Scottish Information Commissioner
www.itspublicknowledge.info

Freedom of Information (Reform) Scotland Bill Proposal

Consultation response from the Scottish Information Commissioner

Q1: Are you responding as an individual or on behalf of an organisation?

On behalf of an organisation

Q2b: Which category best describes your organisation?

Public sector body

Q3: Attribution

I am content for this response to attributed to me or my organisation.

Name of organisation:

Daren Fitzhenry
Scottish Information Commissioner

Q4: Contact details

Daren Fitzhenry
Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610
enquiries@itspublicknowledge.info

Q5a: Which of the following best expresses your view of the proposed bill?

- Fully supportive
- **Partially supportive [Selected]**
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q5b: Please explain the reasons for your response

Firstly, I am grateful for the opportunity to comment on the proposed Bill to reform the Freedom of Information (Scotland) Act 2002 (FOISA). As the regulator responsible for both promoting and enforcing FOI law in Scotland, I have throughout my term of office made clear my view that, while FOISA works well in many ways, attention is required in a number of areas if we are to ensure that our twenty-year-old law remains fit-for-purpose for the society it serves; both now and into the future.

A number of the legislative proposals contained in the draft Bill would address and resolve some of my current concerns around FOI. I fully support, for example, the proposal that the duty to proactively publish information be refreshed, replacing the current poorly-understood and commonly misinterpreted 'publication scheme' duty with a modern, flexible Code of Practice on Publication, enabling the vitally important duty to publish to keep pace with both technological changes and public expectations.

Likewise, I support many other proposals contained in the consultation document, including the proposal to remove the Ministerial veto in section 52 of FOISA, and the proposal to prevent the use of confidentiality clauses to prohibit the disclosure of information shared between contractors providing public services and public bodies. I will further set out my views on these matters later in this response.

However, I am concerned that some of the proposals contained in the consultation document will have unintended and adverse consequences for both the effective operation of FOI law in Scotland and the enforceability of its provisions.

I will set out two of my key concerns below. I also provide my views on other aspects of the proposals in later sections of this consultation response.

Concern 1: the impact and enforceability of a 'gateway' approach to FOI extension

There is clearly a need for FOI law to be extended to apply to a wider range of bodies which carry out public functions or provide public services. It is also clear that the current mechanism to address new ways of public service delivery through FOI extension is not working as intended in practice.

As the Bill proposal sets out, there have been significant changes in how publicly funded services are delivered over the twenty years since FOISA was passed by the Scottish Parliament. Over that time the public sector landscape has changed considerably, with an ever-expanding range of public services being outsourced for delivery under contract by third party organisations, rather than directly by public bodies themselves. There appears to be no sign of the slowing of this pace, with recent reporting revealing e.g. the expanding number of care home places being provided by

private contractors[1], the spending on private ambulance services by health boards[2] and work that is underway in a local authority to identify external organisations that could be brought in to replace in-house council services[3]. This situation has, in many cases, contributed to a reduction or removal of the FOI rights of service-users, while also creating regional and structural inequalities in the rights people have to access information about the public services provided on their behalf.

Polling by my office has also repeatedly shown strong public support for FOI extension in such circumstances, with more than 90% of respondents to our 2022 polling[4] indicating they felt it was important for a range of bodies delivering services under contract - including providers of health and social care services and bodies carrying out large scale building and maintenance projects – to be subject to FOI law.

Designation: the current 'section 5' mechanism

While FOISA contains a mechanism under section 5 through which the Scottish Ministers can designate bodies which appear to Ministers to be exercising public functions or providing public services, it is clear that the current application of this mechanism is not being utilised in an effective, swift or agile way in practice.

Despite assurances given when the FOI Bill was debated in 2002 that the section 5 power would be put to regular, active and ongoing use[5], and various expressions by Ministers of their intention to use the power[6], we have seen only three such orders made since FOI law came into effect in 2005. The first, which designated local authority culture and leisure trusts, came more than eight years after the introduction of FOI in 2013. A further order designated secure accommodation providers, independent special schools and private prisons in 2016 while, in 2019, a third order extended FOI to registered social landlords and their subsidiaries.

We currently await the publication of a discussion paper by the Scottish Government on the further extension of FOI to bodies that provide services on behalf of the public sector, following an initial consultation in 2019. While progress has undoubtedly been delayed by the pandemic, it is nevertheless now almost three years since this consultation period closed. With no discussion paper yet issued, and with that paper to be followed by a further consultation with specific bodies considered for designation, it seems unlikely that any further order will be issued in the near future.

In the meantime, individuals accessing the services under consideration will continue to find themselves with no statutory right to information about day-to-day performance from those services, and no right of appeal when things go wrong. The specific impact of this information gap was starkly exposed during the coronavirus pandemic, when the public interest in scrutinising the decisions taken and services provided by health and social care contractors responsible for looking after vulnerable people was considerably heightened.

It is my view, therefore, that the section 5 mechanism, as it is currently utilised, does not serve as an effective and responsive mechanism through which FOI rights can keep pace with changing

---

[1] https://theferret.scot/care-home-census-reveals-dominance-private-sector/

[2] https://www.glasgowlive.co.uk/news/glasgow-nhs-spends-more-3million-26213177

[3] https://www.pressandjournal.co.uk/fp/news/aberdeen-aberdeenshire/5306275/aberdeen-council-public-services-bbc/

[4] https://www.itspublicknowledge.info/public-awareness-of-foi

[5] Jim Wallace MSP, Minister for Justice, Freedom of Information (Scotland) Bill; Stage 3 debate, Scottish Parliament, Wednesday 24 April 2002.

[6] E.g. Nicola Sturgeon, 11th Annual Holyrood FOI Conference, December 2013; Graeme Dey, Public Audit and Post Legislative Scrutiny Committee, 19 December 2019.

patterns in the delivery of public services. It is clear, therefore, that the current model requires revision.

Benefits of the 'section 5' mechanism

There are, however, also a number of positive features of the 'section 5' model. The approach of designation via an order under section 5 allows a degree of consideration to be applied to the sectors or services identified for designation, enabling dialogue to take place, specific issues or concerns to be explored and addressed and, importantly, the range of bodies falling within the scope of each order to be identified. This approach has a number of advantages which support the effective promotion, delivery, regulation and enforcement of FOI rights. For example, it enables:

- Lists of bodies subject to each order to be created and maintained
- Bodies to be directly notified prior to designation and provided with guidance, resources and support to enable them to meet their FOI duties effectively
- Bodies to be provided with information on statutory or regulatory changes, updates to guidance or codes of practice, or with information on training events and new resources
- Certainty for service-users, regulatory bodies and the organisations themselves around whether or not organisations are subject to FOI law

For the 2019 designation of registered social landlords, for example, my office was able to capitalise on the above advantages: providing ongoing support, advice and guidance for organisations as they prepared for FOI designation. This work helped to ensure that, by the time of implementation in November 2019, 98% of affected organisations felt that they were prepared to meet their FOI duties. One year on, 97% of organisations reported that they were confident in their ability to respond to FOI requests effectively, bringing clear advantages for both organisations and service users[7].

Registered social landlords have continued to meet their FOI duties effectively with, for example, organisations reporting that they responded to 93% of requests on time across 2021, with 90% of requests resulting in the disclosure of some or all of the requested information.

The value of a 'listed' approach to designation has also been recognised by the Irish Office of the Information Commissioner in its recent submission to a consultation on the reform of the Irish FOI law, with the Commissioner calling for a return to a 'listed' approach to designation following the introduction of a 'criteria' approach in 2014. As the Irish Commissioner notes:

> *"Under the previous legislation, there was no dispute as to whether an entity was, or was not, a public body. The matter was clear.*
>
> *[...]*
>
> *"The specific listing of FOI bodies in the Act or subsequently in Regulations, similar to the situation under the FOI Act 1997, would ensure legal certainty and avoid disputes and delays."*[8]

[7] https://www.itspublicknowledge.info/registered-social-landlords-responding-well-to-foi

[8] https://www.oic.ie/publications/special-reports/OIC-Submission-on-FOI-Act-Review.pdf

Concerns around the introduction of a 'gateway' clause

The consultation document contains a proposal to introduce what is, in effect, a 'gateway' clause to FOISA, through the broadening of the definition of Scottish public authorities under section 3 of FOISA to include "publicly funded services"[9]. It goes on to set out that organisations would only be covered in relation to those parts of services and contracts which are "paid for by public money or are public in nature"[10].

My principal concerns around the introduction of such a clause relate to the lack of certainty, the lack of manageability and lack of control that such a clause would bring. In this respect, I share the views of the Irish Information Commissioner.

While much will depend on the specific terms of any such 'gateway' clause, a broad, wide-ranging clause that extends FOI to all bodies that deliver such services would create a number of challenges. There would, for example, be:

- *Challenges for organisations* - e.g. in terms of knowing with certainty whether they were covered by the legislation or to what extent the services or elements of services they provide were covered. Where there was uncertainty, organisations would be unsure whether they should be complying with other duties under FOISA, such as publishing information in accordance with FOI law or providing guidance on making FOI requests. A wide-ranging gateway clause would, in effect, require organisations to reach their own initial conclusions on whether or not FOI law applies to their organisation, with an associated likelihood that organisations which deliver similar services may reach very different conclusions. There may also be issues with organisations being made aware of the legislation and its impact on them.

- *Challenges for individuals* – e.g. in terms of knowing with certainly which organisations are covered by the legislation and whether they have statutory rights to access information from those organisations. This may be compounded where there is also uncertainty on the part of the organisation, leading to gaps in the information provided about FOI, potential disputes with organisations, and issues such as failures to provide requesters with notification of their appeal rights in circumstances where requests are refused.

- *Challenges for my office* – e.g. in terms of knowing with certainty which organisations are covered and to what extent. Also, in terms of advising the public and organisations about who is covered; in terms of providing targeted advice, support and guidance to help organisations prepare for FOI; and in terms of the investigatory resource required to determine whether or not individual organisations are covered in the early stages of appeals. There would also be an impact from this (often protracted and time-consuming) work on the progression of other work, and a substantial increase in the likelihood of legal challenge to determinations of the Commissioner. All of this will result in a substantial increase in required funding and related resource requirements, both of which will be needed so my office can operate efficiently and effectively as a trusted regulator in the face of such change. I look forward to engaging in further discussions around the resource impact of any changes when the business and regulatory impact of the Bill is being considered.

