Scottish Information Commissioner
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Access to information rights in Scotland: a consultation

Response from the Scottish Information Commissioner

Q1(a): Do you or your organisation have direct experience of access to information rights operating in relation to 'outsourced' services?

- Yes
- No
- Not sure

[None selected]

Q1(b): If 'yes' how would you rate your experience of access to information rights in relation to such services?

- Not a problem
- Somewhat problematic
- **Very Problematic [Selected]**

Please provide any detail or context that you can, regarding your experience:

The fundamental issue in relation to access to information held by the majority of 'outsourced' services that deliver public functions and services is that those services are not, generally, directly covered by FOI law.

This lack of coverage will mean that:

- Individuals have no legally-enforceable rights to access information directly from the organisations that provide services.
- Individuals have no statutory right of appeal if they are unhappy with the way a request for information is responded to.
- The organisations providing services do not face statutory obligations under FOI law to deal with information requests in accordance with that law. For example, there will be no requirement to respond to requests within 20 working days; no requirement to withhold information only where FOI law expressly permits it; no requirement to consider the public interest in relation to relevant disclosures; and no requirement to advise and assist those who seek access to their information.

- The organisations providing services face no statutory obligations to publish information in the public interest which relates to the services they provide, the cost or standards of those services, or the reasons for the decisions they take.
- The organisations providing services will not be affected by the positive impact on organisational culture that can arise from FOI designation, including a focus on openness, transparency and accountability, and the associated effect on strengthening public trust.

Where no statutory right to information exists the rights of service-users effectively revert to a pre-2005 status in relation to that service, where decisions around disclosure may be made at the arbitrary discretion of the organisation holding the information, with no statutory right of redress for individuals where requests are delayed, refused or ignored.

Such matters are, of course, of significant importance where the information sought relates to the delivery of key public functions and/or services and, in particular, if there has been a failure in relation to that service.

Where an organisation is not directly covered by FOI law there will, of course, also be no direct right of appeal to the Commissioner.

In this regard, my own direct experience of such cases will inevitably be limited, with no requirement for organisations to direct dissatisfied requesters to me, along with no legal basis for me to take action in relation to such cases.

It should also be noted that, when a request is made to a public authority which relates to information held by a third-party contractor, in many cases a requester may simply receive an 'information not held' response under section 17 of FOISA from the public authority; the authority only being required by FOI law to consider the information that **it** holds in relation to the request. In such cases an authority may exercise caution when considering whether to direct a requester on to a third-party that is not covered by FOISA, given that the third-party organisation will normally face no statutory duties and responsibilities when responding to requests.

Q2(a): If seeking information about a public service delivered under contract by an external provider, how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority on whose behalf the service is being delivered?

- Very confident
- Somewhat confident
- Somewhat doubtful
- **Very doubtful [Selected]**
- Not sure

Please provide any reasons for your answer:

Seeking access to information from a contracting authority about a contracted-out service is not an equivalent alternative to requesting that information directly from a service provider under the Freedom of Information (Scotland) Act 2002 (FOISA), where that service provider is subject to FOI law.

When people use their information rights they will often do so in circumstances where they may have concerns about the quality, standards or performance of a particular public service. While a contracting authority may hold ***some*** information in relation to these areas, they are very unlikely to hold ***all*** of the information that might be sought, and would be very unlikely to hold precise information relating to the specific daily detail of service provision.

The information held by a contracting public body will typically be high-level information relating to contract delivery and expected standards, as opposed to detailed information on the actual day-to-day provision of contracted services. If, for example, a person was concerned about the levels of staffing in a relative's care home on a given day, or the cleanliness of their hospital ward, it's possible that a contracting authority may hold information on how many staff ***should*** be on shift at a particular point in time, or how frequently a ward ***should*** be cleaned under the terms of the contract. However, accurate and reliable information on the ***actual*** service provision at any point in time will generally only be available from a service provider directly. As such, a requester may well be frustrated in their efforts to scrutinise the actual quality and standard of care offered in circumstances where things have gone wrong.

Challenges with access to information in such circumstances were highlighted by NHS Lanarkshire in their submission to the Scottish Parliament Public Audit and Post-Legislative Scrutiny Committee's post-legislative scrutiny of FOISA, where they noted that:

> *"Two of our hospitals are PFI and one is NHS. Currently if we receive any requests for information in relation to these hospitals we consult with the contractors and, where possible, obtain the information from them and respond to the applicant direct... Information is not always given to us to provide the applicant with a full answer. This results in different levels of information being provided… we believe that benefit will be achieved by extending the coverage of the Act to contractors who build and maintain hospitals."*[1]

A similar view was shared by NHS Greater Glasgow and Clyde, which noted that "*If services are being bought with public money, then the public should have a right of access to that information*", and that *"...it would be difficult to explain to a member of the public why information about one hospital is available when equivalent information about another hospital is not*."[2]

In her May 2017 paper *Public Procurement in Scotland*: *The case for scrutiny, accountability and transparency*[3]*,* the economist Margaret Cuthbert cited various examples where information relating to PFI contracts was refused in response to FOI requests made to contracting authorities (although refusals may, of course, have been legitimate in FOI terms). The report nevertheless calls for "*much more openness in freedom of information to allow for scrutiny of contracts*".

When seeking information about a public service delivered under contract by an external provider, therefore, the act of making a request directly to the public authority on whose behalf the service is

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[1] www.parliament.scot/S5_Public_Audit/General%20Documents/04_NHS_Lanarkshire.pdf

[2] https://www.parliament.scot/S5_Public_Audit/General%20Documents/26_NHS_Greater_Glasgow_and_Clyde.pdf

[3] www.jamcuthbert.co.uk/papers%203/MC%20commonweal%2027%207%202017.pdf

being delivered will not, typically, provide the same access to information as that secured by the designation of those service providers.

Q2(b): If seeking information about an ancillary service previously delivered in house - but now delivered under contract by an external provider - how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority to which the service is being delivered?

- Very confident
- Somewhat confident
- Somewhat doubtful
- **Very doubtful [Selected]**
- Not sure

Please provide any reasons for your answer:

My response in relation to Question 2(a) is of equal relevance here. I do not consider that access to specific information about the day-to-day provision of services can be accessed to remotely the same degree or extent through a request made to a contracting organisation, as opposed to one made to directly to the service provider. There will always and inevitably be significant information of value and importance to service-users which will be held by service providers, but not held by a contracting authority itself.

Information held by contracting authorities will inevitably be limited, and may commonly be restricted to that information required to ensure the effective monitoring and performance of the contract. Such information may well fall significantly short of that required by service-users when they find themselves in situations where they wish to use their FOI rights.

Q3(a): Would you welcome further assurance about the future use of the Scottish Government's section 5 power to maintain and extend access to information rights in Scotland?

- **Yes [Selected]**
- No
- Not sure

Q3(b): What, if anything, would provide you with greater assurance that the power can be used consistently to ensure coverage of the Act can keep pace with any changes in the delivery of public services?

I would certainly welcome further assurance about the future use of the section 5 power under FOISA.

