Access to information rights in Scotland: a consultation

November 2022

Scottish Government
Riaghaltas na h-Alba

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1. Ministerial Foreword

George Adam MSP, Minister for Parliamentary Business

Like most modern democracies, Scotland has a statutory regime to provide people with access to information held by government and public services. In Scotland, this was first given effect by the Freedom of Information (Scotland) Act 2002, passed by the Scottish Parliament with broad based cross party support in the early years of devolution and the Environmental Information (Scotland) Regulations 2004, set under that Act. Both came into force in 2005, so by international standards the access to information rights regime in Scotland is relatively young.

The Parliament made changes to the regime in the Freedom of Information (Amendment) (Scotland) Act 2013, to strengthen the requirement for openness. The legislation allowed us to shorten the time periods after which most of the exemptions within the legislation expire, and strengthened the protections against deliberate concealment of information by removing barriers to prosecution for offences under the legislation.

The Scottish Government welcomed the post-legislative scrutiny of the Act undertaken by the former Public Audit and Post-legislative Scrutiny Committee towards the end of the last session of the Parliament. We agreed that a decade and a half on from the original legislation coming into force, and the 2013 reforms having bedded in, the time was right for a fresh look at how the legislation was working for requesters, for public authorities subject to the legislation and their partners, and as a linchpin of democratic scrutiny in Scotland.

The report on post-legislative scrutiny raised some interesting issues and considerations in regard to the operation of the access to information rights regime. It produced a broad set of recommendations for areas where the Committee itself considered there was a need for further public consultation. The Scottish Government was pleased to agree that there should be a public consultation, to seek views from the wider public on the recommendations of the Committee. I am pleased that we are now able to take forward this consultation to seek those wider views and evidence, taking the Committee's recommendations as the starting point.

The Scottish Government believes the access to information rights framework in Scotland is fundamentally sound but we want to understand in greater depth how it is working for people and organisations in practice. Where there are opportunities to improve the operation of the regime within the existing statutory framework we want

to identify and take those opportunities. We also want to gather further evidence and views regarding the need for any changes to the legislation in the future, to ensure it continues to be fit for purpose.

This consultation is intended to gather the views of a wide range of people and organisations in Scotland. I hope that a wide range of individuals and organisations with experience of exercising their rights under the access to information regime will respond to it. These include many civil society organisations, journalists, academics, elected representatives and their researchers as well as many members of the wider public who wish to better understand the information on which decisions by government and public services in Scotland may be based. I hope also that public authorities subject to the legislation will engage with consultation, with a view to how we can all ensure the access to information rights regime in functioning as intended.

I hope that private and third sector organisations who work in partnership with the public sector in Scotland will also engage with this consultation exercise. A key concern of the Committee's report was around whether access to information rights remain effective in relation to services delivered by the partners of public authorities. There was also recognition in the Committee's report of the need to take a considered approach to any changes which might add to the regulatory obligations of businesses and charities in Scotland. My awareness of the need for proportionality of approach is particularly acute in view of the current economic climate and the financial pressures faced by public authorities and their partners. Nevertheless, I am clear in my view that if there are clear and significant gaps in the public's right to access information about key services or the decisions which affect all our lives, these should be addressed.

I am confident that this consultation provides a platform for a productive continuation of the discussion of the issues raised by the post-legislative scrutiny report, and that this exercise will be fruitful in moving forward that discussion. The views and insights we gather through this process will be invaluable in enabling the Scottish Government to develop a considered position on the protection and future development of access to information rights in Scotland.

George Adam MSP
Minister for Parliamentary Business

2. Introduction

This consultation follows the work of the Public Audit and Post-legislative Scrutiny Committee (PAPLS) in the fifth session of the Scottish Parliament, to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Committee's report was published on 19 May 2020[1].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.

The consultation is split into four sections, reflecting the themes of the Committee's report:

- Agility of the regime – maintaining and strengthening access to information rights in the context of varied models of service delivery (page 12) (**Q1 - Q13**)
- Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use (page 38) (**Q14 - Q16**)
- Improving proactive publication – promoting openness as 'business as usual' in a digital age (page 42) (**Q17 - Q20**)
- Technical and other issues – ensuring the Act remains fit for purpose (page 48) (**Q21 - Q31**)

2.1 Background

FOISA came into force on 1 January 2005. The introduction of FOISA - together with its sister information rights regime, the Environmental Information (Scotland) Regulations 2004 (EIRs) - gave everyone in Scotland and beyond substantially increased rights to access information held by government and public services in Scotland. FOISA provides a statutory right for any person to request information from a Scottish public authority, and to be provided with that information. Scottish public authorities can only withhold information if one of a limited number of exemptions applies. A similar, but distinct regime relating specifically to environmental information, is provided by the EIRs.

Both FOISA and the EIRs provide rights of review and appeal to requesters so that where a requester is dissatisfied with the handling of their information request they can require the authority to carry out an internal review. If the requester remains dissatisfied following the conclusion of the review, they have the right to appeal to

[1] See Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002, 19 May 2020 - *Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002 (azureedge.net)*

[2] See Response from the Scottish Government to the Public Audit And Post-Legislative Scrutiny Committee Report on Post-Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA) - Minister for Parliamentary Business.dot

the Scottish Information Commissioner (the Commissioner). Both regimes also place expectations on public authorities in relation to the proactive publication of information about their work. The Commissioner plays a crucial role in overseeing and enforcing compliance with the legislation.