[9] Consultation document page 14

[10] Consultation document page 16

Additional challenges may also arise if, for example, the Bill includes a 'minimal value' clause, through which only services of a certain value fall within scope. Such a clause may create challenges in terms of tracking and monitoring funding levels to determine which organisations fall within scope, with services in receipt of funding at levels close to the threshold potentially dropping in and out of coverage as levels fluctuate.

It is possible to see the real-world effect of some of these challenges in relation to certain aspects of Scotland's FOI law currently, albeit at a much-reduced level. For example, the Environmental Information (Scotland) Regulations 2004 (the EIRs), which sit alongside FOISA and govern access to environmental information, contain a limited 'gateway' element in the provisions under regulation 2(1). That regulation sets out that, alongside bodies which are e.g. listed under schedule 1 of FOISA or designated under section 5 of that Act, the EIRs will also apply to bodies which are "under the control" of a Scottish public authority and have public responsibilities, provide public services or exercise functions of a public nature relating to the environment. Even now, however, some eighteen years after the EIRs came into effect, there is a substantial degree of uncertainty around the scope and reach of these provisions, with certainty generally only arising following an appeal to the Commissioner by someone with enough awareness and understanding of the EIRs to know that they may apply in that specific case.

Indeed, in the eighteen years since the EIRs came into effect, we have, at the time of writing, only seen cases relating to six organisations where we have been able, following investigation, to conclude that the bodies fall within the scope of this clause. These cases involved three Salmon Fishery Boards (Lochaber, Argyll and Wester Ross), a (former) association responsible for the management of local shellfish fishing[11] and, prior to their subsequent designation under FOI, Abellio Scotrail Ltd[12] (designated as Scotrail Ltd) and Dunbritton Housing Association Ltd[13].

Likewise, an equivalent provision exists in relation to publicly-owned companies which are covered by FOI (and the EIRs) by virtue of section 6 of FOISA, in circumstances where they are wholly-owned by one or more public bodies. However, and as noted in the Bill proposal document, there is no single comprehensive list of such bodies, while issues relating to the identification and tracking of such bodies - complicated by the frequency of their creation and dissolution, and changes in status resulting from changes in ownership - cause ongoing practical barriers to the creation and maintenance of such a list.

It is my concern that the challenges which are evident from these current, low-scale examples, would be substantially amplified and exacerbated through the introduction of a wide-ranging gateway clause which applied to all bodies responsible for the delivery of public services in Scotland.

I am concerned that such challenges would have a significant detrimental impact on the practical application of FOI in Scotland, on the ability of my office to enforce FOI rights, and on public confidence in the reliability, efficiency and effectiveness of Scotland's FOI regime.

While I am, therefore, strongly in favour of measures to extend FOISA to non-public bodies that carry out public functions or services, I am not convinced that a wide-ranging, amorphous 'gateway' clause is the most effective route.

---

[11] https://www.itspublicknowledge.info/decision-0972011

[12] https://www.itspublicknowledge.info/decision-0442021

[13] https://www.itspublicknowledge.info/decision-1182014

It is vital to ensure that FOI rights keep pace with changes to public services in an effective, manageable way that protects the reputation and effectiveness of Scotland's FOI laws.

Exploring alternative routes

In summary, my view is that the key issue with the current process of designation under section 5 stems from the slow and tentative pace at which the designation process currently moves and, linked to this, its dependence on the appetite and resource to make such Orders. However, the benefit of this approach is that it is clear, measured, enforceable and understandable and, in most cases, enables most stakeholders to be made aware of the changes being made and the impact for them.

On the other hand, my key concern regarding a gateway clause approach is that, while it would seek to extend FOI law to an extensive range of organisations through a single sweeping measure, such a wide-ranging action would lack clarity for both organisations and the public, while also creating real and significant challenges in relation to monitoring, tracking, management and enforcement, alongside a corresponding requirement for greater resource and a likely increase in costly litigation. As set out above, all of this is will result in a substantial increase in required funding and related resource requirements, both of which will be needed for my office to seek to meet the challenges of such a significant change.

My preference, therefore, would be for the proposed legislation to take an alternate route to FOI extension, which serves to address concerns around ensuring that FOI remains fit-for-purpose, while also ensuring that FOI rights are extended in ways where changes are clear to organisations, understandable to the public and enforceable by the Commissioner.

An appropriate alternative route would be for the Scottish Parliament to consider reform of Schedule 1 to FOISA as it progresses the FOISA Reform Bill. The Scottish Parliament could, through this route, make revisions to Schedule 1, with a review clause enabling this to be revisited periodically. This would enable the Scottish Parliament to consider the specific bodies and / or categories of bodies which should be listed under FOISA in respect of specific public functions, and amend Schedule 1 to FOISA, introducing additional Parts to Schedule 1 where appropriate.

Such a measure would help to ensure that steps to extend FOISA were considered, proportionate and manageable, while also enabling decisions on the designation of such bodies to be informed principally by the Scottish Parliament's consideration of the public interest in this important area.

Under such an approach we might see bodies that provide care services and social work services under section 46 of the Public Services Reform (Scotland) Act 2010 added to Schedule 1 to FOISA e.g. by virtue of the addition of a 'Part 8' to Schedule 1 which covers such services. Such a measure would see a wide range of organisations delivering important public services, including those relating to care homes, child care, adoption and fostering and social work, brought within the scope of FOISA. Similarly, organisations providing services under Private Finance Initiative, Public Private Partnership and Non-Profit Distribution contractual arrangements could be brought within scope via this approach.

This approach could also introduce a timetabled date of commencement for different services or types of service, enabling FOISA to be extended in a manageable and proportionate way, with appropriate training, guidance and advice provided to each sector (and, importantly, service-users and the wider public) in advance of each commencement date. This approach would also enable the relevant business and regulatory impact assessments to be appropriately considered, including ensuring that my office has the required funding and resource in place at the date of commencement.

There is, of course, precedent for public authorities' coverage to be timetabled in this way, not least in relation to FOISA where, prior to coming fully into effect, a statutory instrument was passed which introduced a staggered timetable for the adoption of the FOI publication scheme duty for different types of authorities[14].

I would also suggest that the FOISA Reform Bill could introduce a requirement for the Scottish Parliament to consider further updates to Schedule 1 on a periodic basis – e.g. every five years. Such a measure would enable the Parliament to not only ensure FOISA is fit-for-purpose for the society it serves today, but also that it can be 'future-proofed' through regular reviews to meet future challenges.

Such an approach, set by the Scottish Parliament and driven by the public interest, would enable momentum to be maintained in an ever-changing public sector environment, while also ensuring that measures to extend FOI can be appropriately considered, implemented, tracked, promoted and enforced. This approach would also help to ensure that the stability, effectiveness and reputation of Scotland's FOI regime can be protected for the future.

Under this approach the Scottish Ministers would, of course, also retain their power to amend Schedule 1 under section 4 and to designate additional organisations under section 5 of FOISA, as appropriate.

I would, of course, be happy to explore the proposals set out in this response in more detail at any time that is convenient.

Concern 2: removal of the requirement for requesters to provide a name and address

Section 8 of FOISA sets out the requirements for a request to be considered as 'valid' under FOI, including that it is in a recordable form, that it includes the name and address of the requester, and that it describes the information requested.

Section 16 of the consultation document expresses the view that FOI has become "overly bureaucratic" by having to provide a name and address and suggests the removal of this requirement, the result of which would mean that information requests could, if the requester chose, be made on a wholly anonymous basis. The consultation document does not provide detail on how the current requirement might be replaced, but this would, it can be assumed, involve either allowing the use of wholly anonymised / pseudonymised addresses, or through enabling requests to be made without any contact details (name or address) with responses in such circumstances published online – e.g. through a disclosure log.

While I recognise the desire to ensure that requests are processed in an 'applicant blind' manner, I have significant concerns around the practical effect of such changes, and their impact on a range of other areas of FOI law.

While I note that the Bill proposal sets out that an individual would be required to reveal their identity on appeal to the Commissioner, it is nevertheless the case that, while FOI is generally intended to be 'applicant-blind' in most cases, there are a number of important areas where the name and/or an address for the requester will be essential to the effective processing of an initial request (or a request for review). These areas include:

- ***Section 1(3) (clarification of requests)***
  When a public authority reasonably considers that it requires further information in order to

[14] The Freedom of Information (Scotland) Act 2002 (Commencement No. 2) Order 2003: https://www.legislation.gov.uk/ssi/2003/477/contents/made

identify and locate information, section 1(3) enables it to contact the requester to seek that information. This would not be possible in circumstances where a requester did not provide a contact address.

- ***Section 8(1)(c) (requesting information)***
  Likewise, when someone makes an information request, section 8(1)(c) requires that they must describe the information requested. Such a description will be essential for organisations to respond to the request, and a request which fails to do this will be invalid in terms of FOI law. In such cases, it is expected (under the section 15 duty to advise and assist) that organisation should contact the requester with advice on how a valid request might be made. A failure to provide an address for correspondence would again prevent this.

- ***Section 14(1) (vexatious requests)***
  Public bodies are entitled to refuse requests where it can be demonstrated that a request for information is vexatious. While the public authority must be able to demonstrate that it is the request (as opposed to the requester) that is vexatious, there will be circumstances (as set out in the Commissioner's guidance on this provision[15]) where the past behaviour of a requester will be relevant to informing a decision on whether a current request is vexatious. This may be the case, for example, where there is evidence that the request has been made as part of a pattern of behaviour which is designed to disrupt or harass the authority, rather than to genuinely seek access to the information. The identity of the requester will therefore be an important factor in informing such an assessment.

- ***Section 14(2) (repeated requests)***
  Section 14(2) enables public bodies to refuse to comply with requests which are identical or substantially similar to previous recent requests from the same person. Again, the identity of the requester will be key to informing an assessment of whether a request is repeated.

- ***Section 15 (duty to provide advice and assistance)***
  Section 15 requires that organisations provide reasonable advice and assistance to those who propose to make, or who have made, a request for information. While such advice will sometimes be reactive - responding to requests for assistance - it will often also be proactive, providing e.g. guidance on how to make a valid request, or contacting the requester with advice on how e.g. a request might be narrowed to prevent a cost refusal under section 12 of FOISA. There are a wide range of circumstances where a contact address may be required in order for an authority to effectively fulfil its duty under section 15. The identity of the requester may also be relevant in determining what advice and assistance will be reasonable in the circumstances. For example, it would be reasonable for a member of the public, who is new to FOI, to expect to be given more advice than a lawyer or a regular, professional FOI-user, such as a journalist.