Since FOISA legislation was introduced, there have been a number of statements made in relation to the use of the section 5 provisions. These include from the then Deputy First Minister Lord Wallace in 2002, when he informed the Scottish Parliament that:

> *"Provisions allow providers of services to the public to be added to the Bill case by case, and I reassure Parliament that that power will be exercised."*[4]

And, also in 2002, that:

> *"It is our intent that [section 5] will be used to bring within the scope of freedom of information legislation private companies that are involved in significant public work, such as private companies that are involved in major PFI contracts.*[5]*"*

Similarly, then Deputy First Minister Nicola Sturgeon when referring to the 2013 Order to designate arms-length organisations, noted that:

> *"Many have argued that the section 5 order-making powers were left unused for too long. Be assured, I see this order as an initial order setting the direction of travel. This first order covers a limited number of arms-length bodies. But there is clear scope for future orders to cover different functions of a public nature."*[6]

While, in 2019, then Minister for Parliamentary Business and Veterans Graeme Dey informed the Scottish Parliament's Public Audit and Post Legislative Scrutiny Committee that:

> *"As far as the delivery of public service contracts is concerned, our view is that private companies, or any organisations, should, in principle, be captured, but...we need to be clear about what, among their activities would and should be captured by FOISA. Clearly, the activities that are publicly funded absolutely should..."*[7]

However, more than twenty years have now passed since those initial statements on this matter, yet we have still to see FOISA being extended to organisations that deliver public services under contract in a way which would be proportionate to the changes in public sector delivery methods over that period.

Indeed, there have only been three such orders made since FOI law came into effect in 2005 and progress on designation has continued to move slowly. The order which designated local authority culture and leisure trusts came more than eight years after the introduction of FOI, while a further order designated secure accommodation providers, independent special schools and private prisons in 2016. In 2019, the third order extended FOI to registered social landlords and their subsidiaries.

We currently await the publication of the Scottish Government's discussion paper 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 that paper to be followed by a further consultation with specific bodies considered for designation – there are no strong signs currently of the pace of designation being accelerated.

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 if they do not receive information. The specific impact of this

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[4] Lord Wallace, Scottish Parliament, April 2002; Col 8112: www.parliament.scot/parliamentarybusiness/report.aspx?r=4372&mode=pdf

[5] Official Report, Justice 1 Committee, 5 February 2002; Col 3162-64.

[6] Nicola Sturgeon, 11th Annual Holyrood FOI Conference, December 2013

[7] Official report, Public Audit and Post-legislative Scrutiny Committee, 19 December 2019.

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, is not acting as an effective and responsive mechanism through which FOI rights can keep pace with changing patterns in the delivery of public services.

In terms of what might provide greater assurance around the consistent use of the power to ensure FOISA keeps pace, a key step would be the active and regular use of the power, and for the processes and procedures which are attached to its use to be streamlined and accelerated.

This could, for example, be supported by a publicly-stated, clearly timetabled and ongoing timeline, that works towards specific dates on which e.g. a decision on designation will be made, and an order, where required, will be prepared. Such a timeline could be aligned with the duty under section 7A of FOISA to report to Parliament every two years on the use, or otherwise, of the section 5 power.

Such an approach may help to ensure that the power can be used efficiently and appropriately, responding to ongoing changes in the public sector landscape, to ensure that public functions and public services continue to be fully accountable to the public as a whole.

Q4(a): Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs, where this relates to the provision of a public service?

- Yes
- **No [Selected]**
- Not sure

Please give any reasons for your answer:

As set out in my response to Questions 1-3, it is my view that direct coverage under FOISA is the only approach to ensure that information held by contractors responsible for delivering public services is appropriately accessible under FOISA.

When considering this matter, it is important to bear in mind that people will often have the greatest need to make use of their FOI rights in circumstances where things have gone wrong: where there has perhaps been a failure of a service, and individuals or their loved-ones have perhaps been inconvenienced, distressed or even harmed in some way. In recent years, for example, we have seen FOI being used to access information on a wide range of related issues, including discharges from hospitals to care homes during the Covid-19 pandemic[8], the inappropriate disposal of infant remains[9] and, more recently, the risk of ceiling collapses in schools.[10]

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[8] https://www.bbc.co.uk/news/uk-scotland-58738972

[9] https://www.aberdeencity.gov.uk/sites/default/files/2019-10/FOI_19_0729_BabyAshesScandal_Redacted.pdf

[10] https://www.edinburghlive.co.uk/news/edinburgh-news/edinburgh-council-buildings-used-dangerous-26266400

In such cases, the ability to make FOI requests to appropriately designated organisations has, where available, supported and required organisations to be as open and transparent as possible in response to questions, while also providing affected individuals and the wider public with vital information to help them understand what has gone wrong, and why.

Where serious service failures do occur, an initial instinct within some organisations may sometimes be to resist transparency, e.g. by presenting information in ways that may perhaps minimise the culpability of the organisation, or seeking to withhold or conceal information that may not show the organisation or its actions in the best light, or that may cause embarrassment, or reputational harm.

Direct designation under FOI serves to dampen such instincts, bringing both strong incentives for organisations to act transparently, and real-world consequences should they fail to do so.

In terms of incentives, FOISA can engender a cultural shift towards openness and transparency within organisations in a way that can only be fully achieved through direct designation, while the transparency standards brought about through 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 service improvements. 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[11].

In terms of consequences, direct designation gives service-uses and the public the right to appeal to me where they are unhappy with the response to an information request, enabling me to conduct an independent assessment of whether that organisation's response was appropriate in terms of FOI law, and requiring the disclosure of information if it has been incorrectly withheld. Direct designation also ensures that staff may face criminal charges in circumstances where they alter, erase, destroy or conceal information to prevent disclosure.

Direct designation is, therefore, the only route through which we can adequately ensure that accurate and complete information is available on the quality, performance, standards and cost of the public functions and services that are delivered on our behalf.

Changes to guidance will not alter the fact of whether or not an authority holds the information, and I do not, therefore, consider that stronger guidance for public authorities is an acceptable alternative in circumstances where direct designation is appropriate.

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

Q4(b): Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs where this relates to the provision of an ancillary service, previously delivered in house?

- Yes
- **No [Selected]**
- Not sure

Please give any reasons for your answer:

As set out in my response to the previous question, I do not consider that related guidance for Scottish public authorities is a practical alternative in circumstances where a body is delivering functions or providing services which are appropriate for direct designation.

It is my view that there will, as set out in my response to Question 5 below, be circumstances where services which are deemed as 'ancillary' will be appropriate for FOI designation, as a result of the nature of the service being provided, and the public interest in ensuring that the provider of the service is open, transparent and accountable.

Q5: Do you agree that it is relevant to make a distinction in guidance between public services and ancillary services?

- Yes
- No
- **Not sure [Selected]**

Please provide any thoughts you may have on the relevance, appropriateness and implications of such a distinction:

I would caution against the development of a specific and fixed distinction between 'public services' and 'ancillary services' when considering issues related to FOI designation, and associated policy and guidance.

While it will certainly be the case that organisations responsible for the delivery of public services should be considered for FOI designation, there will also be clear circumstances where organisations whose services are deemed as 'ancillary' may also be suitable and appropriate for designation.

Section 3 of the consultation document provides a small number of examples of services which would be considered to be 'ancillary', including "*the delivery of cleaning and maintenance services within the offices of a public authority*".

While there will clearly be some circumstances where the public interest and public value in relation to the designation of ancillary services will be lower, such a, e.g. in relation to a contract to provide a public authority with stationery, or to clean its office windows, there are other circumstances where the public interest and value in designation will be significantly stronger. For example, the public interest in openness around the cleaning of hospital ward will be significantly stronger than that in relation to the cleaning of a local authority planning office (although even this was heightened during the pandemic). Likewise, the public interest in FOISA applying to 'ancillary'

services which provide catering in schools or care homes, or maintain the safety of school premises or playground equipment, is likely to be significantly enhanced.

