive publication
- Improve enforcement

Consultation Proposals

I now set out the detail and evidence, on which reforms are necessary.

6. Purpose of Statutory Rights and Duties

FoISA has met the positive aim of providing people and organisations with an enforceable right to access information held by public authorities. Opening up the decision-making process, knowing who and what informs decisions and how our money is spent are fundamental to ensuring a fair and equal society. Recovering from a global pandemic creates particular pressures which make the right to enforce access information rights more precious and critical. In tandem, the right must align with how our democratic institutions operate along with public services and services of a public nature. A reformed and reinvigorated law must be accompanied by practice and culture which promotes transparency and accountability in Scotland.

The Scottish Parliament was established to be "open, accessible and accountable". Clearly FoISA is one delivery vehicle. However, consistently the right is undermined by diversification in how public services are delivered which consequently reduces the types of services and provider covered despite public money continuing to foot the bill. Clarity about the purpose and impact of the right is key to creating a shared understanding of the purpose of FoISA.

Transparency and accountability empower people by improving scrutiny and enabling public participation in informed decision making. Article 1 of the 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', of 1998, known as 'the Aarhus Convention', states:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice on environmental matters in accordance with the provisions of this Convention." [24]

The clear intention is that there will be a general gain to the public by an individual request and that the process improves public participation and access to justice. These principles should also be reflected in and listed as intended outcomes of

[24] Known as The Aarhus Convention cep43e.pdf (unece.org)

FoISA. Therefore, introducing a purpose clause to FoISA will send a clear message about rights, duties and impact which will change organisational culture and practice.

A new purpose clause could be drafted using the following texts:

- Amending the existing, introductory text to FoISA
- Article 1 of the Aarhus Convention
- Adapting existing text from the EISRs on participation in decision-making
- The preamble to Tromsø Convention, the Council of Europe Convention on Access to Official Documents[25] (see section on Tromso Convention below)
- The wording of Article 10 of the European Convention on Human Rights (see section on human rights below)

7. Section 1 - General Entitlement

How FoISA has been delivered varies from what was anticipated. The issue of general entitlement has become a problem. Section 1(3) is a clear example that necessitates legal clarification. The current wording is:

> If the authority—
> (a) requires further information in order to identify and locate the requested information; and
> (b) has told the applicant so (specifying what the requirement for further information is), then, provided that the requirement is **reasonable**, the authority is not obliged to give the requested information until it has the further information.

In practice, this means that instead of pausing the request response, the clock is effectively reset to zero and a new 20-day deadline applies from the date on which the clarification was received. An amendment to FoISA could require the clock to be paused rather than set back to zero, which will speed up responses and ensure requests for clarification cannot be used as a delaying tactic.

8. Section 5 – Defining Information

Section 1 of FoISA gives everyone the right to ask designated Scottish public authorities for information they hold and is entitled to be given it, subject to various provisions and exemptions. Under section 73 of FoISA, requested information "means information recorded in any form". In practice, information has been interpreted by the Commissioner as **not** including documents.[26]

The definition of information in FoISA has proven to be agile over the last twenty years but this consultation is about looking ahead so does the current definition

[25] TROMSØ CONVENTION (coe.int) Ratified by the Council of Europe in December 2020 but the UK has neither signed nor ratified it.
[26] Guidance at RighttoInformationorCopies (1).pdf (itspublicknowledge.info)

require to be amended? For example, to ensure people can access the algorithms used by designated authorities such as in decision-making, internal and external policies, procuring goods and services, the services they provide and employment policies and practices. The rapid development of sophisticated techniques, such as identifying workers' trade union membership, is being increasingly understood as a threat under the European Convention on Human Rights) EHRC).[27]

Why people might want to access this information will be varied but it is useful to note that the GB Equalities and Human Rights Commission has announced it will monitor "the use of artificial intelligence by public bodies … to ensure technologies are not discriminating against people. There is emerging evidence that bias built into algorithms can lead to less favourable treatment of people with protected characteristics such as race and sex. The EHRC has made tackling discrimination in AI a major strand of its new three year strategy".[28]

Under FoISA, an algorithm which is recorded and held by a public body should be considered in the same way as any other information that a public body holds. Section 73 of FOISA makes clear that "information recorded in any form" is covered. For example, an algorithm held by an organisation can be treated in the same way as data which is recorded in a spreadsheet or a formula which is used to generate data within a spreadsheet. There may be issues about the extraction of information if it is particularly complex. The Commissioner has set out his approach that the degree of skill and judgement that must be applied may have a bearing on whether or not information is held, noting there that a public authority will hold information if it "holds the building blocks to generate the information and no complex judgement is required to produce it".[29] The question of whether an algorithm is held may hinge on the complexity of judgement required to extract/produce/provide the information.

Where information is recorded and held, it should be subject to the same considerations by a designated body as any other information and with the same ability to refuse a request if it falls under the scope of an existing exemption such as commercial confidentiality, or if it would cost more than £600 to provide. Each information request will be dealt with on a case by case basis, taking into account the detail and nature of the specific information that had been requested. Any refusal of an information request can be challenged through an internal review and an appeal to the Commissioner.

The definition of information is interrelated with how FoISA works more broadly. Therefore, addressing other issues such as repealing exemptions to disclosure are important to securing information.

9. Section 3 – Scottish Public Authorities

[27] Guide to the Case-Law - Data protection (coe.int)
[28] Equality watchdog takes action to address discrimination in use of artificial intelligence | Equality and Human Rights Commission (equalityhumanrights.com) and Artificial intelligence: meeting the Public Sector Equality Duty (PSED) | Equality and Human Rights Commission (equalityhumanrights.com)
[29] Decision 003/2021),

Over the last 20 years, there have been huge changes in how publicly funded services are delivered due to the creation of new organisations to deliver specific services and an increasing reliance on third and private sector organisations. Sometimes people may not realise there has been a change in provider as the staff, buildings and service appear the same. FoISA has not kept up with this new provider landscape, weakening the public's enforceable right to access information.

In 2018, an Audit Scotland report gave some indication of the range of organisations created by designated bodies to deliver public services. It reported that councils are using an "estimated" 130 arms-length external organisations (ALEOs), which have an annual spend of more than £1.3 billion.[30] ALEOs can be created by public authorities as a joint venture to deliver services and functions under contract. These are everyday service providers. The ALEOs which are specifically designated under FoISA are local authority leisure and culture trusts[31].

Currently, over 10,000 bodies are already designated, the largest category being individual GP practices as most are run as independent businesses and provide services for NHS boards.[32] Instead of the Health Board being "designated" under FoISA, it is the private company contracted to deliver a public service. NHS boards specify which healthcare services they need and then fund the GPs to do this work through an arrangement called the General Medical Services Contract.[33]

Reforming FoISA will provide clarity and consistency. Broadening the definition of public authorities under Section 3 of FoISA to cover publicly funded services is the simplest approach to ensure consistency in designation.

10. Consistency in Coverage

In too many cases, there is a loss of the enforceable FoI rights due to diversification of publicly funded service providers. This was identified as a problem in the Commissioner's report of 2015 'FoI 10 years on: Are the right organisations covered?'.[34] It was also raised by Audit Scotland in its written submission to the PAPLS inquiry.[35]

The Commissioner's report warned that immediate steps must be taken to protect FoI rights from the damage caused by the outsourcing of important public services. Little progress has been made. For example, the 2019 consultation on extending FoISA to care homes run by the private sector using the existing Section 5 power has not been progressed despite the urgency of the situation, as exposed by the

[30] 17th May 2018 Councils' use of arm's-length organisations | Audit Scotland (audit-scotland.gov.uk)
[31] Who can I ask? Scottish Information Commissioner (itspublicknowledge.info)
[32] General Practice - Primary care services - gov.scot (www.gov.scot) and GP Practice Contact Details and List Sizes - Datasets - Scottish Health and Social Care Open Data (nhs.scot)
[33] General Medical Services contract in Scotland: a short guide (audit-scotland.gov.uk) pub. by Audit Scotland 2019
[34] Special Reports (itspublicknowledge.info)
[35] https://archive2021.parliament.scot/S5_Public_Audit/General%20Documents/50_Audit_Scotland.pd

high number of deaths in Scottish care homes during the pandemic.[36] The STUC's report on social care in June 2022 reported:

- Nearly 25% of care homes run by big private providers had at least one complaint upheld against them in 2019/20, compared to 6% of homes not run for profit

- In older people's care homes, staffing resources are 20% worse in the private sector compared to the not-for-profit sector

- Privately owned care homes only spend 58% of their revenue on staffing, compared to 75% in not-for-profit care homes

One of the report's recommendations is that "Freedom of Information legislation should be extended to all care providers in receipt of public funding".[37]

Scotland will soon set up a National Care Service and a Bill has been published by the Scottish Government.[38] In paragraph 3, schedule 2 of the Bill, care boards are added to the list of Scottish public authorities in schedule 1 of FoISA. The bill reads: "This means that they will be subject to the requirements that FoISA places on public bodies, including requirements to respond to information requests and adopt a scheme for the pro-active publication of information they hold."[39] However, this approach avoids designation of the providers of health and social care services. An unequal environment persists: public providers will be individually covered by FoISA but not those from the third and private sectors. Therefore, addressing designation of all providers of social care is a matter to be agreed now to ensure there are consistent standards of transparency and accountability regardless of who delivers the service.[40] If a potential provider does not wish to be covered, they need not tender.