- ***Section 25(1) (information otherwise accessible)***
  Section 25(1) sets out that information requests can be refused in circumstances where the requester can reasonably obtain the information other than by requesting it under FOISA. There will be circumstances where the identify of a requester may be relevant when assessing whether information can be reasonably obtained. For example, if the public authority knows that the requester already has access to the information (e.g. as a result of

[15] https://www.itspublicknowledge.info/sites/default/files/2022-08/BriefingSection14VexatiousorRepeatedRequests2022.pdf

previous non-FOI exchanges with the authority), or if it is clear from an address that that individual is currently serving a custodial sentence, this may inform a conclusion that information published online will not be reasonably obtainable by that individual.

- ***Section 38(1)(a) (a requester's own personal data)***
  This section contains an absolute exemption for circumstances where the information requested is the requester's own personal data, ensuring that any such information is instead accessed via the correct legislative route (i.e. under the UK General Data Protection Regulation or Data Protection Act 2018). Again, information relating to the identity of the requester will be vital in ensuring this provision is applied correctly.

- ***Section 38(1)(b) (third party personal data)***
  Likewise, details of the requester's name will also be key to ensuring whether any personal data requested relates to a third party, as opposed to the requester themselves, or in determining, under the tests applied when considering section 38(1)(b), whether the requester has a legitimate interest in obtaining the personal data.

A contact address for requesters is also required to enable authorities to meet their duties to issue notices effectively, e.g. in relation to the issue of fees notices (section 9 of FOISA), excessive cost notices (section 12), refusal notices (section 16), information not held notices (section 17) or when informing requesters of their right of review or appeal to the Commissioner or court (sections 19 and 21).

In addition to the above, the identity of the requester will also be an important factor in determining whether an individual has the legal basis to take an appeal forward with the Commissioner, or to appeal a decision by the Commissioner in the Court of Session. Where it cannot be evidenced that an individual was responsible for making an initial request (or request for review), any such appeal may be barred.

There are, therefore, a range of circumstances where the name and address of a requester may be relevant to the effective handling of requests under FOI law, although this information should, of course, not influence the outcome of a request beyond consideration of the specific matter at hand.

As a result, I have significant concerns about the impact of any measures to remove this requirement on the effective operation of FOI law across these areas.

Q6a: 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 [Selected]**
- Partially supportive
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q6b: Please explain the reasons for your response

As I have made clear throughout my term of office as Scottish Information Commissioner, not least in my detailed response to the Scottish Government's 2019 consultation on FOI extension[16] and my evidence to the Scottish Parliament Public Audit and Post-legislative Scrutiny Committee's post-legislative scrutiny of FOISA[17], it is my view that the further extension of FOISA to bodies - including private companies - that provide public services on behalf of the public sector is long overdue.

The key issue which should be considered when assessing whether extension of FOISA is appropriate in any case should be the nature of the service or function provided, as opposed to the nature of the organisation providing the service. There are also, of course, associated issues with how this is achieved in practice, and my previous comments relating to 'gateway' clauses are relevant in this regard.

FOI designation brings a range of benefits. There are clear benefits for the public, of course, in terms of the route it provides for people to consider, assess and examine the performance and quality of public services – and hold organisations to account and obtain information and answers where things go wrong.

However, FOI designation also benefits to organisations themselves. The requirements of openness and transparency brought about by FOI can act as an important check on corruption or malpractice, with staff and services being incentivised towards good practice through the risks attached to the exposure of practice that falls short. Similarly, the proactive publication of information on decision-making, planning and performance can support engagement, enable more effective bench-marking and drive improvement. The openness and transparency brought by FOI can also help to develop and enhance relationships with service-users, with our 2017 Ipsos MORI research finding that 77% of people would be more likely to trust an authority that publishes a lot of information about its work[18].

I am therefore supportive of further extension of FOI to non-public bodies responsible for performing public functions or delivering public services. However, I consider it equally important, as I have set out in my response to Question 5 above, to ensure that any such extension is

[16] https://webarchive.nrscotland.gov.uk/20220311052435mp_/https://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?lID=13197&sID=12253

[17] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12419&mode=pdf

[18] https://www.itspublicknowledge.info/sites/default/files/2022-03/PublicAwarenessResearch2017Report.pdf

measured, manageable, understandable and enforceable, and serves to enhance, rather than damage, the reputation and effectiveness of Scotland's FOI regime.

As noted in my response to the previous question, I would therefore suggest consideration of exploring an alternative option to the 'gateway' clause proposed in the discussion paper, which enables the goal of protecting and securing information rights to be achieved, while also protecting the practical implementation, reputation and integrity of Scotland's current FOI regime.

Q7a: 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 [Selected]**
- Partially supportive
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q7b: Please explain the reasons for your response

As set out in my response to Question 6 above, it is my view that the key issue to be considered when assessing whether FOISA designation is appropriate should be the nature of the function delivered or service provided, rather than the nature of the organisation providing the service.

As with other such services, however, designation should only apply in relation to the delivery of those services, rather than to the work of an organisation as a whole.

I have participated in a small number of events recently where third sector organisations have been invited to share their views on the FOI designation of public services provided by third sector organisations. While, in general, organisations have expressed their support for the overarching principles of FOI - e.g. in terms of recognising that public services should be accountable to their service-users and the public - a number of organisations have also raised concerns in relation to specific aspects and elements of FOI designation: most notably the resource impact of designation; the fear of being 'inundated' with requests; and concerns around the 'weaponized' use of FOI by those who disagree with the policy position of a particular organisation or service.

Concerns of this nature are perhaps inevitable for organisations faced with the prospect of FOI designation, and similar views have been expressed by bodies identified for designation in the past, with many of the current concerns echoing those made by registered social landlords prior to their designation in 2019.

In the case of registered social landlords, my team and I worked closely with the sector over the implementation period to provide information on the likely impact of FOI for those organisations, along with reassurances around the relationship between the size of an organisation and the number of requests it receives, and information on the provisions available under FOISA and the EIRs to protect against requests which are vexatious or manifestly unreasonable.

My team and I would hope to provide similar support, advice and reassurance for third sector organisations as they prepare for any future designation. The practicality of this will be dependent upon how designation is achieved, as detailed in my previous comments in relation to Question 5.

Q8a: 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 [Selected]**
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q8b: Please explain the reasons for your response

The proposal to create a new statutory role of a Freedom of Information Officer, with roles and responsibilities similar to those of a Data Protection Officer is an interesting one, and one for which I maintain an open mind. I will be interested to learn more about the views of other stakeholders which are put forward during this consultation process, including those from public authority respondents likely to be directly impacted by this proposal.

It is certainly the case that a number of respondents to my recent survey of FOI practitioners[19] reported that they would like to see the establishment of a dedicated resource allocated to FOI, performing a similar role as an organisation's Data Protection Officer. Linked to this, several respondents also indicated that they would like to see a degree of 'professionalisation' of the FOI Officer role, e.g. through the development of accredited training for practitioners, alongside a recognised qualification.

Similar views were also expressed by FOI practitioner delegates attending the 2022 Centre for FOI Practitioner Conference, where this proposal was discussed. However, other delegates at the conference expressed a degree of caution around such measures, with some expressing concerns that a formalisation of the FOI Officer role may prohibit access to that role for certain staff who currently fulfil an FOI Officer function in their organisation.

A case can certainly be made, however, that organisational and cultural benefits may arise from the creation of a formal, statutory FOI Officer role, with that role performing similar functions to those carried out by an organisation's Data Protection Officer. This might include, for example, creating a statutory responsibility to:

- Advise colleagues on FOI compliance
- Monitor compliance with organisational FOI policies
- Assign responsibilities under FOI policies
- Raise awareness of FOI and related policies

---

[19] https://www.itspublicknowledge.info/foi-staff-view-foi-important-public-right

- Train staff on FOI and related matters
- Act as the contact point for the Commissioner
- Conduct assessments and audits
- Report to senior management on FOI practice and performance.

Many of these roles are, of course, already the responsibility of FOI staff within organisations, but giving this role a statutory basis could certainly play a part in raising the profile and status of FOI - and the role of FOI staff - within organisations.

It may also be relevant to be mindful of the fact that such roles and responsibilities are likely to be scalable in organisations of different sizes, and it may be appropriate for organisations to take a proportionate approach to the fulfilment of any associated tasks and duties, depending on e.g. the size of the organisation and the number of FOI requests received. A proportion of bodies covered by FOISA, for example, report receiving few or no requests annually, and responsibilities relating to the fulfilment of any statutory duties should be proportionately scaled in relevant circumstances.

If such a role were to be created, it would also be important to ensure that senior management responsibility and oversight of FOI was nevertheless maintained, in order to facilitate and support effective compliance with FOI across each organisation. The current Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code of Practice)[20] highlights the importance of senior level responsibility for FOI within an organisation, noting, at paragraph 1.2.1 of Part 2, that:

> "*Meeting the requirements of the legislation and bringing about a culture of openness depends significantly on leadership from the top. Authorities should ensure there is a clearly established responsibility at a senior level within the organisation for overseeing compliance with the regimes and creating a culture supportive of the public's right to know.*"

It will be important that such a requirement is retained or enhanced in any future amendment to FOI law, in order to remove the risk of FOI responsibility being wholly delegated by senior management, or viewed as a responsibility which sits at a more junior level in the organisation, with the statutory FOI Officer alone. Senior management responsibility and oversight of FOI is also an essential element in ensuring that FOI is viewed as a core corporate responsibility across an organisation, supporting the development and retention of a positive organisational culture towards openness and transparency.

It may also be the case that the desired enhancement of the status of FOI Officers can be achieved through other, non-statutory means, such as appropriate revisions to the Section 60 Code of Practice.

I note that the consultation paper also recognises that the UK Government's Data Protection and Digital Information Bill proposes replacing the current requirement to appoint a Data Protection Officer with a requirement to instead designate a Senior Responsible Individual with responsibility for data protection matters where processing is carried out by public authorities or where an organisation carried out high-risk processing. The individual may then delegate that task to suitably skilled individuals. If implemented, this will, of course, remove the requirement for organisations to appoint a statutory Data Protection Officer, the model on which the current proposal is based.

