

Access to Information Rights in Scotland

Consultation Analysis

June 2023

Contents

1. Introduction.....	4
1.1 Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002	4
1.2 The consultation.....	4
1.3 Stakeholder discussion events.....	5
1.4 Respondents and responses to the consultation.....	5
1.5 Approach to analysing the responses	5
1.6 Interpretation of the findings.....	5
1.7 This report.....	6
2. Analysis of responses.....	7
2.1 Overview	7
3. Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery	8
3.1 Reflections on the agility of the access to information rights regime at present, to respond to varied models of public service delivery.....	8
3.2 Addressing concerns about agility of the regime and loss of information rights, within the current statutory framework	11
3.3 Assessing the need for primary legislation.....	16
3.4 Additional issues concerning agility of FOISA in the context of varied models of public service delivery (1) (confidentiality clauses)	25
3.5 Additional issues concerning agility of FOISA in the context of varied models of public service delivery (2) (publicly-owned companies).....	27
4. Developments in Information Technology - ensuring access to information rights in the face of changing modes of information use	30
5. Improving proactive publication – promoting openness as 'business as usual' in a digital age.....	33
6. Technical and other issues – ensuring the Act remains fit for purpose.....	41
6.1 Approach to estimating cost of compliance	41
6.2 Transfer of requests between authorities	43
6.3 Seeking Clarification	46
6.4 Removal of section 48 prohibitions – Appeals about decisions of the Scottish Information Commissioner, the Lord Advocate and procurators fiscal.....	49
6.5 First Ministerial 'veto' power	51
6.6 Presumption in favour of disclosure	53
6.7 Failure to comply with a decision on time.....	54
6.8 Handling Environmental Information – Relationship between FOISA and the EIRs.....	56
6.9 New exemption for Scottish Information Commissioner.....	58
7. Key outcomes from responses	60

7.1	Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery	60
7.2	Developments in Information Technology - ensuring access to information rights in the face of changing modes of information use	61
7.3	Improving proactive publication – promoting openness as 'business as usual' in a digital age.....	61
7.4	Technical and other issues – ensuring the Act remains fit for purpose	62
8.	Next Steps	64
9.	Annex A: list of organisations who responded	65
10.	Annex B: Organisations represented at stakeholder discussion events	68

1. Introduction

1.1 Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002

1. The Scottish Government welcomed the post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA) undertaken by the former Public Audit and Post-legislative Scrutiny Committee (the Committee) during the fifth session of the Scottish Parliament.

2. The Committee took evidence from a number of stakeholders with an interest in the functioning of FOISA over the course of 2019. Its report, published in May 2019, highlighted a number of areas where the Committee had concerns about the operation of FOISA, and whether the legislation remained fit for purpose.¹ The most fundamental of these related to the Committee's concern that the legislation had not, in the Committee's view, kept pace with changes in the nature of public service delivery. In that context the Committee was concerned that an insufficient range and number of bodies were subject to the legislation.

3. The Committee also considered whether the legislation had kept pace with developments in information technology, whether it had led to sufficiently robust approaches to proactive publication and whether other changes were required to ensure the Act remained fit for purpose.

4. The Scottish Government provided its formal response to the Committee's report on 25 February 2021.² In that response the Government accepted the Committee's central recommendation that there should be a consultation to seek the views of a wider set of stakeholders on the need for future legislative change, taking the Committee's recommendations as its starting point.

1.2 The consultation

5. The Scottish Government subsequently sought views on the access to information rights regime in Scotland, via a public consultation exercise which ran from 29 November 2022 to 14 March 2023.³ This exercise was aimed at gathering further views on the range of distinct areas highlighted by the Committee.

6. The consultation paper asked 31 questions, organised around the following key themes:

- Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery
- Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use
- Improving proactive publication – promoting openness as 'business as usual' in a digital age

¹ See [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 | Scottish Parliament](#)

² See: [Letter from Minister for Parliamentary Business to PAPLS Convener – 25 Feb 2021](#)

³ [Access to information rights in Scotland: consultation - gov.scot \(www.gov.scot\)](#)

- Technical and other issues – ensuring the Act remains fit for purpose

7. The analysis of responses to the consultation set out in this paper may be best understood if read alongside the original consultation paper.

1.3 Stakeholder discussion events

8. Three stakeholder discussion events were also held during the consultation period, to explore key themes of the consultation: *Proactive Publication*, *Agility of Access to Information Rights* and *Ensuring the Access to Information Rights Regime Remains Fit for Purpose*. Participants included representatives of organisations spanning civil society, and the third, public and private sectors. See Annex B for a list of organisations represented.

9. Extensive notes of these discussions were taken and summary read outs have been provided to participants. Outcomes from the discussion sessions have been referred to throughout the document, where these add value to the comments made by respondents in their written submissions.

1.4 Respondents and responses to the consultation

10. The consultation received 83 responses: 70 responses were from organisations and 13 were submitted by individuals (see Annex A for a list of responding organisations). Responses were received from members of the public, private and third sectors. Activists and civil society organisations, including two trade unions, also responded.

11. Most of the responses were submitted via the Scottish Government's consultation hub Citizen Space, with 26 responses submitted via email.

1.5 Approach to analysing the responses

12. The questions posed in the consultation were mainly closed questions with free text follow ups. This provided respondents with an opportunity to expand on answers in detail if they wished. A number of respondents also chose to answer only the questions most relevant to their organisation. Therefore, whilst there is an element of quantitative analysis undertaken, the majority of this report is based on qualitative analysis of responses in order to illustrate and consider the range of views received. All responses were analysed via the Citizen Space platform. Overarching themes of the responses are considered in part 7 of this report.

1.6 Interpretation of the findings

13. Although the consultation received responses from a mix of public, third sector organisations and civil society, it cannot be assumed to be representative of each sector or the wider population given the relatively small number of responses. It should also be noted that private sector organisations were not very well represented in responses.

1.7 This report

14. This report presents an overview of the range of responses received to the consultation and also considers evidence gathered during engagement sessions. Key themes which emerged are discussed alongside specific detail raised by respondents.

2. Analysis of responses

2.1 Overview

15. The consultation was principally a vehicle for engagement with communities and interested stakeholders in Scotland about the future development of the access to information rights regime. It was aimed at gathering further views on a range of distinct areas highlighted by the Committee.

16. The sections below summarise the responses to the specific questions in the consultation. In addition, during the period the consultation was open, the Scottish Government held three round table engagement events on the key themes of the consultation: proactive publication, agility of rights and keeping rights fit for purpose. These events were attended by approximately 30 stakeholders and key outcomes from each of the discussions were circulated to attendees for comment prior to analysis. The qualitative analysis of the key themes which emerged includes a consideration of the topics covered in the engagement sessions by contributors.

17. We received 83 written consultation responses with 70 of these being submitted by organisations. Of these, 35 were from organisations which are themselves Scottish public authorities, with obligations under current FOI law. The other 35 were from a variety of third sector, civil society and other organisations in Scotland.

18. A list of organisations who responded is provided in Annex A.

3. Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery

19. This section posed a number of questions to respondents relating to the Committee's concern about the agility of the regime to ensure the delivery of access to information rights in the context of varied models of public service delivery. Central to this was the Committee's concern about the impact of 'outsourcing' on access to information rights. The concept of 'outsourcing' was explained in the consultation document as referring to any instance in which a public authority enters a contract with an external provider for the provision of a service, rather than tasking its own directly employed staff with the provision of that service.

20. This section of the consultation posed 13 questions to respondents relating to the Committee's concerns and recommendations in this regard. The first ten of these related to the Committee's overarching concern about whether there are sufficient mechanisms in place to ensure the right bodies are covered by the legislation. The final three relate to more particular issues around the use of 'confidentiality clauses' and the operation of section 6 of FOISA relating to publicly owned companies.

3.1 Reflections on the agility of the access to information rights regime at present, to respond to varied models of public service delivery

Question 1(a)

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

21. There were 56 responses to this question. Of these, 34 said they did have direct experience of access to information rights operating in relation to 'outsourced' services, 21 respondents advised they did not have such experience. One respondent said they were not sure.

22. Respondents who answered yes to having direct experience of 'outsourced' services included a number of local authorities, NHS boards and third sector bodies.

Question 1(b)

If 'yes' how would you rate your experience of access to information rights in relation to such services?

23. There were 32 substantive responses to this question. Respondents were split between advising it was 'not a problem' (14 respondents) and those who indicated it was 'somewhat problematic' (13 respondents). A further five respondents stated their experience of access to information rights in relation to 'outsourced' services was 'very problematic'.

24. Those with the greatest concerns in this area included the Campaign for Freedom of Information in Scotland, UNISON Scotland and the Scottish Information Commissioner.

“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.” (Scottish Information Commissioner response)

25. The Commissioner also highlighted what he viewed as an increased likelihood of a requester receiving an ‘information not held’ response under section 17, as public authorities, “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”.

26. A lack of clarity around the term ‘outsourcing’ was commented on by the Campaign for Freedom of Information in Scotland. Other responses (UNISON Scotland, Common Weal) noted the difficulty experienced when seeking information from public authorities in relation to third party contractors, with some information being refused due to commercial confidentiality concerns.

27. Of the 14 respondents who answered that their experience in relation to ‘outsourced’ services was ‘not a problem’, half were local authorities. The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) also indicated that their members had not found this a problematic issue.

28. It was specifically noted by four of the 14 that they received low volumes of FOI requests in relation to ‘outsourced’ services and that freedom of information requirements were included within contracts. For example, Public Health Scotland advised that, “contracts exist and operational policies are applied to/from outsourced services to ensure access to such information is available as if it were an ‘in house’ process”.

Question 2 (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?

29. A total of 57 respondents answered this question. Of these, seven indicated they were ‘very confident’, 26 indicated they were ‘somewhat confident’, seven indicated they were ‘somewhat doubtful’, 11 indicated they were very doubtful and a further six that they were ‘not sure’. There were 48 respondents who provided reasons for their answers.

30. Among those respondents who indicated a degree of confidence about seeking information about services delivered under contract, the contractual

obligations of external parties to provide information were highlighted, as were information sharing agreements.

31. The respondents who answered 'very doubtful' included the Environmental Rights Centre for Scotland, UNISON Scotland and the Scottish Information Commissioner. They expressed the view that it was unlikely a member of the public would receive the same level of access to information from a third party as they would from a public body.

32. Three respondents also highlighted potential difficulties a member of the public may encounter by not knowing the identity of the public authority who contracted out the service.

Question 2 (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?

33. In total, 52 respondents answered this question with the split of answers being similar to 2(a). There were five respondents who indicated they were 'very confident', 20 indicated that they were 'somewhat confident', five indicated that they were 'somewhat doubtful' and 12 indicated they were 'very doubtful'. A further 10 indicated they were 'not sure'. There were 38 respondents who provided reasons for their answer.

34. Those indicating a degree of confidence included 11 local authorities and various third sector and civil society organisation including Alzheimer Scotland and the Church of Scotland.

35. For the 25 respondents indicating a degree of confidence, the overall view expressed was that contractual arrangements between authorities and external providers in relation to an ancillary service would generally include provision to protect information rights, alongside regular reporting requirements. A recurring comment amongst these respondents was that much of the information requesters might be expected to seek would already be held by the relevant public authority as the recipient of the service. Therefore providing information in response to FOI requests about an ancillary service previously delivered in house - but now delivered under contract by an external provider - was not seen by these respondents as problematic.

"The definition of 'held' in FOISA and the narrow scope of the commercial interests exemption, properly balanced with the public interest test should ensure that the public are not in any way prevented from accessing relevant information about an ancillary service." (Renfrewshire Council response)

36. The 17 respondents indicating a degree of doubtfulness were more sceptical. The Campaign for Freedom of Information in Scotland commented that external

providers of public services may not gather the information listed under the Model Publication Scheme and highlighted that voluntary compliance by external providers avoids regulation as there would be no right to apply to the Scottish Information Commissioner.

37. A number of responses, with differing overall viewpoints in this section of the consultation, expressed the opinion that whether or not the service was ancillary was immaterial.

3.2 Addressing concerns about agility of the regime and loss of information rights, within the current statutory framework

Question 3 (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?

38. There were 58 responses to this question, with 43 respondents answering 'Yes', three respondents answering 'No' and 12 respondents advising they were 'not sure'.

39. Those answering 'yes' covered a wide range of organisations including the third sector, academia, regulators and the National Union of Journalists.

40. The three who answered 'No' included one individual and two organisations (UNISON Scotland, Glasgow City Council).

Question 3 (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?

41. There were 46 responses to this open question, providing varied comments.

42. A number of respondents mentioned the Scottish Government's previously stated intention to bring forward a paper on the future use of the section 5 power and this was viewed as a positive step. A number of third sector organisations commented that they would wish to see further clarification on the future use of this power.

43. One organisation which responded advised they would like to see greater certainty with regards to the use of the section 5 power. Their response notes that the power has not often been used, therefore they argue, because there are few examples of consultation on the issue, it is difficult to understand the principles applied in deciding on new designations under FOISA.

44. Similarly, the National Union of Journalists thought the infrequent use of the section 5 power indicates it is not the correct mechanism to continue to use in the future.

45. The Centre for Freedom of Information, University of Dundee, also noted that while in theory there was scope for a constant refreshing of the schedule 1 list, in practice this has not happened. They suggest the granting of public contracts could in future be treated as a trigger for considering the use of the section 5 power.