When considering possible future changes to FOISA it is necessary to be mindful of any impact on the operation of the EIRs. The EIRs are based on the provisions of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation and Access to Justice in environmental matters (the Aarhus Convention) signed by the UK in 1998 and give effect to Aarhus-based EU Directive 2003/4/EC on public access to environmental information. The EIRs therefore are rooted in international agreements regarding public access to environmental information.

The Scottish Government fully supports such agreements, and recognises the importance of adhering to Europe-wide standards in respect to access to environmental information. We are keen also to learn from the experience of other jurisdictions in Europe and the wider world to inform the development of access to information rights in Scotland more widely.

The access to information rights provided by FOISA and the EIRs are broadly similar to those provided by the equivalent UK legislation - the Freedom of Information Act 2000 (the UK Act) and Environmental Information Regulations 2004 (the UK EIR regulations) - which apply to public authorities in England, Wales and Northern Ireland and to public authorities with reserved (i.e. non-devolved) functions in Scotland. Whilst there are some notable differences, which are generally considered to make the Scottish regime more rigorous in particular respects, discussions around the development of access to information rights in the rest of the UK nevertheless have some applicability to the Scottish context.

2.2 Post-legislative scrutiny

The PAPLS Committee took evidence from a number of stakeholders with an interest in the functioning of FOISA, over the course of 2019. These included journalists, activists, organisations representing civil society and the voluntary sector, and representatives of various public sector organisations. The Scottish Government submitted its own written evidence and the former Minister for Parliamentary Business and Veterans provided oral evidence to the Committee on 19 December 2019. The Commissioner also provided detailed written and oral evidence to the Committee.

The Committee's report was published on 19 May 2020[3].The Scottish Government provided its formal response to the Committee's report on 25 February 2021[4]. In that response the Government accepted the Committee's central recommendation

[3] See Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002, 19 May 2020 - *Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002 (azureedge.net)*

[4] See Response from the Scottish Government to the Public Audit And Post-Legislative Scrutiny Committee Report on Post-Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA) - Minister for Parliamentary Business.dot

that there should be a consultation looking at the case for future legislative change, and taking the Committee's recommendations as its starting point.

With the exception of a number of specific technical changes suggested to the Committee in the Commissioner's evidence, the Committee made relatively few definitive recommendations for specific changes to the legislation. Rather, it highlighted a number of areas where it had concerns about the real-world operation of FOISA, and whether the legislation remained fit for purpose. 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.

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 technical changes were required to ensure the Act remained fit for purpose.

2.3 Scottish Government position

The Scottish Government regards FOISA as a fundamentally robust and internationally well-regarded piece of legislation. It is the longstanding position of the Scottish Government that we seek to operate within FOISA, rather than proposing significant changes to it, but that we are open to adjusting the regime where it is necessary and sensible to do so.[5] We therefore approach this consultation with an open mind, but also with a clear view that the case for any new primary legislation must be thoroughly tested - and should only be considered where there are no satisfactory routes for improving the operation of the information rights regime within the current statutory framework.

This consultation is principally a vehicle for engagement with communities and interested stakeholders in Scotland about the future development of the access to information rights regime. It is aimed at gathering further views on a range of distinct areas highlighted by the Committee. We have therefore not completed detailed impact assessments to accompany this consultation. However, whether developing new policy within the current statutory framework or if bringing forward specific proposals for legislative change in the future, it will be necessary to consider fully the impact of change on people, communities and organisations in Scotland.

Given the significance of access to information rights for the realisation of wider human rights, we anticipate that assessing the impact of new policy on human rights will be a key consideration in taking forward any reform. Assessing the business and regulatory impact of any change will also be central to ensuring that approaches are proportionate and do not place unduly onerous burdens on public authorities or their partners. This is of particular importance in light of the current economic climate.

[5] See *The Scottish Government's six principles of FOI* - Guide to information published by the Scottish Government - gov.scot (www.gov.scot)

There are two areas in which the Committee's recommendations will not be considered as part of this consultation. The first is the Committee's recommendation to consider the introduction of a 'duty to record' certain categories of information. As the Committee's report recognises, any such duty would sit more naturally within public records legislation, rather than FOISA. The Scottish Government is currently exploring the Committee's recommendation to commission research into international approaches to 'duty to record'. We have undertaken to update the Committee's successor in the current Parliament (the Standards Procedures and Public Appointments Committee) on the progress of that work.

The second is the Committee's recommendation to consult on the Scottish Information Commissioner's proposal to amend section 74 of FOISA, to expressly allow that formal notices under FOISA may be transmitted by electronic means. Such a provision was subsequently made on a temporary basis by the Coronavirus (Scotland) Act 2020, to ensure that the Commissioner and Scottish public authorities could continue to discharge their FOI obligations while staff were required to work remotely. The change has now been made on a permanent basis by the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

2.4 Responding to this consultation

We are inviting responses to this consultation by **Tuesday 14 March 2023**.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space . Access and respond to this consultation online at: https://consult.gov.scot/constitution-and-cabinet/access-to-information-rights-in-scotland/. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **Tuesday 14 March 2023**.