---

[20] https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/

I wait with interest to review the outcome of the current consultation process.

Q9a: Which of the following best expresses your view on creating a statutory duty to publish information?

- **Fully supportive [Selected]**
- Partially supportive
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q9b: Please explain the reasons for your response

As set out in my submissions to the Public Audit and Post-Legislative Scrutiny Committee's post-legislative scrutiny of FOISA[21], I recommended the removal of the requirement for public authorities to adopt a publication scheme, and to replace this with a simple statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication, with both mandatory and guidance elements.

Although the current model under sections 23 and 24 of the FOISA has made significant inroads towards the objective of supporting proactive publication, evidence suggests that this is now an outmoded approach to the publication of information. There is broad consensus that the current publication scheme model has failed to fully deliver its intended results. The existing duty was drafted at a time when access to the internet within Scottish households was less common than today, and before the era of smartphones and internet access on-the-go. Public expectations about access to information have changed, and are likely to continue to do so.

Public awareness research conducted in 2022[22], confirmed that 56% of respondents would use an internet search to locate information. 59% confirmed that they would look at an authority's website. However, for those falling in the 16-34 age group, 73% responded that they would use a search engine.

Some commentary from our recent FOI practitioners' survey[23] in respect of the current model, included:

- *"We are restricted by the website interface…and therefore people access the information via search, rather than through the scheme itself."*
- *"The publication scheme requirement is out of date and should be updated to reflect that the majority of websites have A-Z and free-text searching rendering most of the requirements of the scheme a duplication of work."*

---

[21] https://www.itspublicknowledge.info/sites/default/files/2022-05/SICPostLegislativeScrutinyEvidence.pdf

[22] https://www.itspublicknowledge.info/public-awareness-of-foi

[23] https://www.itspublicknowledge.info/sites/default/files/2022-08/FOI%20Practitioner%20Survey%202022%20-%20Survey%20Report.pdf

- *"Publication scheme is outdated, requesters don't really understand what it is or how it relates to them receiving information. It does not help me leverage improved/increased proactive publication within my organisation.*"

Model Publication Scheme monitoring exercises conducted by my office in 2015-2018[24], suggested that the current model is seen as way of 'ticking a box' that shows that the authority is complying with FOISA, rather than an opportunity to use the framework to promote and enable the dissemination of information. This research also concluded that practice was poor in relation to making specific classes of information available. Even where there is a supplementary statutory duty to publish certain information (e.g. expenditure over £25,000), performance was poorer than expected (resulting in my office taking intervention and/or enforcement action). The research also concluded that many authorities were not regularly reviewing their Guide to Information - i.e. they were not updating and reviewing the information they made available under the publication scheme duty.

The right to request information is now established within the processes of most Scottish public authorities. We now need a new approach to drive and embed a similar cultural change towards the practice of proactive publication.

A new Code of Practice on Publication could set certain mandatory requirements to ensure key principles apply to improve consistency across the public sector, e.g.:

- What must be published (if held by the authority)
- How the published information must be made available and searchable
- How long it should be available for
- Regular reviews

The proactive publication duty should enable and ensure that public authorities have a committed, focussed and ongoing regard to the publication of information they hold where it is in the public interest to do so.

Effective monitoring and enforceability of the current model has presented my office with a number of difficulties. An enforceable Code of Practice could require authorities to, for example, report annually to the Commissioner on their approach to publication, the information they publish (including new information made available), and how they comply with the requirements of the Code.

I envisage that an enforceable Code of Practice would specify the minimum required information to be published (reflecting aspects of the current model), while offering public authorities flexibility to determine the best way to meet those requirements. The Code might also require consideration of the following when making decisions around publication:

- Trends in the subject matter of requests received
- Disclosed information
- Decisions by the Commissioner
- Topical issues likely to attract attention and interest

[24] https://www.itspublicknowledge.info/model-publication-scheme-monitoring

- Feedback from stakeholders

Providing the Commissioner with enforcement powers to take action in the event of a breach of mandatory elements of the Code would allow my office to have greater control and influence over the standard of proactive publication, and enable improvements in the quality, consistency and accessibility of information across the public sector. The suggested reporting scheme would also assist in that regard.

A statutory Code of Practice would also enable future updates to be made without the need for a change to the primary legislation. It therefore offers a flexible and future-proofed option to ensure the continuing maintenance of high standards of proactive publication by Scottish public authorities. Given the pace of technological change, this is an important consideration.

Consideration should also be given to who should prepare the new Code. My office, which has 20 years of experience of overseeing compliance with the publication duty, may be best placed to prepare, as well as to enforce, the Code, although there will be additional resource implications in doing so. Such a Code, as with current FOISA Codes, could be subject to parliamentary approval, perhaps under the negative resolution procedure.

Q10a: Which of the following best expresses your view on reducing exemptions under FOISA?

- Fully supportive
- Partially supportive
- Neutral
- **Partially opposed [Selected]**
- Fully opposed
- Unsure

Q10b: Please explain the reasons for your response

I do not necessarily share the view set out in the consultation document that the number of exemptions within FOISA is excessive and requires to be reduced. While I would certainly be interested in hearing the views of stakeholders on which exemptions should be removed and why, it is my general view that the exemptions contained within FOI are, on the whole, relatively carefully and narrowly drawn. In addition, there are checks and balances in place for certain exemptions which ensure that information can only be appropriately withheld where e.g. disclosure would (or would be likely to) result in substantial prejudice to a particular interest (the harm test) and where the balance of the public interest does not favour disclosure (the public interest test).

It is my view that these exemptions on the whole strike an effective balance between enabling appropriate access to public information while also ensuring that information whose disclosure may cause significant harm can be appropriately withheld.

While I note the proposal in the consultation document that each of the FOISA exemptions should now be subject to a public interest test, I have closely considered those limited exemptions to which the public interest test does not currently apply and am of the view that it will also be appropriate to maintain the status quo in this regard.

While it is the case that FOISA does currently contain a small number of exemptions which are 'absolute' (meaning that they are not subject to the public interest test in section 2(1) of FOISA), these exemptions are limited, with their 'absolute' status on the whole applying for reasons which are sensible and appropriate to the circumstances. In general, absolute exemptions will typically apply either where disclosure would breach other laws, or because there are other existing routes through which information can be accessed.

Current absolute exemptions broadly comprise:

- *Section 25: Information otherwise accessible* – e.g. where the information is exempt because the requester can reasonably access it other than by making an FOI request for it.
- *Section 26: Prohibitions on disclosure* – e.g. where disclosure of the information is expressly prohibited by another law (including where disclosure would be a criminal offence), or where disclosure would constitute a contempt of court.
- *Section 36(2): Confidentiality* – e.g. where information has been obtained from another person and disclosure would represent an actionable breach of confidence. While not subject to the public interest test in section 2(1), where a breach of confidence is in the public interest ('the public interest defence'), information may still be disclosed.
- *Section 37: Court records, etc*. – although the Scottish Court and Tribunals Service is subject to FOISA, courts themselves are not public authorities for the purposes of FOISA and so are not required to make information available in response to FOISA requests. Section 37 ensures that existing procedures governing access to information generated by or used in court proceedings are not overridden by FOISA.
- *Section 38(1)(a),38(1)(b) (read with 38(2A) or (2B)), 38(1)(c) and 38(1)(d): Personal information* – these exemptions protect personal information, including personal data of which the requester is the data subject (section 38(1)(a)) as well as of third parties (section 38(1)(b)). The reason for this is because access to this information should be appropriately accessed (or protected) under data protection law rather than FOISA. Similarly, section 38(1)(d) absolutely exempts a deceased persons health records, with access to such records governed by the Access to Health Records Act 1990.

In relation to section 41 of FOISA (Communications with Her Majesty, etc. and honours) I would, of course, be fully supportive of measures to update the wording of this exemption to reflect the ascension of King Charles III, even if the update is not technically necessary for the effective functioning of FOISA in this regard.

In terms of the proposal to remove this exemption in its entirety, as detailed in paragraph 27 of the Bill proposal, I hold no strong view. I do note, however, that unlike the position under UK law, measures to introduce an absolute exemption for royal communications were resisted by the Scottish Parliament in 2012, as it considered the Freedom of Information (Amendment) (Scotland) Bill[25]. This means that the exemptions available under section 41 of FOISA continue to be subject to the public interest test, requiring the disclosure of information in circumstances where the balance of the public interest favours that disclosure. We have also seen correspondence between the (then) Prince Charles and (then) First Minister Alex Salmond on a range of topics, including climate change, food, agriculture and historic buildings, being disclosed in Scotland under the

[25] This became the Freedom of Information (Amendment) (Scotland) Act 2013

Environmental Information (Scotland) Regulations 2004 (which contain no directly equivalent exemption to section 41 of FOISA).

I also note that the Scottish Government has previously indicated that it intends to review the exemption contained under section 26(b) of FOISA. This creates an absolute exemption where disclosure would be incompatible with a European Community obligation. I would, of course, be supportive of further consideration around the removal of this provision (along with the associated provision under section 45(2)(c)(ii) of FOISA).

Q11a: 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 [Selected]**
- Partially supportive
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q11b: Please explain the reasons for your response

I am supportive of a proposal which would amend the legislation to prevent a reliance on confidentiality clauses between public authorities and contractors responsible for the delivery of public services when withholding information under FOISA. There are, within FOISA, a broad range of existing exemptions which might be appropriately considered in circumstances where such information genuinely should not be disclosed. These include, for example:

- *Section 30(c)* – which enables information to be withheld where disclosure would be likely to substantially prejudice the effective conduct of public affairs
- *Section 33(1)(a)* – which enables information to be withheld if it constitutes a trade secret
- *Section 33(1)(b)* – which enables information to be withheld where is disclosure would be likely to substantially prejudice a commercial interest
- *Section 38(1)(b)* – which protects personal information
- *Section 39(1)* – which enables information to be withheld where disclosure would be likely to endanger the health or safety of an individual.

Indeed, it is hard to conceive of circumstances where genuinely sensitive information which should not be disclosed which is shared between a contractor and a public authority would not fall within the scope of one (or more) of the above exemptions.