While, therefore, there will typically be an inherent strong public interest in the transparency and accountability in the delivery of 'public services' there may also be an equally strong public interest in ensuring the transparency of certain types of services which are deemed to be 'ancillary'. I would therefore caution strongly against relying on the distinction between these two types of services as a key or sole factor when determining whether or not FOI designation may be appropriate.

Instead, I would recommend that, in all cases, consideration is given to a factor-based approach to the assessment of whether or not individual services are appropriate for designation, as set out in my predecessor Rosemary Agnew's 2015 Special Report 'FOI 10 Years On: Are the Right Organisations Covered?'[12]. This proposed the use of such an approach to assist considerations of the extent to which a function or service may be public in nature (and therefore appropriate for designation under section 5). The report described this approach as "*an assessment based on applying a set of factors…that lead to a conclusion that, on balance, a function is public in nature*", and stated that "*the number of factors that are met may be relevant to the decision, but number alone will not be determinative. It is the overall balancing of the factors relevant to the function under consideration that will inform the outcome*."

The ten factors identified in that Special Report were:

1. The organisation is exercising "public functions" that were previously exercised by a public body, or is responsible for areas of activity which were previously within the public sector, e.g. privatised utilities.

2. The organisation is authorised to exercise the regulatory or coercive powers of the state, e.g. privately-run prisons, or has extensive or monopolistic powers which it would not have if it were not carrying out the function.

3. In carrying out the relevant function, the organisation is taking the place of a public authority, i.e. the functions are of a nature that would require them to be performed by a public authority if the organisation did not perform them.

4. The activities or decisions of the organisation affect the public because it is providing a service that is public in the sense of being done for, by or on behalf of the people as a whole, versus "private" in the sense of being done for one's own purpose.

5. The function carried out is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay.

6. The particular functions carried out are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities.

7. The state (directly or indirectly) regulates, supervises or inspects the performance of the function, or imposes criminal penalties on those who fall below publicly stated standards in performing it.

8. By carrying out the functions, the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

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[12] https://www.itspublicknowledge.info/sites/default/files/2022-08/Special_Report_10_Years_On_August%202014.pdf

9. Designating the organisation would improve civic engagement, or remove or mitigate the effects of inequality.

10. The organisation's decision makers are appointed, directly or indirectly, by the State.

In terms of prioritising considerations around designation, my own response to the Scottish Ministers' 2019 consultation of the extension of FOI set out the following additional factors as relevant in this area:

1. The extent to which an organisation is delivering (or supporting the delivery of) a public function or service.

2. The degree of public interest in relation to the function or service being delivered.

3. The risk of harm to individuals, communities or the wider public should the service, or elements of the service, fail.

4. The risk of harm to public finances should the service, or elements of the service, fail.

5. The cost to the public purse in delivering the function or service.

6. The overall lifespan of the service.

Consideration of the above range of factors will support a measured and proportionate approach when considering whether functions and services are appropriate for designation, with this consideration applying regardless of whether services are deemed to be 'public' or 'ancillary'.

It will almost certainly be the case that a number of services which are currently deemed to be 'ancillary' – such as those for the provision of stationery or the cleaning of windows – will not, on consideration of relevant factors, be appropriate for FOI designation. However, there will undoubtedly also be other such services, which are deemed to be significantly 'public' in nature - with a high risk of harm arising from failure - where designation will almost certainly be appropriate.

Q6(a): What are your views on the introduction of a Gateway clause as a means of making the Act more 'nimble'?

- I support the introduction of a Gateway Clause
- **I oppose the introduction of a Gateway Clause [Selected]**
- Not sure/have no view

Please provide more information about your views below:

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. As set out in my response to Question 3(b), it is also clear that the current mechanism under section 5 to address new ways of public service delivery through FOI extension is not working as intended in practice.

While the section 5 mechanism (as it is currently utilised) does not serve as an effective and responsive route through which FOI rights are keeping pace with changing patterns in public service delivery, there are 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[13].

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."*[14]

My principal concerns around the introduction of a 'gateway' 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 certainly whether they were covered by the legislation or to what extent services or elements of services were covered. Where there was uncertainty, organisations would be unsure whether they should be

[13] https://www.itspublicknowledge.info/registered-social-landlords-responding-well-to-foi
[14] https://www.oic.ie/publications/special-reports/OIC-Submission-on-FOI-Act-Review.pdf

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 certainty 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.

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 to 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[15] and, prior to their subsequent designation under FOI, Abellio Scotrail Ltd[16] (designated as Scotrail Ltd) and Dunbritton Housing Association Ltd[17].

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. 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.

Q6(b): If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for small and medium-sized enterprises (SMEs)? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

- I would favour a specific exclusion for SMEs
- **I would oppose a specific exclusion for SMEs [Selected]**
- Not sure/have no view

Please provide more information about your views below:

My general view in relation to the introduction of a gateway clause is set out in my response to the preceding question.

Beyond this, I will however note that I am not in favour of specific exclusions based solely on the size of individual organisations. The key issue, when considering designation, should be around the nature of the public function or the public service being provided. Where the nature of the function and/or service indicate that the organisation or sector is a suitable candidate for designation (e.g. through consideration of the factors outlined in my response to Question 5 above), then that organisation (or sector) should be considered for designation, regardless of size.

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[15] https://www.itspublicknowledge.info/decision-0972011
[16] https://www.itspublicknowledge.info/decision-0442021
[17] https://www.itspublicknowledge.info/decision-1182014

FOI currently applies to a wide range of organisations across Scotland, of varying size and complexity. This includes, of course, a number of large national and local organisations with responsibility for the delivery of high-profile public services, such as the Scottish Government, local authorities, Police Scotland and NHS Boards. It also, however, includes a large number of substantially smaller organisations, which nevertheless are responsible for delivering public services which are of related importance and value to service-users and the wider public. Smaller organisations include individual GP surgeries, dental practices, opticians and pharmacists across Scotland, along with national bodies such as the Drinking Water Quality Regulator for Scotland, the Commissioner for Ethical Standards in Public Life in Scotland, the Mental Welfare Commission for Scotland and, of course, my own organisation, which currently comprises just 23 staff members.

In my experience, and in general terms, the impact of FOI on an organisation in terms of the number of information requests received will commonly be proportionate to the size of the organisation, and the scope, nature and public profile of its services. While large, high-profile bodies such as those referenced above (the Scottish Government, local authorities, etc) will typically receive larger numbers of requests; smaller organisations with a more limited range of services and a lower profile attached to those services, will typically receive significantly fewer.

Statistics relating to FOI request volumes for 2021-22, for example, show that, of the 531 organisations that report data to my office, 28 organisations reported receiving more than 1,000 requests across the year. These organisations exclusively comprised local authorities, the Scottish Government, Police Scotland and the Scottish Fire and Rescue Service. Meanwhile, 340 organisations - 64% of all bodies - reported receiving 12 requests or fewer, or no more than one request a month, on average. Within that number, 211 organisations (40%) reported receiving three requests or fewer, while 114 organisations (21%) reported receiving no FOI or EIR requests across the year. Those bodies reporting no requests covered a wide range of organisations and services, many of which were, as noted, small organisations with a lower public profile. These include a number of recently-designated organisations, including independent and special schools, arms-length trusts, registered social landlords and their subsidiaries.