If you are unable to respond using our consultation hub, please send your response, including the completed Respondent Information Form to foiconsultation@gov.scot or by post to:

Freedom of Information Unit
Scottish Government
1W, St Andrew's House
Regent Road
Edinburgh,
EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: https://www.gov.scot/privacy

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.gov.scot. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to foiconsultation@gov.scot.

2.5 Scottish Government consultation process

Consultation is an essential part of the policy making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: http://consult.gov.scot. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot

address individual concerns and comments, which should be directed to the relevant public body.

The Respondent Information Form is available to download from the supporting files section. To place them in context, the questions from the form are also interspersed in the relevant sections throughout this document.

Access to information rights in Scotland: consultation

Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy: https://www.gov.scot/privacy/

Are you responding as an individual or an organisation?

☐ Individual

☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☐ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

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

A key concern of the Committee was around whether the Act was sufficiently 'nimble' to adapt to the different ways in which public services are delivered. Central to this was the concern that 'outsourcing' was diluting the information rights of the public.

On its most expansive meaning, the term 'outsourcing' refers 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. On that definition many examples of 'outsourcing' consist merely of routine, and uncontentious procurement decisions by public authorities.

This observation underlines the need for a proportionate approach when considering the impact of outsourcing. Outsourcing is most likely to raise concerns about potential weakening of access to information rights when the service outsourced is either:

- **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
- **an ancillary service, previously delivered in house:** i.e. an 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

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.

The impact of outsourcing on the realisation of access to information rights in a UK context was considered by the (UK) Information Commissioner in her report to the UK Parliament, *Outsourcing Oversight?*: *the case for reforming access to information law* in 2019.[6] The UK Cabinet Office responded to that report on 24 April 2019.[7]

The current regime within Scotland contains features intended to allow for concerns about outsourcing to be addressed. These fall into two principle categories:

a. the Scottish Ministers' powers to extend and maintain coverage of FOISA; and

[6] Outsourcing Oversight?: the case for reforming access to information law - Information Commissioner, 2019
[7] Letter from Chloe Smith MP, Parliamentary Secretary to Elizabeth Denham, Information Commissioner - 24 April 2019

b. mitigations against loss of information rights through guidance and contractual arrangements.

3.1 The Scottish Ministers' powers to extend and maintain coverage of FOISA

Section 5(2)(b) of FOISA grants Scottish Ministers the power to designate persons or bodies that:

i. appear to the Scottish Ministers to exercise functions of a public nature; or
ii. provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority.

Before using the power the Scottish Ministers have a statutory obligation to consult with the organisations to be designated, or their representatives. The powers have been used in the past to extend coverage of the Act in significant ways. In 2013 the Scottish Ministers made an order extending FOISA to arms-length organisations delivering culture and leisure services on behalf of local authorities. In 2016 a further order extended to private prisons, independent special schools, grant aided schools, providers of secure accommodation and Scottish Health Innovations Ltd. Most recently, in 2019 a section 5 order extended coverage of FOISA to all registered social landlords and their subsidiaries.

In 2019 also the Scottish Government ran a consultation exercise on the future use of the section 5 power[8]. Our analysis of that consultation was published in March 2020, shortly prior to the first coronavirus lockdown.[9]

The Scottish Government recognises the Committee's concern about whether the section 5 power is a sufficient mechanism to ensure that coverage of the Act keeps pace with change. Nevertheless, it seems clear that the power has played a significant role in maintaining and broadening coverage of the Act. In her 2019 report the (UK) Information Commissioner recognised that the section 5 provisions have been used more actively in Scotland than the equivalent provisions under the UK Act.[10]

In its report the Committee proposed that it should be an 'overarching 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. However, the Committee also recognised the need for a proportionate approach to extension of FOISA.

[8] Future orders - Freedom of Information coverage extension: consultation - gov.scot (www.gov.scot)
[9] Freedom of information - extension of coverage: consultation analysis - gov.scot (www.gov.scot)
[10] see page 7 - Outsourcing Oversight: the case for reforming access to information law - Information Commissioner, 2019

The Committee supported in principle the use of a 'factors based approach' to guide decisions about extension - taking account of factors such as the extent to which a body is delivering a public function, the level of public interest in the relevant function and the cost to the public purse associated with the function.

As set out in our 2019 consultation paper this is, broadly speaking, the approach we have previously taken to the use of the section 5 power[11], but we recognise there could be scope to increase the rigour and consistency of the approach.

In addition to the section 5 power, the Scottish Ministers also have a power under section 4 of the Act, to add further entities to schedule 1 of FOISA, as Scottish public authorities in their own right. This is a more limited power, being applicable only to bodies which meet the Scotland Act 1998 definition of a Scottish public authority.[12] However, it is also a key tool for ensuring coverage of the Act is kept up to date.