Public authorities are, of course, currently discouraged from entering into confidentiality arrangements through the good practice guidance contained in the Section 60 Code of Practice[26]. Paragraph 7.1.2 of Part 2 of the Code, for example, sets out that authorities should *"exercise*

[26] https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/

caution about making any confidentiality agreements with third parties in relation to information they are to supply".

Similarly, paragraph 8.4 of Part 2 notes that it is good practice to ensure that procurement partners understand "*the extent to which their information may be disclosed*" and that they should also be made aware that the authority "*will not implicitly accept confidentiality terms*".

While the Code makes clear that such arrangements are not good practice, therefore, the use of confidentiality clauses are not expressly prohibited, and the provisions under section 36(2) of FOISA remain available to public bodies in circumstances where a confidentiality clause has been accepted in arrangements between authorities and contractors. In such cases I have little power to prevent such clauses or to limit their effect and, where such a clause exists, creating a breach of confidence that would be actionable if information were disclosed, I would have no choice but to uphold the application of the exemption.

In recent years, my office has seen evidence of the impact of the good practice guidance available in the Section 60 Code in this area, with fewer cases considered by my office featuring confidentiality clauses which cover contractor information. While this is certainly to be welcomed, and provides evidence of the Code working well in practice, it nevertheless remains the case that - should an authority enter into such a clause - its provisions must be accepted wherever a breach of confidence would be actionable.

I therefore support a proposal which would remove the ability of public bodies to rely on blanket confidentiality clauses when withholding information which has been supplied by contractors providing public services, requiring them to instead consider the 'real-world' impact of disclosure in terms of the specific exemptions outlined above. This would ensure that information is withheld only when an appropriate case can be made for doing so, taking full account e.g. of the risk of harm from disclosure and the balance of the public interest. Introducing such a measure would, in itself, clearly be in the public interest.

Such a step would also echo Irish FOI law, where section 35(2) of the 2014 FOI Act prevents public authorities and bodies providing public services to them relying on confidentiality clauses to prevent access to information held by public authorities, unless the confidentiality agreement is need to protect a third party's confidentiality.

Q12a: 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 [Selected]**
- Neutral
- Partially opposed
- Fully opposed
- Unsure

Q12b: Please explain the reasons for your response

A wide range of information relating to the Scottish Government's procurement policy will, of course, currently be covered by FOISA, both through the requests that can be made to the Scottish Government for relevant information, and through the information which it is required to proactively publish in compliance with its adoption of the Commissioner's Model Publication Scheme (MPS).

Under the MPS commitment, all public bodies, including the Scottish Government, are required to publish a range of procurement information proactively. This will include:

- Procurement policies and procedures
- Invitations to tender
- Register of contracts awarded which have gone through formal tendering, including name of supplier, period of contract and value
- Additional information which is required to be published by applicable procurement legislation and statutory guidance (e.g. the Procurement Reform (Scotland) Act 2014, the Procurement (Scotland) Regulations 2016 and Public Contracts (Scotland) Regulations 2015)
- Links to procurement information the authority publishes on the Public Contracts Scotland website[27]

Other relevant information may be available on request through the mechanisms provided under FOISA and the EIRs, subject to any relevant exceptions / exemptions which may apply.

Paragraph 33 of the discussion paper also implies that private contractors should be covered by FOISA, in order that relevant information relating to the procurement process and the associated requirements can also be accessed from the contractors themselves. As set out in my response to Question 5 above, I am supportive of measures which would extend FOISA to contractors providing public services, albeit through the measured, proportionate and considered process I outline in response to that question, rather than a sweeping single designation via a gateway clause.

[27] https://www.publiccontractsscotland.gov.uk/

Q13a: 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 [Selected]**
- No
- Not sure

Q13b: Please explain the reasons for your answer

While there would undoubtedly be costs attached to various elements of the proposed Bill, the specific nature and impact of those costs will only be able to be fully assessed once the Bill proposals are further developed and finalised. The financial impact will be determined, for example, by how far the final proposal to extend FOI reaches, along with e.g. the extent to which the amendments made impact on the procedures, systems and staff that are in place within organisations. As such, it is difficult, at this stage in the process, to consider with any degree of accuracy what the final financial impact might be.

My general position, however, is that the costs attached to a reasonable, measured and proportionate extension of FOISA would indeed be significantly outweighed by the public interest benefit. However, where I have indicated concerns that specific parts of the Bill may adversely impact the practical implementation of FOISA, I am less clear on whether any benefits from such changes would outweigh the costs associated with them.

In general terms, any change which is introduced is also likely to result in resource implications for my own organisation, particularly in relation to the extension of FOI law, the relaxation of exclusions (allowing appeals to be made in relation to requests made to a procurator fiscal, the Lord Advocate, or my own office), or the removal of exemptions. As the regulator responsible for both enforcing and promoting FOI law, my office will have a range of responsibilities which arise from any extension, or relaxation of exclusions or exemptions. These include (but are not limited to):

- Supporting organisations as they prepare to meet their FOI duties through the provision of advice, guidance and training
- Working with partner organisations to support the development of template resources to assist designated organisations
- Managing the adoption of FOI publication duties by organisations to support the proactive publication of information
- Conducting investigations and preparing decisions when a requester is dissatisfied with the response to an information request. Depending on the route taken for extension, this could lead, in many cases, to a ‘two-stage’ investigation process. For example, we may first have to carry out an investigation to determine whether a body is subject to FOISA, before proceeding with an investigation to determine whether an authority has complied with FOISA in its handling of a request.
- Promoting key changes to FOI law and advising the public and other stakeholder groups on changes made
- Developing and updating resources to reflect key changes

- Undertaking interventions (where appropriate) to support underperforming organisations to make improvements to FOI practice.

The resource impact on my office from any extension will depend on the nature and number of organisations being considered for designation and the manner through which FOI law is extended. Where, for example, this involves a large number of additional organisations and / or a strong public interest in the accountability of the services provided, then I will require additional resource in order to meet my statutory duties effectively. The relevant business and regulatory impact assessments will need to be undertaken in respect of each change so that my office, as statutory regulator, is sufficiently resourced to be able undertake appropriate and effective regulatory activity. It is essential that the specific resource impact for my organisation is considered further during any follow-up consultation activity in relation to specific proposals.

Although FOI does bring cost implications, it should be noted there are clear and substantial public interest benefits arising from many of the proposals set out in the consultation document. Extension of FOI to bodies responsible for performing public functions and delivering public services would help to restore the gradual erosion of FOI rights that has taken place in recent years. There are inherent public interest benefits in ensuring that those responsible for the delivery of public functions and services are open, transparent and accountable in relation to those services. This ensures that service-users and the public have rights to information about the cost, standards and performance of the vital public services that are provided for themselves and their communities and, importantly, are able to access information, interrogate standards and seek reassurance when things go wrong.

Public interest benefits would also arise from the increased transparency and accountability of such services, helping to drive up standards, support efficiencies, improve performance, prevent malpractice and build public trust. Many of these benefits can, of course, also help offset the costs associated with the implementation and resourcing of FOI by contributing to reductions in cost in other key areas.

It is also the case that recent experience has suggested that the costs and impact for organisations associated with FOI designation are often not as significant as anticipated. For example, prior to the 2019 designation of registered social landlords – the most recently designated group of organisations – one survey commissioned by representative bodies estimated that landlords would each receive in the region of 60-90 information requests a year. Our research, however, carried out one year on from designation, found that the average number of requests received by each organisation across the first year was 7.5, while 83% of landlords reported receiving 12 requests or fewer – or no more than one a month, on average.

In addition, 91% of survey respondents told us that they did not employ any new staff to meet their FOI requirements, with 89% reporting that responsibility for FOI was added to an existing job role. 57% of respondents also reported that FOI had a small impact on staff workload and 32% reported a medium impact. Landlords also reported that the number of information requests they received did not change significantly when compared to pre-FOI request numbers, with 47% reporting that requests had increased only a little, while 34% reported that they had stayed the same.

A key difference, however, for those who did choose to make a request, was that their requests now had to be considered within a statutory framework, with information only being refused when it was legally appropriate to do so, and a right of appeal to an independent regulator where the requester was unhappy with the outcome. All of this, of course, will bring important public interest benefits for tenants, communities and society as a whole.

Q14. 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?

Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

I cannot foresee any significant negative impacts for individuals, regardless of protected characteristics, as a result of FOISA being amended by the Bill proposals. On the other hand, however, I am of the view that a considered extension of FOI law to cover a wider range of public services delivered by third party organisations, including providers of social care, social work and healthcare services, will have a significant positive impact on the rights of those individuals, giving them an important right to information about the quality, standard and performance of the services provided on their behalf.

Q15: 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?

Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?

Again, I do not foresee any significant negative environmental or sustainability impact as a result of the proposed amendments to FOISA, but I do see a range of positive benefits of those provisions where I have already expressed a view.

Designation under FOISA would also ensure that affected bodies are made subject to the Environmental Information (Scotland) Regulations (EIRs), giving the public important rights to access environmental information held by affected organisations, including rights to information relating to air quality, land use, building conditions, waste, emissions and environmental programmes, policies and plans, where relevant. Increasing the accessibility and availability of environmental information held by affected organisations will be a clear, positive outcome for individuals and communities arising from the proposals.

Q16: 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)?

There are a significant number of other amendments to FOISA contained within the Bill proposal which have not been directly addressed in the preceding questions. I will provide additional brief comment setting out my initial view on these proposed amendments below. I would be pleased to provide further information on any or all of the points raised at any time that is convenient.

My additional comments are as follows:

Purpose Clause proposal (paragraph 6 of the consultation document)

While I note the desire to introduce a purpose clause to FOISA which summarises the rights, duties, aspirations and objectives of FOI law, as Commissioner I am less sure of the need for this. It is my view that, twenty years on from its implementation, the overarching purpose of Scotland's FOI law is generally well understood by both those who use the law and those who are subject to it, and changing this may result in unintended consequences.

There is a degree of clarity and simplicity to FOISA as it currently stands, with the long title of the legislation:

> "*An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes."*

and section 1(1) of FOISA:

> *"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority"*

combining to clearly set out - in relatively plain-English terms - the central aim and purpose of the law. I am not entirely clear what additional benefits a purpose clause would bring, and am concerned that it may result in an effect opposite to that intended; over-complicating and introducing ambiguity to the initial expression of the purpose of the legislation.