46. NHS Forth Valley thought it could be helpful to implement a routine timetable for the government to review the bodies which are subject to FOISA.

47. The Campaign for Freedom of Information in Scotland set out in their response that they believe the section 5 power is not fit for purpose and highlight that the power is instigated by Scottish Ministers rather than the Scottish Parliament. UNISON Scotland, who answered 'no' at question 3(a) above also indicated a clear view that section 5 is outdated, and should be replaced.

48. The Scottish Information Commissioner was critical of how the section 5 power has been used to date:

“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.”
(Scottish Information Commissioner response)

49. The Commissioner indicated a desire for a 'publicly-stated, clearly timetabled and ongoing timeline' for future consideration of extension under section 5.

Question 4 (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? i.e. the direct provision of a service to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility.

50. There were 62 responses to this question. Of these, 48 said 'yes' (that stronger guidance would be helpful), seven said 'no' (that stronger guidance would not be helpful) and a further seven were 'not sure'. There were 50 respondents who provided reasons for their answers.

51. Those indicating that stronger guidance would be helpful included a range of Scottish public authorities, third sector and civil society organisations.

52. Respondents with this viewpoint indicated stronger guidance would be helpful in assisting both public authorities and their contractors to understand their duties and to provide additional clarity. Some indicated this would be most effective via an

update of the section 60 code of practice, however, other responses voiced the opinion that this should be legislative in nature rather than through guidance only.

53. Those who indicated that stronger guidance would not be helpful included the Scottish Information Commissioner, the National Union of Journalists, the Campaign for Freedom of Information in Scotland and UNISON Scotland. These respondents generally indicated the view that stronger guidance could not be a substitute for stronger legally enforceable rights.

Question 4 (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? i.e. an internal service provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider.

54. There were 58 responses to this question. The breakdown of responses was fairly similar to 4(a), with the majority (45 respondents) answering 'yes' (that stronger guidance would be helpful), 8 respondents answering 'no' (that stronger guidance would not be helpful) and five indicating they were 'not sure'. There were 41 respondents who provided reasons for their answer.

55. Views expressed by respondents were similar to those expressed in response to 4(a), with the majority favouring stronger guidance indicating this would be helpful to bring greater clarity for authorities and their contractors. Those indicating stronger guidance would not be helpful again expressed concern about any approach which would seek to substitute strengthening of guidance for the expansion and strengthening of legal rights.

Question 5

Do you agree that it is relevant to make a distinction in guidance between public services (i.e. those provided directly to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility) and ancillary services (i.e. internal services provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider)?

56. There were 57 responses to this question. Of these, 23 agreed it was relevant to make a distinction between public services and ancillary services while 19 disagreed. There were 15 respondents who indicated they were not sure on this point. There were 49 respondents who provided further thoughts on the relevance, appropriateness and implications of such a distinction.

57. Those indicating agreement thought a distinction would provide welcome clarity especially as some service providers are unlikely to have FOI experience.

Such a distinction could provide guidance to the ancillary service providers outlining their obligations and responsibilities under FOISA.

58. There were respondents such as Caledonian Maritime Assets Ltd (CMAL), Highlands and Islands Enterprise and South of Scotland Enterprise who believe the distinction can already be drawn from existing legislation including the Public Records (Scotland) Act 2011.⁴

“The distinction can already be made in practice and in guidance within the existing statutory framework. The distinction is important because it avoids disproportionate oversight of non-public records held by service providers providing ancillary services” (CMAL response)

59. Highlands and Islands Enterprise also point to Element 15 of the Model Records Management Plan (*public records created by third parties*). Element 15 states: “An authority’s plan must include reference as to what public records are being created and held by a third party carrying out a function of the authority and how these are being managed to the satisfaction of the authority”.⁵

60. South of Scotland Enterprise also suggest there may be an opportunity to create a stronger link between the Public Records (Scotland) Act and FOISA, strengthening rights of access to information accordingly.

61. As with question 4 (b), most local authority respondents disagreed that such a distinction was important, especially for requesters. However, there were those, such as East Dunbartonshire Council, who would welcome stronger guidance as a means of ensuring consistency, particularly in relation to what is expected of service providers. For Stirling Council, the distinction between public and ancillary services was less important than a potential consideration of contract value i.e higher value contracts fall under the scope of FOISA.

62. Others who thought a distinction was not helpful included those who were of the view that the distinction is artificial (SOLAR) and that the same principles apply in law under both public and ancillary services (Glasgow City Council).

63. There was a general view among those who disagreed with the relevance of the distinction that the method of delivering a public service should not have an impact upon transparency and access to information under FOISA. Additionally, the National Union of Journalists noted that to separate public and ancillary services may suggest less public interest in the provision of the latter and they argue this is not always the case.

64. The Campaign for Freedom of Information in Scotland (CFOIS) disagreed with the examples provided within the consultation:

⁴ Public Records (Scotland) Act 2011, <https://www.legislation.gov.uk/asp/2011/12/contents>.

⁵ National Records of Scotland, Model Records Management Plan, <https://www.nrscotland.gov.uk/record-keeping/public-records-scotland-act-2011/resources/model-records-management-plan>.

“The delivery of health services by NHS Boards and education services by local authorities would be clear examples of public services. The delivery of cleaning and maintenance services within the offices of a public authority might be an example of an ancillary service”⁶

65. CFOIS use the example of cleaning services to illustrate where there may be different interpretations over what is a public or an ancillary service. Consequently, such a distinction could be seen to be confusing to requesters. CFOIS recommend that there should be a simple process under FOISA to identify designated service providers regardless of whether they are public or ancillary.

66. The principle of ‘transparency following the public pound’ was highlighted by UNISON Scotland in their response and the suggestion of making a distinction between public and ancillary services risks creating a two tier approach to information rights.

Stakeholder discussion – Agility of Access to Information Rights - overarching principles

Participants in the Stakeholder discussion on ‘Agility of Access to Information Rights’ were asked to consider the following principle advanced by the Committee:

“the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation.”

Participants were asked to consider: whether this principle was correct; how well the current access to information rights regime delivers on the principle and whether there were any gaps between theory and practice; whether participants were aware of any direct examples where requesters have been frustrated in their efforts to obtain information about services due to the delivery model of that service and what scope there is to address issues satisfactorily within the current framework.

Discussion outcomes:

- › There was general agreement regarding the principle that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation.
- › Issue is how to implement taking on board complexities, nuances and potential exceptions
- › Participants generally agreed that there’s a need to draw a distinction between ‘public function’ and the ‘public pound’, with the former being the relevant issue here generally speaking
- › There was also a shared sentiment across groups that the terms used need to be defined better than they are in the principle as set out by the Committee. This was of particular importance for 3rd sector and new private service providers

⁶ see [Access to information rights in Scotland: a consultation \(www.gov.scot\)](http://www.gov.scot) - page 12

- › Participants highlighted some examples of where access to information has been frustrated e.g. care homes during the coronavirus pandemic, in relation to PPI and PFI contracts, as well as potential impacts of the National Care Service legislation and implementation. However there was also recognition that the participants were not requesters of information by and large and therefore were not best placed to provide detailed examples
- › There was also a sentiment that just because they are not necessarily aware of lots of examples that doesn't imply there is a lack of evidence of this being an issue.

3.3 Assessing the need for primary legislation

Question 6 (a)

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

67. There were 65 responses to this question. Of these, 18 were in favour of the introduction of a Gateway clause, whilst 24 were opposed. A further 23 advised they were not sure/had no view. There were 55 respondents who provided further reasons for their views.

68. Respondents who were in favour of the introduction of a Gateway clause (5 individuals, 13 organisations), were from a variety of sectors and included the Care Inspectorate, the Scottish Public Services Ombudsman, Common Weal and SHEIP – a working group of Scottish Higher Education Information Practitioners.

69. Some, such as Common Weal, indicated they would be in favour of a gateway clause without reservation. Others expressed concerns around the potential impact upon resources but were supportive, with reservations.

70. Although in favour, the need for proportionality was highlighted by a number of these respondents, particularly third sector organisations, including the Environmental Rights Centre for Scotland, who suggest a 'proportionality test' should apply with greater clarity required around the definition of 'services of a public nature'. Other respondents, including Rape Crisis Scotland, proposed the need for a clear definition of both 'public services' and 'public funds' in order to protect smaller organisations from a disproportionate financial or administrative burden.

71. The Centre for Freedom of Information – University of Dundee also thought the creation of a gateway clause would be beneficial as it would create consistency between FOISA and the EIRs.

72. Respondents opposed to the introduction of a gateway clause (2 individuals, 22 organisations) included seven local authorities, a variety of third sector organisations and the Scottish Information Commissioner.

73. Concerns were raised about a potential 'broad brush' approach to implementing any gateway clause by respondents including Voluntary Health Scotland. Whilst in favour of measures to extend FOISA to non-public bodies that carry out public functions, the Scottish Information Commissioner expressed

opposition to a “wide ranging, amorphous gateway clause”. In his response to this question, the Commissioner outlined a number of potential problems with the implementation of a broad gateway clause including a lack of certainty, lack of manageability and lack of control.

74. The Commissioner’s response expressed concern that that a wide-ranging gateway clause would, “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”.

75. His response also highlighted potential challenges for both individuals and the Commissioner, in terms of knowing with certainty which organisations are covered by the legislation and the potential for these to have a detrimental impact on the practical application of the law.

76. Others also thought a gateway clause would cause an unnecessary degree of uncertainty compared to the use of section 5 to extend coverage.

77. Some third sector respondents voiced concern that a gateway clause would place a significant strain on resources in a sector where bodies often have limited funding.

“the overwhelming message from the voluntary sector is that any potential gateway clause that extends FOI in a broad, one-size-fits all manner to voluntary organisations is not feasible or realistic, as it fails to deliver targeted and proportionate regulation across a unique sector.” (SCVO response)

78. Similarly, Victim Support Scotland (VSS) suggest that, in the current challenging financial climate, it is unlikely that voluntary organisations would receive further funding to cope with the any additional financial or administrative burden if subject to FOISA. VSS would prefer to explore alternative means of extending coverage in order to reduce the potential impact on smaller voluntary organisations.

Question 6 (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)?

79. There were 62 responses to this question and there was an even split between those favouring and those opposing a specific exclusion for SMEs with 22 responses supporting such an exclusion and 22 opposing. A further 18 answered that they were not sure/had no view. There were 49 respondents who provided further reasons for their view.

80. Those who provided reasons for supporting an exclusion for SMEs generally expressed concern about the proportionality of extending FOISA to smaller organisations by this means of a gateway clause. Some of these respondents expressed concern that the administrative burden of becoming subject to FOISA might discourage SMEs from bidding for public contracts.

“In introducing duties on SMEs in relation to FOIs, there is a risk that some businesses with limited capacity will be reluctant to enter into contracts with public bodies. For this reason, we consider it appropriate for an exclusion for SMEs to be applied to any Gateway clause.” (Visit Scotland response)

81. Most of those who provided reasons for opposing an exclusion for SMEs reflected the view that the accessibility of information about public services should not be determined by the size of the provider. A number highlighted that there are already a significant number of small-medium sized organisations which are designated as Scottish public authorities for the purposes of FOISA, including a number which would meet the definition of an SME.

“It is not clear why the size of the service delivery vehicle should be an issue. Some public services (e.g. primary care providers) would meet the criteria for an SME.

We would suggest that the need to provide for information rights is part of the tender and the resource for the outsourcing should include that this can be met. What may be needed to support this is access to support and guidance for SMEs who may not receive many requests for information.” (Scottish Public Services Ombudsman)

82. Whilst opposed to a gateway clause, the Scottish Information Commissioner also expressed concern about the idea that organisations should be excluded from FOISA on the basis of their size – taking the view that organisations should be considered for designation under FOISA on the basis of the functions or services they deliver, and pointing out that there are already many small and medium-sized organisations subject to the legislation.

83. UNISON Scotland emphasised the need for a regulatory level playing field between organisations bidding for public contracts, and regarded a specific exclusion for SMEs as contrary to this,

84. Some opposing an exclusion recognised concerns about proportionality, but took the view that a specific exclusion for SMEs was not the best approach:

“It is understandable that the Scottish Government would want to ensure that SMEs are not disadvantaged compared to larger businesses when they are seeking to engage with public contracts. However, a specific exclusion of SMEs would infringe upon the overarching principles of transparency and accountability in public matters that FOI(S)A is seeking to achieve.” (Centre for Freedom of Information in Scotland – University of Dundee response)

Question 6 (c)

If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations? 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).

85. There were 66 responses to this question. Again, there was a fairly even spread of responses with 26 answering that they would be in favour of a specific exclusion for third-sector organisations whilst 22 opposed this. A further 18 respondents answered that they were not sure or they had no view. There were 56 respondents who provided further reasons for their view.

86. Those supporting an exclusion for third sector organisations from any gateway clause generally cited similar concerns about proportionality and administrative burden to those advanced in relation to SMEs in responses to 6(b) (above). However, some additional considerations were advanced by a number of respondents representing a third sector perspective. A number of organisations (LGBT Youth Scotland, Scottish Women's Aid, Rape Crisis Scotland) raised concerns about the risk of FOI being used to harass or hinder the work of third sector organisations, by those hostile to their aims. Third sector respondents also emphasised the pressured resource context in which many third sector organisations operate.