While request volumes will generally be proportionate to the size, nature and profile of the organisation, there will, of course be occasional exceptions to this rule. These will arise, for example, where matters of significant public interest impact on a particular service or organisation, leading to an increased public desire for accountability, transparency and scrutiny. Such matters can arise, for example, as a result of service failures within organisations. There might also be circumstances where changes in policies or practice lead to short-term ‘spikes’ in request volumes. Housing associations, for example, have in the past experienced such spikes during periods of rent review, where service-users and tenants have sought more information on the rationale which has informed related decision-making.

I am not, therefore, in favour of exclusions to FOISA coverage being introduced on the basis of the size of an organisation. The size of an organisation should not be a key consideration in relation to whether or not services are brought within the scope of FOISA.

This should, instead, be focused solely on the nature of the function and/or service provided and consideration of the public interest and public value in that service falling within scope.

It should also be noted that all such organisations will currently be subject to data protection law, which gives individuals rights in relation to the information that organisations hold about them. As such, any organisation which has taken its duties under data protection law seriously should currently have staff with responsibility for information governance in post, and a range of procedures in place which support the management and handling of personal data, including

responding to subject access requests. Organisations will be able to draw on these resources and experience when preparing for designation under FOISA.

I would also note that, when the revised data protection laws were introduced, debate was not principally focussed on the impact of such changes on smaller organisations. Instead, it was recognised that smaller organisations would face a proportionately smaller impact, and the key consideration was correctly focussed on the rights and protections provided by the legislation, e.g. in terms of ensuring that personal data was protected and individual access rights respected. I would suggest that it is equally appropriate to focus principally on the rights afforded to individuals and communities in the case of FOI.

Q6(c): If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

- I would favour a specific exclusion for third-sector organisations
- **I would oppose a specific exclusion for third-sector organisations [Selected]**
- Not sure/have no view

Please provide more information about your views below, including your thoughts on whether a distinction should be made between large and small/medium sized third sector bodies (e.g. those employing fewer than 250 staff members):

My general view in relation to the introduction of a gateway clause is set out in my response to Question 6(a).

My view in relation to introducing exclusions based on the size of an organisation is set out in my response to 6(b).

Beyond these points, I would only reflect and reiterate again that the key issue when considering matters around designation should be in relation to the nature of the public function or service provided, and not the nature of the organisation delivering the service.

I see no reason why individuals should have their statutory rights removed as a result of a decision to engage the third sector in the delivery of services, nor why individuals should face regional or sectoral inequalities in accessing information about equivalent public services simply because of differences in the organisation delivering the service.

This would seem to me to be clearly contrary to the public interest, while also being confusing to the public and contributing to inequalities and the loss of rights.

While different sectors - or different sizes of organisation - may face different issues as they prepare to meet their duties under FOI, the key principle is that bodies which are responsible for the delivery public services should be accountable to the public, and that rights should not be lost because delivery models change.

Where the model for designation is considered, proportionate and timetabled – e.g. through a ‘list’ approach rather than a ‘gateway’ clause – I can also work with affected organisations to support them as they prepare to meet their duties under FOI. Such work can reap significant benefits,

helping to reassure organisations around their concerns and provide appropriate support, guidance and advice to help them meet their duties under the law.

For the 2019 designation of registered social landlords, for example, work done by my office 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.

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 would, of course, ultimately be dependent upon how designation is achieved (and my office being appropriately resourced to do so).

Q7: What are your views on the desirability of broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies?

- **I support broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies [Selected]**
- I oppose broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies
- Not sure/have no view

Please provide more information about your views, including any thoughts you have on how a broadened section 5 power might operate:

I would be supportive of any measure which would enable the powers under section 5 of FOISA to be used more effectively. As noted in my response to Question 3(a) above, I do not consider that the section 5 power is currently working as intended.

As noted in section 3.8 of the consultation document, broadening the basis on which the power can be exercised to move away from an approach solely based around a consideration of ‘public function’ may be desirable. This might, for example, be achieved by amending section 5 to enable designation where organisations also appear to be delivering services of a public nature (without such services being tied, as they currently are, to a consideration of an authority’s function under section 5(2)(b) of FOISA).

Q8(a): What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of public services is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs?

- I consider it necessary to amend the legislation
- I do not consider it necessary to amend the legislation
- **Not sure/Have no view [Selected]**

Please provide more information about your view, including any thoughts you have on how any such approach might work:

As I have set out earlier in my response, it is my view that direct designation of organisations that deliver public functions or provide public services would give the greatest access to information about the services provided and functions performed. Proposals to provide a "clearer legislative steer" about what may be held by contractors on behalf of authorities are interesting, but may be problematic.

Even if FOISA was amended to broaden the definition of 'information held' to cover information held by third party contractors in relation to public services provided, there would be a range of practical challenges to the effective operation and enforcement of such provisions.

For example, even if a clearer legislative steer was given, there may nevertheless be circumstances where a third party does not fully and openly comply with a requirement to supply information to the public authority in response to an information request. Such circumstances may arise, for example, where the information held by the third party may show it or its actions in a less-than-favourable light, or where disclosure may cause embarrassment or reputational harm for the organisation.

Following receipt of a request, a public authority would be restricted in the action that it could take to secure the provision of information, with compliance, in many cases, being dependent on the quality of the relationship between the contractor and the authority, or the extent to which the contractor complies with the specific terms of any contract arrangement.

It is worth noting that there is some evidence available which suggests that, even where contractual terms for the supply of information exists, there can be problems with compliance with those terms. A 2017 Report by the economists J and M Cuthbert[18] for example found that, in the case of hubCos (regional 'joint venture' companies not currently subject to FOI which are established by public sector bodies to facilitate the delivery of smaller-scale infrastructure projects) all requests made for information about the number and value of contracts awarded through the hubCos went unanswered, despite relevant partnership agreements requiring that hubCos "*assist and cooperate*" in the provision of FOI responses, and "*transfer*" any requests to public bodies for a response.

Where a case was subsequently appealed to the Commissioner, my power to take action would also be significantly diluted.

While I would be able to engage with the public authority in relation to the provision of information, there would be no direct obligation for a contracting authority to engage with my office, with

[18] http://www.jamcuthbert.co.uk/papers%203/final%2010%2010%202017.doc

communications principally taking place via the contracting authority (as the body designated under FOISA). There may be challenges, as a result, in securing appropriate submissions, e.g. in relation to the work done to identify and locate information, or the rationale for application of exemptions. There may also be challenges in circumstances where my investigatory work found that further searches were required, in terms of securing third party compliance with those requirements. In circumstances where it was deemed that the issue of an Information Notice under section 50 of FOISA was necessary to secure information, such a notice could only be served on the public authority itself, and not the third-party contractor, with no associated direct obligation on the contractor to comply.

Likewise, the power to pursue an offence under section 65 may be limited in circumstances where it was suspected that information had been altered, erased, destroyed or concealed to prevent disclosure.

Direct designation of affected organisations would resolve these issues and uncertainties, enabling the organisations themselves to take control of request-handling, which also providing important safeguards to enable appropriate compliance with the statutory requirements of FOISA in all circumstances. Designation would also put decision-making directly into the hands of third-party contractors themselves, giving them agency in, and responsibility for, the necessary decision-making around relevant FOI disclosures.