I am therefore concerned that the introduction of substantial additional introductory text may have unintended consequences for legislation that works relatively well in practice, with the possibility that this text may have the effect of inadvertently affecting the interpretation of currently settled, secure and widely understood elements of the law. For this reason, I am of the view that the introduction of a purpose clause is not required.

Clarification proposal (paragraph 7)

The proposal contained in paragraph 7 to 'pause' rather than 'reset' FOISA's 20-working day timescale when clarification is required under section 1(3) of the legislation is an interesting one.

On one hand, and at face value, such an amendment would indeed be welcome, ensuring that requesters who have submitted valid (but unclear) requests for information are not disadvantaged as a result of clarification being sought at a late point in the 20-working day timescale, with the effect that the FOI 'clock' is reset once clarification has been provided, and requesters find themselves having to wait significantly more than 20-working days from initial submission to receive their response. Where this occurs, it can clearly be frustrating for requesters, and can damage relations between individuals and organisations, often creating the impression – rightly or wrongly - that the organisation may be trying to deliberately delay or frustrate an FOI disclosure.

However, a straightforward requirement to 'pause' the FOI clock rather than 'reset' it in such circumstances may also have the effect of introducing additional issues and challenges. For example, this may have the unintended consequence of leading authorities to undertake a closer examination of the 'validity' of specific information requests prior to issuing a response which, in turn, may result in the same issue of the FOI clock being 'reset' - albeit via a different statutory route.

Currently, section 1(3) of FOISA enables an authority to seek clarification where it reasonably requires further information in order to identify and locate the requested information.

Separate from this, section 8(1) of FOISA sets out the requirements for a valid information request. This includes that it must be in a recordable form, it must include a name and address and, under section 8(1)(c), that it must "*describe the information requested*". Where a request does not fulfil the criteria required by section 8(1)(c) it will not be a 'valid' request, so the 20-working day 'clock' for a response will simply not start (although an organisation should, of course, provide the requester with advice and assistance under section 15 of FOISA to support them in making a valid request).

I rarely hear of cases where the validity of a request under section 8(1)(c) is questioned or disputed. This is principally, I suspect, because issues relating to whether or not information has been described appropriately are currently resolved by means of section 1(3) of FOISA alone. The current consequence of both routes – the resetting of the timescales – is the same, with the result that section 1(3) serves as the most effective route for resolving such issues, and creating, in most cases, no requirement to distinguish between a request which is 'invalid' under section 8(1)(c), and one which is simply 'unclear'.

I am, however, concerned that a move to 'pause' rather than 'reset' timescales under section 1(3) may lead to more authorities looking towards section 8(1)(c) when a poorly-described request is received, given that it would enable them to retain the option of 'resetting' FOI timescales in such circumstances. This may result in similar issues to the concern at the heart of the Bill proposal arising, with the added frustration for requesters of being told that a request is 'not valid', rather than simply 'unclear'. The nuances in the language used here may, in turn, have a negative effect on relations between individuals and organisations.

A possible alternative to this issue, however, may be to adopt the proposal set out in section 6.2 of the Scottish Government's current consultation document[28], which suggests an amendment to FOISA which allows an authority a defined period in which to seek clarification if a request is unclear, after which any additional days' delay will be deducted from the timescale for a response.

For example, under this approach, an authority may, following receipt of a request, be given 5-working days in which to seek clarification within which the clock can be reset. Once this initial 5-working day period has expired, any future request for clarification would result in a 'pausing' rather than a 'resetting' of the clock.

Such an approach would serve to incentivise authorities to conduct an early review of requests in all circumstances, to ensure that the information sought is both clear and adequately described. This approach may bring wider benefits for organisations, helping to support the early consideration and allocation of requests, which may support better compliance against timescales in all circumstances. Indeed, as a recent practical workshop on responding to FOI requests on

[28] https://www.gov.scot/publications/access-information-rights-scotland-consultation/pages/1/

time[29] highlighted, a failure to consider requests early can be one of the most common causes of a late FOI response.

Defining "information" (paragraphs 8 and 12)

Paragraph 8 of the consultation document seeks views on whether the definition of "information" in FOISA requires to be amended, while paragraph 12 seeks views on whether section 3 of FOISA should be amended to set out that "information held" will include information held on personal devices where that information concerns the delivery of public authority business.

The current definition of 'information' contained within section 73 of FOISA is a simple one, setting out that it means "*information recorded in any form*".

As noted in the consultation document, this simple, clear definition has proven to be agile over the last twenty years, flexible enough to be applied to all changes in technology or systems used. Decision 131/2020[30], for example, considers a request for official communications made via the WhatsApp messaging system.

A broad, wide reaching definition is appropriate, because it ensures that all future forms and formats of information, whether currently known or unknown, will fall within scope. My concern is that introducing further detail to this definition may risk creating unnecessary and unwelcome complications, potentially leading to unintended gaps where exceptions to the definition may slip through. I would therefore be in favour of retaining the status quo in respect of this provision.

That said, it may be appropriate to consider whether further updates to the Section 60 Code of Practice[31] are required, clarifying e.g. under section 6.2 of Part 2 of the Code that certain types of information - including information relating to public authority business which is held on personal devices - will fall within scope and should be searched in appropriate circumstances.

I would also like to take this opportunity to offer some clarification around the point made in the paragraph 8 of the Bill proposal that "*information has been interpreted by the Commissioner as **not** including documents*." While it is true that FOISA provides a right to 'information' and not to 'documents', it is also the case that information which is contained *within* documents will be covered by FOISA, and in many cases, the simplest and most appropriate route for the provision of that information will be the disclosure of the document in question. My guidance on this issue also makes clear that:

> *"Where a requester has asked for a copy of a document and it is reasonably clear that it is the information recorded in the document which the requester wants, the public authority should respond to the request as a request properly made under FOISA."*[32]

Section 4 – Public Authority with Mixed / No Reserved Functions (paragraph 13)

Paragraph 13 proposes amending section 4 of FOISA to remove the discretion of Ministers when designating additional Scottish public authorities, with any such body being automatically covered.

As set out in my response to Question 5 above, my general view is that it is preferable for some form of affirmative action to be required where additional bodies are brought within the scope of FOISA, in order to enable confirmation of their status under FOISA, support the effective

---

[29] https://www.itspublicknowledge.info/holyrood-conference-2022-workshop-report

[30] https://www.itspublicknowledge.info/decision-1312020

[31] https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/

[32] https://www.itspublicknowledge.info/sites/default/files/2022-03/RighttoInformationorCopies%20%281%29.pdf

monitoring and tracking of those authorities, and ensure that organisations can be effectively supported in their preparations to meet their duties and responsibilities under FOI law.

As such, I would again be in favour of maintaining the status quo in this area (albeit alongside greater use of available powers to bring bodies under the scope of FOI law).

Section 6 – Publicly Owned Companies (paragraph 15)

Paragraph 15 of the Bill proposal notes the challenges that have emerged in recent years in terms of determining the full range of publicly-owned companies which are covered by section 6 of FOISA. These challenges also reflect some of my concerns around the introduction of a wide-ranging 'gateway' clause, which I have discussed in more detail in response to Question 5 above.

Paragraph 15 proposes the creation of a new offence of failing to carry out duties upon designation. It should be noted that FOISA, in its current form, creates a very limited number of offences, with offences introduced for circumstances where information obtained by the Commissioner is disclosed unlawfully (section 45); or where, following an information request, a record is altered, destroyed, concealed, etc. to prevent disclosure (section 65). The creation of a new offence for a failure to carry out duties on designation would, therefore, be a comparative anomaly within FOISA, and would be distinct, and perhaps disproportionate, when compared to the obligations faced by organisations that are covered by FOISA via other routes.

This issue may be more effectively resolved through amending section 6 to include a duty to notify the Commissioner whenever a wholly publicly-owned company is established, liquidated or dissolved, or where the ownership status of a publicly-owned company changes, bringing it outside (or inside) the scope of FOISA.

Such a measure would enable my office to build a list of wholly publicly-owned companies, track and monitor this list, and provide appropriate support, guidance and advice in a way that is not possible through the current approach.

I also note the point made in paragraph 15 that an amendment is proposed to address the issue whereby bodies jointly owned by two or more public authorities are not currently considered to fall within the scope of FOISA. In relation to this point, I would first like to clarify that a company which is jointly owned by two or more public authorities **will** currently fall within the scope of FOISA, **unless** one of those public authorities is the Scottish Ministers. This situation appears to have arisen inadvertently as a result of the drafting of section 6(1), whereby the current drafting makes a company subject FOISA if it wholly owned:

a) *by the Scottish Ministers;* ***or*** (my emphasis)

b) by any other Scottish public authority

While section 6(1)(b) of FOISA refers to a singular 'public authority', this provision should be read in conjunction with the Interpretation Acts, which set out that, unless a contrary intention is indicated, words in the singular which are contained in legislation will include the plural (and vice versa).

Companies which are wholly-owned by one or more Scottish public authorities will, therefore, be covered by virtue of 6(1)(b), while companies which are wholly owned by the Scottish Ministers and one or more public authorities will fall out of scope. An amendment to 6(1) to clarify that the latter is also covered (along with relevant consequential amendments to section 6(2)) would address this oversight. At the same time, it may be prudent, for clarity, to make it clear that any reference to "any other Scottish public authority" in section 6 includes "one or more Scottish public authorities."

Section 10 – Time for Compliance (paragraph 19)

Paragraph 19 proposes an amendment to the provisions contained in the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016[33], which permit grant-aided and independent special schools, which were brought within the scope of FOISA by virtue of a 2016 designation order[34] to disregard non-school days when calculating working days, up to a maximum period of 60-working days following the receipt of the request. This provision was introduced in order ensure that small, independent schools - with perhaps low staff numbers and no external support - remained able to respond to requests within statutory timescales where e.g. the schools were closed over holiday periods.

While I note the concerns raised in the consultation document about the special provisions awarded to such schools, I do not currently hold significant concerns around these provisions.

In general, FOI statistics show that grant aided and independent special schools receive low numbers of requests. For example, across 2020-21, only seven of the 36 independent or special schools which reported data to me via my statistics portal reported receiving FOI requests, with those seven organisations reporting 23 requests between them. I have yet to receive any appeals which raise issues or concerns relating to the timescale extension available.