3.2 Mitigations through guidance and contractual arrangements

Section 60 of FOISA requires the Scottish Ministers to issue a code of practice for Scottish public authorities regarding the discharge of their functions under the Act. FOISA mandates the Scottish Ministers to revise the code from time to time.

The current iteration of the Section 60 Code includes advice intended to mitigate the risks that the outsourcing of services may pose to information rights:

> *Where a public authority is considering outsourcing any of its functions it should take steps to ensure that there is no resulting reduction in the public's rights to access information through requests and proactive publication. This may be by outsourcing to a wholly-owned company which will be subject to the regimes. Where this is not possible, the authority must take steps to ensure public access to information relating to the functions which have been outsourced, as set out in part 2, section 8 of this Code (particularly information about performance and finances). This might be through the provisions of any contract in place.* [13]

Part 2, section 8 of the Section 60 Code sets out detailed guidance on the handling of procurement-related and contractual information by Scottish public authorities. This includes guidance on the categories of information which authorities should ensure is available and the basis on which commercially sensitive or confidential information might sometimes be legitimately withheld under FOISA or the EIRs.

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[11] See - Future orders - Freedom of Information coverage extension: consultation - gov.scot (www.gov.scot)

[12] see Section 4, Freedom of Information (Scotland) Act 2002

[13] *Part 1, Section 3: Scottish Ministers' Code of Practice on the Discharge Of Functions by Scottish Public Authorities Under the Freedom Of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004* - FOI/EIR: section 60 code of practice - gov.scot (www.gov.scot)

Paragraph 8.4.10 of the Code stipulates that disclosure provisions should be included within contracts. This stipulation is specifically in relation to information provided to the public authority by the contractor during the completion phase of the contract. However, the guidance indicates that in some instances this 'may also be expanded to include the disclosing of information by the contractor'.

Whether information held by contractors is subject to FOISA and the EIRs will ultimately depend on whether that information is considered to be held by the contractor 'on behalf of' the authority in terms of section 3(2)(b) of FOISA or regulation 2(2)(b) of the EIRs. This is an issue upon which the Commissioner may occasionally be called to make determination.

A previous decision of the Commissioner in 2013 considered this issue in relation to a request for information made under the EIRs[14]. In that instance the Commissioner decided that information held by a contractor was indeed 'held on behalf' of the contracting authority. However, this does not set a precedent for all future cases.

Whether information held by a contractor is considered to be 'held on behalf' of the contracting public authority may depend on various factors relating to the nature of the relationship between the two and the nature of the service provided. The detail (or lack) of any explicit contractual provisions may not be the only relevant factor in making such determinations. Nevertheless, clear contractual provisions specifying ownership of information, and the contractor's obligations to provide information to the authority for the purposes of responding to requests, are likely to be helpful in providing clarity.

3.3 Transparency in public procurement

These matters should be seen in the context of the public sector's wider commitment to transparency in matters of contracting and procurement. Procurement legislation requires contract opportunities exceeding £50,000 in value for the provision of goods and services and exceeding £2m in value for construction projects to be advertised through Public Contracts Scotland. This ensures public access to a range of information about each opportunity including Invitation to Tender information, the terms and conditions that will apply to any resulting contract with the supplier, specification and technical requirements, the award criteria etc.

The Procurement Reform (Scotland) Act 2014 requires a wide range of public authorities to publish and maintain a public contracts register setting out such details as the name of the contractor, the subject matter of the contract and the estimated value of the contract. The Public Services Reform (Scotland) Act 2010 also requires public authorities to publish information about all payments in excess of £25,000.

[14] See Decision 094/2013 (itspublicknowledge.info)

In addition, the Scottish Information Commissioner's Model Publication Scheme requires all public authorities subject to FOISA to proactively publish information regarding how the authority procures goods and services from external providers.

3.4 Use of access to information rights to obtain additional information

Whenever a service is provided by an external provider under contract on behalf of a public authority, it is to be expected that substantial, detailed information regarding the delivery of that service will be provided to the authority under the terms of the agreement, to allow the delivery of the service and the performance of the contractor to be monitored by the authority. There is no ambiguity whatever that such information held by the authority is subject to FOISA and the EIRs. Any ambiguity about ownership of information for the purposes of FOISA and the EIRs can relate only to whatever information about the delivery of the service is held only by the contractor, and not directly by the public authority itself.

This point does not minimise the importance of access to information rights in relation to services delivered under contract. Nevertheless, it is important to set the issue in some perspective.

To take a robust view on the need for further development of the information rights landscape in this area we wish to gather further evidence regarding the true impact of outsourcing on access to information rights. This consultation exercise provides an opportunity to do so. As well as seeking written responses to the questions below regarding the impact of outsourcing, we will also engage proactively with journalists, activists, researchers and organisations representing civil society as well as with public authorities and third and private sector providers to seek views and further evidence on this issue.

The Scottish Government is committed to assessing the business and regulatory impact of its policies. The development of any new policy approach to information held by contractors would need to take full account of the impact on those contractors and on contracting public authorities. We would lay particular stress on the need to consider any impacts on small or medium sized organisations. Making these assessments will require engagement with public authorities and their contractors.