From FoI requests, we can see the extent of private sector contracts in other publicly funded services:

- In 2018/19, NHS Boards in Scotland spent £80.5 million on the private sector[41]

- The total value of all contracts awarded by the Scottish Government during the 2016-2021 parliamentary session was £3,209,786,818[42]

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[36] Coronavirus (COVID-19): adult care homes - additional data - gov.scot (www.gov.scot)
[37] Pg 4 Ibid.
[38] 20th June 2022 National Care Service (Scotland) Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website
[39] Pg 20 of the Explanatory Notes Explanatory Notes accessible (parliament.scot)
[40] The submission appears at CFoIS – The Campaign for Freedom of Information in Scotland
[41] 10th January 2020 NHS Boards expenditure on private sector: FOI release - gov.scot (www.gov.scot)
[42] 15th April 2021 Contracts during 2016-2021 parliamentary sessions: FOI release - gov.scot (www.gov.scot) 5

The PAPLS Committee concluded: "The overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation. The Committee notes that the Scottish Government's consultation on the extension of FoISA invites views on whether to include 'organisations providing services on behalf of the public sector' not already subject to the Act. The Committee agrees that, in principle, organisations that provide public services on behalf of the public sector should be covered by FoISA in a proportionate manner."[43] This view is consistent with the UN Human Rights Committee's General Comment 34 which defines "public bodies" and states that "the designation of such bodies may also include other entities when such entities are carrying out public functions".[44]

In practice there will be operational issues: for example when contracts are awarded, will the designation under FoISA have to be secured by the private company or by the public authority who has issued the contract for services? When the contract ends, people may still make FoI requests for information obtained during the delivery of the contract, so will the duties contained under FoISA remain in perpetuity? Consulting is a key to ensure a workable and reliable system of designation.

Another problem caused by FoISA failing to keep pace with the diversification in the delivery of public services is the growing inconsistency with the Environmental Information (Scotland) Regulations (EISRs), which can apply to private services delivering a public function. For example, the Commissioner ruled that Abellio ScotRail Ltd (ASL) was a Scottish public authority under the EISRs as Scottish Ministers can exert decisive influence on the entity's action during the contract.[45] Now that Scotrail has been nationalised, it is automatically covered by FoISA.

This consultation seeks to address the confused and inconsistent approach to designation which has developed under FoISA despite the Section 5 power which enables adding designated bodies. The onus is on Scottish Ministers to initiate the process and that system has failed. It is accepted that coverage should apply to only those parts of services and contracts which are delivered by the private and third sectors which are paid for by public money or are public in nature. Wording from section 6(5)[46] of the Human Rights Act 1998 and the judgement in the English Court of Appeal London and Quadrant Housing Trust ("the Trust") V Weaver in 2009 offers a useful example.[47]

11. Accountability of the Third Sector

Designating those aspects of third sector organisations which deliver publicly funded services is consistent with the regulatory environment and makes operational sense.

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[43] Paras 7 and 8 PAPLS052020R2.pdf

[44] 'Article 19: Freedoms of Opinion and Expression', para 7 and 18 at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

[45] Decision 044/2021 Decision 044/2021 (itspublicknowledge.info)

[46] Human Rights Act 1998 (legislation.gov.uk)

[47] London & Quadrant Housing Trust v Weaver, R. (On the application of) [2009] EWCA Civ 587 (18 June 2009) (bailii.org)

The types of organisations to be covered usually have charitable status and seek funds from the public and other grant making bodies. Being transparent and accountable is shown to build public trust and make voluntary donations more likely.

The Scottish Charity Regulator (OSCR) requires registered charities to be transparent and accountable. Its report 'Scottish Charity and Public Surveys 2020' contains key findings which demonstrate why coverage under FoISA has advantages for public accountability and building public trust. In total, 58% of the public said knowing how much of a donation goes to the cause and 55% said seeing evidence of what the charity has achieved would make them feel a charity was trustworthy. Being open and accountable is also a crucial aspect of charity governance and plays an important role when seeking funding from funders and the public.

Usefully, OSCR publishes a list of the 300 highest income charities in the Register. This list excludes cross-border charities and is updated daily. In some cases the income figure will include that for the charity and its subsidiary companies rather than the charity alone.[48] The list includes bodies already designated under FoISA such as universities, housing associations and Historic Environment Scotland, and it lists third sector organisations too.

Civil society and third sector organisations also have a role in accessing information so they can serve the public and deliver on their objectives. Protecting civic space, enhancing participation, funding and encouraging activity by civil society is an ongoing priority for the UN which acknowledges the core role of accessing information:

> "Civic space is the environment that enables civil society to play a role in the political, economic and social life of our societies. In particular, civic space allows individuals and groups to contribute to policy-making that affects their lives, including by accessing information, engaging in dialogue, expressing dissent or disagreement, and joining together to express their views."[49]

An organisation's designation under FoISA should be regarded as an asset rather than a liability. However, it should be acknowledged that being designated under FoISA may cause operational problems for some small organisations that receive small amounts of money to deliver services on a shoestring or through volunteers. Therefore, it is proposed that the value of the contract needs to be agreed before designation under FoISA commences. Your views on what that threshold should be are sought.

12. Section 3 – Information Held and Personal Devices

The PAPLS Committee understood that "tools" such as WhatsApp messages and texts used for official business along with private email accounts are covered by FoISA in certain circumstances. However, the Committee decided "there may be

[48] Accessed on 4th July 2022 at OSCR | The 300 highest income charities
[49] OHCHR | ProtectingCivicSpace

merit in the legislation being amended to make explicit what is meant by the term "information."[50] An amendment to section 3 of FoISA could represent a slightly different approach by explicitly defining "information held" as extending to personal devices if the information concerns the delivery of public authority business.

FoISA also covers online meeting software whose use soared during the pandemic. However, ensuring that information requests are answered fully, including the 'held' information on personal devices, such as computers and phones, is a recognised problem, practice and perception across the UK. The UK Information Commissioner's Office (ICO) conducted a yearlong investigation, into practices by Ministers and officials at the Department of Health and Social Care (DHSC) during the pandemic. The investigation found the lack of clear controls and the rapid increase in the use of messaging apps and technologies – such as WhatsApp – had the potential to lead to important information around the government's response to the pandemic being lost or insecurely handled. The ICO concluded there "were real risks to transparency and accountability within government and has now called for a review of practices as well as action to be taken to ensure improvements are made in relation to how officials and Ministers use private correspondence channels moving forward."[51]

In Scotland, there is also concern that private communication channels and information in private email accounts or messaging services are forgotten, overlooked, autodeleted or otherwise not available. This frustrates the FoI process and puts at risk the preservation of official records of decision making. There is also a danger that emails containing personal details are not properly secured in people's personal email accounts. Using private channels of communication does not in itself appear to constitute a breach of either FoISA or data-protection rules as long as it is not prohibited by the designated authority and there are sufficient controls in place to allow information to be accessed.

It is understood that a proper balance needs to be achieved in legislation to ensure all information relevant to a request under section 1 is accessible and disclosed. Public authorities should ensure they have a clear strategy and a transparent 'use your own device' policy (UYOD) agreed with employees. The right to privacy is a human right, protected by Article 8 of the ECHR, and the rights and duties need to be balanced. A clear agreement on UYOD, including the management and deleting of information, password protection and device security, is advisable for all designated bodies. The reform of FoISA is an opportunity to address the issues through clear policies and enforcement.

13. Section 4 - Public Authority with Mixed/No Reserved Functions

The consultation proposes to amend section 4 of FoISA to remove the discretion of Scottish Ministers in designating "any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998)". Such bodies should be automatically covered. For example, this would cover the

[50] Para 16.
[51] 'Behind the Screens' pub July 2022 Behind the Screens (ico.org.uk)

Convention of Scottish Local Authorities (CoSLA), a powerful organisation with a key strategic role:

- Leading reforms that improve public services and save money effectively
- Negotiating fair and affordable pay and workforce conditions on behalf of all councils
- Supporting councils to work together, and deliver shared services that increase their capacity

Whilst each of its member councils are separately designated under FoISA, CoSLA remains outside the regulatory eco-zone despite its pivotal role in strategic decision making which impacts on all of us.

14. Section 5 - Power to Designate

The PAPLS Committee report states:

> "The Committee is concerned at the slow pace by which organisations have been designated under section 5 of the Act. Witnesses commented that even where consultation has taken place, there has been considerable delay before a designation has been made. This suggests that the current legislation is insufficiently nimble to keep pace with the changing nature of the public sector landscape. As such, the Committee considers that changes need to be made to FoISA to address this." (Par 9)

Before making a Section 5 order, Scottish Ministers must consult: every person to whom the order relates, or persons appearing to them to represent such persons and consult other persons they consider appropriate. As a result there is an imbalance in the consultation process. So far, Ministers have appeared to place a greater importance on the views of the bodies proposed for designation rather than stakeholders such as the public, civil society and journalists. This approach is out of step with jurisprudence of the European Court of Human Rights (ECtHR) and should be reformed. The ECtHR has highlighted the role of access to information laws in enabling people to form an opinion and have highlighted the importance of journalists, bloggers and civil society organisations in obtaining information in the public interest which they share widely (see section on human rights below).

