



Scottish Information
Commissioner
it's public knowledge

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Dear Convener

Call for Evidence: Procurement Reform (Scotland) Bill

I refer to the Infrastructure and Capital Investment Committee's call for evidence on the Procurement Reform (Scotland) Bill.

I would like to thank the Committee for agreeing to extend the deadline for providing submissions.

I responded to the Scottish Government's consultation on the Procurement Reform Bill late last year. Regrettably, my comments do not appear to have been picked up in the draft Bill and I have significant concerns regarding the operation of sections 28 and 29 as currently drafted.

As Scottish Information Commissioner, I am responsible for the promotion and enforcement of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). Both give individuals (including the persons listed in section 28(1) of the Bill) the right to ask for any recorded information held by a Scottish public authority. The request can be made at any time (unlike section 28(2)(b) of the Bill).

The right to be given information under FOISA and the EIRs is subject to a number of provisions. For example, information may be withheld if disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (section 33(1)(b) of FOISA) or disclosing the information would be a breach of confidentiality (section 36(2) of FOISA).

Therefore, there already exists in Scotland a means by which individuals can request recorded information held by Scottish public authorities in relation to a procurement exercise regulated by the Bill.

I appreciate and would advocate making information available in the way set out in the draft Bill is good practice. I am not suggesting that the provisions contained in sections 28 and 29 of the Bill should be removed, especially as making information available in this way is good practice and, in any event, the rights in section 28(4) are wider than the right to access recorded information. But I would strongly recommend



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that consideration is given to bringing these provisions (in sections 28 and 29) more into line with the existing provisions in FOISA and the EIRs.

This could be done by making the following changes:

- (i) Section 28(2) – making the format of a request the same as that required for making an information request under section 8 of FOISA.
- (ii) Section 28(3) – changing the period during which a response should be made from 30 days to 20 working days, in line with section 10 of FOISA.
- (iii) Section 29 – amending the reasons for withholding information so that they tie in with the exemptions in section 35 (Law enforcement) and section 33 (Commercial interests and the economy) of FOISA. A public interest test should also be added to these provisions in line with section 2(1)(b) of FOISA, so that, even where an exemption applies, the information should be disclosed if, on balance, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

It may also be useful to introduce a new provision into section 28, which makes it clear that the rights to obtain information under the Bill are without prejudice to the right to make a request for recorded information under FOISA or the EIRs.

My suggestions are made with the intention of making sure that Scotland has an integrated approach to access to information legislation and that there is consistency in the approach. Unless there is clarity as to which regime is being used, this part of the Bill as drafted is very likely to lead to confusion, on the part of both public authorities and requesters who are used to dealing with information requests under freedom of information legislation.

I would, of course, be very happy to discuss my concerns with the Committee in more detail.

Yours sincerely

Rosemary Agnew
Scottish Information Commissioner