

Response from the Scottish Information Commissioner, submitted to

National Care Service for Scotland consultation

29 October 2021

All questions not answered, with exception of the below:

DATA PROTECTION AND FREEDOM OF INFORMATION

Q13: Are there alternative approaches that would address current gaps in social care data and information, and ensure a consistent approach for the flow of data and information across the National Care Service? Please add any comments in the text box below:

As Scottish Information Commissioner my role is to promote and enforce freedom of information (FOI) in Scotland, including the Freedom of Information (Scotland) Act 2002 (FOISA). I welcome that the consultation paper (p39) clarifies that both the National Care Service and Community Health and Social Care Boards would be subject to FOISA, as Integration Joint Boards are at present. This will provide an important mechanism to deliver transparency regarding the work of bodies with such wide-ranging functions, directly in the public interest.

I note that the consultation paper also references separate potential consultation work regarding extension of FOISA to private and third sector organisations that deliver health and social care functions (under section 5 of FOISA to extend FOI requirements to bodies that either exercise functions of a public nature or have a contract with a Scottish public authority to provide a service which is a function of that authority).

As the Scottish Government is aware, in my response to its Freedom of Information coverage extension consultation, I made the case for the expansion of FOI, using the powers contained in section 5 of FOISA, to cover organisations that provide health and social care services to the public. I outlined how I considered such services to be functions of a public nature, and explained why I considered that any such extension should not be limited solely to those bodies carrying out such services under contract with Scottish public authorities. The value of such a right to information from the care sector, and the impact of the lack of a right to information from many providers, has been emphasised during the recent pandemic.

This consultation currently envisions the extension of FOISA to care providers as being a separate issue to be dealt with through the section 5 consultation process, rather than as part of this consultation. I am concerned that such an approach risks a failure to appreciate and capitalise on the value of information rights in this area, considering it as an “add-on”, rather than as an essential part of system design and regulation. I am also concerned that it risks the creation of delays in any designation, as it seems unlikely that a separate section 5 designation process would be examined in detail until the shape of the new national care service is known, necessarily causing delays.

I suggest that the right to information should be a key aspect to be considered in any rights-based approach to care. It is a crucial enabler in the stated aims of involving and empowering people to engage in the decisions that affect them, achieving consistency and accountability, and building a system with human rights at its heart.

To truly ensure transformation of Scotland’s care services, and to realise the vision stated in the consultation paper of ensuring that in future “transparency is paramount”, due consideration should be given to whether FOI should be extended to care services (regardless of provider) alongside - and

indeed I would suggest as part of - the primary legislation scrutiny process of any Bill introducing such transformation. This would enable information rights to be an inherent part of the design of the “significant cultural and system change” envisioned, rather than as part of separate discussions under s5 designations of FOISA. It would also enable consideration by the Scottish Parliament of the extent to which FOISA should be extended to care services in whichever ways they are provided, holistically alongside consideration of all other changes and reforms proposed, as opposed to taking a piecemeal approach, determined via statutory instrument at a (potentially much) later date.

About you

- Name: **Daren Fitzhenry**
- Email: **enquiries@itspublicknowledge.info**
- Are you responding as an individual or an organisation: **Organisation**
- Organisation: **Scottish Information Commissioner**
- The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference: **Publish response with name**
- We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise? **Yes**
- I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy: **I consent**