“At present, most third sector organisations are operating under immense pressure following the pandemic and now the cost-of-living crisis. We continue to hear of voluntary organisations losing funding, struggling to keep the doors open and having to reduce services due to the operating environment. Many have limited resources, no access to legal support or data protection officers and will be unfamiliar with this legislation. Any clauses to include the third sector would need to be coupled with ongoing training and resources to ensure the sector is brought up to speed on the duties.” (Voluntary Health Scotland response)

87. Some respondents favouring a specific exclusion for third sector organisations from any gateway clause qualified their response by suggesting this should perhaps apply only to organisations below a particular size, or delivering services on a short/medium term basis:

“We believe that organisations which could be considered for this exclusion would be those who employ less than 250 people and/or have an annual turnover of less than £500,000. We also believe that exemptions should be considered for third sector and voluntary organisations who are only contracted to provide outsourced public services for a limited period (24 months or less.)” (Victim Support Scotland response)

88. Those opposing a specific exclusion for third sector organisations generally made similar points to those made in relation to SMEs in response to question 6(b) i.e. that information rights should depend on the nature of the function or service being delivered, not on the type of organisation delivering them. However, some

respondents (Aberdeenshire Council, National Union of Journalists) indicated that they could see merit in excluding smaller organisations/those with small contracts.

89. Some respondents opposing an exclusion for third sector organisations highlighted that some third sector organisations are large, and significant providers of public services:

90. Third sector organisations vary dramatically in income, staffing, purpose and in terms of whether they deliver public services.

“Historically Non-Governmental Organisations (NGOs) did not receive any or only a small proportion of their income from government or the public sector but the relationship in some cases is now blurred.

OSCR usefully provides a list of the top 300 income earners which are charities. Some are already covered by FoISA such as Universities, colleges, Culture and Sport Glasgow (Leisure ALEO), Historic Environment Scotland and Wheatley Homes Glasgow Limited (RSL). Income to charities can be tiny and immense such as £95,331,000 which is associated with one charity.” (Campaign for Freedom of Information in Scotland response)

91. A number of respondents who either said they did not know/had no view or who did not directly address the question around a specific exclusion made wider points about the proportionality of extension of FOISA in the third sector.

92. The Scottish Council for Voluntary Organisations (SCVO) emphasised the need to avoid placing unnecessary burdens on charities:

“...the overwhelming message from the voluntary sector is that any potential gateway clause that extends FoI in a broad, one-size-fits-all manner to voluntary organisations is not feasible or realistic, as it fails to deliver targeted and proportionate regulation across a unique sector... Policymakers must develop tailored solutions that have a clear purpose to ensure that voluntary organisations continue to play their part in access to information rights”. (SCVO response)

Question 7

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

93. There were 65 responses to this question. Of these, 32 respondents answered that they supported broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies, 10 indicated that they would be opposed to this while 23 stated they were not sure/had no view. There were 43 respondents who provided further information about their views.

94. Those who supported broadening the powers generally regarded this as having value in enabling the powers to be used somewhat more widely, noting the

increase in the scope of access to information rights this could bring. A number of respondents (Scottish Information Commissioner, Campaign for Freedom of Information in Scotland, Centre for Freedom of Information – University of Dundee, National Union of Journalists) expressed a clear view that the section 5 powers have been underused to date. Some of these, whilst supporting broadening of the power nevertheless expressed scepticism about whether this would truly address the root issues:

“At the general level, broadening the section 5 powers would have a benefit in the Scottish Government’s ability to denote a body as a public authority. However, as noted earlier, the problem encountered in the (lack of) use of section 5 powers is not their scope but rather the lack of political will to use these powers. Broadening the section 5 powers will not by itself address this issue.” (Centre for Freedom of Information – University of Dundee response)

95. The Campaign for Freedom of Information in Scotland particularly highlighted its concern that the power to initiate section 5 designation sits only with Ministers, and not with the Scottish Parliament.

96. However, nine of the respondents supporting change, representing a range of public and third sector respondents, also expressed some degree of caution about broadening, emphasising the need to have due regard to proportionality in future use of the power:

“...it is possible that broadening the existing section 5 power to extend FoISA represents a more proportionate approach. This would introduce a degree of flexibility and discretion, where relevant circumstances can be considered in their own context, that wouldn’t be available through the gateway clause proposal. We would again reiterate our consistent position that there must be careful consideration given to the capacity of third sector organisations to manage formal statutory duties under FoISA”. (Health and Social Care Alliance Scotland response)

97. Most of those expressing opposition to the change cited concerns about proportionality and the potential impact on private and third sector partners of Scottish public authorities of becoming designated as Scottish public authorities in their own right under FOISA:

“being subject to FoISA would place an additional financial and administrative burden on third sector organisations, many of whom are already facing significant budget and resource constraints...the third sector is a hugely diverse sector with a range of organisations of varying sizes and so it would be inappropriate to treat it as a uniform entity”. (Obesity Action Scotland and the Royal College of Physicians and Surgeons of Glasgow response)

98. A number of respondents who indicated they did not know/were not sure or who did not directly answer the question also made comments. A number of these (Children 1st, SFHA, SCVO, Scottish Community Alliance) expressed concerns about proportionality and the potential impact of designation on third sector bodies. Others (Law Society of Scotland, SOLAR, Dumfries & Galloway Council) expressed doubt about whether such change would truly add any value to the existing breadth of the

power. UNISON Scotland had doubts about the adequacy of the approach – preferring more fundamental change to the way bodies become subject to FOISA.

Question 8 (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 (i.e. any service provided directly to members of the public, for which the authority itself is regarded as having ultimate responsibility) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs? Please provide more information about your view, including any thoughts you have on how any such approach might work.

99. There were 61 responses to this question, with an approximately equal split between those who do consider it necessary to amend the legislation (21 responses), those who do not (19 responses) and those who answered they were 'not sure/had no view' (21 responses). There were 44 respondents who provided further comment on their views.

100. From those in favour of amending the legislation, the view that this would provide greater clarity and increase transparency around the use of public funds, came across strongly in the responses. Others, such as East Dunbartonshire Council, thought amending the legislation would provide a useful 'safety net' in addition to guidance provided to contractors. UNISON Scotland noted they would be keen to see a broader definition of 'public authorities' under section 3 of FOISA to cover publicly funded services, in order to provide what they described as 'a consistency in designation'.

101. The majority of those holding the opposite view, that it is not necessary to amend the legislation, mentioned that they thought the current legislation was sufficient (12 of 19 responses) although some noted that improved guidance would be welcome. Clarity in contracts regarding FOISA again emerged as a preferred option for this group over amending legislation.

102. Those who believed it is not necessary to amend the legislation included the majority of local authority respondents, Community Pharmacy Scotland, Scottish Enterprise, Public Health Scotland and Homes for Scotland and SOLAR.

Question 8 (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 (i.e. any internal service within an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs? Please provide more information about your view, including any thoughts you have on how any such approach might work.

103. There were 58 responses to this question. As with question 8 (a), there was an approximately even split between those who considered it necessary to amend the legislation (20 respondents), those who did not consider it necessary (17 respondents) and those who stated they were 'not sure/had no view' (21 respondents). There were 38 respondents who provided further comment on their views.

104. On the whole, respondents provided answers which were similar to those they submitted for question 8 part (a), with many referring to the previous question for this answer.

105. Some of those respondents who considered it necessary to amend the legislation commented on whether a distinction between public facing and ancillary services was helpful.

"...the artificial distinction between public facing and ancillary services goes against the principles of Freedom of Information. We support a gateway principle of transparency following the public pound. We agree with the PAPLS committee view that "that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation." This is not the case under FOISA and we believe that it is both appropriate and urgent to amend the legislation accordingly". (UNISON Scotland response)

106. Of the 17 who responded saying they do not consider it necessary to amend the legislation, six specifically noted that more explicit guidance could be helpful.

Question 9

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?

107. There were 43 respondents who provided some form of comment in response to this question. There were a variety of views, including those who believed there was sufficient flexibility within the current legislation.

108. The need for greater proactive publication was commonly raised in responses. Another theme was the need for the Scottish Government to give due consideration to proportionality and the unintended impact upon the third sector and front line services if a broad approach is taken to amending FOISA.

109. For example, the Health and Social Care Alliance warned of a potential 'chilling effect' where policy development is hampered by a fear that discussions will be made public. Others thought a greater focus should be on the potential effects of any change in legislation on FOI practitioners and smaller organisations and whether additional funding would be available to cope with the administrative burden.

110. Taking a different view is the Campaign for Freedom of Information in Scotland, who argue radical reform is needed and point to the former Scottish

Information Commissioner's 2015 report, '*FOI Ten Years On - Are the Right Organisations Covered?*' to suggest this has been a long standing issue.⁷

111. The Scottish Information Commissioner outlined his proposal for a greater role for the Scottish Parliament in the extension of FOISA, which he envisages as, 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.” (Scottish Information Commissioner response)

Stakeholder discussion – Agility of Access to Information Rights – possible legislative change

Participants in the Stakeholder discussion on ‘Agility of Access to Information Rights’ were asked to consider whether there is a need for changes in primary legislation to address concerns about the agility of access to information rights. They were asked what they saw as the opportunities and challenges associated with each of the broad approaches (instituting ‘gateway clause’, broadening section 5 power, or providing clearer legislative steer on information ‘held on behalf’) considered in the consultation and which of these was the most promising/least problematic overall.

Discussion outcomes:

- There was disagreement among participants regarding the need for legislative changes with some arguing strongly in favour of this and others against, instead arguing for strengthening current arrangements or using secondary legislation
- Nonetheless all agreed that there should be the same level of transparency expected irrespective of which type of organisation is delivering a public function
- Some participants noted that the existing legislation was rather old in the face of advances in technology
- There was some concern around the breadth of any proposed “gateway clause”, particularly on burden to identify, support and prepare organisations in advance of the change. Targeted support showed real benefit when e.g. registered social landlords were brought under FOI. It was felt that change could create a lot of work for the

Scottish Information Commissioner (in terms of the need to support authorities) but that it may be possible to scope out the need for this, using existing information on contracts for public services.

- Participants reflected on how private sector organisations would fund new FOI obligations. It was noted that when FOISA had been introduced, FOI was intended to

⁷ [FOI 10 years on: Are the right organisations covered?](#) – Scottish Information Commissioner - 2015

be incorporated into business as usual costs rather than being funded separately. However, doing this with private sector organisations doesn't avoid there being costs - if FOI makes it more costly to deliver public services then contracts will become more expensive, or suppliers will not bid.

› There were differing views on whether organisations generally receive requests in proportion to their size

› There was a broad discussion about possible alternative approaches. However, participants felt that to understand the correct solution would require a much better understanding of the scale of the problem, i.e. how many public services are contracted out to how many non-public body organisations.

3.4 Additional issues concerning agility of FOISA in the context of varied models of public service delivery (1) (confidentiality clauses)

112. Questions 10 and 11 considered the Committee's recommendation that the Scottish Government consult on amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. The consultation paper explained that this issue – about the effect of Scottish public authorities entering legally binding confidentiality agreements with contractors - was distinct from the wider provisions within FOISA intended to allow authorities to take account of the legitimate commercial interests of third parties.

Question 10

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?

113. There were 55 responses to this question with a majority (34 responses) indicating that they were not aware of any instances where such a confidentiality clause acted as a barrier to the release of information under FOISA. Eight respondents indicated they were aware of at least one instance while a further 13 answered that they 'did not know/prefer not to say'. There were 28 respondents who provided further reflections on this question.

114. Local authority respondents tended to emphasise how, in their experience, confidentiality clauses in contracts did not impact upon the release of information under FOISA. They were not treated as a justifiable means for withholding information, as opposed to valid exemptions in relation to commercial confidentiality.

115. In particular, North Ayrshire Council points to section 36 of FOISA (confidentiality) as a means of striking the correct balance between the duty to release and competing rights to confidentiality.

116. The smaller number of respondents who answered that they were aware of an instance of a confidentiality clause included the Scottish Information Commissioner, the Scottish Public Services Ombudsman and one local authority.

117. There was a view among many respondents that awareness should be raised in relation to the current legislation if it is felt confidentiality clauses are being mis-used to withhold information under FOISA.

Question 11

Do you favour amending FOISA to prevent Scottish public authorities from relying on confidentiality clauses with contractors as a basis for withholding information?
Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure.

118. There were 61 responses to this question. There was an approximately even split of views with 22 respondents advising they were in favour of making this amendment while 21 indicated they were not in favour and 18 answered they 'did not know/had no view'. There were 44 respondents who provided comments explaining their reasons further.

119. Those in favour of the amendment were from a mix of sectors and comprised seven individuals and 15 organisations. The organisations included Highlands and Islands Airports Ltd, the National Union of Journalists a housing association and a local authority.

120. The Scottish Information Commissioner is in favour of making such an amendment noting the following exemptions which would capture genuinely sensitive information shared between a contractor and a public authority:

- 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 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 any individual.

121. The Commissioner also highlighted the fact the public authorities are already discouraged from entering into confidentiality agreements under the section 60 Code of Practice, although they are not expressly prohibited.

122. Those not in favour of making the amendment were comprised of the majority of local authority responders and legal representatives including Shepherd and Wedderburn LLP, Kennedys Scotland LLP and SOLAR.