Q8(b): What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of ancillary services previously delivered in house is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs:

- I consider it necessary to amend the legislation
- I do not consider it necessary to amend the legislation
- **Not sure/Have no view [Selected]**

Please provide more information about your view, including any thoughts you have on how any such approach might work:

Again, and as I have set out earlier, it is my view that direct designation of organisations that deliver public functions or provide public services under FOISA would give the greatest access to information about the services provided and functions performed.

It is also my view that there will, as set out in my response to Question 5 above, be circumstances where services which are deemed as ‘ancillary’ will be appropriate for FOI designation, as a result of the nature of the service being provided, and the public interest in ensuring that the provider of the service is open, transparent and accountable.

I therefore consider that direct designation may be appropriate in such circumstances.

Where, however, direct designation is not appropriate – e.g. because the nature of the ancillary service is such that there may be limited public interest in, or public value arising from, its designation, amending the legislation in the manner suggested may provide some additional information, but it is subject to my practical concerns set out in my response to Question 8a above.

Q9: Do you have other thoughts on how the Committee's general concern about the agility of the legislation, in terms of its ability to keep pace with developments in the way public services are delivered, might be addressed? This could be either through non-legislative or legislative means:

As set out in my separate response to the current consultation on a Private Member's Bill to reform FOISA, it is my view that it would be desirable to amend FOISA to enable the Scottish Parliament to take an active and ongoing role in decisions around the extension of FOISA, supplementing and complimenting the current powers that Ministers have under section 4 and section 5.

An appropriate Bill could be introduced to enable the Scottish Parliament to make revisions to Schedule 1 to FOISA. The combination of this and section 5 would enable both Ministers and the Scottish Parliament to play a key role in this important area.

Such a Bill could also consider introducing a requirement for a review of the legislation allowing 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 not only to ensure that FOISA is 'fit-for-purpose' for today's society, but also that it can be 'future-proofed' to meet the challenges of tomorrow.

Such an approach, set by the Scottish Parliament and driven by the public interest, in tandem with Ministers' own power in this area, would enable momentum to be maintained in an ever-changing public sector environment. This approach would also help to ensure that the stability, effectiveness and reputation of Scotland's FOI regime can be protected for the future.

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

Q10: Do you have any experience of a confidentiality clause agreed between a Scottish public authority and its contractor - as opposed to a wider concern to respect commercial interests - acting as a barrier to the release of information under FOISA?

- **Yes, I am aware of at least one such instance [Selected]**
- No, I am not aware of any such instances I do not consider it necessary to amend the legislation
- I don't know/would prefer not to say

Please provide details or any further reflections:

In the past my office has seen examples of confidentiality clauses acting as a barrier to the disclosure of information under FOISA, although I am pleased to note that such cases have become increasingly rare in recent years. This has been influenced, I suspect, by the embedding of cultural and organisational changes in this regard following the introduction of FOISA, alongside updates to procurement guidance and associated guidance in the Section 60 Code, including, under paragraph 8.4 of Part 2 of the Code, that procurement partners should be made aware that the authority "*will not implicitly accept confidentiality terms*".

Q11: Do you favour amending FOISA to prevent Scottish public authorities from relying on confidentiality clauses with contractors as a basis for withholding information?

- **Yes, I would favour making this amendment [Selected]**
- No, I would not favour making this amendment
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

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[19]. Paragraph 7.1.2 of Part 2 of the Code, for example, sets out that authorities should *"exercise 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.

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

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 - this will impact access to that information.

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.

Q12: Are you aware of any specific instances where access to information through FOISA has been frustrated as a consequence of the current structure of the section 6 provisions?

- **Yes, I am aware of at least one such instance [Selected]**
- No, I am not aware of any such instances
- I don't know/would prefer not to say

Please provide details or other comments below:

The current structure of the section 6 provisions contains elements which are similar to the provisions of a limited 'gateway' clause, whereby bodies are covered where they fall within the scope of the definition contained under section 6. While this provision is, by its nature, broad-ranging and will capture (with the exception of the matter discussed in response to Q13 below) the full range of relevant organisations, issues have arisen in terms of determining all bodies captured by the provision.

This approach means that challenges can arise in terms of contacting organisations to provide appropriate advice, support and guidance about updates to the law, or in terms of assessing compliance with FOISA requirements such as the publications scheme duty. Under current provisions, there is no statutory requirement to notify the Commissioner when a body falls within scope and, put simply, if we don't know who they are, we cannot regulate them effectively.

The nature and structure of section 6 also means that there may be a range of companies covered by the provisions which, due to a lack of knowledge or poor communications between them and their parent authority, are not aware that they are even subject to the provisions of FOI law.

It may, therefore, be appropriate to consider an amendment to 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 simply not possible through the current approach.

Q13: Do you agree that the wording of section 6 of FOISA should be amended so as to ensure all companies wholly-owned by any combination of schedule 1 authorities, including the Scottish Ministers, fall within the definition of a 'publicly-owned company'?

- **Yes, I would favour making this change [Selected]**
- No, I would not favour making this change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

As noted in the consultation document, the current situation which means that companies which are wholly-owned by the Scottish Ministers and one or more other Scottish public authorities are not covered by FOISA is an anomaly, and appears to have arisen inadvertently as a result of drafting of section 6(1).

I would, therefore, be wholly supportive of an amendment to 6(1) to address this oversight.

Q14: Do you agree that updating the Section 60 Code of Practice, to provide explicit guidance on mitigating the risks associated with any use of unofficial platforms, would be the best way to provide greater assurance that authorities are fully appraised of their obligations in relation to information held on unofficial platforms?

- **Yes [Selected]**
- No
- I don't know/have no view

Please give any reasons for your answer:

I would be in favour of updates to the Section 60 Code to provide appropriate guidance which mitigates the risks associated with the use of unofficial platforms. Any such update could clarify within the Code that certain types of information, including information relating to public authority business which is held on personal devices or stored on unofficial platforms, will fall within scope, while also providing further good practice guidance and advice for authorities on the use of private devices or unofficial platforms in such circumstances.

I would, of course, be keen to be consulted on the development of any such guidance.

Q15: Do you believe there would be value in amending FOISA to incorporate a fuller definition of the term 'information' within the legislation?

- Yes, I would be in favour of such a change
- **No, I would not be in favour of such a change [Selected]**
- I don't know/have no view

Please give any reasons for your answer:

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".

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. 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. It is also worth noting that the Court of Session has not been inclined to take a narrow view to the definition of information in related cases considered under FOISA.[20]

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 definition.

As set out my guidance on section 17 of FOISA (Information not held), Information which is generated in a private email account in the course of conducting public authority business will be held by the account owner on behalf of the authority. This guidance goes on to make clear that "*It is the purpose of the communication which matters, not the method by which it was created or delivered, or where it is stored*." My guidance goes on to advise authorities and staff to observe good records management practice, to ensure that they are able to comply with their obligations under FOISA.

While there can, from time to time, be challenges when accessing information held on personal devices or stored on unofficial platforms when responding to FOI requests - or, indeed, when investigating FOI appeals - there are routes through which these challenges can be navigated. Ultimately, as Commissioner, I can consider exercising my power to issue an Information Notice to require the supply of relevant information. The issue of such a notice would, however, be carefully considered, taking care to ensure that it did not e.g. breach an individual's right to privacy under Article 8 of the European Convention on Human Rights.