In addition, no action has so far been taken on the latest Scottish Government consultation of 2019 to extend designation to, for example, private care homes. In October 2021, the Scottish Government updated the Scottish Parliament on its failure to use the Section 5 power between 2019 and 2021 but advised it "intends to bring forward a policy paper in the near future, setting out the Scottish Ministers' broad approach to the use of their section 5 power over the coming years, drawing on the evidence gathered during our 2019 consultation". The Scottish Government also stated its goal is to "ensure that coverage is robust and reflects changing

patterns of public service delivery".[52] CFoIS believes the proposed amendment to the Section 3 power will help deliver that goal (see section 3 on Scottish Public Authorities).

Designating RSLs under FoISA had been resisted since 2002 but was eventually agreed, along with some of their subsidiaries, and implemented in November 2019. 'Registered Social Landlords and FoI: One Year On', a report by the Commissioner, found 97% of responding organisations were confident in their ability to respond effectively to FoI requests, 84% of requests for information held by organisations resulted in some or all of the requested and 81% were publishing more information due to FoI. The report shows their professionalism in carrying out their legal duties, the appetite for information from the public and the organisational drive to proactively publish information as well as respond to information request.[53] Instead of hampering service delivery, FoI compliance can improve it.

Section 7A of FoISA places a duty on Ministers to report on delivery of the Section 5 duty every two years which can continue to be interrogated and publicised.[54]

15. Section 6 - Publicly Owned Companies

Under Section 6 of FoISA, publicly owned companies by designated authorities are automatically covered. However, research published by CFoIS has demonstrated there is a gap in the recorded number of publicly owned companies and those known to the Commissioner. A CFoIS briefing of 2020 indicated that as many as 99 requests are unknown to the Commissioner.[55] Therefore, a new offence is proposed of failing to carry out duties upon designation.

An amendment is also proposed to address the current practice whereby bodies jointly owned by two or more public authorities are not considered to fall within the scope of FoISA.

16. Section 8 - Requesting Information

Requesting information has become overly bureaucratic by having to provide a name and an address.[56] The intention is to balance the right to privacy under Article 8 of the ECHR with the process of making an information request. The process adopted by the designated body must be "applicant neutral", so if the request is valid processing it without personal details is reasonable and consistent with the Tromsø Convention.[57] At the stage of appeal to the Commissioner, it is understood that

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52 'Freedom of Information (Scotland) Act 2002: report on exercise of section 5 power' pub. 29th October 2021, Paras 23 and 28 Freedom of Information (Scotland) Act 2002: report on exercise of section 5 power - gov.scot (www.gov.scot)

53 Registered Social Landlords 'responding well' to FOI (itspublicknowledge.info)

54 Section 7A of FoISA and duty commenced on 31st October 2015.

55 Briefing-on-Public-Company-Case-Final.pdf (cfois.scot)

56 Section 8 (1)(b) of FoISA & section 4 'Receiving a request for information' in the 'Scottish Ministers' Code of Practice' https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/

57 Section 4(2) and (3) of Tromsø

disclosure of the applicant's identity and address is required to follow the legal process. The proposal is to amend section 8 to balance rights with duties.

17. Role of Freedom of Information Officer (FIO)

Under Section 1 (2) of the Public Records (Scotland) Act, an authority's records management plan must "identify the individual who is responsible for management of the authority's public records, and if different, the individual who is responsible for ensuring compliance with the plan". Designating a person is an approach also adopted under the UK's Data Protection Act and the EU's General Data Protection Regulation (GDPR). The GDPR requires the appointment of a data protection officer (DPO) in public authorities or body, or if it carries out certain types of processing activities. Through the Data Protection Act 2018 (DPA), the GDPR is given further effect and includes the role of Data "Controller".[58] This important line of accountability and independent scrutiny is a model for consistent compliance under FoISA. Legislative proposals at the UK Parliament are noted.[59]

A new role of 'Freedom of Information Officer' is proposed with similar powers and duties to DPOs under Sections 69-71 of the DPA.[60] The proposal is designed to ensure all designated bodies understand the importance of compliance with FoISA and the need to manage risk in terms of legal compliance and public reputation. Strengthening the role is a recognition of the professionalism and expertise needed. In 2022, the Commissioner carried out a survey of Scotland's FoI practitioners who said they would like to seek the profile of FoI and FoI practitioners elevated within organisations.[61]

18. Proactive Publication of Information

In 2017, the Commissioner published the report 'Proactive Publication: time for a rethink?', which considered "how fit for purpose are the publication and dissemination duties set out in FoISA".[62] The PAPLS Committee accepted "the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information". The Committee opted for "a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency".[63] I support these reforms.

A Code of Practice must be based on existing legislation that directly impacts on the efficient delivery of FoISA duties. For example, the Public Records (Scotland) Act 2011, which came into force on the 1st January 2013, provides for designated bodies to ensure all employees, contractors, agents, consultants and other trusted third parties who have access to any information held, are fully aware of and abide by their duties under the Act.[64] Designated bodies must also submit a Records Management Plan (RMP) to be agreed by the Keeper of the Records of

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[58] See section 6 at http://www.legislation.gov.uk/ukpga/2018/12/section/6/enacted

[59] Section 14 of the Data Protection and Digital Information Bill, Part 1 Data Protection and Digital Information Bill - Parliamentary Bills - UK Parliament

[60] Data Protection Act 2018 (legislation.gov.uk)

[61] Practitioner Survey 2022 | Scottish Information Commissioner (itspublicknowledge.info)

[62] Special_Report_Proactive_Publication_2017.pdf (freedominfo.org)

[63] Para 20

[64] Public Records (Scotland) Act 2011

Scotland. The RMP means records are well managed and can therefore be more easily proactively published or accessed if there is an FoI request.

The duty to publish information in the Code operates along with compliance under section 66 of FoISA: "Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it."

Practice has shown that proactive publication should be a legal duty to drive forward the pace and detail of disclosure. The duty can be enhanced by a requirement to maintain a complete disclosure log which may also reduce the need for some FoI requests as the information is already available.

19. Section 10 – Time for Compliance

Section 10 requires designated bodies to respond to an information request "promptly" and within 20 working days, unless "reasonable" clarification is required. The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 permits unequal response times. This amendment has not been progressive. It permits all grant-aided schools and independent special schools to have up to 60 days to respond to cover all "school holidays". At the time, CFoIS opposed the amendment:

> "State schools, provided by Scotland's 32 local authorities, have been covered by FoISA since it became effective on 1 January 2005. When the public's enforceable right to access information was introduced by the Scottish Parliament, an important principle was established: that all bodies covered by FoISA had to follow, equally, the same rules. For example, that all information requests should be answered promptly, and within 20 working days. Now that important principle is under threat as the Scottish Government is proposing a two-tier system for a new category of body covered by FoISA: grant-aided schools and independent special schools."[8]

FoISA is nimble as it requires information requests to be answered within 20 **working** days. This means a closed school has a longer response time. The current law is inadequate in equally protecting the rights of requestors and delivering transparency and accountability in publicly funded services. It also sets a very bad precedent as Scotland increases the number of bodies and functions to be covered by FoISA.

The 60 working day response time also appears discriminatory. Section 69 of FoISA was innovative in introducing the right of children to make information requests.[65] The UN Convention on the Rights of the Child (UNCRC), which will be given domestic effect via the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill[66], provides a number of rights which are undermined by this exception:

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[65] Freedom of Information (Scotland) Act 2002 (legislation.gov.uk)

[66] United Nations Convention on the Rights of the Child Incorporation Scotland Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website

- Article 3(1) requires that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"

- Article 13 (1) states "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice"

- Article 28 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity…[67]

Children need enhanced not reduced rights protection. The preamble of the UNCRC states: "In the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance… the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection…" Therefore FoISA, by delaying the flow of information to requestors from two categories of education providers, undermines the human rights of children, their families, carers and those journalists and civil society organisations who are seeking information in the public interest. It is especially worrying that independent special schools, which educate some of our most vulnerable children, are permitted such extended response times.

The significance and value of information requested under FoISA can diminish over time, so it is important requestors are able to access information to which they are entitled promptly and without delay. The same principle applies to the timescales for internal reviews. In practice, children and their families may wait a combined 120 days before they can complain to the Commissioner, whereas children who attend schools other than grant-aided schools and independent special schools, wait a maximum of 40 working days (if no clarification is sought or fees levied).

20. Meeting Response Times

FoISA requires information requests to be answered "promptly" and not later than 20 working days. For some, the 20 working days appears to be the routine default position rather than a maximum in exceptional cases. The average 'mean' response time for an FoI to the Scottish Government over the last 12 months is even longer – 22 days.[68] Given the legal developments in information management in Scotland and the adoption of the digitisation of many services, consideration should be given as to whether a 20 working days deadline is excessive.