123. Of those not in favour, reasons included: the section 60 guidance is clear in discouraging the use of confidentiality clauses and that it does not appear that public authorities are relying on such clauses to withhold information.

Stakeholder discussion – Agility of Access to Information Rights – Transparency, confidentiality and legitimate commercial interests

Participants in the Stakeholder discussion on ‘Agility of Access to Information Rights’ were asked to consider how well the current access to information rights regime balances the need for openness with the protection of legitimate commercial interests. In that context they were asked about the experiences of requesters of information, Scottish public authorities and their partners/suppliers in this regard, the salience of the particular issue about use of confidentiality clauses and whether a prohibition on such clauses– along the lines of the Irish model – would be proportionate and desirable.

Discussion outcomes:

- Participants discussed some examples where greater transparency around contracting might have brought benefits. The collapse of construction and facilities management company Carillion and the Campaign for Freedom of Information in Scotland’s difficulties in obtaining a list of publicly owned companies were both discussed in this regard.
- There was agreement that use of confidentiality clauses was not the norm, but there was divergence of views as to whether they could ever justifiably be used
- Participants expressed keenness to understand more about the practical implications of the approach in Ireland and what learning could be drawn from this.

3.5 Additional issues concerning agility of FOISA in the context of varied models of public service delivery (2) (publicly-owned companies)

124. Questions 12 and 13 related to the Committee’s recommendation that the Scottish Government should consult on amending FOISA to ensure that companies wholly owned by a combination of authorities are subject to FOISA. The consultation paper set out the Scottish Government’s understanding that companies wholly-owned by a combination of authorities are regarded as ‘publicly-owned companies’ in terms of section 6 FOISA – and are therefore have the obligations of Scottish public authorities in their own right, under the law. However, this would not appear to apply where one of the co-owners is the Scottish Ministers.

125. The Scottish Government has accepted in principle that this is anomalous, and an unintended consequence of the structure of section 6.

Question 12

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?

126. This question received a total of 52 responses. Five respondents answered that they were aware of such an instance (where access to information has been frustrated) and 38 not aware of any instances. A further nine respondents answered the 'did not know/would prefer not to say'. There were 14 respondents who expanded on their answer in detail.

127. Those who were aware of such an instance where access to information through FOISA has been frustrated as a consequence of the current structure of the section 6 provisions comprised: a local authority, the Scottish Information Commissioner, Common Weal, the Campaign for Freedom of Information in Scotland and UNISON Scotland.

128. The Campaign pointed to their briefing on this subject and explained the difficulties they have faced in finding the names of companies wholly owned by designated bodies.

129. The Scottish Information Commissioner suggested there should be a duty to notify his office when a new publicly-owned company is established:

"...it may 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."
(Scottish Information Commissioner response)

130. There were a variety of organisations (30 responses) and eight individuals who answered that they were unaware of any such instances of access to information being frustrated as a consequence of the current structure of the section 6 provisions. The organisations included legal bodies, local authorities, civil society and the third sector. Further details or comment on this answer was limited from this group.

Question 13

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'? Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure.

131. There were 56 responses to this question. Most respondents were clearly in favour of making this change with 38 respondents answering 'yes'. Only two respondents answered that they would not be in favour of making this change. 16

respondents answered 'I don't know/have no view'. There were 29 respondents who explained their reasons in greater detail.

132. Those in favour represented a range of organisations. Those who provided reasons for their view generally expressed the opinion that the change would be a sensible measure to ensure there are no unintended gaps within coverage of FOISA. Seven respondents specifically referred to the benefit of change in producing greater legal clarity. Those opposed to the change did not set out any reasons in support of their views.

4. Developments in Information Technology - ensuring access to information rights in the face of changing modes of information use

133. This section of the consultation considered the Committee's concerns that developments in information technology, and the use of new methods of information storage and communication within public authorities may be undermining access to information rights. Central to this was the Committee's concern about the use of so called 'unofficial' platforms such as private email accounts or WhatsApp groups for the communication of information related to the work of public authorities and the possibility that use of such platforms by staff members or officers of public authorities may result in such information being overlooked by authorities when locating, retrieving and providing information in response to requests.

134. Respondents were asked to consider the following questions:

Question 14

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 obligation in relation to information held on unofficial platforms?

135. There were 60 responses to this question, with 45 respondents indicating that they did agree, six indicating that they did not agree and nine indicating that they did not know/had no view. In total, 41 respondents provided reasons for their answer.

136. Respondents indicating reasons for agreement generally referred to the value clearer guidance could have in ensuring organisations are fully aware of their obligations. Some respondents saw the value of such guidance as being to discourage the use of 'unofficial' platforms whilst other respondents explained their support in terms of the value of clearer guidance about managing their use in the context of organisations' discharge of their obligations under FOISA.

137. One local authority respondent (East Renfrewshire Council) highlighted that the Code of Practice on Records Management by Scottish Public Authorities, issued by the Scottish Ministers under section 61 of FOISA could be an alternative vehicle for guidance on this issue. Another local authority (Stirling Council) also qualified its support for clearer guidance, by highlighting that any detailed guidance may become obsolete quickly due to further developments in technology. Guidance therefore needed to remain broad in nature.

138. Among those expressing disagreement, most felt that existing guidance was sufficient or that it should be up to organisations to develop their own approach in line with their business needs. One respondent (Public Health Scotland) expressed concern that providing clearer guidance about managing the use of 'unofficial platforms' might further encourage their use. The Campaign for Freedom of Information in Scotland indicated that further guidance in the section 60 code would be insufficient and that all authorities require a 'use your own device' policy to mitigate concerns about the use of unofficial platforms.

139. Respondents who provided reasons for expressing no view generally recognised that there may be some value in providing additional guidance but also expressed reservations about how much value this would add in practice. Others felt that other vehicles might be just as appropriate, or more appropriate for providing additional guidance for public authorities and their staff. One trade union respondent (UNISON Scotland) considered that a more general effort to ensure staff members in public bodies are aware of their FOI obligations is needed, and requires to be resourced.

Question 15

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

140. There were 59 responses to this question, with 27 respondents indicating they would see value in such a change, 24 indicating that they would not see value in such a change and 8 indicating that they did not know/had no view. There were 43 respondents who provided reasons for their answer.

141. Opinion on this question was therefore quite evenly split. Of those opposing change, most indicated that they considered the existing definition of information to already be sufficiently clear. This was the basic view of the Scottish Information Commissioner who expressed concern 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".

142. Those who indicated that they would see value in such a change generally saw this in terms of providing greater clarity to authorities and their staff. Alzheimer Scotland reflected that the adoption of a fuller definition might help to clarify for authorities that FOISA does not only apply to written information, but also to information held in other formats such as audio and video recordings. Some of those supporting change emphasised that any new definition should not narrow the scope of the definition in any way.

143. Those who provided reasons for expressing no view generally expressed uncertainty as to the value and impact of any change to the definition.

Question 16

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?

144. There were 43 responses to this question, of which 37 indicated their support for 'any information in written, visual, aural, electronic or any other material form' as their preferred definition, in order to mirror the existing wording of the EIRs. This included a number of respondents whose basic preference in response to the previous question was not to change the definition at all. Some of the respondents provided further comment – explaining either that they saw intrinsic value in aligning

the definition with that provided in the EIRs or that they considered the suggested definition to be the widest possible.

145. Only two respondents provided detailed thoughts on how an alternative definition might be constructed. Moray Council suggested defining information as “captured data that can be read, heard or viewed; it covers all mediums whether that is electronic or hard copy (inc. paper, photographs, microform, art, historical archives etc). Data that can be interpreted is information”. Scottish Enterprise suggested any revised definition may seek to move beyond describing the formats in which information may be held, to specifying what constitutes information substantively ‘e.g. data, facts’.

Stakeholder discussion – Keeping Rights Fit for Purpose - Use of ‘unofficial platforms’

Participants in the ‘Keeping Rights Fit for Purpose’ stakeholder discussion were asked to consider issues around the use of so-called ‘unofficial platforms’. Specifically, participants were asked to consider the potential impact on the capacity of public authorities to locate, retrieve, and provide information in compliance with FOISA and the EIRs, and what they considered the best approach to tackling any concerns in this area.

Discussion outcomes:

- There was wide agreement that “Unofficial platforms” either shouldn’t be used or should only be used with caution, and that information held on them should be regarded as within scope of FOISA. However, practice is complicated by a number of circumstances, e.g. when staff leave, small charity organisations that don’t have ‘official platforms’, i.e. where staff have to use their own personal devices for work.
- Particular issues noted around ‘grey areas’ – e.g. at what point should a personal conversation between colleagues be considered to become a work conversation? Developments in IT functionality, such as availability of chat functions in Microsoft Teams and similar packages add to the salience of such issues.
- There was a divergence of views the extent to which this issue is amenable to being dealt with by legislation. Some participants felt it could be tackled through better corporate cultures (push for integrity, clear guidance on official record, duty of candour). Some participants felt a change in the law may be excessive to tackle the issue.
- There was general agreement around the need for clearer definitions.

5. Improving proactive publication – promoting openness as 'business as usual' in a digital age

146. Sections 23 and 24 of FOISA contain provisions to require and promote the proactive publication of information by Scottish public authorities. This section of the consultation sought respondents' views on the effectiveness of the regime in this regard, and how approaches to proactive publication might be improved.

147. In particular, views were sought on the proposal – originally put forward by the Scottish Information Commissioner – to replace the existing statutory requirement to maintain a publication scheme with a simple statutory duty to publish information, supported by a Code of Practice set by the Commissioner. Wider views on proactive publication, and the types of information respondents would wish to see authorities making available were also sought.

148. Respondents were asked to consider the following questions:

Question 17

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

149. There were 60 responses to this question, with 45 agreeing that the provisions of sections 23 and 24 of FOISA require to be updated. Five respondents did not agree that the provisions required to be updated whilst ten indicated that they did not know or had no view. There were 46 respondents who provided reasons for their answer.

150. Most of those explaining why they agreed that the provisions of sections 23 and 24 required to be updated referred to the changed ways in which people seek to access information about the work of public authorities. There was a widely held view that people rarely use the scheme itself as a tool for identifying and finding available information. Rather, people tend to rely on search engines, A-Z guides on authorities' websites etc.

151. There was also a view among some of these respondents that the requirement to maintain a publication scheme is seen as a 'tick box' exercise by authorities and adds little real value to their overall approach to making information available about their work. Some respondents in favour of updating the provisions provided more nuanced views. The Centre for Freedom of Information at the University of Dundee agreed that the provisions require to be updated, but indicated that the concept of the model publication scheme retains value as a guide for what authorities should publish and a standard against which a public authority can judge its own approach.

152. Two public authority respondents (Care Inspectorate, Stirling Council) suggested change should make the requirements less prescriptive – recognising the diversity of authorities and their needs:

“FOISA should reference best practice and provide an example of appropriate publication schemes, but not let this be restrictive or compulsory for organisations. In a digital world we publish much more information and publication schemes can be difficult to maintain.” (Care Inspectorate response)

153. Others, such as SHEIP – A working group of Scottish Higher Education Information Practitioners, the Campaign for Freedom of Information in Scotland, Environmental Rights Centre for Scotland and the National Union of Journalists emphasised the need to reform in order to place significantly greater emphasis on proactive publication as a central aspect of the regime:

“We...support amending FOISA to put greater emphasis on proactive publication as the primary way in which SPAs demonstrate their transparency and accountability, with individual requests as a ‘fall-back’ for when information is not proactively published.” (SHEIP – A working group of Scottish Higher Education Information Practitioners response).

154. Those providing reasons for disagreeing that the provisions require to be updated generally indicated that the existing provisions are adequate.

155. A number of respondents who said they did not know/had no view or who did not directly respond to the question provided some comment on their perspectives. Transparency International UK and the Scottish Community Alliance both expressed a general view that proactive publication requirements should be strengthened. Others, such as NHS Greater Glasgow & Clyde and North Ayrshire Council emphasised the need to be mindful of the resource required to proactively publish information.

Question 18

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?

156. There were 60 responses to this question. Of those, 44 expressed agreement with the proposal, seven expressed disagreement and nine indicated that they did not know/had no view. There were 47 respondents who provided reasons for their answer.

157. Those expressing agreement with the proposal generally referred to the Commissioner’s proposal representing an approach which would be simpler, more effective or more up to date. Some of those in favour also sought to qualify their support. A number of public authority respondents emphasised the need to be mindful of issues of proportionality – recognising that proactive publication of information requires staff resource. Any changes which would generate substantively increased obligations for public authorities would require to be resourced.

158. A number of respondents across sectors expressed concern about the enforceability of any duty, and accompanying Code. There was a clear desire on the part of a number of respondents for assurance that any move to a new model would not entail a substantive reduction or dilution of existing proactive publication duties.

159. Two civil society respondents – mysociety/What Do They Know and the Common Weal think tank – made comment about how to better integrate information released by various authorities.

160. Some of those expressing disagreement with the proposal did so on the grounds that the existing statutory requirements are already sufficient and that the proposed approach could place additional resource demands on authorities. Others feared that the proposed approach could inadvertently have the effect of reducing or diluting proactive publication requirements. Concerns about enforceability were raised in this regard. Both perspectives were also represented in comments from a small number of other respondents who said they did not know/had no view or who did not answer the question but nevertheless provided comment.

161. The Commissioner's own submission restated his reasons for favouring the approach, and offered some reflections on issues of workability and enforceability:

“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...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).” (Scottish Information Commissioner response).