As a result, and given the matters outlined above, I do not consider the timescale extension available in such circumstances to be of significant concern. However, I would be interested to learn of other views around this matter.

Meeting Response times (paragraph 20)

Paragraph 20 of the proposal document asks whether the 20-working day timescale available under FOISA is excessive.

My view is that this timescale, given the associated requirement to respond 'promptly' in section 10(1) of FOISA, generally works well in practice, striking an appropriate balance between providing public bodies with enough time to identify, retrieve, consider and supply information, while ensuring that requesters receive that information within a reasonable timescale. For the most part, public authorities comply with this timescale, with 86% of the 73,983 FOI and EIR requests reported in 2021-22 receiving a response within the statutory timescales.

While compliance rates are relatively high, they could and should, of course, be improved; any failure to respond to an FOI request within 20-working days will represent a failure to comply with the requirements of FOISA. My office continues its work to support public authorities to improve compliance with timescales, including through our intervention work[35], our 'responding on time' self-assessment toolkit[36], and our involvement in celebrating and promoting learning from FOI best practice through events[37] and awards[38].

I am of the view, however, that the current FOI response timescale is appropriate.

---

[33] https://www.legislation.gov.uk/ssi/2016/346/contents
[34] https://www.legislation.gov.uk/ssi/2016/139/contents/made
[35] https://www.itspublicknowledge.info/interventions-activity
[36] https://www.itspublicknowledge.info/module-1-responding-on-time
[37] https://www.itspublicknowledge.info/holyrood-conference-2022-workshop-report
[38] https://www.itspublicknowledge.info/foi-awards-2023

Records Management and Operational Matters (paragraph 21)

Paragraph 21 of the Bill proposal suggests that the FOISA reform Bill should consider measures which are required to improve records management. As set out in my evidence to the Public Audit and Post Legislative Scrutiny Committee's consideration of FOISA, before any such measures are put in place it is important to consider two key issues:

1. the extent and scope of any such duty i.e. which organisations and what information would be covered

2. whether any such requirement should form part of FOISA, or whether it might be more appropriately dealt with under records management legislation.

My evidence to the Committee also highlighted the importance of the appropriate regulation of any measures which were introduced, noting that any duty must be enforceable if it is to have value. Questions around where the responsibility for any such regulation would sit would have to be considered and resolved.

I would be happy, however, to contribute further views on this matter at a later date should further proposals in this regard be developed.

Cost to Requesters (paragraph 22)

I note the proposal that a separate parliamentary process may be initiated to explore issues related to fees and charging. I look forward to contributing my views on this matter in due course, as appropriate.

In general, however, I am of the view that the fees regulations as they are currently set strike a suitable balance between permitting the right of access while at the same time preventing authorities from spending prohibitive amounts of time and resource to respond to requests. The costs associated with complying with FOI should also always be considered alongside the benefits which increased transparency will bring.

The experience of my office suggests that instances where fees are charged by public authorities are rare, with fees notices issued in relation to only 0.06% of the FOISA requests reported via my 2021-22 statistics portal. In general, then, authorities by and large do not tend to consider costs until such time as a request is found to exceed the £600 upper cost limit.

I note that the separate consultation being carried out by the Scottish Government seeks views on a proposal to permit public authorities to estimate excessive cost of compliance in terms of staff time, rather than financial cost. As noted in my response to that consultation, I maintain an open mind in relation to such proposals, and look forward to learning from the views and experience of others as these processes move forward. I would, however, caution against any proposals where the effect was to further reduce or limit the cost (or time) allowed to respond to information requests.

Funding of the Scottish Information Commissioner (paragraph 23)

I welcome and support the comment in the Bill proposal that sufficient funding for my office will be imperative for the effective function of a reformed FOISA. I have provided further additional comment in relation to the potential financial implications of the Bill at Question 13 above, and my office looks forward to engaging more directly in discussions around funding and resource as any specific measures arising from the Bill proposals take shape.

Also, as I have set out above, the relevant business and regulatory impact assessments will need to be made so that my office, in fulfilling its functions, has the required funding and resource in place.

Section 48 – When application excluded (paragraph 28)

I fully support of the removal of the prohibitions contained in section 48 FOISA against appeals being made to the Commissioner in relation to the FOI responses of the Commissioner, a procurator fiscal, or the Lord Advocate (in relation to information held by the Lord Advocate in their capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland).

In relation to my own position, I consider this prohibition to be unnecessary, as it restricts the public's right to know as it relates to my office and removes the right to appeal my decisions to the Court of Session on a point of law. At the present time if requesters are dissatisfied at the end of the review process, they can only resort to judicial review proceedings and, given the position elsewhere in the UK (the ICO investigates appeals about its own handling of requests), I see no reason why the Scottish legislation should prevent my office from doing the same. Such a move would clearly be in the interest of those requesting information.

While the Scottish Government's 2021 response letter on the report on post-legislative scrutiny of FOISA[39] report noted that the provision was intended to avoid any appearance of a conflict of interest arising from my office considering appeals about decisions I have made, there are existing internal measures in place which protect the independence and impartiality of decisions and investigations. I would also add that other regulators can and do regulate their own compliance with legislation. The removal of this provision would bring my office more in step with our own duties and obligations under FOI legislation as a public body, and so I fully support the removal of this provision.

In relation to procurators fiscal or the Lord Advocate, the Policy Memorandum which accompanied the FOI (Scotland) Bill indicated that it was considered incompetent to make the Lord Advocate subject to the enforcement powers of the Commissioner because any decision taken by the Lord Advocate - as head of the systems of criminal prosecution and investigation of deaths in Scotland - is to be "taken by him independently of any other person" under section 48(5) of the Scotland Act 1998.

The effect of this provision is that, while people are able to make FOI requests to the Lord Advocate or the Crown Office and Procurator Fiscal Service (COPFS), their right is not legally enforceable in the same way as for requests to other authorities, with both appeals to the Commissioner and subsequent appeals to the Court of Session on a point of law being excluded (where the information is held by the Lord Advocate in their capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland). The inability to appeal such FOI decisions of COPFS is a deficit in our right to information when compared to England and Wales.

Since 2012/13, my office has received between 5 and 11 appeals each year which have had to be excluded under section 48 of FOISA. There is no equivalent provision in the UK FOI Act relating to the Crown Prosecution Service (CPS) in England and Wales as the UK Information Commissioner's Office (the ICO) investigates and issues decisions in respect of the CPS. The ICO has found in favour of the applicant in a number of cases, generally relating to technical issues, such as failing to respond on time; refusal notices which do not comply with FOI requirements; or excessive costs.

---

[39] https://archive2021.parliament.scot/S5_Public_Audit/General%20Documents/FOISA_Letter_from_Minister_for_Parliamentary_Business.pdf (page 16).

I cannot investigate similar concerns relating to prosecutors in Scotland. The only recourse available to requesters in Scotland is judicial review. Although some other enforcement powers are available (e.g. I can issue an enforcement notice if there is an unacceptably high level of failures to respond to requests), I cannot investigate a requester's dissatisfaction with the way in which their individual request was handled. This creates a deficit in Scotland's FOI laws when compared with the rest of the UK.

I do not consider that section 48 of the Scotland Act 1998 would necessarily preclude a right to make an appeal regarding the handling of an FOI request by the Lord Advocate. When making a decision about whether to release information under FOISA, it does not appear that the Lord Advocate is acting in any special capacity relating to prosecutions or the investigation of deaths in Scotland, which is the basis of the Lord Advocate's exclusion from this area of FOI legislation. Rather, the Lord Advocate is carrying out duties under FOISA in the same capacity as any other public authority, and should be treated as such.

This provision again means that the only option available to requesters in Scotland is judicial review. The Commissioner cannot investigate a requester's dissatisfaction with the way a request has been handled, again creating a deficit in Scotland's FOI laws when compared with the rest of the UK.

I would be in favour of such a change which brought the Lord Advocate and COPFS fully within scope of FOI legislation in Scotland.

Section 51 – Enforcement Notices (paragraph 29)

I support the proposal at paragraph 29 to reform section 51 of FOISA, enabling the Commissioner to issue Enforcement Notices in relation to failures to comply with the FOISA Codes of Practice. As set out in my evidence to the Public Audit and Post Legislative Scrutiny Committee, while I can currently issue Enforcement Notices where an authority has failed to comply with a provision of Part 1 of FOISA, I cannot issue such notices in relation to breaches of the Codes of Practice – the most I can do is make an informal recommendation and rely on the good faith of the authority to follow it, or issue a more formal Practice Recommendation under section 44 of FOISA.

There are no penalties for failing to follow such a Practice Recommendation, while failure to comply with an Enforcement Notice can be referred to the Court of Session, which may deal with the matter as a contempt of court.

Extension of 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, would be a valuable tool in helping to drive continued improvement in FOI performance across the public sector.

Should it be decided that these powers are excessive for breaches of the Codes generally, I would ask that specific consideration be given in relation to the enforcement of the mandatory provisions of any future publication Code.

Section 52 – Exception from duty to comply with certain notices (paragraph 30)

I am of the view that the power of veto given to the First Minister in section 52 FOISA is contrary to the fundamental principles of FOI, that it serves no useful purpose, and the removal of this provision - which essentially exists to enable certain provisions of FOISA to be circumvented - would substantially strengthen FOI law in Scotland.

The lack of use of the veto provides clear evidence that there is no need for it. Should the public interest require that information be withheld then there are exemptions within the legislation which

are available for Scottish Ministers to apply and, where Ministers disagree with the Commissioner's conclusions on any case, an appeal can be made, as in all other circumstances, to the Court of Session on a point of law. To remove the veto would strengthen FOI law in Scotland, and apply FOI law equally to all Scottish public authorities. The veto having never been used ultimately demonstrates that it serves no real purpose and I maintain the legislation does not require circumventing, and that exemptions routed in the public interest are sufficient.

I also note that having such a veto weakens a jurisdiction's international Right to Information (RTI) assessment score, and therefore, while Scotland is not currently RTI rated, the removal of the veto would improve the international standing and reputation of Scottish FOI law.

The Right to Appeal Against the Commissioner's Decisions (paragraph 31)

As set out in my evidence to the Public Audit and Post Legislative Scrutiny Committee, which is reprinted under paragraph 31 of the Bill proposal, I am of the view that the current FOISA appeal route in Scotland works well, striking an appropriate balance between giving requesters an independent right of appeal where they are unhappy with an FOI response, and ensuring that most FOISA appeal cases reach a final resolution in as straightforward and timely a manner as possible.