It is useful to note the Minister for Parliamentary Business and Veterans' evidence to the PAPLS Committee on 19th December 2019, where he suggested that:

[67] OHCHR | Convention on the Rights of the Child

[68] See FOI response times: FOI release, July 2022 at FOI response times: FOI release - gov.scot (www.gov.scot)

> "If we were to bring in an amendment that saw the clock stopped at midnight on 24 December and restarted at midnight on 3 January, that would provide that once-a year break, when everyone tends to be on holiday anyway. If that had been in place this year, it would have added only three days to the process, which is not very long. I accept it would add to the wait for receiving responses, but I think that, on balance, that would be worth doing. That would be the only time in the year when I would suggest a break of that nature, and I hope that it is a suggestion that the committee might give some consideration to."[69]

This idea seems innocuous, but there is no need to change the law on 'working days' as the term is quite clear. Particular information may be considered time-sensitive, but if the statistics are automatically gathered daily they should be readily available and promptly disclosed. Better still, they should be proactively published to avoid the need for FoISA to be engaged at all. The law currently caters for precisely the scenario presented by the Minister where no change is necessary. The precedent would be unhelpful and may lead to further timed breaks in FoISA operating.

21. Records Management and Operational Matters

FoISA established a legal framework to provide the public with an enforceable right, but the process can seem legalistic and complicated in delivery, particularly given the amount of case law that has been developed over the last 18 years. Lord Wallace of Tankerness, who piloted the Freedom of Information (Scotland) Bill through Parliament, observed "just how technical and legalistic much of this has become". That has been partly influenced by an approach that treats all cases as if they may end up in court. As so few people ever have the resources to go there, it seems a disproportionate way of working.

FoISA also depends on good records management so that a designated authority can be sure what information is held within an authority. Cuts in staff and resources weaken the framework in which FoISA operates. The report from the Commissioner, published in May 2022, into the Scottish Government's compliance with the Improvement Action Plan agreed in 2018 following the Level Three intervention[70] also identified a weakness in records management citing "evidence of widespread failures to comply with records management requirements when handling FoI requests".[71] The Commissioner concludes that "while significant improvements have been made in a number of areas, further work is required if FoI performance is to be raised and sustained." The Bill to reform FoISA should consider what other measures are required to ensure a simple process underpinned by efficient records management.

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[69] Pg 8 Official Report http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12437&mode=pdf

[70] Interventions activity | Scottish Information Commissioner (itspublicknowledge.info)

[71] Scottish Government Intervention Progress Report published | Scottish Information Commissioner (itspublicknowledge.info)

Reforming FoISA will join up and strengthen the impact of existing legislation designed to promote transparency and accountability. Legislation that has a direct impact on what should be recorded and proactively published includes:

- The Public Records (Scotland) Act 2011[72]
- The Re-use of Public Sector Information Regulations 2015[73]
- Copyright, Designs and Patents Act 1988[74]
- The Procurement Reform (Scotland) Act 2015
- The Public Contracts (Scotland) Regulations 2012[75]

22. Costs to Requestors

The charging policy permitted under FoISA is set out in The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.[76] It is anticipated the issue of costs to requestors will arise during the reform of FoISA. A separate parliamentary process can be initiated on charging which accounts for cost of living increases to the current fee regime.

23. Funding of the Scottish Information Commissioner

Schedule 2 of FoISA makes provision for funding the work of the Commissioner. Whilst there is no need to change the legislation, ensuring the legal changes proposed in this consultation are effective necessitates an increase in budget. The Scottish Parliament has the power to agree the increase in the budget and consequently ensure the legal reforms make a positive impact.

FoISA already requires, before the start of each financial year, the Commissioner to prepare "proposals for the use of resources and expenditure during the year (a 'budget') and, by such date as the Parliamentary corporation determines, send the budget to the Parliamentary corporation for approval".[77] The Commissioner may "in the course of a financial year, prepare a revised budget for the remainder of the year and send it to the Parliamentary corporation for approval". As the Commissioner "must ensure" the resources "will be used economically, efficiently and effectively", it will be useful for the Parliament to take evidence from the Commissioner as to what budget is considered reasonable in all the

[72] Available at http://www.legislation.gov.uk/asp/2011/12/contents
[73] Available at http://www.legislation.gov.uk/uksi/2015/1415/contents/made
[74] Available at http://www.legislation.gov.uk/ukpga/1988/48/contents
[75] See Scottish Government website at https://www2.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/procurementlegislationfaqs
[76] The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (legislation.gov.uk)
[77] At Section 4A of Schedule 2

circumstances.[78] Sufficient funding for the Commissioner is imperative for the effective functioning of a reformed FoISA.

24. Section 2 - Effect of Exemptions

FoISA permits numerous exemptions to disclosure under section 2, which are subject to a public interest test and which are "absolute". In Part 2 of FoISA, 17 exemptions are listed and that number needs to be reduced. Your views are welcome on which ones should be deleted in sections 26-41. Given the purpose of FoISA, and requirement for the Scottish Parliament to comply with human rights law and the Sustainable Development Goals (SDGs), each listed exemption under FoISA should now be subject to a public interest test.

25. Section 31 - National Security and Defence

The exemption to disclosure of information, under section 31, concerns national security and defence. I propose to repeal section 31 (2) and (3) as the power of Scottish Ministers to issue a certificate "safeguarding national security" is no longer required. For example, despite Glasgow hosting COP26 in November 2021, no certificate certifying the need for an exemption was issued in the build up to, or during the international conference attended by global leaders. Given the security needed to protect world leaders in Glasgow was delivered without invoking section 31, this provision is now redundant. Also, defence is a matter reserved to the UK Government.

26. Section 33 - Commercial Interests and the Economy

Section 33 needs to be reviewed given the recommendation from the PAPLS Committee as it "considers that the Scottish Government should consult on amending FoISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.

Confidentiality clauses, also known as non-disclosure agreements or NDAs, are provisions which seek to prohibit the disclosure of information on the basis that commercially sensitive business information needs to be protected. Therefore, greater clarity is needed on when uses of such clauses are appropriate.

27. Section 41 – Communications with Her Majesty etc. and Honours

The death of Queen Elizabeth II necessitates this section to be amended to reflect the ascension of King Charles II.

Section 41 of FoISA permits information to be treated as exempt Information if it

[78] For information on the SPCB's responsibilities for property, services and staff go to Scottish Parliamentary Corporate Body | Scottish Parliament Website

relates to:

> (a) communications with Her Majesty (now His Majesty), with other members of the Royal Family or with the Royal Household; or
> (b) the exercise by Her Majesty of Her prerogative of honour

Under section 2 of FoISA, a decision on whether or not to apply the exemption or to disclose the requested information is subject to a public interest test which provides flexibility on a case by cases basis. A designated body has to decide whether in all the circumstances of the case the public interest in disclosing the information is not outweighed by applying an exemption. There is no equivalent exception under the EISRs.

The matter has been considered in some depth by the Finance Committee of the Scottish Parliament in its Stage 1 Report on the Freedom of Information (Amendment) (Scotland) Bill in 2012. For example, the Scottish Information Commissioner highlighted an Upper Tribunal (Administrative Appeals Chamber) ruling on requests for correspondence between Prince Charles and several UK government departments. The Tribunal's ruling required the disclosure of much of the withheld information demonstrating that there are circumstances where it will be in the public interest for relevant information to be disclosed.'[79]

However, the FoISA exemption to disclosure remains problematic and has not kept up to date with wider policy considerations and legislative change. As has been reported, the Queen and now the King have been able to lobby the Scottish Government on the impact of proposed legislation. For example, it has been reported that the "King may have lobbied ministers on emergency plan to help tenants as it could affect his Balmoral estate"[80] and "the Scottish government had given the Queen advanced access to at least 67 parliamentary bills deemed to affect her public powers, private property or personal interests".[81] It is unclear why this arcane custom was inherited from Westminster given the Scottish Parliament was established to be "open, accessible and accountable". Removing this exemption makes sense given that all regulated lobbying is subject to the Lobbying (Scotland) Act 2016 which came into force on 12th March 2018. The Act was introduced with the intention of bringing greater openness and transparency around lobbying MSPs and Scottish Government Ministers and requires certain organisations to record on the public Lobbying Register any instances of regulated lobbying.[82]

28. Section 48 - When Application Excluded

Section 48 requires reform as it provides no appeal to the Commissioner in respect of an information request to a procurator fiscal or the Lord Advocate when there is a

[79] fir-12-06w.pdf (parliament.scot) Pages 1-9
[80] King Charles allowed to vet proposed Scottish rent freeze law | King Charles III | The Guardian 4th October 2022
[81] Revealed: Queen vetted 67 laws before Scottish parliament could pass them | Queen Elizabeth II | The Guardian 28th July 2021
[82] Home - Lobbying Register

dispute about the extent that the information requested concerns criminal prosecution and investigations of deaths in Scotland. There is no equivalent provision in the Freedom of Information Act 2000 (FoIA) relating to the Crown Prosecution Service (CPS) or limiting the powers of the UK ICO. The ICO investigates and issues decisions in respect of the CPS. Therefore, section 48 is proposed for deletion to provide consistency in enforceable rights across reserved and devolved FoI rights.

29. Section 51 - Enforcement Notices

Section 51 requires reform. The Commissioner, in his submission to PAPLS Committee Inquiry, recommended that Parliament extends "the scope of enforcement notices to include failures to comply with the Codes of Practice, either immediately, or after a practice recommendation has not been actioned".[83]

30. Section 52 - Exception from duty to comply with certain notices

Section 52 requires reform to remove the Ministerial veto to a decision notice or enforcement notice which is given to the Scottish Administration on certain types of information. Currently this section undermines the purpose of FoISA.