Question 19

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

162. There were 57 responses to this question. Only eight respondents indicated that there was an alternative approach which they regarded as preferable to the proposal put forward to the Commissioner. There were 23 respondents who indicated that there was no other approach they saw as preferable and 26 respondents indicated that they didn't know/had no view.

163. Eight respondents provided substantive views regarding the nature of possible alternative approaches. The think tank Common Weal and NHS Forth Valley both suggested more emphasis should be placed on ensuring that authorities publish information released in responses to requests.

“...a simpler solution may be to mandate authorities to publish a disclosure log (so members of the public can see what has been previously released under FOISA). This would ensure that information which is capturing public attention is proactively made available to more than the individual who asked for it.” (NHS Forth Valley response).

164. Common Weal also highlighted their proposals for a Scottish Statistics Agency, as a mechanism for ensuring better public access to official statistics. Highlands and Islands Enterprise and South of Scotland Enterprise both called for greater standardisation of proactively published information across authorities.

165. Drawing on the 2017 report by former Scottish Information Commissioner Rosemary Agnew *Proactive Publication: time for a rethink?*⁸, SHEIP - A working group of the Scottish Higher Education Information Practitioners, suggested that there should be a new ‘transparency framework’ for Scotland. In SHEIP’s view this should develop proactive publication obligations as part of a wider reform of access to information rights in order to ensure that the overall set of obligations for authorities remains deliverable and proportionate.

166. A registered social landlord respondent advocated the introduction of a Code of Practice alongside the requirement to maintain a Publication Scheme, rather than as an alternative to it.

167. One local authority respondent (Glasgow City Council) supported the idea of a general duty to publish information, but did not believe this should be ‘enforceable’. This was set in the context of the Council’s wider concerns about the workability and resource implications of any change in approach.

168. The Scottish Federation of Housing Associations suggested changes to the existing Model Publication Scheme to make it more streamlined and flexible. One individual respondent suggested the publication of ‘raw data’.

Question 20(a)

How satisfied are you with the availability of information about the work of government and public services in Scotland in the public domain?

169. There were 52 responses to this question. Five respondents indicated they were ‘very satisfied’ with the availability of information about the work of government and public services. A further 16 respondents indicated they were ‘somewhat satisfied’, 15 said they were ‘neither satisfied nor dissatisfied’, 10 were ‘somewhat dissatisfied’ and 6 were ‘very dissatisfied’. Overall therefore, there were more respondents who were satisfied than dissatisfied. However, it should be noted that of the 21 respondents who said they were ‘very satisfied’ or ‘somewhat satisfied’, 16 were Scottish public authorities. Only two of these responses came from civil society or third sector organisations. Two responses were from individuals and one from a legal firm.

⁸ [Proactive Publication – time for a rethink?](#) - Scottish Information Commissioner - 2017

170. Of those saying they were ‘very dissatisfied’ or ‘somewhat dissatisfied’ only four were Scottish public authorities. Seven of these responses came from third sector or civil society organisations (including trade unions) and a further five came from individuals.

171. Of those indicating that they were ‘neither satisfied nor dissatisfied’ four were third sector or civil society organisations⁹, nine were Scottish public authorities and two were individuals.

172. Overall therefore, Scottish public authorities were more likely to be satisfied with the existing availability of information about government and public services in Scotland than third sector or civil society organisations were. However, there was a mixture of views across respondents of all types.

173. A total of 30 respondents provided reasons for their answers. Eight of those expressing satisfaction with information available referred to their view that there is already a significant volume of information available about the work of government and public services and/or that Scottish public authorities discharge their obligations well. However, nine respondents also or instead indicated where they saw room for improvement. Generally these comments related either to there being scope to publish more information, to making information easier to find or to improving the quality of communication with the public.

174. The Scottish Information Commissioner’s response provided detailed reflections on how proactive publication could be improved.

“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.” (Response from Scottish Information Commissioner)

175. Those expressing dissatisfaction generally referred either to a simple lack of information, to inconsistent or ‘patchy’ approaches by authorities or to there being an insufficient culture of publication.

176. Three of the 15 respondents who said they were ‘neither satisfied nor dissatisfied’ also made comments. One third sector organisation (Community Pharmacy Scotland) indicated that whilst their organisation had access to the information it needs, it could not comment on wider availability of information. Others (incl Moray Council) commented on there being a wide range of information available but highlighted issues around consistency and accessibility e.g. the lack of availability of information in different languages.

⁹ The Law Society of Scotland is included in this category. The Law Society of Scotland is not presently recognised as a Scottish public authority. The [Regulation of Legal Services \(Scotland\) Bill](#) introduced in the Scottish Parliament on 20 April 2023 proposes to make certain aspects of its functions subject to FOISA.

Question 20(b)

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

177. There were 31 responses which made some substantive comment in response to this question. The most commonly recurring theme across these responses was the importance of making financial information available. There were 13 responses which made some reference to finance, funding, budgets, the use of public money etc.

178. Other key themes highlighted in the responses were the desire for: data/statistical information (10 responses), information about services (6 responses), information about/underpinning decisions and policies (5 responses), performance information (5 responses), information about contracts (3 responses), information about people involved in services and their interests (2 responses), diversity data (2 responses), demographic data (2 responses), major projects or other high impact issues (2 responses).

179. Three respondents (Scottish Information Commissioner, Campaign for Freedom of Information in Scotland, Kennedys Scotland LLP) highlighted what they saw as the value in the existing categories already highlighted in the Commissioner's Model Publication Scheme. In his own response, the Commissioner highlighted his own public awareness research:

“My public awareness research, 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.” (Scottish Information Commissioner response).

180. A number of other specific comments were made by individual respondents. One public authority (East Renfrewshire Council) highlighted the value that Freedom of Information requests might have as a steer to information which ought to be prioritised for publication. Another public authority (Public Health Scotland) reflected on the importance of ensuring that authorities publish an 'equal balance' of information about what has not gone well against information the authority would wish to highlight.

181. The Campaign for Freedom of Information in Scotland called specifically for publication of information about companies and arms-length bodies set up by authorities, citing concerns about the effectiveness of section 6 of FOISA (relating to wholly-owned companies). The think tank Common Weal suggested the adoption of a 'Glass Wall' approach to publication of information by Scottish public authorities to ensure 'the proactive disclosure of all information that could conceivably be disclosed by a properly worded FOI request'.

Question 20(c)

How would you prefer to access information about government and public services in Scotland?

182. A total of 34 respondents provided substantive comments in response to this question. The majority (19) made some reference to accessing information 'online'. This may also have been assumed by some others.

183. Two respondents made explicit that they would wish to see information also made available in hard copy or 'non-digital' formats, for reasons of accessibility and one made reference to the role of local libraries. The importance of giving considerations to wider issues of accessibility was also highlighted by a number of respondents:

"Information must be available in digital and non-digital formats, including written materials. A variety of language options, including braille and translated versions, is also required, as are other communication options such as audio-visual formats. Attention should always be paid to the use of language to ensure that is clear and the information should be available in simple, easy-to-use/read formats that enable everyone the ability to understand it." (Alzheimer Scotland response)

184. Four respondents suggested the use of some form of central location, repository or database of publicly available information as a means of making information easier to find. The think tank Common Weal highlighted its proposals for a Scottish Statistics Agency and a 'Glass Wall', clarifying that it would still see a role for public authorities in assisting members of the public to access information under such arrangements.

Stakeholder discussion – Proactive Publication

At the dedicated stakeholder discussion event on *Proactive Publication* participants were asked to consider a fictional case study of a new Scottish public authority and to consider what the aspirations of that body should be in terms of its approach to proactive publication of information. In the second part of the discussion participants were asked to consider how this compared with real-world approaches by government and public services in Scotland. In the final part of the discussion participants were asked about the effectiveness of the existing statutory regime in encouraging proactive publication and what changes – if any – might help to promote stronger approaches to proactive publication by authorities.

Discussion Part 1 – Considering fictional case study

- › There was a general feeling that the current situation is not quite fit for purposes any more despite the principle of proactive publication being sound.
- › Participants highlighted the need for bodies to resource Proactive Publication, and not simply rely on the good practice of individual practitioners.
- › There was a shared view that information that is proactively published also needs to be easily accessible in a standardised way across organisations where possible.

› Proactive publication needs to be built upon and brought into alignment with current technological advancements.

Discussion Part 2 – Considering approaches by government and public services

- › Participants considered issues around how Proactive Publication schemes are monitored, assessed and enforced.
- › There was discussion around the extent to which issues such as commercial confidentiality are overextended to act as a block.
- › There was an overall sentiment that greater clarity around how different pieces of legislation and broader factors - including issues such as commercial confidentiality, GDPR and any other relevant legislation - interact with and may have unintended consequences for proactive publication.
- › Consideration was also given to issues of scale, and how requirements may differentially impact on organisations which are very small versus very large in size.

Discussion Part 3 – Considering the statutory regime

- › There was a divergence of views about whether a ‘one size fits all’ approach presents issues, and whether greater clarification in guidance is required.
- › This related to issues around determining which organisations should be regarded as providing public services.
- › There was discussion regarding the capacity for enforcement, particularly with regard to non-public sector bodies that might be - or become – designated as Scottish public authorities for the purposes of FOISA.

6. Technical and other issues – ensuring the Act remains fit for purpose

185. The final section of the consultation considered eleven other areas in which the post-legislative scrutiny report recommended that the Scottish Government should consult. Each of these related to matters concerning the operation of the legislation. Some of the questions relate substantively to the overall strength of the regime in terms of the rights which it provides to requesters seeking information and obligations on authorities. Others related principally to issues of operational effectiveness.

186. The responses to these questions are summarised and analysed below.

6.1 Approach to estimating cost of compliance

187. Question 21 reflected the Committee's suggestion that change be considered to make the meaning of the cost limit clearer to requesters. The consultation document explained that since both the overall cost limit (£600) and the maximum hourly rate authorities can impute for staff time (£15) have remained fixed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004, the effective cost limit for most requests has remained equivalent to 40 working hours for most requests (since $600/15=40$) and can be expected to remain so for the majority of requests, without significant further erosion as a result of inflation.

Question 21

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)?

188. In total, 63 respondents answered this question. There were 42 respondents who indicated they would support a change of this nature, ten who indicated they would not and eleven who indicated they did not know/had no view. There were 54 respondents who provided reasons for their answer.

189. Of those expressing their support, 21 expressed reasons for doing so which broadly aligned to the Committee's reasons for supporting the change i.e. they considered that an approach based around staff time would be clearer and easier for requesters to understand.

190. A number of other respondents expressing support made more detailed comments regarding the upper cost limit, fees regulations and their implications for request handling. A number of authorities' (General Teaching Council for Scotland, SportScotland, Aberdeenshire Council and two other local authorities) called for a re-examination of the effective cost limit, currently equivalent to 40 working hours, expressing concern about the resource implications associated with the handling of large or complex requests and the potential for this to impact on the delivery of other services and statutory functions. Three of these respondents highlighted that the

effective upper cost limit is substantially higher under FOISA than under the equivalent UK Freedom of Information legislation.

191. The think tank Common Weal suggested that there should be greater flexibility within the regime than at present for authorities to engage with requesters around the handling of large/resource intensive requests, including greater latitude to provide partial responses.

192. One individual respondent suggested the cost limit should be based around the length of the statutory deadline, rather than 40 working hours.

193. Seven respondents provided reasons for opposing change. Two of these (Centre for Freedom of Information – University of Dundee and Environmental Rights Centre for Scotland) referred to seeing little value in changing the approach. One other (a Scottish public authority) expressed concern about losing the ability to include non-staff related costs.

194. One individual respondent opposing the change advocated that the £600 cost limit should remain, but without continuing to be linked to a £15 per hour ceiling on imputed staff costs (i.e. so that the limit should be a simple cash cost of £600). Another individual respondent commented that there should be no fees regulations, since all information should be provided free of charge.

195. SHEIP – a working group of Scottish Higher Education Information Practitioners set their opposition in the context of their wider view that the provisions of FOISA should be brought into line with those of the EI(S)Rs, which have no defined upper cost limit.

196. The Campaign for Freedom of Information in Scotland opposed the change and commented that detailed consideration of new fees regulations should only take place after wider reform of FOISA.

197. A number of respondents indicating that they did not know/had no view or who did not respond to the question nevertheless made some comments. Notably, the Scottish Information Commissioner indicated that he is open minded about the approach to these issues. The Commissioner's response highlighted that there is scope to significantly alter the approach in this area by making changes to the fees regulations set under sections 12 and 13 of FOISA, without the need for new primary legislation. The Commissioner's response highlighted that in some circumstances a 40 working hour limit could represent a lowering of the effective cost limit, since there may still be some Scottish public authorities with staff members for whom the hourly cost of employment is still less than the £15 ceiling. However, the Commissioner also recognised that these instances will likely be fewer than in the past.

198. A range of other issues regarding effectiveness, proportionality and ensuring the rights of requesters were raised by other respondents in this category.

6.2 Transfer of requests between authorities

199. Questions 22 and 23 related to the Committee's recommendation that the Scottish Government should consult on amending FOISA to permit the transfer of FOI requests between authorities, where the authority which has received the request does not hold the information requested, but believes another authority to do so. There are currently no provisions to do this within FOISA, but there are provisions to do so within the EIRs. A number of public authorities who provided evidence to the Committee suggested that making similar provisions within FOISA might improve the administration of requests, and be helpful to individuals seeking information.