Question 1(a)

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

☐ Yes

☐ No

☐ Not sure

Question 1(b)

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

☐ Not a problem

☐ Somewhat problematic

☐ Very problematic

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

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?

[By ‘public service’ we mean a service which is delivered directly to members of the public, and whose provision would commonly be understood to be the responsibility of the public authority]

☐ Very confident

☐ Somewhat confident

☐ Somewhat doubtful

☐ Very doubtful

☐ Not sure

Please provide any reasons for your answer:

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?

[By ‘ancillary service previously delivered in house’ we mean 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].

☐ Very confident

☐ Somewhat confident

☐ Somewhat doubtful

☐ Very doubtful

☐ Not sure

Please provide any reasons for your answer:

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

To consider options for addressing concerns about the agility of the regime within the current statutory framework it may be helpful to begin with considering the existing mitigations outlined in the section above.

Future use of the Scottish Ministers' section 4 and 5 powers

In 2019 the Scottish Government ran a consultation exercise on the future use of the section 5 power. Our analysis of that consultation was published in March 2020, shortly prior to the first coronavirus lockdown.

In our consultation analysis we indicated that we would bring forward a paper setting out the Scottish Government's approach to the future use of the section 5 power. That piece of work was subsequently delayed by the impact of the coronavirus outbreak, and is still in development. However, it would be our hope that by setting out a clearer strategic approach to the future use of the power we can go some way to addressing the Committee's concerns about the usefulness of the power to ensure coverage of the Act keeps pace with developments in models of public service delivery.

In 2015 the former Commissioner published her Special Report: *FOI 10 years on: Are the right organisations covered?*[15]. Many of the areas raised in that report informed the use of the section 5 power over subsequent years e.g. in relation to arms-length organisations, private prisons and registered social landlords.

In 2019, the current Commissioner provided a detailed submission to the Scottish Government's consultation on future use of the section 5 power. We have committed to consider fully all the areas for extension identified by the Commissioner:

- health and social care services provided under contract to Scottish public authorities
- services provided under PFI/PPP/NPD contract arrangements
- HubCos and services provided under contract through the HubCo model
- transport services provided on behalf of Scottish public authorities

The Scottish Government will set out its proposed approach to each of these areas in due course. We will also set out a strategy for keeping the use of the powers under review going forward.

Strengthening mitigations through guidance and contractual arrangements

Greater assurance around information rights might also be achieved by providing stronger guidance both to contractors and contracting authorities regarding when, under the existing regime, information held by a contractor ought to be considered

[15] FOI 10 years on: Are the right organisations covered? (pdpjournals.com)

'held on behalf' of the relevant contracting public authority for the purposes of FOISA and the EIRs. .

One obvious vehicle for providing refreshed guidance would be the Section 60 Code. We would not envisage that the Code itself would provide detailed guidance on the drafting of contracts. However, there might be scope to revise the Code in order to provide a clearer steer regarding the circumstances in which information held by a contractor is likely to be considered 'held' by the contracting authority in terms of section 3(2)(b) of FOISA or regulation 2(2)(b) of the EIRs. Revised guidance might therefore make explicit that in such circumstances the authority should consider that it is required to obtain the relevant information from its contractor when it has received a request for the information.

It may be noted that the Public Records (Scotland) Act 2011 (PRSA) makes special provision for records held by contractors delivering services considered to be a 'function' of the contracting authority. Section 3(1) of PRSA provides that records held by a contractor carrying out an authority's functions are to be considered part of the public records of that authority.[16]

However, it should be acknowledged that concerns raised by stakeholders about the impact of 'outsourcing' on access to information rights have sometimes also related to services which might be considered 'ancillary' to the functions of the relevant authority rather than as constituting public functions in their own right. For example, in the PAPLS evidence sessions witnesses cited the case of outsourcing of ICT services by a local authority.[17] The point was made by witnesses to the Committee that the delivery of ancillary services can involve large scale expenditure of public funds, and that the transference of such ancillary functions from 'in house' providers to external providers may place outside the scope of FOISA and the EIRs some information regarding the delivery of the ancillary service and - by extension - the deployment of those public funds.

As noted in the previous section such concerns should be seen in perspective, given the substantial amount of information about such contracts, and the services delivered under them, which is likely to be either in the public domain, or able to be requested from the contracting authority under FOISA or the EIRs. Nevertheless, the concern is a legitimate one. In developing any revised approaches to contracting or guidance for authorities, consideration would need to be given to how, and whether, to make distinction between 'public' and 'ancillary' services.

Whilst ancillary services can be very significant in terms of their cost to the public purse and may play a critical role in a public authority's delivery of its functions, ancillary services can also include functions which are only indirectly related to an authority's core functions e.g. the cleaning and maintenance of office space. It seems to the Scottish Government that whether or not a hard distinction is drawn between 'public' and 'ancillary' services delivered under contract, there is a need to be mindful of proportionality in any approach taken.

[16] See Section 3 - Public Records (Scotland) Act 2011 (legislation.gov.uk)
[17] See: Official Report - Public Audit and Post-legislative Scrutiny Committee - 19 September 2019

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?