31. The right to Appeal Against the Commissioner's Decisions

If you disagree with the decisions of the Commissioner an appeal may be made, on a point of law, to the Court of Session. Critics point out that under FoISA there is no realistic prospect of appealing decisions as the court of session costs are extremely high.[84] As a result there have been very few appeals in Scotland but several have been successful by designated bodies as well as the public.[85]

The Scottish Government has considered appealing[86] and pursued one appeal in 2020-21: "The Scottish Government appealed a decision ordering it to disclose details of contact between the First Minister and Mr Alex Salmond. The appeal was restricted to one paragraph in a document. The Commissioner chose not to defend the appeal after being satisfied that (following information being provided to him after the decision was issued), disclosing the paragraph could, as a result of jigsaw identification, identify a complainer in the criminal case against Mr Salmond. This would have constituted a contempt of court."[87]

Critics complain that, given the practical hurdles, decisions of the Commissioner are absolute since the public cannot afford to seek an appeal to an independent court to review the decision. There is a human rights aspect too, as under Article 13 of the ECHR people have the "right to an effective remedy" without discrimination (Article

[83] Para 27(ii) 19_Scottish_Information_Commissioner.pdf (parliament.scot)
[84] Rates at Court of Session Fees (scotcourts.gov.uk)
[85] APPEAL BY GLASGOW CITY COUNCIL v. SCOTTISH INFORMATION COMMISSIONER (scotcourts.gov.uk)
[86] Scottish Information Commissioner decision on independence referendum legal advice: response - gov.scot (www.gov.scot)
[87] Commissioner's Annual Report p.g. 19 SIC_Annual_Report_and_Accounts_2020-21.pdf (itspublicknowledge.info)

14). Cases cannot be pursued to the European Court of Human Rights until all domestic remedies have been exhausted. This is a pernicious issue that affects many parts of the legal process in Scotland.

The argument is that an alternative approach should be adopted so requestors who are unhappy with the Commissioner's decision can appeal if the costs and complexity of the process are considerably reduced.

Without knowing the merits of each case, it is useful to note the Commissioner has reported that "65% of our decisions found wholly or partially in favour of the requester"[88] so as many as 35% who could be dissatisfied and who would welcome the legal change. The new appeal process could also test the Commissioner's approach and reasoning in interpretation of FoISA. Currently, appeals to the Commissioner are from: public and other (81%), media (8%) and private/commercial enterprise (5%).[89]

However, there is a concern about the unintended consequences of introducing what appears to be a progressive measure but which in practice may create a device used by designated bodies to delay publication of (sensitive/embarrassing) information. This consultation allows for the issues to be discussed and considered.[90]

The matter was addressed by the Commissioner in his evidence to PAPLS inquiry:

> "7. FOISA's appeal route works well. If a requester remains unhappy with the authority's handling of a request after it has conducted an internal review, the requester can make an "application for decision", commonly known as an "appeal", to my office. After a full investigation, I can issue a decision notice which can be challenged, on a point of law only, by either party in the Court of Session.
>
> 8. In the judicial context, the role of the Commissioner has been recognised as that of a specialist tribunal, whose decisions and performance of delicate balancing exercises under the legislation should be accorded "a considerable degree of deference".
>
> 9. The appeal process is comparatively quick and produces greater certainty for requesters and authorities when compared to the tribunal system (where a Commissioner's decision can be challenged, on a point of fact or law, to a tribunal, whose judgment is then appealable to a higher court). Such is the appeal process under the UK Freedom of Information Act 2000 (FOIA). Additional layers of appeal tribunals create more complexity in the system, an extra layer of cost, and it takes longer for the requester and authority to get to

[88] Pg 22 Ibid
[89] P.g. 16 Ibid
[90] The CFoIS Bill received a submission from Alistair Sloan (Alistair Sloan | Faculty of Advocates) which appears on its website 2022 – CFoIS (scroll towards the bottom of the page)

> the final outcome. Particularly where the significance or value of information requested under FOI can diminish over time, it is important that requesters are able to access information to which they are entitled without undue delay, even if the authority appeals the decision.
>
> 10. These disadvantages of the UK system were recognised by the Independent Commission on FOI (the Burns Commission) in its 2016 report6 into FOIA. The report actually recommended removing the right to appeal to the First Tier Tribunal. The Burns Commission found that in the vast majority of appeals (87% in 2014) it was the requester who appealed, and 79% of those were dismissed or withdrawn, leading it to conclude that a considerable amount of resources and judicial time was taken up with "unmeritorious appeals". When giving evidence to the Burns Commission, the UK Information Commissioner's Office (ICO) pointed to the Scottish system as offering an example of how FOIA appeals could become more efficient."[91]

The PAPLS Inquiry Report did not take up this issue in its recommendations, but I am keen to receive your views.

31. Section 63 - Disclosure of information to Scottish Public Services Ombudsman or to Information Commissioner

The purpose of amending Section 63 is to increase the flow of information between regulators. According to Audit Scotland: "Public audit plays a key role in providing assurance that public money is well managed and in providing independent and objective evidence on the performance of public bodies… We want the public interest, trust and confidence to be at the heart of Audit Scotland's work."[92] Compliance with FoISA must be integrated with the annual audit, given the investment of public money in delivering and maintaining a robust FoI regime.

Audit Scotland provides the Auditor General and the Accounts Commission with the services they need. It gives "independent assurance to the people of Scotland that public money is spent properly, efficiently and effectively" across 223 public bodies including: the Scottish Police Authority, Scottish Fire and Rescue Service, and Scottish Water, 23 NHS bodies, 32 councils, 72 joint boards and committees (including 30 health integration boards) and 21 further education colleges.[93] Audit Scotland could include compliance with and administration of FoISA as set out in the Commissioner's reports in the overall audit of individual organisation's performance, as well as in thematic reports and the issuing of independent assurance to the people of Scotland on the spend of public money.

Increasing the flow of information between the Commissioner and regulators may also assist the investigative role of the Scottish Public Services Ombudsman (SPSO), as the final stage for complaints about public service organisations in

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[91] paras 7-10 19_Scottish_Information_Commissioner.pdf (parliament.scot)
[92] Audit quality | Audit Scotland (audit-scotland.gov.uk)
[93] Audit Scotland | Audit Scotland (audit-scotland.gov.uk)

Scotland.[94] If the complaint is upheld, the organisation is required to implement the recommendations by a specific date and these are checked by the Complaints Reviewer. In making recommendations and evaluating implementation, the SPSO may benefit from accessing reports from the Commissioner about the designated body's compliance with FoISA. For example the frequency of appeals to the Commissioner to access information about a service delivery which matches the complaint adjudicated by the SPSO.

Amending this section will give effect to the PAPLS Committee conclusion that designated bodies need to understand "FoI as an essential element of public service provision and ensure that it is resourced accordingly."[95] In 2017 independent polling for the Commissioner reported 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.[96] Therefore, FoI is not an add-on but intrinsic to the delivery of public services.

32. Section 64 – Concealing 'held' information on private devices

The Commissioner's intervention in the Scottish Government's performance, begun in 2017, is ongoing.[97] The involvement of Special Advisers (SPADs) in the handling of FoI requests has already been investigated. The use of modern communication apps on devices such as mobile phones raises issues about the procedures for handling information that should be disclosed but is held on private computers and mobile devices. Balancing privacy with duties is key to effective reform. An amendment is necessary to prohibit the concealment of information on private devices. Such an offence provides clarity and serves as a deterrent.

33. Potential Impacts of the Proposed Bill

Procurement

The Scottish Government and state-owned bodies frequently purchase goods and services from external providers. The impacts of public sector procurement spend on Scottish output, GDP and FTE employment represents around 4% of the total Scottish economy. This public purchasing is funded through taxpayers' money and, therefore, public rules apply to ensure its efficiency and transparency. These rules set the requirements that suppliers of goods or services must satisfy to compete for public contracts.

Section 8(2) of the Procurement Reform (Scotland) Act 2014 states that "a contracting authority must also comply with the sustainable procurement duty" when carrying out a public tender process. Section 9(1)(i) of the Act defines this duty as requiring that a contracting authority must consider how the procurement process

[94] Home | SPSO
[95] Para 26 of PAPLS Inquiry Report
[96] http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx
[97] Intervention_Report_-_Scottish_Government_201702106.pdf and Intervention 201702016 Scottish Government (itspublicknowledge.info)

could improve the “economic, social, and environmental wellbeing of the authority’s area”.

There is therefore a duty incumbent on contracting authorities to assess this prior to the awarding of the tender during the design of the procurement process. How can it be ensured the sustainable procurement duty is being taken seriously? Currently the Environmental Information Scotland Regulations (EISRs) enable enforceable, information requests and a degree of accountability to enable scrutiny.

However, if a requestor is looking for information on economic and social wellbeing, that can fit into devolved powers and organisations covered by FoISA and to which this consultation is relevant. There are two main actors in the procurement process: the contracting authority, i.e. the public body in the question, and the private actor that wins the contract. Contracting authorities should already be covered by existing FoI law as they are designated public bodies.

It should be possible for the public to find out any requirements of economic and social wellbeing on the private actor, by requesting information on how the contracting authority developed these requirements. By requesting information the public can find out how the contracting authority assessed the suitability of the winning bid in relation to economic and social wellbeing requirements. Following on from this, reforming FoISA would ensure it is possible to request information from the private provider to assess the actual impact of awarding the contract to that provider from an economic and social wellbeing perspective.