Question 22

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?

200. There were 58 responses to this question. Nine respondents indicated that they were aware of such examples. There were 38 respondents who indicated that they were not aware of any such examples and 11 who said they were not sure/didn't know. There were 23 respondents who elaborated on their answer.

201. Of those who said they were aware of such instances, two were local authorities confirming their own experience of transferring requests. One local authority respondent commented that it 'regularly' transfers EIRs requests to other authorities without issue. Another, Stirling Council, reflected on its own experience of the transfer of a request:

"The transfer of an EIR request, provided the requester with a smooth transition of their request from one public authority to another. It improved the request experience for the requester, and also helped create and cement closer working relationships between the two public authorities." (Stirling Council response)

202. A third local authority (East Renfrewshire Council) did not provide a specific example, but highlighted the very close working relationship councils may sometimes have with other bodies such as culture and leisure trusts, which can include the provision of administrative services. The Council's response commented that in such circumstances the refusal of a request by one body, with signposting to the other, can appear to be something of a technicality and that better service would be provided to the requester if requests were able to be transferred.

203. Other respondents indicating that they were aware of such instances provided more general comments about the issues involved in the transfer of requests between authorities. The Scottish Information Commissioner commented that only one appeal case considered by his office has related to the application of regulation 14 (the EIRs provision permitting transfer of requests). In that instance the Commissioner determined the provision to have been incorrectly applied by the authority.

204. Of the 38 respondents who indicated that they were not aware of such instances only nine provided further comments to elaborate on their response. Seven of these were from public authorities indicating that they do not/have no experience of transferring requests EIRs requests (including Moray Council, Renfrewshire Council, NHS Forth Valley, Glasgow City Council).

205. Two of these (Glasgow City Council and another local authority) indicated that they instead refuse requests, and signpost to the relevant authority. Other authorities simply indicated they had not found the need to make use of the provision.

206. The Centre for Freedom of Information – University of Dundee indicated that in its research on the EIRs it had not encountered these provisions as an issue, but nevertheless indicated the view that they are helpful in principle. SOLAR also indicated that it is not aware of any such instances.

207. Three respondents who said they were not sure/didn't know whether they were aware of any examples or evidence, or who did not answer the question, provided some relevant additional comment. North Ayrshire Council commented that they have been cautious about transferring EIR cases due to concerns about data protection (this issue was highlighted in the consultation document). The Campaign for Freedom of Information in Scotland also reflected on the need to consider the privacy of requesters noting that, 'some requestors do not want designated bodies to know that they are making information requests and quite deliberately choose who to approach for information'.

208. The Scottish Federation of Housing Associations conveyed their understanding that the provisions are rarely used in their sector.

209. Overall, responses to this question would seem to support the view that most authorities transfer EIR requests to other authorities infrequently and that the overall impact of this on the experience of requesters is likely to be limited.

Question 23

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?

210. There were 59 responses to this question. Views were evenly split with 22 respondents indicating that they would favour the introduction of such provisions, 22 indicating that they would not favour this and 15 indicating that they did not know/had no view. There were 44 respondents who provided further reasons for their view.

211. Of the 17 respondents who provided reasons for supporting the change most (13) gave reasons which corresponded broadly to the reasons set out in the Committee's report i.e. that this would help to improve the service to requesters of information and/or be administratively helpful to authorities.

212. Two respondents – one individual and one authority (NHS Forth Valley) qualified their support by making clear that, as under the EIRs, the ability to transfer requests should only be an option for authorities – not a requirement, citing concerns about feasibility and proportionality. SHEIP - A working group of the Scottish Higher Education Information Practitioners' indicated that this measure would have particular value as part of a more general reform of FOISA including the introduction of a 'Gateway Clause' and greater alignment with the EIRs. The think tank Common Weal also linked this issue to their own wider proposals for reform of the system, advocating that there should be a central body to help coordinate and target requests.

213. Among the 19 respondents who provided reasons for opposing change there were a number of recurring themes. The most dominant was that any change was simply unnecessary since the existing arrangements are effective. Some also expressed concerns about any change making the system less clear for requesters and/or taking control out of the hands of requesters. There were also concerns about the requester's data protection and privacy rights set out by a number of the respondents.

214. These concerns were summarised in the Scottish Information Commissioner's response:

"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....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." (Scottish Information Commissioner response).

215. Seven respondents who either indicated that they did not know/had no view or who did not answer the question provided some additional comment. Most of these reflected on the balance of considerations put forward by respondents supporting or opposing change i.e. that the proposal could have benefits in principle in terms of enabling a better service to requesters, but comes with a number of administrative challenges. This was the view of Scottish Enterprise:

"There are benefits to such an approach, as long as it is subject to an obligation to adopt a process that addresses any concerns around data protection.

Allowing the transfer of requests between authorities would provide a better customer journey, with clarity on which public authority holds information, but a number of practical issues would need to be overcome." (Scottish Enterprise response)

216. One respondent (Kennedy's LLP) reflected that the change would have most value in the event of significant extension of FOISA to further entities e.g. the designation of more contractors working on behalf of authorities would likely generate more scenarios in which the transfer of a request (from authority to contractor, or vice versa) would enable a more joined up service.

6.3 Seeking Clarification

217. Question 24 considered the Committee's recommendation that FOISA should be amended with respect to time for compliance so that requests for clarification merely pause - and do not reset - the 'clock' for compliance within the statutory timescale. Under the existing statutory regime authorities have twenty working days to respond to any request. However, where a request is not sufficiently clear to allow the authority to identify and locate the information sought the authority may seek clarification from the requester. The authority's twenty working day statutory time frame is considered to recommence from the date on which a sufficiently clarified request is received from the requester.

218. Some witnesses who provided evidence to the Committee expressed concern about authorities sometimes leaving it until close to the original twenty working day deadline before seeking clarification, resulting in significant delay within the process. This was felt to represent poor customer service to the requester, and may in some instances give rise to suspicion that the process of clarification is being misused by the authority to provide themselves with more time to answer requests without formally breaching the statutory deadline.

219. The Committee suggested that this problem might be addressed by amending legislation so that requests for clarification only pause the statutory timeframe, rather than resetting it, so that any working days which have already elapsed between the authority's receipt of the request and its decision to seek clarification would be deducted from the timeframe within which the authority would be required to respond to a sufficiently clarified request once received.

220. The Scottish Government's consultation document also posited a possible 'compromise' option of allowing a defined period after receipt of a request during which the authority may seek clarification, only after which any additional days delay would be deducted from the statutory timeframe for responding to the request once sufficient clarification had been received.

Question 24

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

1. Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested
2. 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
3. Leaving the provisions of the legislation unchanged in respect to timescales
4. None of the above/No preference

221. There were 63 responses to this question. Of these, 17 favoured option '1' (clock only paused), seven favoured option '2' (defined period for seeking clarification), 29 favoured option '3' (no change) and 10 chose option '4' (none of the above/no preference).

222. The largest number of respondents (29) favoured making no change to provisions (option 3). However, there was a clear difference of perspectives between public authorities and other types of respondent in respect to this question. Of the 28 responses favouring no change, 22 were from Scottish public authorities. Two others, from SHEIP – a working group of Higher Education Information Practitioners and the Scottish Federation of Housing Associations, may also have represented public authority perspectives. The remaining five were from individual respondents.

223. Of the 17 respondents favouring option 1, only five were Scottish public authorities, although a further one came from an organisation which represents a category of Scottish public authorities (Community Pharmacy Scotland). Three of the responses came from individuals and the other eight came from third sector or civil society organisations.

224. Of the seven respondents who favoured option 2, four were Scottish public authorities, two were third sector or civil society organisations (Church of Scotland, Common Weal) and one was a legal firm (Kennedys LLP).

225. Of the ten who selected option 4, four were Scottish public authorities and a fifth was a representative body representing public authorities (SOLAR). The other five represented the third sector, civil society or academia.

226. Of the 29 respondents who favoured option 3, 22 provided further comment or reasons for their view that the provisions of the legislation should be left unchanged with respect to timescales. Most expressed a view that the existing provisions work adequately. There was a common view among respondents that it would be unreasonable to reduce the statutory timescale within which authorities are required to respond to any request before a sufficiently clear request has been received. A number of the respondents commented that whilst authorities generally seek clarification promptly, there can be valid reasons why in some cases it may only

become apparent at a later stage that clarification is required. Respondents also reflected on the value that the process of seeking clarification can have in terms of enabling engagement with requesters, and expressed concern that any change might discourage authorities from seeking clarification.

227. Of the 17 respondents who favoured option 1 (clock only paused), ten provided comments in relation to their view. Most of these respondents felt that allowing for the 'clock' on requests to be paused rather than reset struck a more appropriate balance between the needs of the requester and the authority than the current arrangements.

228. Five of the seven respondents who favoured option 2 (defined period for seeking clarification) provided further comment on their views. These respondents generally saw this 'compromise' approach as striking the best balance between the need for authorities to have sufficient time to consider requests and the legitimate customer service expectations of requesters:

"We are of the view that this approach would strike a balance between setting reasonable expectations on authorities and ensuring prompt service to requesters."
(Creative Scotland response)

229. One respondent (Kennedys LLP) suggested there would be a need to give careful consideration to the length of the defined period, noting factors that can contribute to delay in authorities identifying information requests.

230. The Scottish Information Commissioner was among respondents favouring this approach. The Commissioner reflected that adopting option 1 (clock only paused) could have the unintended consequence of incentivising authorities to refuse unclear requests as 'invalid' on the grounds that the request does not 'describe the information requested' in terms of section 8(1)(c) of FOISA. Option 2 (defined period for seeking clarification) was regarded by the Commissioner as mitigating that risk.

231. Two respondents who selected option 4 (none of the above/no preference) provided substantive additional reflections on the issues. The Centre for Freedom of Information at the University of Dundee highlighted that none of the options emphasised the importance of the obligations for authorities to respond 'promptly' to all requests. Scottish Enterprise considered that further 'hybrid' options should be explored.

232. In addition to the above analysis, it is worth noting that a number of Scottish public authority respondents to this question indicated that in terms of their own internal approach to case management they already consider the clock to be merely 'paused' rather than 'reset' by requests for clarification (Moray Council, North Ayrshire Council and two other Scottish public authorities). An individual respondent, who identified themselves as working for a Scottish public authority also indicated that their organisation takes the same approach.

Stakeholder discussion – Keeping Rights Fit for Purpose – Provisions for Seeking Clarification

Participants in the 'Keeping Rights Fit for Purpose' stakeholder discussion considered the proposal to 'pause' rather than 'reset' the clock when clarification is sought.

Discussion outcomes:

- › There was some divergence in views on this issue.
- › A risk was highlighted that an unintended consequence of the proposed change could be increased rejections of requests as 'invalid' in terms of section 8 of FOISA, if authorities are incentivised against seeking clarification.
- › There was discussion around the distinction between a valid request which doesn't describe what the requester intended (and should be clarified) and invalid requests (which can be rejected as such).
- › Suggestions were made in terms of good practice around clarifying requests early, and both parties being able to clarify and build trust.

6.4 Removal of section 48 prohibitions – Appeals about decisions of the Scottish Information Commissioner, the Lord Advocate and procurators fiscal

233. This section of the consultation sought views on whether the current prohibitions within section 48 of FOISA - which prevent the Scottish Information Commissioner from considering appeals about: a) the handling of information requests by his own office; b) the handling of information requests by the Lord Advocate in her capacity as head of the prosecution system and procurators fiscal – should, in principle be removed.

234. The consultation highlighted that with regard to the latter of these, the original policy memorandum for the Freedom of Information (Scotland) Bill took the view that it would not be within the legislative competence of the Scottish Parliament to empower the Commissioner to consider appeals about decisions of the Lord Advocate. This relates to the provisions of section 48 of The Scotland Act 1998 (the Act which established the Scottish Parliament) which stipulate that decisions of the Lord Advocate as head of the system of prosecution and investigation of deaths in Scotland are to be 'taken by him independently of any other person'.¹⁰

¹⁰ 30. [Freedom of Information \(Scotland\) Bill: Policy Memorandum - 27 September 2001](#) (see para 111-117)

Question 25

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?

235. There were 56 responses to this question. Of these, 29 indicated that they would be in favour of such a change, six indicated that they would not be in favour of such a change and 21 indicated that they did not know/had no view. There were 26 respondents who provided reasons for their views.

236. Of the 29 respondents indicating support for the change, 18 provided further comment in explanation of their views. Most of these respondents referred to the value that an appeal stage would have for requesters seeking information from the Commissioner's office. Three of these respondents (Scottish Information Commissioner, NHS Forth Valley, Public Health Scotland) referred to similar provisions already being in place in other parts of the UK in respect to the Information Commissioner's Office (ICO) which regulates compliance with the (UK) Freedom of Information Act 2000. Five of these respondents also qualified their support by stipulating that there would be a need to ensure the sufficient independence of the internal appeal process.

237. Four respondents who opposed the change offered comments about their reasons (Centre for Freedom of Information – University of Dundee, Stirling Council, Environmental Rights Centre for Scotland, SportScotland). These respondents all expressed concerns about the potential for actual or perceived bias within the process. There were no other detailed comments from respondents.

Question 26

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)?