☐ Yes

☐ No

☐ Not sure

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?

[by 'public services' we mean any service provided directly to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility]:

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.

☐ Yes

☐ No

☐ Not sure

Please give any reasons for your answer:

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.

☐ Yes

☐ No

☐ Not sure

Please give any reasons for your answer:

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)?

☐ Yes

☐ No

☐ Not sure

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

3.6 Assessing the need for primary legislation

The 'Gateway Clause' proposal

In its report the Committee expressed its view that 'the current legislation is insufficiently nimble to keep pace with the changing nature of the public sector landscape', and made the general recommendation that changes to FOISA itself are required to address this. However, as noted above the Committee also recognised the need to take a proportionate approach.

The Committee indicated that it was attracted to the concept of a 'gateway clause' for bringing bodies within the scope of FOISA automatically on the basis of their functions or receipt of public funds:

> **11. The Committee is also attracted to the idea of the legislation being amended to introduce a "gateway clause" which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. As such, the Committee recommends that the Scottish Government consults on amending FOISA to introduce a mechanism by which relevant elements of non-public sector bodies would automatically fall within the scope of FOISA if they fulfilled certain criteria relating to the provision of public services or functions and/or receipt of significant public funds.**

The Committee thereby suggested two principal bases on which organisations might be designated automatically via the operation of a 'gateway clause':

1. the body fulfils particular criteria relating to the provision of public services
2. the body is in receipt of significant public funds

A 'gateway clause' could be constructed around either one of the above bases. Alternatively, it could refer to both bases, stipulating that organisations are to be subject to FOISA if they fulfil a set of criteria under either basis, or that criteria under both bases would need to be fulfilled. Regardless of which of these options were

deemed most favourable, it would be necessary to set clear criteria to define the bases for automatic designation.

In the Scottish Government's response to the Committee's report we highlighted what we see as significant challenges which would be associated with the 'gateway clause' approach.[18] The principal challenge is in constructing a provision which would be sufficiently broad to add meaningfully to the coverage of the legislation but which would also provide clarity about which organisations were covered by the Act.

There is a fundamental tension between these two goals. As our response to the Committee noted a similar issue is already present in the operation of section 3(1)(b) and section 6 of FOISA, which together provide that any company wholly owned by a Scottish public authority is automatically subject to FOISA. This means that companies may fall in or out of FOISA as a result of changes in ownership arrangements. Companies subject to the legislation can also be created or wound up at any time.

Consequently, it is very difficult to state definitively at any given time which companies are subject to FOISA by virtue of being wholly owned by Scottish public authorities. A 'gateway clause' would seem to raise the prospect of introducing similar uncertainty about the FOISA status of a much wider range of organisations.

In the 2019 Scottish Government paper, *Freedom of Information International Review: Scope of Bodies Included*, Douglas Jack noted research indicating that those jurisdictions in which access to information laws rely principally on a defined list of bodies subject to the legislation - as opposed to a statutory definition - generally have stronger records on compliance. The paper suggests that this likely to be because of the greater certainty provided by a defined list.[19]

The Scottish Government would also have concerns about a 'gateway clause' in terms of its potential impact on the third and private sector partners of public authorities, particularly where these are small or medium-sized organisations. The Scottish Government has a clear policy commitment to reduce barriers for small and medium-sized enterprises (SMEs) to doing business with the public sector in Scotland. We would have concerns about the impact of any measure which might lead to uncertainty on the part of SMEs bidding for public contracts regarding whether fulfilment of the relevant contract would bestow duties on the SME as a public authority under FOISA in its own right.

We would have similar concerns in regard to the impact on third sector partners of public authorities, particularly where these are organisations of small or medium size. Under current arrangements SMEs, third sector partners or other organisations fulfilling public contracts may sometimes have obligations to assist their contracting public authority with fulfilling its own FOI obligations. However, that is quite a

[18] See Response from the Scottish Government to the Public Audit And Post-Legislative Scrutiny Committee Report on Post-Legislative Scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA) - Minister for Parliamentary Business.dot

[19] See Freedom of Information International Review: Scope of Bodies Included (Supporting documents - Freedom of Information International Review: scope of bodies included - gov.scot (www.gov.scot))

different matter from the organisation becoming a public authority subject to FOISA in its own right with the full set of statutory obligations which accompany such a designation.

There are examples of SMEs and third sector bodies which are already subject to the legislation as public authorities in their own right – notably in the primary care, educational and social housing sectors. Nevertheless, the Scottish Government regards proportionality as an important consideration in decisions about extension of FOISA and we would have concerns about any approach which could automatically bestow public authority status on small or medium sized organisations, without the requirement for consultation with the relevant sector as at present.

We consider therefore that if a gateway clause provision were to be included in legislation there would be merit in considering an exclusion for SMEs and/or third sector organisations, so that the requirement to consult with them prior to any designation would be retained. However, we acknowledge also that any differential treatment of SMEs or third sector organisations may add to the complexity of the provision and could exacerbate the uncertainty associated with any gateway clause.