However, the need to consider such issues would exist regardless of whether or not private devices were included in the definition of information and I am, on balance, therefore in favour of retaining the definition as it currently stands, given that it ensures that all relevant information under consideration will fall within scope.

[20] See: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0

Q16: If a definition of information were incorporated within FOISA should this definition be 'any information in written, visual, aural, electronic or any other material form'; or something else? [Please specify]:

As set out in my response to Question 15, I am not convinced of the need to amend the definition of 'information' in FOISA, and consider that the current definition contained in section 73 is adequate and fit-for-purpose.

Q17: Do you agree that the current provisions of sections 23 and 24 of FOISA, in regard to publication schemes, require to be updated?

- **Yes, I agree there is a need to update the provisions [Selected]**
- No, I do not agree there is a need to update the provisions
- I don't know/have no view

Please explain the reasons for your answer:

Although the FOISA 'publication scheme' duty has made significant inroads towards the objective of supporting proactive publication, the current model in sections 23-24 of FOISA is outdated.

Section 23 requires authorities to adopt and maintain a publication scheme; in practice most authorities have adopted my Model Publication Scheme (MPS) (section 24). This requires public authorities to publish, as a minimum, documents under the categories listed in the MPS. Evidence suggests that this is now an outmoded way to approach the publication of information. 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.

As evidenced in the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee's report, there is broad consensus that the current publication scheme model has failed to fully deliver its intended results.

Some commentary collected from our recent survey of FOI practitioners[21] 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."*
- *"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."*

Public awareness research conducted in 2022, 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.

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

Monitoring of MPS compliance conducted in 2015-2018, suggested that the MPS model was seen as a 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.

The outmoded document-based index no longer reflects the manner in which the public seek information, or the most effective/efficient way for a public authority to disseminate information.

As set out in my submissions to the Public Audit and Post-legislative Scrutiny Committee[22], I recommend the removal of the requirement for public authorities to adopt a publication scheme, and 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 sections.

A new Code of Practice on Publication would offer flexibility to ensure that the duty can remain up-to-date with fast-paced technological advances and the increasing expectation that information will be quickly and easily accessible, without having to make a request.

Q18: Do you agree with the Commissioner's proposal that the requirement to adopt and maintain a publication scheme should be replaced by a simple duty to publish information, supported by a Code of Practice on publication, set by the Commissioner subject to Parliamentary approval?

- **Yes, I would be in favour of such a change [Selected]**
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

I suggest removing the requirement to adopt a publication scheme, and replacing it with a requirement on authorities to comply with an enforceable Code of Practice, with both mandatory and guidance sections.

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.

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[22] SICPostLegislativeScrutinyEvidence.pdf (itspublicknowledge.info)

A Code would also enable future updates to be made without the need for changes 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.

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.

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 could, as with the current FOISA Codes, be subject to Parliamentary approval, perhaps under the negative resolution procedure. This would be similar to the (UK) Information Commissioner's preparation of statutory codes on data protection under the Data Protection Act 2018 (the DPA) (e.g. the Data-Sharing Code of Practice under section 121 of the DPA, and the Direct Marketing Code of Practice under section 122 of the DPA). Those codes are submitted to the Secretary of State who lays them before Parliament, which can choose to resolve not to approve the Code. A similar approach would also ensure that there are opportunities for the public to contribute through formal consultation.

Q19: Is there any other alternative, that you see as preferable to the Commissioner's proposed approach?

- Yes
- **No [Selected]**
- I don't know/have no view

Q20(a): How satisfied are you with the availability of information about the work of government and public services in Scotland in the public domain?

- Very satisfied
- **Somewhat satisfied [Selected]**
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied

Please provide reasons for your answer:

While recognising the significant increase in information made available to the public as a result of the current duty to publish under FOISA, the current model falls short of what was originally intended and has failed to keep pace with expectations and technological developments, or drive significant cultural change towards proactive publication.

Model Publication Scheme monitoring conducted by my office from 2015-2018, 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)[23]. The research also concluded that many authorities were not regularly reviewing their Guides to Information - i.e. they were not updating and reviewing the information they make available under the publication scheme duty.

Providing the Commissioner with enforcement powers to act 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.

I envisage that a Code 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 my office
- Topical issues likely to attract attention and interest
- Feedback from stakeholders

Practical experience of authorities of proactively publishing information on topics in which there is a strong public interest have demonstrated the benefits of taking a responsive approach:

- *In 2011, corruption claims were made against City of Edinburgh Council officials working on property conservation. The Council received as many as 70 requests a day for related information and, by January 2012, more than 90 appeals had been made to my office. The Council decided to publish external audit reports it had commissioned into the scandal. The reports were heavily redacted to remove personal information and information relevant to ongoing police investigations. In the week following the publication of the reports, the Council received no information requests about the issue.*
- *The Scottish Police Authority, as part of improvement work initiated following an intervention undertaken by my office, regularly review and publish FOI request information. This has, alongside other work, contributed to a significant improvement in its ability to respond to request on time, from approximately 60% in quarters 2 and 3 of 2020-21 to 100% on time in recent quarters.*

An enforceable Code would allow my office to require, for example:

- Annual reviews by authorities of requests received, and evidenced updates to their published information to include information that has been requested frequently, or in which a public interest has emerged.
- Publication by default of certain information where held by an authority, e.g. board minutes.

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

- Processes which prompt decisions to be taken about publication of information at the point of creating or commissioning the information, not after the information has been produced, embracing the principles of Transparency by Design.
- Links between Records Management Plans (required to be submitted to the Keeper of the Records of Scotland under the Public Records (Scotland) Act 2011) and published information.
- Engagement with stakeholders to determine what information should be published.

Q20(b): Specifically, what types of information regarding the work of government and public services in Scotland do you consider should be made available proactively?

My public awareness research[24], indicates that the proportion of people who feel it's important that certain types of information are published has remained consistent across recent years. How authorities spend money is seen as important by the largest proportion of people, followed by information about decision-making, service delivery, performance and contracts.

The categories referred to above feature in the current Model Publication Scheme; we propose that these categories initially remain as the minimum standard in any new approach brought forward. A new Code of Practice would focus on the responsiveness of each authority (as set out above), requiring them to demonstrate how they are responding to what their stakeholders wish to see published, and how they want to access it.

Q20(c): How would you prefer to access information about government and public services in Scotland?

A duty to proactively publish must be responsive and accessible with regard to how the information is made available. Emerging and changing technologies have had a significant impact on how the public expect to receive information and authorities' methods of publication since the introduction of FOISA in 2005.

Our most recent public awareness research poll[25], indicated that 59% of people would look at a public authority's website to find information; 56% stated they would use an internet search; 73% of the 16-34 age group said they would use a search engine.

The Scottish Household Survey 2020, reported that 93% of households has access to the internet, dropping to 87% in the 20% most deprived areas[26]. The low cost and wide reach of online publication should not override the duty to provide information in alternative formats, where required, and the provision of alternative methods for those without internet access or who cannot use the internet.

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

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

[26] https://www.gov.scot/publications/scottish-household-survey-2020-telephone-survey-key-findings/pages/5/#:~:text=92%25%20of%20adults%20used%20the,the%2020%25%20least%20deprived%20areas.&text=Internet%20u

New technologies will offer opportunities to further enhance the duty to proactively publish and the possibility of creating new value-adding services. A recent report by My Society[27] describes some of the current issues around fragmented public data (where there is a requirement for multiple public authorities to publish the same data) and identifies minimum features for a requirement to publish to be successful. Findings from this report, may inform the approach to proactive publication under FOI.