Currently, as has been highlighted, there is a disparity in access to information. If a service is carried out by a public authority, such information is available. These reforms would enable an applicant, and consequently the wider public, to conclude whether the duty of economic and social wellbeing procurement is being taken seriously, and to know if public money is being spent in a way which benefits an area’s economic and social and environmental wellbeing.

It is also worth noting that Scotland must abide by international obligations. In 2021, the UK joined the World Trade Organisation’s Agreement on Government Procurement (GPA) in 2021. The EU is also a member of the GPA, so the UK, and Scotland, already applied the rules set out in the GPA, which include ensuring local goods and services are not favoured in public procurement. Following Brexit, responsibility for some aspects of procurement policy previously set at EU level has fallen to Scottish Ministers, including responsibility for calculating the thresholds at which GPA procurement rules apply within WTO guidelines, so it is particularly important that FoISA is updated to reflect these changes.

See also the section on human rights and the UNGPs which cover procurement too.

Sustainability

The proposed Bill will enhance Scotland's ability to comply with the Sustainable Development Goals (SDGs).[98] In Scotland, the SDGs are given effect through the National Performance Framework (NPF). The proposed reforms will integrate FoISA with SDG 16:

- Peace, justice, and strong institutions (16.3)
- Transparent, accountable institutions (16.6)
- Responsive, inclusive, participatory, and representative decision-making (16.7)
- And public access to information (16.10)[99]

UNESCO is the custodian of SDG indicator 16.10.2 on access to information. In 2019, the indicator changed from a Tier 11 to Tier 1 in recognition of its status as a top-level way for assessing progress on SDG implementation, as a basic human right and a key tool for promoting the rule of law. It is an enabler for sustainable development in areas such as health, environment, addressing poverty and fighting corruption. UNESCO has been designated by the UN General Assembly as the custodian agency for global monitoring of Indicator 16.10.2 in respect of proactive and reactive publication of information.[100] Monitoring compliance and identifying any dilution of commitments and reductions in practice remains ongoing at a global level.[101] The UK reports on progress and delivery.[102] Scotland needs to be aware of and incorporate developments at this global level.

Equalities

The duties set out in FoISA and proposed in this consultation must be delivered in a way that complies with the Equality Act 2010, which protects people against discrimination based on protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Public Sector Equality Duty will also apply to some of the 10,000+ bodies already designated under FoISA. For example, reasonable adjustment to ensure a person with sight loss can read the response to a request for information.

FoISA was drafted to ensure equal outcomes, specifically requiring:

- The applicant making information requests to be treated equally – Part 1

[98] Scotland and the sustainable development goals: a national review to drive action - gov.scot (www.gov.scot)
[99] SDG Indicators — SDG Indicators (un.org) and Sustainable Development Goals | National Performance Framework
[100] Access to information gets an upgrade in SDG indicators framework (unesco.org)
[101] Freedom of Information Advocates Network – Measuring SDG 16.10.2 (foiadvocates.net) and Political Integrity - Global Data Barometer Handbook
[102] Indicator 16.10.2 - Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information - U.K. Indicators For The Sustainable Development Goals (sdgdata.gov.uk)

- A duty on designated bodies to provide advice and assistance to requestors before and after requests are submitted – Section 10

- A specific right to children to make a request – Section 69

However, these requirements are undermined by the current provision of services which affect certain groups. For example, providers of disability services are overwhelmingly in the private or charity sectors and not subject to FoI.

It is also important these key elements are strengthened through reform and that is one of the reasons an FoI Officer is proposed in each of the 10,000+ designated bodies so there is a clear understanding of rights and duties, and staff have the expertise to comply. For example, it is a matter of record that some authorities are treating requestors differently despite the obligation to be applicant neutral.[103]

The consultation proposes all designated bodies are treated equally by repealing the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016. As a result, all grant-aided schools and independent special schools will have to respond to requests “promptly” and within 20 working days. The impact on children and their families will be that equal response times will be introduced regardless of the school provider.

Polling undertaken by the Commissioner in 2022 found 63% of people said they are "fully aware" or "moderately aware" of the rights to ask for information from public bodies. This is down from 71% when the same question was asked in 2019, although "fully aware" is unchanged at 21%. The only age group to change by more than two percentage points in terms of knowledge of FoISA was 16-34, down from 87% to 83%. Older people are more likely to have asked for information in writing (38-50% compared to 25-27% in younger groups) and by other means; young adults are much less likely than others to look on authority websites regularly and twice as likely to look elsewhere online.[104] Therefore, the delivery of FoISA has to be agile to engage with all ages equally.

Requests for and disclosure of information under FoISA have followed the increasing adoption of digital devices and communication used by the public, public authorities and government. However, the impact of a “digital first” approach is unequal. In 2021, a report published by five charities called for Scotland to provide universal, “sensory literate” services. The report invited government and public authorities to think about the barriers faced by people affected by deafness, those with a sight loss and people who have a dual sensory loss and look at how they engage with and work with them to meet their needs.[105] It is useful to note that in the Commissioner’s 2022 polling, when asked how they would seek info about a public body, 59% said

[103] See Level 4 intervention report from the Commissioner – accessed 18th August 2022 Interventions activity | Scottish Information Commissioner (itspublicknowledge.info) & PracticeRecommendationAberdeenshireCouncil.pdf (itspublicknowledge.info)
[104] 2022-Public-Awareness-Research-summary-of-results.pdf (itspublicknowledge.info)
[105] Mental Health, Sensory Loss and Human Rights – the Transition Report calling for Sensory Literate Services – deafscotland

they would look at the authority's website; 56% said they would use internet search; 45% said they would send an email or letter.

The 2021 Digital Strategy for Scotland, "A Changing Nation: How Scotland Will Thrive In A Digital World', has three key themes: People and Place, A Strong Digital Economy and Digital Government and Services. Key programmes and outcomes within these themes include focusing on improving broadband connectivity, continuing to bring the digitally excluded online, increasing digital skills, and ensuring government services are designed around the people who use them.[106] The delivery of FoISA's reform must be integrated with this wider context of digital and communication inclusion.

Human Rights

Reforming FoISA will positively impact on the equal enjoyment of human rights and the incorporation of UN ratified treaties in the forthcoming human rights bill for Scotland. Section 57 of the Scotland Act 1998 requires the Scottish Government to comply with the European Convention on Human Rights (ECHR). Article 10 of the ECHR is the right to form an opinion by receiving and imparting information and ideas. Case law indicates that Article 10 applies when requests for information are in the public interest which is defined by four tests:

- The purpose of the information request
- The nature of the information sought
- The particular role of the seeker of the information in "receiving and imparting" it to the public (such as campaigning organisations, journalists and Bloggers)
- Whether the information is ready and available[107]

In Magyar Helsinki Bizottsag v Hungary, the Grand Chamber of the European Court of Human Rights (ECtHRs), the public interest of the requesting non-government organisation (NGO) was key. The ECtHR was "satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest" and the "refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest" so there was a breach of Article 10 of the ECHR. It further stated that acting on and for the public interest is a purpose of a non-governmental organisation (NGO).[108]

The ECtHRs quoted from the case of Claude Reyes et al. v. Chile (judgment of 19 September 2006) at the Inter-American Court which found:

> "The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it,

[106] Digital Launch of new Digital Strategy for Scotland - Digital (blogs.gov.scot)

[107] For example, the Grand Chamber decision in the case of on Magyar Helsinki Bizottság v. Hungary *(*Application no. 18030/11*)* 8th November 2016 http://hudoc.echr.coe.int/eng?i=001-167828 and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30th January 2020 at http://hudoc.echr.coe.int/eng?i=001-200435

[108] Judgement at paras 164-165 and at 197 at European Court of Human Rights at http://hudoc.echr.coe.int/eng?i=001-167828

> and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State." [109]

Therefore, being able to share the information disclosed is part of the process of ensuring public accountability and organisational transparency. However, there is concern in Scotland at statements included in FoI responses appearing to warn people about the consequences of sharing information. For people not used to dealing with legal matters, alerts that they must comply with 'copyright law' and the 'Open Government Licence' are concerning and may stifle information sharing. Greater attention is needed on reassuring the public that it is ok to share the information disclosed and that may be through a public information campaign.

It is also useful to note that under Section 12 of the Human Rights Act 1998, a court "must have particular regard to the importance of" the ECHR right to freedom of expression and, to journalistic, literary or artistic material which is in the public interest to be published. The public interest in accessing and sharing information should be central to FoISA reform. The right will be balanced with the right to privacy which can vary how the information is released rather than censoring it.[110]
When reforming FoISA, section 29 of the Scotland Act 1998 is engaged which requires legislation to be compliant with the ECHR.

Article 19 of the UN's International Covenant on Civil and Political Rights provides for the right and the freedom to form an opinion by seeking, receiving and imparting information and ideas.[111] The Scottish Government has promised an integrated Human Rights Bill for Scotland that will give domestic effect to certain UN treaties. Application will be restricted to devolved matters and bodies. FoISA already provides the legal mechanism to enforce this human right, but it does need reformed to ensure compliance with the ECHR and be fit for purpose in a modern democracy.