As noted in the introduction to this paper, it has been the longstanding position of the Scottish Government that we seek to operate within FOISA rather than proposing significant alterations to it. This is because we regard the current legislative regime as fundamentally sound and as working well. The introduction of a gateway clause, unless very narrowly defined, would represent a significant departure from the approach originally taken in the legislation. The Scottish Government is yet to be convinced that such a significant departure would be beneficial, but we remain open to considering it further, subject to assurance that it could be capable of operating in a clear and proportionate way.

3.7 Alternative legislative approaches

This consultation seeks to gather a range of views on the necessity of, and possible approaches to, future legislative change. At Question 9 below we have provided an open opportunity for respondents to advance any views on alternatives to the ‘gateway clause’ proposal advanced by the Committee.

However, it seems to the Scottish Government that if primary legislation to improve the agility of the regime to developments in the public service landscape were considered necessary, then the development of alternative approaches to reform might begin by considering how the existing features - intended to address concerns about the impact of outsourcing and ensure the agility of the legislation - might be strengthened.

Whilst the Scottish Government is not, at the current time, persuaded of the necessity of new primary legislation in this area, we have nevertheless sketched out in broad terms some possible alternative approaches. We hope that this will help to inform responses to this consultation.

3.8 Broadening of the section 5 extension power

As discussed above, the current power to extend coverage of FOISA to new entities requires the Scottish Ministers to identify either a 'function of a public nature' being exercised or a service being delivered under contract which can be considered a 'function' of the contracting authority. Either way, the concept of public function is central to the operation of the current section 5 power.

This constrains the use of the power in some circumstances, since it is not sufficient merely to demonstrate that a particular organisation is in receipt of significant public funds or has a long term, high value contract with a public authority. If designating under section 5(2)(a) Scottish Ministers require to be able to demonstrate that the function for which the relevant body is to be designated is in fact 'public' in nature. If designating under section 5(2)(b) it is necessary to demonstrate that the service being provided by the contracted body is in fact a 'function' of the contracting public authority. In practice, this has usually been taken to mean that the service is part of the statutory functions of the contracting public authority.

Broadening the basis on which the power can be exercised, so as to move away from a strictly 'public function' based approach might give greater latitude to extend FOISA to other bodies. In its report the Committee specifically raised the issue of whether being in 'receipt of significant public funds' ought in itself to serve as a basis for designation under FOISA. Currently, extent of public funding is one of the factors used by the Scottish Ministers when considering the application of the existing section 5 power. However, it is not a basis for designation in its own right.

The addition of a specific power to extend FOISA to a person or body purely on the basis that the body is in receipt of significant, and ongoing funding from a Scottish public authority, might make it easier for the Scottish Ministers to extend FOISA in certain circumstances. Of course, there would be a need in the course of designing any such power to define what was meant by 'significant' funding.

An alternative approach might look to amend the legislation to empower Ministers to extend FOISA to persons providing services under contract where the service provided had traditionally been delivered by the authority's own directly employed staff. This may help to address the concern about the status of 'ancillary' services previously delivered in house.

These possible options for broadening the section 5 power are intended to be illustrative rather than comprehensive. Other approaches to broadening the section 5 power may well have merit, and Question 7 below provides an opportunity for respondents to submit other suggestions.

Providing a clearer legislative steer on when information is 'held on behalf' of an authority

The section above, *Strengthening mitigations through guidance and contractual arrangements*, discusses the scope for providing greater clarity in guidance around when information held by a contractor should be considered 'held on behalf' of the contracting authority in terms of section 3 of FOISA. It is suggested this may provide

greater assurance that information about 'outsourced' services will remain accessible through the provisions of FOISA and the EIRs.

In her 2019 report *Outsourcing Oversight?: The case for reforming Freedom of Information Law in the UK* looking at the impact of 'outsourcing' on Access to Information Rights the (UK) Information Commissioner suggested amending section 3 of the UK Act and regulation 3 of the UK EIR Regulations to provide 'a clearer legislative steer on what information about a public contract is 'held' for the purpose of the legislation'.[20]

The provisions of section 3 of the UK Act and regulation 3 of the UK EIR Regulations as they relate to information held on behalf of public authorities are substantively similar to the equivalent provisions within section 3 of FOISA and regulation 2(2) of the EIRs. The (UK) Information Commissioner's suggestion is therefore germane also to the discussion about the Scottish legislation.

The (UK) Information Commissioner's report does not elaborate on how such a 'clearer legislative steer' might be provided, or the basis on which legislation might distinguish between information held on behalf of the contracting authority and information held by the contractor purely on its own behalf.

In its response to the report the UK Government indicated that it did not see a need for new primary legislation in this area[21]. The UK Government response considered the relevant guidance in the UK Government's Freedom of Information Code of Practice[22] revised in 2018, along with wider guidance on public sector contracting and the (UK) Information Commissioner's oversight in these matters to be sufficient.

The Irish Freedom of Information Act 2014 provides an interesting model in regard to the relationship between authorities and their contractors - or 'service providers' as the Irish legislation calls them. Section 11(9) of the Irish Act explicitly provides that information held by a 'service provider', relating to the provision of the relevant service, is to be considered 'held' by the contracting FOI body for the purposes of the Act. Furthermore, it places an explicit duty on service providers to provide such information for the purposes of fulfilling the FOI body's obligations under the Act.