Q21: Do you support changes to FOISA, and to the fees regulations, to permit authorities to estimate excessive cost of compliance in terms of staff time, rather than financial cost (the limit being set at 40 working hours)?

- Yes, I would support changes of this nature
- No, I would not support changes of this nature
- **I don't know/have no view [Selected]**

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

It is worth first noting that the fees limits are set by secondary legislation which already allow limits and thresholds to be reviewed by Ministers without the need for changes to the primary legislation.

I would, however, be interested to learn of the views of others in relation to this proposal. It is worth noting that a proposal to calculate the cost of compliance in terms of staff time, rather than financial cost, with the limit being set at 40 working hours, would be equivalent to the current maximum limit set in the FOISA Fees Regulations. This sets the current maximum staff cost at £15 per hour, which allows for 40 hours of work to be undertaken before the £600 current upper cost limit is reached.

A calculation based on staff time, as opposed to staff cost, has the potential to provide greater clarity and simplicity for requesters and authorities when calculating whether the excessive cost limit of FOISA has been reached, with this calculation based on a simple calculation of time, regardless of the employee carrying out the work. This can be contrasted with the current system where a calculation for a request made to two separate authorities might involve a different hourly rate, depending on the staff member involved (with the associated possibility of further variations within that hourly rate where there are two or more staff members involved in the handling of a single request). The calculation and presentation of such costs can lead to complexities for both authorities and requesters, and a calculation based solely on hourly rate may help to simplify and clarify this process.

That said, however, it should also be noted that there may be circumstances where this proposal would lead to the equivalent of the £600 excessive cost limit being reached sooner than it might under current provisions. Current provisions, for example, set a *maximum* hourly rate of £15 per hour, regardless of who is carrying out the work, and where a staff member is employed at a lower rate, calculations should be based on that lower rate. Where a staff member is on a lower rate, therefore, the time allowed to respond to the request may exceed the proposed 40-hour limit under current provisions.

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[27] https://research.mysociety.org/html/unlocking-fragmented-data/#summary

I am, however, also aware that hourly staff rates have typically increased in the eighteen years since the FOISA Fees Regulations were first introduced and, given that median hourly earnings for full-time employees in the UK is now estimated to be £16.30[28] (up from £10.55 in 2005[29]), there will presumably be fewer current circumstances where the hourly-rate will fall below the £15 threshold for the calculation of fees than may have previously occurred.

It is also the case that the current Fees Regulations enable calculations to include the cost of 'providing' information (e.g. including postage costs) and it is not clear whether or how such costs would be considered in a calculation based on staff time alone.

In short, then, I maintain an open mind in relation to such proposals, and would be interested to learn from the views and experiences of others. In general terms, however, I would caution against any proposals where the effect was to further reduce or limit the cost (or time) allowed to respond to information requests.

Q22: Are you aware of any examples or evidence of how the existing power to transfer requests under the EIRs regime has affected the service provided to requesters, either positively or negatively?

- **Yes [Selected]**
- No
- Not sure/don't know

Please elaborate:

Instances of Public Authorities transferring requests under the EIRs have been extremely rare and at the present time only one case involving regulation 14 of the EIRs is published on our website. The case in question dates from 2020[30] and involved a Scottish Public Authority believing they had engaged regulation 14 of the EIRs as part of a review outcome by supplying a link to relevant pages of a website, including information on how to make an information request.

The reliance upon regulation 14 was not the sole basis of the investigation and subsequent decision, however the decision did find that the public authority in question had not considered regulation 14 adequately in dealing with the request or requirement for a review.

Appeals involving regulation 14 of the EIRs have otherwise not been received by my office. However, we do occasionally see cases where authorities have advised where the applicant can redirect their request, under the general duty to provide advice and assistance.

Anecdotally, I understand when an authority may believe another authority holds the requested information, they will generally point the requester in the required direction, rather than formally seeking to transfer the request. As far as I am aware, and from the absence of more appeals on this matter, I believe that system works well.

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[28] https://commonslibrary.parliament.uk/research-briefings/sn02795/#:~:text=Pay%20Levels,and%20%C2%A315.47%20for%20women.

[29] https://www.statista.com/statistics/280687/full-time-hourly-wage-uk/

[30] https://www.itspublicknowledge.info/decision-0482020

Q23: Do you favour introducing a provision into FOISA to allow the transfer of requests between authorities, similar to that contained within Regulation 14 of the EIRs?

- Yes, I would be in favour of such a change
- **No, I would not be in favour of such a change [Selected]**
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

While FOISA does not allow authorities to transfer a request to another authority, as set out above, the EIRs do currently allow authorities to transfer a request for environmental information which is not held by the receiving authority, but known or reasonably believed to be held by another public authority. In these instances, the authority must contact the requester promptly to inform them that they do not hold the information, but can suggest which public authority they believe may hold the information, and subject to agreement from the requester, offer to transfer the request.

In principle the introduction of such a provision may appear as a sensible and logical amendment to the legislation, and I am aware certain public authorities have argued that extending a transfer provision to FOISA would be helpful. However, I do hold concerns regarding how it would operate in practice, and the potential hidden risks which could inadvertently damage a requester's experience of seeking information from a public authority. Such a provision may also add unnecessary administrative steps to the processing of an information request.

Transfers of requests under FOISA may result in a requester being sent back to the original public authority should the second authority not be able to fulfil the request, possibly creating frustration for the requester regarding the process and confusion over which public authority 'owns' the request at which point in time. The current practice, where a request would be formally closed (through the issue of an 'information not held' notice under section 17) by one authority, with a requester being directed to a second authority to make a 'new' information request may help to keep such lines of communication and responsibility clear for both requesters and authorities.

I remain of the view that the present arrangements in FOISA operate in a manner which is simpler, cleaner and clearer for requesters and for authorities, who may advise the requester to redirect their request, rather than offer to transfer the request themselves.

Anecdotally, I understand that the transfer of requests is rarely used under the EIRs and, while the Section 60 Code already makes it clear that requests should not be transferred without the express agreement of the applicant, this is an area where guidance could be updated going forward.

There are also data protection issues to consider: there may be good reasons why a requester does not want a second authority to know that they have made an information request.

Q24: Which of the following approaches in relation to the effect of seeking clarification do you most favour:

- Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested
- **Amending FOISA to allow an authority a defined period in which to seek clarification if the request is unclear, after which any additional days' delay will be deducted from the statutory timescale for response [Selected]**
- Leaving the provisions of the legislation unchanged in respect to timescales
- None of the above/No preference

Please provide comment/reasons for your answers:

The proposal 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 an authority 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 not be required to 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 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 requesters and authorities.

A solution to this issue, however, may be to adopt the proposal set out in section 6.2 of the consultation document, 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 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 time[31] highlighted, a failure to consider requests early can be one of the most common causes of a late FOI response.

Q25: In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of the Commissioner's own office, subject to assurances about the internal independence of that process?

- **Yes, I would be in favour of such a change [Selected]**
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

I remain in support of the removal of the prohibitions contained in section 48 FOISA against appeals being made to the Commissioner against certain public authorities. I maintain this prohibition is 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.

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

While the Scottish Government's 2021 response letter to the report on post-legislative scrutiny of FOISA[32] 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.