Guiding Principles on Business and Human Rights (UNGPs)
Reforming FoISA will positively impact on Scotland's delivery of the UN's 31 'Guiding Principles on Business and Human Rights' (UNGPs), setting out the state's duty to protect human rights and the corporate responsibility to respect human rights.[112] Remedies must also be available to prevent and address human rights abuses. Transparency and accountability are key to the delivery of the UNGPs such as numbers 8, 15(b) and 31(e).

The UNGPS provide an integrated framework for making Scotland, fairer and more accountable. To put the global agenda in a domestic context, the Scottish Parliament hosted a conference in October 2010 to discuss these issues, which was attended by over 80 countries as well as UN staff.

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[109] Ibid, para 61
[110] Human Rights Act 1998 (legislation.gov.uk)
[111] Treaty available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[112] At GuidingPrinciplesBusinessHR_EN.pdf (ohchr.org)

The UK was the first country to adopt a 'National Action Plan on Business and Human Rights', in 2013, based on the UNGPs, and has periodically reviewed and updated commitments such as in May 2020.[113] There is no separate Scottish document despite a published baseline assessment.[114] However, the Scottish Government is already committed to delivering the UNGPs.[115] The UNGPs apply to public procurement, including numbers 4, 5 and 6, which have implications for this Bill as well as the development of a national care service for Scotland.

Open Government Partnership (OGP)

Scotland's voluntary 'Open Government Partnership' initiative (OGP)[116] has agreed a third National Action Plan which has a "continued focus on Financial Transparency, Participation and Open Data".[117] The OGP is clear "there is more to do" and will work to "ensuring that decision-making is open and accessible; that we recognise the value of, listen to, and act on perspectives outside of government; and that we enable meaningful public scrutiny." It focuses on: Financial Transparency, Climate Change, Health and Social Care, Participation, and Data and Digital. This voluntary initiative is welcome, but it cannot replace the legal framework on enforceable rights and duties which FoISA provides, and which was itself prompted by an inadequate voluntary regime.

The 2001 'Explanatory Notes' which accompanied FoISA made the case for a statutory and enforceable right and explained that: "The Code of Practice on Access to Scottish Executive Information is a non-statutory scheme which requires the Scottish Executive and its associated agencies to make certain information available to the public and to release information in response to specific requests. The Bill creates a statutory right of access and provides for a more extensive scheme for making information publicly available, covering a much wider range of public authorities…"[118]

The governments of Estonia, Korea, Morocco, Nigeria and the United Kingdom have been elected to serve a three-year term on the OGP Steering Committee, beginning on October 1 2021.[119] The political enthusiasm for the OGP regime provides an opportunity to explicitly link it with the statutory duty to proactively disclose information under Sections 23 and 24 of FoISA. Making information available which people want and providing a disclosure log of answers to information requests may reduce the number of individual requests for information. OGP may assist with

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[113] At UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK (www.gov.uk)
[114] Advertised in May 2015 at National Baseline Assessment on Business and Human Rights (government-online.net) and progress at Business and Human Rights – Scotland's National Action Plan for Human Rights (snaprights.info)
[115] Human rights - gov.scot (www.gov.scot)
[116] Open Government Partnership Open Government Partnership - Scottish Government Blog (blogs.gov.scot) & Improving public services: Open Government Partnership - gov.scot (www.gov.scot)
[117] Action plan – Scotland, United Kingdom, 2021 – 2025 (opengovpartnership.org)
[118] b36s1en.pdf (parliament.scot) para 5, published 27th September 2001
[119] 2021 Government Steering Committee Elections (opengovpartnership.org)

regulation as it can provide evidence of the designated body's commitment to proactive publication of the type of information the public wants.

Designated bodies should proactively publish information, including the nine categories set out in the Commissioner's Model Publication Scheme (MPS) such as:

- Class 3: How we take decisions and what we have decided Information about the decisions we take, how we make decisions and how we involve others

- Class 4: What we spend and how we spend it Information about our strategy for, and management of, financial resources (in sufficient detail to explain how we plan to spend public money and what has actually been spent)[120]

Proactive publication needs to be improved and OGP can aid that process.

Tromsø Convention

Reforming FoISA can ensure compliance with the Council of Europe Convention on Access to Official Documents[121], known as the Tromsø Convention. It has not yet been signed or ratified by the UK Government and that process is a reserved matter. FoISA's reform will benefit from provisions in the Tromsø Convention including:

- The preamble sets a useful context for rights: "Considering that exercise of a right to access to official documents: (i) provides a source of information for the public; (ii) helps the public to form an opinion on the state of society and on public authorities; (iii) fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy"[122]

- Article 10 is instructive on pro-active publication: "At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest"

The Tromsø Convention has been ratified by countries, including Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, Norway, the Republic of Moldova, Sweden and Ukraine. It has also been signed by Spain.[123]

34. Resource Implications

The Scottish Executive's Financial Memorandum which accompanied the FoISA bill of 2001 required designated bodies to "absorb within planned resources" the costs of implementation. Therefore, the centrality of delivering openness and accountability was understood to be part of business as usual for public bodies. In 2001, it was

[120] FoISA MPS at The Model Publication Scheme (itspublicknowledge.info)
[121] Council of Europe Convention on Access to Official Documents
[122] Text and Explanatory Notes at 16809f5c1a (coe.int)
[123] Spain signs the Tromsø Convention on Access to Official Documents – Access Info Europe (access-info.org)

estimated the cost to public funds of implementing the proposals in the Bill "might fall within the range of £2.5 million to £4.8 million per year".[124] It was acknowledged "that many Scottish public authorities already handle, within existing resources, large volumes of requests for information – and make a great amount of information available to the public proactively as well as in response to requests – whether or not under a formal regime. Many public authorities will therefore have existing structures in place to support the provision of information under the Bill"[125]

The report 'Registered Social Landlords and FoI: One Year On', published in March 2021 by the Commissioner, confirmed RSLs have not been overwhelmed by FoI, with 57% reporting a 'small' impact on staff workload, and 95% reporting 24 requests or fewer during 2020. Most organisations used existing staffing and structures to resource FoI, with only 8% of organisations employing new staff.

Bodies proposed for designation under FoISA in the private sector may be routinely answering environmental information requests from the public and they do communicate and share information with their shareholders, banks, auditors and regulators such as the UK ICO and the Health and Safety Executive. Also, they will have been supplying information to the public bodies that contracted services or goods from them. The cost of individual organisation's liability to meet the infrastructure of proactive publication and compliance, such as meeting statutory timescales and providing advice and assistance, is a business decision that may stop bodies tendering for contracts. Alternatively, as part of the contract there is an element included by the public authority to pay for compliance with FoISA.

Third sector organisations will only be covered by FoISA if they meet the criteria e.g. to deliver publicly funded services of a certain value. Due diligence will have been undertaken on whether they have the skill set and capacity to undertake a contract and the tendering process will also mean that they have the correct system in place to be trusted with public money e.g. compliance with GDPR and health and safety. Similarly, if they choose to conduct business with the public sector, they must establish the correct infrastructure to ensure compliance with FoISA. An alternative approach is to replicate the model adopted by some RSLs and contract with a central organisation rather than provide an in-house service.

Third sector organisations already proactively publish a lot of information about their work to build public trust and to encourage donations[126] to sustain the positive impact they make.[127] They also have a range of statutory duties such as reporting to OSCR if they are a charity or a SCIO, and compliance with data protection law to the UK ICO. Therefore, they must have existing structures in place able to support the provision of information.

[124] Para 208 and 212 at b36s1en.pdf (parliament.scot)
[125] Para 210 Ibid
[126] 25,413 charities are registered with OSCR OSCR | Home – accessed 26th November 2021
[127] Chartered Institute of Fundraising - Scotland (ciof.org.uk)

Under section 13 of FoISA, there is a provision to charge for disclosure in specific circumstances. The fee charged is determined by regulations. Charging happens comparatively rarely. The regulations, agreed in 2004, were subject to the negative resolution procedure. Updating the charges would be separate from this consultation.

The Commissioner is an independent office holder appointed by the Scottish Parliament who promotes and enforces FoISA. The Commissioner will merit an increase in budget to cover the new functions as well as investigative and enforcement powers proposed.

Some public authorities will save money as they will be no longer liable for answering FoI request relating to contracted out services to ALEOs, third and private sector providers.

35. Conclusion

From the above evidence and examples, I hope you too are persuaded that FoISA needs to be reformed. However, I also appreciate that people and organisations may have different views and I welcome your responses so we have a full picture of how to deliver transparency, accountability and scrutiny in Scotland. I now invite you to comment on my proposals.

36. Questions

You are required to complete questions 1-5. Please complete the remaining parts of the consultation that are of interest. You do not need to answer all the questions.

SECTION 1 - ABOUT YOU

1**. Are you responding as:**

☐ an individual – in which case go to Q2A
⦸ on behalf of an organisation? – in which case go to Q2B

2A. Which of the following best describes you? (If you are a professional or academic whose experience or expertise is not relevant to the proposal, please choose "Member of the public")

☐ Politician (MSP/MP/Peer/MEP/Councillor)
☐ Professional with experience in a relevant subject
☐ Academic with expertise in a relevant subject
☐ Member of the public

2B. Please select the category which best describes your organisation:

☐ Public sector body (Scottish/UK Government/Government agency, local authority, NDPB)

☐ Commercial organisation (company, business)
☐ Representative organisation (trade union, professional association)
⦸ Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
☐ Other (e.g. club, local group, group of individuals, etc.)