238. There were 54 responses to this question. Of these, 30 indicated they would be in favour of such a change, 4 indicated they would not be in favour of such a change and 20 indicated that they did not know/had no view. There were 26 respondents who provided reasons for their views.

239. Those favouring change generally expressed the view that it was unsatisfactory for the Lord Advocate (and, by extension, the prosecution service in Scotland) not to be subject to the same level of scrutiny and oversight as other public services in relation to the handling of information requests. A number of these respondents (Scottish Information Commissioner, Victim Support Scotland, General Teaching Council for Scotland, Environmental Rights Centre Scotland, Centre for Freedom of Information – University of Dundee) specifically indicated their view that such a change need not be regarded as undermining the independence of the prosecution system.

240. The Commissioner clarified his view on the issues around legislative competence highlighted in the consultation paper:

“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.” (Scottish Information Commissioner response)

241. Two respondents opposing change provided further comment. Kennedys LLP indicated they considered the prohibition to be necessary in order to safeguard the independence of COPFS and the Lord Advocate. East Dunbartonshire Council also considered that it is in the public interest for aspects of the work of the Lord Advocate and procurators fiscal to be ‘excluded from the provisions of FOISA’.¹¹

Stakeholder discussion – Keeping Rights Fit for Purpose – Removal of Section 48 prohibitions

Participants in the ‘Keeping Rights Fit for Purpose’ stakeholder discussion considered the proposal to remove the prohibitions within section 48 of FOISA, thereby allowing the Commissioner to consider appeals about the handling of requests by his own office, the Lord Advocate and procurators fiscal.

Discussion outcomes:

- › Removal of section 48 prohibitions was widely supported by participants, particularly with regard to Lord Advocate and procurators fiscal.
- › Some participants thought it would be odd to have the Commissioner’s office consider an appeal against itself.
- › Participants welcomed the fact that although decision notices can’t be issued against the Crown Office, enforcement action can be taken if they too often fail to respond.
- › It was noted that the Commissioner can already be involved in making decisions about information in high-profile/sensitive criminal justice cases, since he does consider appeals about requests made to Police Scotland.
- › In practice, Commissioner won’t order disclosure of information that would prejudice criminal investigations.

6.5 First Ministerial ‘veto’ power

242. Section 52 of FOISA provides that the First Minister may issue a certificate to overrule a decision of the Commissioner in respect of the handling of any request by

¹¹ For clarity, the system of prosecution and investigation of deaths is not excluded from FOISA, only from the Commissioner’s power to consider appeals.

the Scottish Administration (i.e. by the Scottish Ministers, or any non-Ministerial office holder or department), where the information in question is considered to be of exceptional sensitivity.

243. Question 27 sought views on whether this provision of the legislation should be retained or removed:

Question 27

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
- I don't know/have no view

244. There were 59 responses to this question. Of these, seven supported retention of the power and 22 supported its removal. There were 24 respondents who indicated that they did not know/had no view.

245. Of the seven who supported retention, three were individual respondents and four were organisations across a range of sectors (Community Pharmacy Scotland, Church of Scotland, Public Health Scotland, a registered social landlord). Four provided comments in support of their view. These generally expressed support for the principle of the power as a safeguard to be used in exceptional circumstances. One individual respondent qualified their support for retention, indicating that the First Minister should be obliged to inform other party leaders and the Lord Justice General of Scotland (the Lord President) in the event of any use.¹²

“PHS believes the current veto power to be proportionate and fit for purpose.”
(Public Health Scotland response)

246. Of the 22 respondents supporting removal of the power, 20 provided comments to further explain their views. Most of these indicated the view that the power was anomalous and/or contrary to the principles underpinning access to information legislation. The Centre for Freedom of Information – University of Dundee commented that in its view the power breaches “the basic requirements of executive accountability and judicial independence by enabling the Executive to override what is essentially a judicial decision”. It went on to cite the judgement of the UK Supreme Court in a case considering the application of similar provisions under the equivalent UK legislation¹³ as evidence that the power serves little purpose.

247. The Scottish Information Commissioner restated his own view that the power is contrary to the fundamental principles of FOI, serves no useful purpose and that its removal would strengthen FOI law in Scotland. The Commissioner rejected the

¹² Section 52 of the FOISA currently requires the First Minister to lay a copy of any certificate issued under section 52 before the Scottish Parliament within 10 days

¹³ See [R \(on the application of Evans\) and another \(Respondents\) v Her Majesty's Attorney General \(Appellant\) - The Supreme Court](#)

view – presented in the consultation paper - that the fact that the power has never been used is evidence that it is regarded as ‘genuinely exceptional’. Rather, the Commissioner regarded this as evidence that the power is not needed.

248. The think tank Common Weal, whilst supporting removal of the ‘veto’ indicated that if any veto power were required this should be exercised by the Scottish Parliament.

249. Four of those who said they did not know/had no view or who did not answer the question provided some comments. Two of these simply indicated that they felt this issue was unlikely to impact their organisation (Scottish Federation of Housing Associations, Glasgow City Council). A further two referred to being able to see both sides of the argument (Kennedys LLP, Victim Support Scotland):

“We note that as the power has never been used it could be argued that it is not being misused and has proved to be reserved for exceptional circumstances. However, we acknowledge the argument that this could also be used as evidence for its removal as its lack of use could suggest it is not required.” (Victim Support Scotland response).

250. However, the overall balance of respondents’ views in response to this question was clearly on the side of removing the power.

Participants in the ‘Keeping Rights Fit for Purpose’ stakeholder discussion considered the proposal to remove the First Ministerial ‘veto’. There was wide support among participants for removing the power. Participants commented the veto power is seen as exceptional, out of step internationally and potentially contrary to principles of FOI. They also suggested that the power was regarded as a “nuclear option”, noting that it has never been used, even used during the coronavirus pandemic.

6.6 Presumption in favour of disclosure

251. Question 28 sought respondents views on the suggestion that a provision should be added to FOISA, similar to 10(2)(b) of the EIRs, ‘that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure’. This suggestion arose from the Scottish Information Commissioner’s written evidence to the Committee, which suggested that this may improve the international standing of FOI legislation in Scotland.

Question 28

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?

252. There were 57 responses to this question. Of these, 22 indicated that they would be in favour of such a change, 25 indicated that they would be opposed and 10 indicated that they did not know/had no view. There were 45 respondents who

provided reasons for their view. There was some divergence between the perspectives of Scottish public authorities and other respondents.

253. Of the 25 respondents who opposed the change, 22 were either Scottish public authorities or were from organisations representing a public sector perspective. One was from a third sector organisation (Alzheimer Scotland), one from a legal firm (Kennedys LLP) and the other from an individual.

254. Of the 22 responses supporting the change, five were from Scottish public authorities and a further one from an organisation which represents a category of authorities (Community Pharmacy Scotland). Nine were from civil society and third sector organisations. Seven were from individuals.

255. Five respondents (NHS Forth Valley, Scottish Federation of Housing Associations, Visit Scotland, SportScotland and another Scottish public authority) who either indicated that they did not know/had no view or who did not answer the question provided substantive comments. These all indicated a view that there is already understood to be a presumption in favour of disclosure within the legislation.

256. It is notable that that Scottish Information Commissioner's response indicates that the Commissioner has changed his view on this issue, and no longer favours this amendment to primary legislation:

“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.” (Scottish Information Commissioner response).

6.7 Failure to comply with a decision on time

257. Question 29 sought respondents views on the technical recommendation – originally made to the Committee by the Scottish Information Commissioner – that section 53(1)(a) should be amended to allow the Commissioner to refer late compliance with Decision Notices to the Court of Session. The consultation paper recognised that this would strengthen the position of the Commissioner in relation to authorities to require timely compliance with Decision Notices, but would wish to take the views of authorities, requesters and the wider public into account before accepting the case for change.

Question 29

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?

258. There were 57 responses to this question. Of these, 30 indicated that they would be in favour of such a change, eight indicated that they would be opposed and 19 indicated that they did not know/had no view. A total of 33 respondents provided reasons for their answers.

259. Answers suggest that there is wide support, among both civil society and third sector organisations and Scottish public authorities for this change. There were 21 comments from those supporting the change. These generally expressed the view that this would represent a welcome strengthening of the Commissioner's powers of enforcement and to encourage timely compliance on the part of authorities:

“ERCS believe this would strengthen compliance by public authorities, and improve the enforceability of decision notices issued by the Scottish Information Commissioner.” (Environmental Rights Centre for Scotland response)

260. One public authority expressing support for the change (East Dunbartonshire Council) also emphasised the need for proportionate approaches in practice, noting the cost both to authorities and the Commissioner's office of referrals to the Court of Session.

261. The Scottish Information Commissioner set out his rationale for seeking this change:

“Decision Notices cannot...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.” (Scottish Information Commissioner response)

262. There were seven comments from those opposing the change. These generally expressed concerns about proportionality and cost. Some of these emphasised the need for constructive/collaborative relationships between the Commissioner and authorities. One respondent (Kennedys LLP) questioned whether any change along the lines envisaged would truly alter the status quo.

263. Of those expressing that they did not know/had no view or who didn't answer the question, three provided substantive comments. One of these (NHS Forth Valley) expressed a degree of caution about issues of proportionality. The other two (North Ayrshire Council and another Scottish public authority) expressed greater sympathy for the change.

6.8 Handling Environmental Information – Relationship between FOISA and the EIRs

264. Question 30 considered whether the definition of ‘information’ within FOISA should be amended so as to specifically exclude environmental information – recognising that requests for environmental information require to be responded to under the EIRs.

265. The Scottish Information Commissioner had originally proposed this change in written evidence to the Committee as an approach to simplifying responses to requests for environmental information. Currently, responses made to requests under FOISA need to apply the exemption at section 39(2) of FOISA (environmental information) in order to proceed to consider the request under the EIRs. This is generally regarded as adding to the complexity of responses.

Question 30

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?

266. There were 57 responses to this question. Of these, 30 indicated that they would be in favour of this change, 16 indicated that they would be opposed to this change and 11 indicated that they did not know/had no view. There were 40 respondents who provided reasons for their answers.

267. There were 23 respondents who provided reasons for supporting the change. These generally expressed agreement with the proposition that excluding environmental information from FOISA would make the position clearer and lead to simpler responses to requesters, with no reduction of rights. The Centre for Freedom of Information – University of Dundee commented that their research suggests a lack of public understanding of the relationship between FOISA and the EIRs. The Centre felt a change along these lines might help to highlight the difference between the two regimes to members of the public.

268. One Scottish public authority respondent indicated that more clearly delineating the two regimes might also provide a helpful steer to authorities to ensure they are handling requests for information under the appropriate regime.

269. There were 12 comments from respondents opposing the change. Half of these indicated either that the change was simply unnecessary or that, rather than bringing greater simplicity, the exclusion of environmental information from FOISA might make the system more confusing for requesters:

“We would be concerned that amending the definition of ‘information’ within FOISA so as to specifically exclude environmental information, within the definition of Regulation 2(1) of the EIRs would make the system harder to navigate for the public and those requesting information.” (Transparency International UK response)

270. The Campaign for Freedom of Information in Scotland expressed concerns about the workability of the approach, highlighting the difficulties and subjective judgements involved in disentangling 'environmental' from non-environmental information. Aberdeenshire Council commented that it would be simpler for authorities and members of the public if there were a single regime for all information requests.

271. There were five comments from respondents who had indicated that they did not know/had no view or who did not answer the question. These generally recognised there could be some value in the change, but expressed concern to avoid any problems or unintended consequences that might arise.

272. Notably, the Scottish Information Commissioner's response was one of these. The Commissioner was clear that he remains broadly in favour of the proposal but expressed concern in the context of the Retained EU Law (Revocation and Reform) Bill currently being considered by the UK Parliament, which proposes a process for sunseting Retained EU Law, where it has been deemed unnecessary for preservation.

273. Several other respondents also highlighted this as a concern. Three respondents who indicated their support for the change (South of Scotland Enterprise, Highlands and Islands Enterprise, CMAL) nevertheless expressed the need for clarity about the implications of the Bill for the future of the EIRs. Two respondents opposing change (Campaign for Freedom of Information in Scotland, General Teaching Council for Scotland) cited the perceived uncertainty generated by the Bill as among their reasons for opposing change.

274. Since the closure of the consultation there have been developments in UK Government's approach to the Retained EU Law (Revocation and Reform) Bill. There is no longer an expectation that the legislation will automatically sunset provisions.

275. There were other themes in responses which spanned respondents who either supported, opposed or had no view on the change. Two respondents supporting change (Kennedys LLP and Scottish Enterprise) thought the change would bring the handling of requests for environmental information more into line with the way in which requests for personal data are already handled. However, SHEIP – a working group of Scottish Higher Education Information Practitioners, opposing the change, commented that the handling of environmental information under FOISA currently is comparable to the handling of personal information, and that any amendment which excluded environmental information only would be 'incomplete'.

276. Other respondents questioned whether changes to primary legislation were necessary in order to address the perceived problem about the current provisions adding to the complexity of response letters. Both the General Teaching Council for Scotland (opposing the change) and Scottish Federation of Housing Associations (expressing no overall view) suggested these issues might be addressed through better guidance rather than changes to legislation.

277. Overall, whilst there was a mix of views across responses there was fairly wide support expressed for the change, subject to assurances that this would not lead to gaps in rights, and general recognition of the issue the proposal seeks to address.