While I recognise the views of those who may support the introduction of an additional appellate layer, it is my view that the detrimental aspects of this would outweigh the benefits, drawing the FOI appeal process out further, creating additional layers of complexity and potentially delaying the disclosure of information to requesters. There may be substantial additional costs associated with the introduction of such a step, including legal costs which may require to be borne by my office, by organisations and by requesters themselves.

Section 63 – Disclosure of Information to the Scottish Public Services Ombudsman or to Information Commissioner (paragraph 31)

Paragraph 31 proposes an amendment to section 63 of FOISA to support and increase the flow of information between regulators. It is not fully clear from the Bill proposal the specific nature of the changes being proposed so it is difficult to comment on this proposal in detail, but I would note that section 63 current allows for the disclosure of information between my office, the Scottish Public Services Ombudsman and the (UK) Information Commissioner's Office. I am not aware of any specific issues or areas where there have been problems in this regard. I therefore don't see a strong need for amending section 63 of FOISA, but I am, of course, interested in hearing from others with views on this matter.

I also note the proposal, expressed in paragraph 31, that Audit Scotland could include compliance with, and administration of, FOISA as part of its overall audits of an individual organisation's performance, drawing information from my own reports and data. I have significant concerns in relation to this point, not least in relation to the breaching of clear jurisdictional boundaries between our respective organisations, and the specific protections in place to safeguard the independence of my office and the exercise of my functions. I would, therefore, strongly oppose this measure.

Section 64 – concealing 'held' information on private devices (paragraph 32)

It appears that the intention in paragraph 32 may be to propose a revision to section 65 (Offence of altering etc records with the intent to prevent disclosure), as opposed to section 64 (Power to amend or repeal enactments prohibiting disclosure of information).

If this is the case, and while I understand the aim behind the proposal to amend FOISA to prohibit the concealment of information on private devices, I am generally satisfied that the existing provisions under section 65 are sufficient in this regard.

Section 65 in its current form creates an offence where, having received an information request, an individual alters, defaces, blocks erases, destroys or conceals a record held by the authority with the intention of preventing the information being disclosed. Official information held on private devices constitutes information which is held by an authority, and a deliberate attempt to conceal, etc. such information to prevent disclosure would constitute an offence under section 65 in its current form.

Providing specific definition around this area may also create problems in terms of 'future-proofing' FOI rights, with additional descriptions becoming out of date as the technology we use, or the terminology we use to describe it, changes.

I do not, therefore, consider it necessary to introduce an amendment to section 65 to cover these specific circumstances.

Human rights (Paragraph 33)

In relation to the discussion in paragraph 33 of the Bill proposal regarding the impact of Magyar Helsinki Bisottzag v Hungary [2016] ECHR 975 (Magyar)[40], it should be noted that, while the European Court of Human Rights did rule that Article 10 imparts a right to access information held by public authorities provided certain "threshold criteria" are satisfied (e.g. the person requesting the information must be requesting the information with a view to informing the public in the capacity of a "public watchdog" and the information must be of general public interest), subsequent UK judgments[41] have considered the application of Magyar in domestic law, concluding that Article 10 does not create a right to request information from a public authority, nor does it have any bearing on FOI laws. Although these domestic cases considered the (UK) Freedom of Information Act 2000, they will apply equally to FOISA.

In practice, this means that requesters cannot invoke Article 10 to achieve a more helpful outcome than they would otherwise get by applying the wording of FOISA. A requester can't argue, for example, that an absolute exemption should be interpreted as being subject to the public interest test. In addition, case law has also recognised that FOI law does not provide an exhaustive scheme for the disclosure of information, but is simply one route by which information may be received.

I also note the comments in the relevant section of paragraph 33 regarding the risk that, in some circumstances, statements relating to copyright and licencing included in FOI responses may inhibit people from sharing disclosed information. It may be that this is an appropriate area for consideration in future revisions of the Scottish Ministers' Section 60 Code of Practice, but such revision should take account of the Re-use of Public Sector Information Regulations 2015, which regulate the re-use of information.

---

[40] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-167828%22]}

[41] E.g.: *Moss v Information Commissioner and the Cabinet Office* [2020] UKUT 242 (AAC),

Further amendments

In addition to the measures set out in the Bill proposal, I would also recommend that the following amendments to FOISA be incorporated in any subsequent Bill, as detailed in my response to the Public Audit and Post-Legislative Scrutiny Committee's consultation.

Introduce a power to compel witnesses to give evidence in an intervention or appeal

Unusually for a regulator, FOISA provides the Commissioner with no power to compel witnesses to give evidence when carrying out his duties, whether it be undertaking an intervention or investigating an appeal. While section 50 of FOISA does provide powers to issue Information Notices to require the provision of (recorded and unrecorded) information, no equivalent power exists in relation to the interviewing of witnesses. The success of interventions to improve public authority FOI practice can often be dependent to the quality of the information gathered as part of that intervention and, as illustrated via the Commissioner's ongoing intervention to improve the FOI performance of the Scottish Government, in-person interviews with key officials to gain information relating to non-documented culture and practice within organisations is often a key element of that process.

An amendment providing the Commissioner with the power to compel witnesses to give evidence would reinforce this process, strengthening the quality of interventions and investigations and reducing the potential for inefficiencies.

I would hope that such a provision would not be required to be widely used, but it would be a vital tool in circumstances where an organisation failed to co-operate fully with my intervention or investigatory work.

Further technical amendments

In addition to the above, I would also strongly recommend that any Bill emerging from this process incorporate the following technical amendments (extracted from my post-legislative scrutiny consultation response).

I would, of course, be most happy to provide further information and evidence in relation to any or all of the comments made in this consultation response.

	Section no & title	**Proposed change/ addition**	**Comment/ explanation**
1.	53, Failure to comply with notice)	Amend section 53(1)(a) to make it clear that failure to comply with a decision in time can also be referred to the Court of Session	Section 53 sets out that if an authority fails to comply with notices issued by the Commissioner, the Commissioner can certify in writing to the Court of Session that the authority has failed to comply. The Court may deal with the authority as if it were in contempt of court. All notices issued by the Commissioner (Decision Notices, Information Notices and Enforcement Notices) must specify the timeframe within with the public authority is to comply with them (sections 49(6)(c), 50(2)(b)(iii) and 51(1) respectively). However, whereas Information Notices and Enforcement Notices can be referred to the Court of Session if any aspect of the notice is not complied with (including the timescale for

	Section no & title	Proposed change/ addition	Comment/ explanation
			compliance as specified in the notice), Decision Notices can only be referred for failure to comply with the steps the Commissioner has required the authority to take. Decision Notices cannot be referred for failure to comply with the timescales for compliance. In practice, this can result (and has in the past resulted) in the Commissioner spending public money on legal fees to commence the certification procedure, only for the authority to comply late, at which point the Commissioner can no longer pursue the matter. To avoid this happening in the future, the Commissioner should be able to certify to the court failures to comply with the timescales set in Decision Notices.
2.	73, Interpretation	Amend definition of "information" to exclude environmental information as defined in the EIRs	The definition of "information" in section 73 includes environmental information. Requests for environmental information must be responded to under the EIRs. With the current definition of "information" in section 73, if an authority receives a request for environmental information, it cannot deal with the request solely under the EIRs – it must first exempt the information under FOISA, and issue a refusal notice under section 16 before then going on to handle the request under the EIRs. Apart from being a laborious process, this is not user-friendly, as the requester receives a confusing communication, advising them that the information is being withheld from them, even if it is being disclosed in full under the EIRs. It should be possible for environmental information requests to be dealt with solely under the EIRs. Some consequential amendments would be needed: section 39(2) and (3) should be deleted (N.B. simply making section 39(1) an absolute exemption won't be enough to prevent joint responses – a section 16 refusal notice would still have to be issued under FOISA). However, given the current EU Law (Revocation and Reform) Bill, it is acknowledged that this may not be appropriate until the law on this point is settled.
3.	New	Provide an exemption for	Section 45 of FOISA provides that the

	Section no & title	Proposed change/ addition	Comment/ explanation
	exemption	information provided to the Commissioner under or for the purposes of FOISA	Commissioner and his staff must not disclose any information which has been obtained by him under or for the purposes of FOISA if the information is not already in the public domain, unless the disclosure is made with lawful authority. This might include submissions or information the authority has withheld because it believes the information to be subject to an exemption from disclosure. Section 45 also provides that to knowingly or recklessly disclose such information is a criminal offence. It is clearly the intent of section 45 to prevent the disclosure of such information. However, there is no statutory prohibition against disclosure of this information. Section 26 of FOISA says that information is exempt if its disclosure by a Scottish public authority *otherwise than under this Act* is prohibited by or under an enactment, so does not allow a prohibition within FOISA to be treated as an exemption. In the event of receiving a request for such information, the Commissioner has to rely on other exemptions, e.g. section 30(c) which relates to prejudice to the effective conduct of public affairs: given the provisions of section 45, it would clearly not be within the expectations of public authorities providing information and submissions to the Commissioner that these would be released into the public domain, and there is a very real likelihood that if authorities expected that the Commissioner might disclose information they would not provide it in the first place. The Commissioner's investigation function is dependent on gathering evidence and submissions, so the impact would be to prejudice substantially the very function and purpose of determining appeals under FOISA. The absence of a statutory prohibition on disclosure which would allow the Commissioner to rely on section 26 of FOISA is understood to have been due to a drafting omission. The (UK) Information Commissioner can rely on section 44(1)(a) of FOIA (the FOIA equivalent of section 26) to withhold such information, because, although it is drafted in similar terms to section 26 (i.e. it also only applies to prohibitions on disclosure "*otherwise than under this Act*"), the prohibition itself is actually contained in another Act - the Data Protection Act 2018.

	Section no & title	Proposed change/ addition	Comment/ explanation
			Given the terms of section 45 of FOISA, it is clear that it was the intention of Parliament that such information should be prohibited from disclosure, and an exemption which specifically relates to information which has been obtained by the Commissioner under or for the purposes of FOISA should be created to remedy this oversight.

Further information

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610
enquiries@itspublicknowledge.info
www.itspublicknowledge.info