3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

⦸ I am content for this response to be attributed to me or my organisation
☐ I would like this response to be anonymous (the response may be published, but no name)
☐ I would like this response to be confidential (no part of the response to be published)

Name/organisation: Voluntary Health Scotland

4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

Contact details: kimberley.somerside@vhscotland.org.uk

Note: All answers to the questions may be published (unless your response is “not for publication”).

Aim and approach

5. Which of the following best expresses your view of the proposed Bill?

☐ Fully supportive
☐ Partially supportive
☐ Neutral (neither support nor oppose)
⦸ Partially opposed
☐ Fully opposed
☐ Unsure

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.

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.

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. We are concerned about the lack of clarity in some of these proposals around definitions, anticipated impact and the complex funding environment the sector is operating in. The proposals could have unintended consequences for voluntary organisations depending on their size, remit, delivery model and/or funding mechanisms. These potential impacts have not been sufficiently considered which leaves us with significant concerns and questions about the proposals.

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. We have encouraged our members to respond to this consultation and the Scottish Government's with their own experiences if they have capacity to. We ran our draft position by our membership before submitting it.

Detail of the proposal

6. Which of the following best expresses your view on the private sector being designated under FoISA if it is publicly funded and the service is of a public nature?

- ☐ Fully supportive
- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

Please explain the reasons for your response.

See page 13-17 for reference.

7. Which of the following best expresses your view on the third/charitable/ voluntary sector being designated under FoISA if it is publicly funded and the service is of a public nature?

- ☐ Fully supportive

- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ⊘ Partially opposed
- ☐ Fully opposed
- ☐ Unsure

We agree with the SCVO that whether policymakers should designate voluntary organisations under FoI that are publicly funded and deliver services of a public nature requires a more nuanced response than yes or no.

The voluntary sector is diverse, at Voluntary Health Scotland our network includes a range of medium and large condition specific organisations, smaller community organisations, as well as social enterprises. Many of our members work in service delivery and provide direct support for communities and people. The definition of public service is not clear in these proposals, 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.

Additionally, from the consultation it is not clear whether the proposals would apply solely to contracts, service level agreements or grants. The third sector funding landscape is complicated, and many organisations are operating on one-to-three year contracts and/or short term grants. We believe a more substantial impact assessment needs to be carried out to better understand how the legislation would operate within these short-term funding cycles and for different types of voluntary organisations and funding models. Additionally, we need to better understand the demands this would place on third sector organisations, as we note from the PAPLS 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.

Ultimately, it is very challenging to gauge the impact of the proposals, especially given this is an area of legislation the voluntary sector is not well versed in engaging with. We agree with the SCVO that, wherever possible, contracting authorities should retain the ultimate responsibility for managing FoI requests relating to contracted public services.

8. Which of the following best expresses your view on the creation of a new statutory officer within designated authorities – a Freedom of Information Officer?

- ☐ Fully supportive
- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

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. It would likely be a significant ask of organisations to create a new officer or add duties onto existing employees' responsibilities. Any inclusion of 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.

Significant resources would 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 need to better understand the demands this would place on third sector organisations. 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.

Voluntary organisations are not in the position to bear the costs of extending freedom of information. The sector is already facing a significant funding crisis, with many organisations having to reduce their service provision despite increasing demand for support. Without sustainable additional resources voluntary organisations will inevitably have to direct resources away from front-line delivery. This is especially worrying in the context of organisations supporting the delivery of health and social care services and preventative activity.

9. Which of the following best expresses your view on creating a statutory duty to publish information?

- ☐ Fully supportive
- ☐ Partially supportive

- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

Please explain the reasons for your response.

See page 21 for reference.

10. Which of the following best expresses your view on reducing exemptions under FoISA?

- ☐ Fully supportive
- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

Please explain the reasons for your response.

See page 26 for reference.

11. Which of the following best expresses your view on amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services?

- ☐ Fully supportive
- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

Please explain the reasons for your response.

See page 26 for reference.

12. Which of the following best expresses your view on FoISA being updated to ensure aspects of procurement policy set by the Scottish Government are covered?

- ☐ Fully supportive
- ☐ Partially supportive
- ☐ Neutral (neither support nor oppose)
- ☐ Partially opposed
- ☐ Fully opposed
- ⦸ Unsure

See page 31 for reference.

Financial implications

13. Any new law can have a financial impact which would affect individuals businesses, the public sector, or others. Do you think any cost is outweighed by the public interest benefit?

☐ Yes
☐ No
⦸ Not Sure

As outlined in previous questions we are concerned about regulatory costs to third sector and voluntary organisations, especially given the current funding crisis and cost of living pressures. Smaller and medium organisations, and organisations primarily run by volunteers could find the regulatory costs unmanageable.

We were disappointed to read in the consultation the proposal that "if a potential provider does not wish to be covered, they need not tender." Although this was in the context of private providers of social care, it isn't made clear whether the same sentiment is held relating to third sector organisations. We share SCVO's concern that unfunded and unsupported demands placed on organisations will likely lead to third sector organisations not tendering for public service contracts. We hope this is not the intention of the proposal, as the third sector often provides local community-based expertise and support which would leave a significant gap in public service provision if they are locked out of tendering.

Equalities

14. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?

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, which could have implications for the individuals in society who are supported by the third sector.

In particular we share SCVO's concerns about vexatious requests and the burden on organisations to prove a request is vexatious. We note the SCVO example of how corporate entities could use FOI to slow down processes to impede progress and abuse avenues to access information to misrepresent

and undermine the credibility of voluntary sector research, policies, and activities.

We would also have concerns about organisations working to protect marginalised communities who could be subject to malicious information requests. In their response, SCVO also noted the particular difficulties and misrepresentations that have recently affected organisations campaigning on equalities issues, in particular relating to LGBTQ+ people. We appreciate FOI does not cover personal and private information, but targeted campaigns of vexatious requests could have significant resource implications for organisations working in these spaces. Voluntary organisations need certainty that people and organisations cannot use FoI nefariously to bring undue burden to their organisations, their staff and volunteers, and other organisations supporting people with protected characteristics.

Sustainability

15. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?

Similarly to our response to question 13, we believe strengthening people's access to information rights would have a positive impact, but we have significant concerns about the impact some of the current proposals might have on the sustainability of the voluntary sector.

General

16. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

In general, we believe there needs to be a more clarity on the definitions, details of designation and potential impacts on the third sector. Our member organisations are not entirely clear about the information gap that is trying to be filled through the current proposals. 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 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.

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.

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.

Thank You

37. How to Respond to This Consultation

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Format of responses

If possible, please submit your response electronically – preferably in a MS Word document. Please keep formatting of this document to a minimum.

Please make clear whether you are responding as an individual (in a personal capacity) or on behalf of a group or organisation. If you are responding as an individual, you may wish to explain briefly what relevant expertise or experience you have. If you are responding on behalf of an organisation, you may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

Please include with your response contact details (e-mail if possible, or telephone or postal address) so we can contact you if there is any query about your response.

Where to send responses

Responses prepared electronically should be sent by e-mail to:

clarkkatyfoi@parliament.scot

Responses prepared in hard copy should be sent by post to:

Katy Clark MSP
The Scottish Parliament
Edinburgh
EH99 1SP

Deadline for responses

All responses should be received no later than **2nd February 2023.** Please let me know in advance of this deadline if you anticipate difficulties meeting it.

38. How responses are handled

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received (other than "not for publication" responses) on my website at katyclark.org. Published, responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published.

Where responses include content considered to be offensive, defamatory or irrelevant, my office may contact you to agree changes to the content or may edit the content itself and publish a redacted version.

I expect to prepare a summary of responses that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member's Bill). The summary may cite, or quote from, your response (unless it is "not for publication") and may name you as a respondent to the consultation (unless your response is anonymous).

If I lodge a final proposal, I will be obliged to provide copies of responses (other than confidential responses) to the Scottish Parliament's Information Centre (SPICe). SPICe may make responses available to MSPs or staff on request.

Requests for anonymity or for responses not to be published

If you wish your response to be treated as **anonymous,** please state this clearly. You still need to supply your name, but if the response is treated as anonymous, only an anonymised version will be published or provided to SPICe. If you request anonymity, it is your responsibility to ensure that the content of your response does not allow you to be identified.

If you wish your response to be treated as "not for publication" please state this clearly. If the response is treated as confidential it will not be published or provided to SPICe.

Other exceptions to publication

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory content. If I think your response contains such content, it may be returned to you with an invitation to provide a justification for the content or to edit or remove it. Alternatively, I may publish it with the content edited or removed, or I may disregard the response and destroy it.

Data Protection

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or ask for your response not to be published. I will not publish your signature or personal contact information.

Information on how I process your personal data is set out in my **privacy notice**, which can be found here. Please confirm that you have read the privacy notice by ticking the box below.

⦸ I confirm that I have read and understood the **privacy notice** (referred to above) to this consultation which explains how my personal data will be used.

If a respondent is under 12 years of age, I will need to contact you to ask your parent or guardian to confirm to us that they are happy for you to send us your views.

☐ Please tick this box if you are under 12 years of age.

I may also edit any part of your response which I think could identify a third party unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the FoISA. So if the information you send me is requested by third parties the Scottish Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, potentially even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FoI. Further information about Freedom of Information can be found at: www.itspublicknowledge.info.