6.9 New exemption for Scottish Information Commissioner

278. Question 31 sought views on the proposal for a new exemption, available for use only by the Scottish Information Commissioner, applicable to information received by the Commissioner obtained by him under, or for the purposes of, fulfilling his statutory role under FOISA.

279. The Commissioner's office may sometimes receive requests for information provided to his office in connection with appeals being considered by the Commissioner. Information requested may include that which has been provided to his office by a Scottish public authority for the purpose of enabling the Commissioner to make a determination on whether that same information should be released by the authority.

280. The Commissioner generally considers that it would be undermining of the process and his own role in it if his office were to release such information against the wishes of the relevant authority. For reasons explained in the consultation paper, the Commissioner does not consider that that provisions of section 45 of FOISA (confidentiality of information obtained by or furnished to the Commissioner) provide him with a sufficient legal basis for refusing to do so. His office therefore generally relies on exemptions with FOISA, such as section 30(c) (substantial prejudice to the effective conduct of public affairs) in order to avoid doing so.

Question 31

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?

281. There were 59 responses to this question. Of these, 35 indicated that they would be in favour of such a change, six indicated that they would be against and 18 indicated that they did not know/had no view. There were 33 respondents who provided reasons for their answer. The vast majority of these were from respondents supporting the change.

282. Those supporting change generally expressed the view that this was a sensible provision, to address an unintended problem in the legislation and that the change would help to enhance the confidence of Scottish public authorities when providing information to the Commissioner.

283. Only one respondent opposing the change provided reasons. This was a member of the public who expressed the view that there should not be any exceptions from the duty to provide information.

284. Four respondents who indicated that they did not know/had no view or who did not answer the question provided further comment. Two of these (East Renfrewshire Council, Scottish Federation of Housing Associations) referred to having little experience of the issue. The think tank Common Weal expressed some caution that any change must not “make it easier to hide or avoid disclosure of information that would be legitimately released prior to the change”.

285. Overall, there was wide support for the change among respondents.

7. Key outcomes from responses

7.1 Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery

286. Across questions relating to the agility of the regime and its ability to deliver access to information rights across diverse models of service delivery there was a clear divergence between respondents representing the perspectives of Scottish public authorities and those representing civil society and the third sector.

287. Respondents representing the perspectives of Scottish public authorities were generally more likely to consider that the law as it stood was sufficient to ensure that information about services – including those delivered by private and third sector providers under contract – was accessible, whilst civil society and third sector respondents were more sceptical about this. The Scottish Information Commissioner also expressed scepticism.

288. There was a widely held view among respondents that greater assurance about the Scottish Government's future use of its power under section 5 of FOISA, to extend the legislation to further entities, would be welcome.

289. There was also wide support for greater clarity in guidance about the FOISA status of information held by external contractors – whether in relation to the delivery of 'public' or 'ancillary' services. More respondents than not recognised the relevance of making a distinction between 'public' and 'ancillary' services when considering issues around access to information.

290. Views were more varied in relation to changes to primary legislation to address issues around coverage of the legislation. Civil society and third sector respondents were generally more persuaded of the case for reform to make the primary legislation more agile, in terms of its ability to ensure the 'right' organisations are covered with Scottish public authorities expressing more caution. Some third sector organisations also expressed concern about the impact and proportionality of extension of FOISA to third sector service providers.

291. The proposal for a 'Gateway Clause' to introduce a greater component of automaticity in coverage was supported by a significant minority of respondents, representing a diverse range of organisations. There were divided views about whether there should be exceptions for SMEs and/or third sector providers from any measure.

292. There was majority support for broadening the section 5 power to enable extension of FOISA to a wider range of bodies. There was a roughly equal split of views on whether a 'clearer legislative steer' was required in relation to the FOISA status of information held by contractors – whether in relation to 'public' or 'ancillary' services.

293. The Scottish Information Commissioner made a specific proposal for legislative reform, in terms of a new power for the Scottish Parliament to make

revisions to Schedule 1 of FOISA and a requirement for the Parliament to periodically review coverage of the legislation.

294. Relatively few respondents had direct experience of 'confidentiality clauses' affecting the release of information and views were divided on whether the legislation required to be amended to prevent reliance on them.

295. There was wide support for changes to improve and clarify the operation of section 6 of FOISA, to ensure companies wholly owned by a combination of the Scottish Ministers and other authorities are subject to FOISA.

7.2 Developments in Information Technology - ensuring access to information rights in the face of changing modes of information use

296. There was recognition by respondents of all types of the compliance risks which may be posed by the use of so called 'unofficial platforms' for conducting business in Scottish public authorities. There were a range of views advanced about how to mitigate these risks. However, most respondents tended to the view that answers to these questions were likely to lie in stronger guidance and organisational approaches rather than changes in the law.

297. Opinions on the desirability of introducing a fuller definition of 'information' into the legislation were divided. Most respondents agreed that if such a definition were to be introduced, it should mirror that provided in the EIRs: 'any information in written, visual, aural, electronic or any other material form'.

7.3 Improving proactive publication – promoting openness as 'business as usual' in a digital age

298. There was a general view among respondents that there is scope for improvement to approaches taken by Scottish public authorities to proactive publication, but mixed views on how to best advance that improvement.

299. There was openness on the part of most respondents to the proposed changes advocated by the Scottish Information Commissioner – to replace the existing statutory requirement for each Scottish public authority to maintain a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice. However, some respondents had concerns about the workability of the approach. Some respondents suggested alternative approaches.

300. There were mixed perspectives among respondents regarding how satisfied they were with the current availability of information about government and public services in Scotland. Overall, more respondents said they were 'satisfied' than 'dissatisfied'.

301. Respondents provided various perspectives on the types of information they would wish to see authorities proactively making available. This most frequently mentioned was financial/budgetary information. Data/statistical information, information about services, information about/underpinning decisions and policies,

performance information, information about contracts, information about people involved in services and their interests, diversity data, demographic data, major projects or other high impact issues were also mentioned by respondents as areas where they would wish to see proactive publication.

7.4 Technical and other issues – ensuring the Act remains fit for purpose

302. There was wide support for the proposal to amend the approach to estimating cost of compliance to reflect and estimate of staff time, without a requirement to state this in financial terms. However, some respondents believed making this change would add little value. Some had concerns about authorities losing the ability to take non-staff related costs into account.

303. Views were divided in relation to the introduction of a power to transfer of requests between authorities under FOISA, as can already be done presently under the EIRs. Relatively few respondents had experience of this provision operating under the EIRs. Equal numbers of respondents supported and opposed the change.

304. There was a clear divergence of perspectives between Scottish public authorities and other respondents on the proposals to amending the provisions for seeking clarification. Almost half of respondents overall favoured making no change in this area, with a smaller minority actively supporting either of the change options put forward. However, among respondents not representing a Scottish public authority perspective there was stronger support for change, with the option of 'amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested' being the most popular among these respondents.

305. There was majority support among respondents for removal of section 48 prohibitions on the Scottish Information Commissioner considering appeals about information request handling by his own office and decisions of the Lord Advocate (in her capacity as Head of the systems of prosecution and investigation of deaths in Scotland) and procurators fiscal, with relatively few actively opposing the proposal. However, significant numbers of respondents indicated that they did not know/had no view on these issues.

306. Over three times as many respondents supported the removal of the First Ministerial 'veto' power as supported its retention. However, the largest group of respondents to this question indicate that they did not know/had no view. Those advocating for removal generally indicated their view that the power was contrary to the principles of Freedom of Information. Some of those supporting its retention expressed support for the power as a safeguard for use in exceptional circumstances.

307. There were more respondents who opposed the introduction of specific provision for a presumption in favour disclosure into FOISA, than there were who supported it. However, there was a divergence in perspectives on this matter between Scottish public authorities and other respondents, with support for the measure stronger among civil society and third sector respondents. Among

respondents of all perspectives there was recognition that a presumption in favour of disclosure should already be understood to be the expectation under FOISA.

308. There was wide support for the proposal that the Scottish Information Commissioner should be empowered refer failure to comply with a decision on time to the Court of Session. However, a significant number of respondents indicated they did not know/had no view on the proposal. Those supporting change saw this as a reasonable measure to give the Commissioner greater leverage to require prompt compliance with decisions on the part of authorities. However, some respondents expressed concerns about proportionality, and the need for a constructive relationship between the Commissioner and authorities.

309. There was wide support for the proposal to specifically exclude environmental information from FOISA in order to improve the approach to handling environmental information and the relationship between FOISA and the EIRs. Those supporting change generally considered this could make the access to information regime clearer for requesters. However, some had concerns about the risk of unintended consequences.

310. There was majority support among respondents for a new exemption for the Scottish Information Commissioner to provide a more satisfactory basis for him to refuse to disclose information received from Scottish public authorities to enable his consideration of appeal cases. However, a significant number of respondents indicated they did not know/had no view on this issue. Some respondents questioned whether the measure was necessary.

8. Next Steps

311. The Scottish Government will consider the outcomes from this consultation analysis, and provide its response later in 2023.

312. In order to do so, we will consider the options available to the Scottish Government to respond to the views of respondents within the framework provided by the existing primary legislation, including through the use of secondary legislation.

313. We will also give further consideration to the case for amendments to primary legislation.

9. Annex A: list of organisations who responded

Aberdeenshire Council

Alcohol Focus Scotland

Alzheimer Scotland

Caledonian Maritime Assets Limited

Campaign for Freedom of Information in Scotland (CFoIS)

Care Inspectorate

Centre for Freedom of Information, University of Dundee

Children 1st

Church of Scotland

Common Weal

Community Pharmacy Scotland

Creative Scotland

Development Trusts Association Scotland (DTAS)

East Dunbartonshire Council

East Renfrewshire Council

Environmental Rights Centre for Scotland

General Teaching Council for Scotland

Glasgow City Council

Health and Social Care Alliance Scotland

Highlands and Islands Airports Ltd (HIAL)

Highlands and Islands Enterprise

Homes for Scotland

JustRight Scotland

Kennedys Scotland LLP

Law Society of Scotland

LGBT Youth Scotland

Moray Council

mySociety/WhatDoTheyKnow

National Union of Journalists (NUJ)

NHS Forth Valley

NHS Greater Glasgow & Clyde

North Ayrshire Council

Obesity Action Scotland and the Royal College of Physicians and Surgeons of Glasgow (*joint response*)

Paths for All

Public Health Scotland

Rape Crisis Scotland

Renfrewshire Council

Scottish Autism

Scottish Charity Regulator (OSCR)

Scottish Community Alliance

Scottish Council for Voluntary Organisations (SCVO)

Scottish Enterprise

Scottish Federation of Housing Associations (SFHA)

Scottish Higher Education Information Practitioners working group

Scottish Information Commissioner

Scottish Public Services Ombudsman

Scottish Sports Council t/a sportscotland

Scottish Women's Aid

Shepherd and Wedderburn LLP

SOLAR (Society of Local Authority Lawyers and Administrators in Scotland)

South of Scotland Enterprise

Stirling Council

Transparency International UK

UNISON Scotland

Victim Support Scotland

VisitScotland

Voluntary Health Scotland

West Dunbartonshire Council

There were 13 organisations who responded indicated they did not wish their responses to be published. These are not listed above, but their comments have been drawn on within the analysis, without identifying them.

10. Annex B: Organisations represented at stakeholder discussion events

Proactive Publication – 6 February 2023

Centre for Freedom of Information – University of Dundee
Campaign for Freedom of Information in Scotland
NHS Healthcare Improvement Scotland
NHS Forth Valley
Scottish Information Commissioner
NHS Tayside
National Union of Journalists
British Association for Supported Employment
CMS Cameron McKenna Nabarro Olswang LLP
Construction Scotland
Scotland Excel
Scottish Community Alliance
Directorate for Covid Recovery and Public Service Reform (Scottish Government)

Agility of Rights – 22 February 2023

Scottish Council for Voluntary Organisations
Northlink Ferries
Academic researcher
Law Society of Scotland
General Teaching Council for Scotland
Animal Concern
Strathclyde Partnership for Transport
Burness Paull LLP
Centre for Freedom of Information – University of Dundee
Campaign for Freedom of Information in Scotland
UNISON Scotland
Business Services Association (Scotland)
NHS Forth Valley
Scottish Information Commissioner
National Union of Journalists
British Association for Supported Employment
CMS Cameron McKenna Nabarro Olswang LLP
Development Trusts Association Scotland
Scottish Community Alliance
Directorate for Covid Recovery and Public Service Reform (Scottish Government)
Scottish Procurement and Property Directorate (Scottish Government)
Directorate for Legal Services (Scottish Government)

Keeping Rights Fit for Purpose – 27 February 2023

UNISON Scotland
Campaign for Freedom of Information in Scotland
NHS Forth Valley

Scottish Information Commissioner
Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO)
British Association for Supported Employment
Scottish Community Alliance
Directorate for Digital (Scottish Government)
Directorate for Covid Recovery and Public Service Reform (Scottish Government)
Scottish Procurement and Property Directorate (Scottish Government)
Directorate for Legal Services (Scottish Government)
Northlink Ferries
Law Society of Scotland
NHS Ayrshire & Arran
General Teaching Council for Scotland
Animal Concern
Burness Paull LLP



© Crown copyright 2023



This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-83521-062-8 (web only)

Published by The Scottish Government, June 2023

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1318602 (06/23)

W W W . g o v . s c o t