Q26: In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of procurators fiscal and the Lord Advocate (relating to the systems of criminal prosecution and investigation of deaths)?

- **Yes, I would be in favour of such a change [Selected]**
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Section 48 of FOISA states that no appeal may be made to the Commissioner in respect of the Commissioner, a procurator fiscal, or the Lord Advocate (to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigations of deaths in Scotland).

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 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 (FOIA) 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 FOIA requirements; or excessive costs.

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[32] Minister for Parliamentary Business.dot 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 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 means 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.

Q27: Do you support the retention of the First Minister's 'veto' power in relation to the release of information held by the Scottish Administration, or do you consider the power should be removed from FOISA?

- I support the retention of the First Minister's veto power
- **I consider that the power should be removed [Selected]**
- I don't know/have no view

Please provide reasons for your answer:

I remain 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.

I do not agree with the assertion that the lack of application of the 'veto' illustrates that the circumstances which would call for its use to be 'genuinely exceptional', nor that we should regard it as an 'important safeguard'. The lack of use of the veto, I would maintain, 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, while Scotland is not currently RTI-rated, the removal of the veto would also improve the international standing and reputation of Scottish FOI law.

Q28: Do you agree that specific provisions requiring the restrictive interpretation of exemptions and a presumption in favour of disclosure require to be incorporated within FOISA?

- Yes, I would be in favour of such a change
- **No, I would not be in favour of such a change [Selected]**
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

I firmly believe a general presumption in favour of disclosure serves the overall benefit of FOI legislation and helps ensure the public receive as much information as they can through the normal discharge of FOI duties and obligations by public authorities. However, as I have submitted previously, the drafting of section 1(1) of FOISA makes it clear that the default position is that information should be disclosed. Indeed, the Section 60 Code of Practice notes a presumption in favour of disclosure across both FOI and EIR legislation, describing it as "in-built" in the regimes themselves as well as the Policy Memorandum which accompanied the original Bill stating "a presumption of openness" underpinned the introduction of FOI legislation in Scotland. This presumption is also embedded within the public interest test contained under section 2(1)(b) of FOISA.

Having considered this in some detail, I have concluded that the existing system deals with the matter clearly without the need for any additional provisions which may have unintended consequences or interfere with existing provisions. For example, legislative change incorporating a presumption in favour of disclosure would not be appropriate when applied to matters of personal data, otherwise accessible information or prohibitions on disclosure. On balance, I would therefore support greater emphasis on embedding a culture and practice of a presumption in favour of disclosure, rather than incorporating it in to the legislation itself.

Q29: Do you support amending section 53(1)(a) to make it clear that failure to comply with a decision notice on time can be referred to the Court of Session?

- **Yes, I would be in favour of such a change [Selected]**
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

While Information Notices (issued under section 50 of FOISA) and Enforcement Notices (issued under section 51) can be referred to the Court of Session if any aspect of the notice is not complied with (including timescale for compliance as specified in the notice) Decision Notices (issued under

section 49(5) of FOISA) can only be referred for failure to comply with the steps my office has instructed the authority to take.

Decision Notices cannot, therefore, be referred for failure to comply with the timescales for compliance, and this can and has resulted in my office spending public money on legal fees to commence the certification procedure, only for the authority to subsequently comply, at which point I can no longer pursue the matter.

I would be supportive of amendments which may allow failures to comply with timescales set in Decision Notices to be actionable via the certification procedure, which would strengthen that aspect of the FOI process, help reduce additional expenditure on legal fees, and recognise the importance of timescales within the wider Decision Notice framework.

Q30: Do you favour amending the definition of 'information' within FOISA so as to specifically exclude environmental information, within the definition of Regulation 2(1) of the EIRs?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- **I don't know/have no view [Selected]**

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

I would accept the current process is not user-friendly and can be seen as laborious for public authorities and the requester to receive communication which is likely to be confusing in most cases, 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. However, any amendments relating to access to environmental information must consider the full legislative landscape at the present time and cannot be considered in isolation.

While EIR legislation in Scotland extends to Scotland only, the regulations themselves derive from Directive 2003/4/EC of the European Parliament and the Council on Public Access to Information. The source of the Directive is the international agreement the ‘Convention on Access to Information, Public Participation in Decision-Making an Access to Justice in Environmental Matters’. The 1998 United Nations ‘Aarhus Convention’ requires ‘Community law’ in this area be consistent with that of the Convention, which states signatories much provide access to environmental information. As the UK Government is seeking to ‘sunset’ the majority of retained EU law via ‘The Retained EU Law (Revocation and Reform) Bill, currently at Committee Stage in the House of Lords at time of this submission, this would see all retained EU law contained in domestic secondary legislation and retained direct EU legislation expire in December 2023 should the Bill pass. Therefore, while I support the suggested change, we must be mindful of the possible impacts this could have on the EIRs, as if environmental information is made exempt under FOI legislation, any impact to the EIRs via the revoking of the Directive must still comply with the Convention, and not represent a reduction in the public’s rights to access environmental information.

So, while I am generally in favour of the amendment suggested, I would have concerns about this change being made until the legal position of the continued status of the EIRs is clear. Excluding

environmental information from FOISA at a time when the UK's adherence to the Directive empowering the EIRs could be revoked creates the very real risk of loss of access rights. I therefore await with interest the result of the deliberations in the UK Houses of Parliament regarding how the Bill could affect the EIRs.

Q31: Do you support the creation of a new exemption, available only for use by the Commissioner, specifically for information provided to the Commissioner under, or for the purposes of FOISA?

- **Yes, I would be in favour of such a change [Selected]**
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

At the present time section 45 of FOISA requires each member of my office not to disclose any information which has been obtained under or for the purposes of FOI if the information is not already in the public domain, unless the disclosure is made with lawful authority. This can include information which a public authority has withheld because it believes the information is subject to an exemption from disclosure. Section 45 of FOISA also provides that to knowingly or recklessly disclose such information is a criminal offence.

While section 45 is designed to prevent the disclosure of such information, there is no statutory prohibition against disclosure of this information. Section 26 of FOISA states that information is exempt if its disclosure by a Scottish public authority "otherwise than under this Act" is prohibited by or under an enactment, and so does not allow a prohibition within FOISA to be treated as an exemption.

When I receive a request for information that I have received in support of my investigations, I currently have to rely on other exemptions (such as section 30(c) (prejudice to the effective conduct of public affairs)). Given the provisions of section 45 FOISA, it would clearly not be within the expectations of public authorities providing information and submissions to my office that these would be released into the public domain. If authorities consider that I may disclose information into the public domain which they had relied upon an exemption to withhold, this would be likely to impact on public authorities' willingness to provide information to my office in the first place. My office's investigative function is wholly dependent on assessing evidence provided by requesters and public authorities, and would be prejudiced substantially should public authorities lose confidence in the confidentiality of that process.

The absence of a statutory prohibition on disclosure which would allow me 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 the UK FOI Act (the equivalent of FOISA's section 26) to withhold such information, because, although it is drafted in similar terms of section 26, the prohibition itself is contained in the Data Protection Act 2018.

I believe an exemption which specifically relates to information which has been obtained by the Commissioner under or for the purposes of FOISA would remedy this oversight, and be to the overall benefit of FOI legislation and practice in Scotland.

Further information

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

t 01334 464610
f 01334 464611
enquiries@itspublicknowledge.info

www.itspublicknowledge.info