The Irish legislation is constructed differently to FOISA. The wider legal environment and public sector landscape within which the legislation operates is also different, so it is not possible to straightforwardly replicate the effect of the Irish provisions within FOISA. The Scottish Government understands that the Irish Information Commissioner may occasionally be called upon to make determination on whether bodies meet the definition of 'service provider' in terms of the legislation. However, the Scottish Government also understands there is no distinction made within the Irish regime between 'service providers' directly delivering public services and those delivering ancillary services to FOI bodies. Information relevant to the provision of

[20] Outsourcing Oversight: The case for reforming Freedom of Information Law in the UK (see section 3.22, page 57)
[21] Letter from Chloe Smith MP, Parliamentary Secretary to Elizabeth Denham, Information Commissioner - 24 April 2019
[22] Freedom of Information Code of Practice - 4 July 2018

such services is considered ‘held’ by the FOI body for the purposes of the access to information regime.

The Scottish Government would have some concerns about introducing any similarly broad provision within the Scottish regime. Principally, before moving in such a direction we would wish to be assured that the impact on private and third sector partners of public authorities would be proportionate and not unduly burdensome - particularly for small and medium sized organisations. Any undue burden would present a barrier to firms winning public contracts. It is also the case that any associated costs would ultimately be recovered through the contract (i.e. from the public purse).

Any new provisions to provide a clearer legislative steer within FOISA would require to be clearly defined so as to provide maximum clarity regarding the circumstances in which information held by contractors is to be considered ‘held on behalf’ of the contracting authority. Equivalent amendments may also be required to the EIRs, to ensure consistency between the two regimes.

In principle, if this could be achieved, it might represent a somewhat more manageable and proportionate approach to building a greater element of automatic agility into the legislation than a ‘gateway clause’ seeking to designate contractors as authorities subject to the legislation in their own right, on the basis of a statutory definition.

At the current time the Scottish Government has no clear proposal for how such a clearer legislative steer might be provided in a way which takes appropriate account of considerations about proportionality. Nevertheless, we remain open to considering these issues further.

Question 6(a)

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

☐ I support the introduction of a Gateway Clause

☐ I oppose the introduction of a Gateway Clause

☐ Not sure/have no view

Please provide more information about your views below, including any thoughts you have on how any ‘gateway clause’ might relate to:

a) outsourced public services (i.e. any service provided directly to members of the public, for which the authority itself is regarded as having ultimate responsibility):

b) 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):

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)? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

☐ I would favour a specific exclusion for SMEs

☐ I would oppose a specific exclusion for SMEs

☐ Not sure/have no view

Please provide more information about your views below:

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? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

☐ I would favour a specific exclusion for third-sector organisations

☐ I would oppose a specific exclusion for third-sector organisations

☐ Not sure/have no view

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

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?

☐ I support broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies

☐ I oppose broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies

☐ Not sure/have no view

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

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:

☐ I consider it necessary to amend the legislation

☐ I do not consider it necessary to amend the legislation

☐ Not sure/have no view

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

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:

☐ I consider it necessary to amend the legislation

☐ I do not consider it necessary to amend the legislation

☐ Not sure/have no view

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

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? This could be either through non-legislative or legislative means:

3.9 Additional issues concerning agility of FOISA in the context of varied models of public service delivery

The Committee made two other recommendations relating to the agility of the legislation in the context of varied models of public service delivery and the relationships between public authorities and contractors delivering services on their behalf:

1) Amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services.

The issues discussed in this section are distinct from those discussed in the previous section in relation to information held by contractors. The issues here relate narrowly to the question of when and whether Scottish public authorities should be able to rely on the fact of a 'confidentiality clause' in an agreement with a contractor as a basis for withholding information under FOISA.

The use of 'confidentiality clauses' should not be confused with the application of the commercial interests exemption. Under section 33(1)(b) of FOISA an authority may withhold information if disclosure would 'prejudice substantially the commercial interests of any person'. This may apply whether there is a confidentiality agreement in place or not, and may be used to protect the legitimate commercial interests of any person or organisation, not only organisations delivering services to the authority.

However, the commercial interests exemption is subject to the public interest test. When applying it authorities are required firstly to determine that the relevant information would indeed be likely to prejudice substantially the commercial interests of some person or organisation. Secondly, they are required to balance the public interest in avoiding that substantial prejudice against the public interest in release of the information. When any request is appealed, it will be open to the Commissioner to take a different view from that taken by the authority, and to require release of the information.

The Scottish Government has a clear view that it is appropriate, and of significant importance to the effective operation of the access to information rights regime that there are measures within the legislation to allow for the protection of commercial interests, subject to the public interest test. The Section 60 Code of Practice is clear about the importance authorities should attach to respecting legitimate commercial interests.

By contrast, a confidentiality clause in the relevant sense is a contractual provision intended to create a legally binding requirement to maintain confidentiality around particular information, where no such requirement may have existed otherwise. Where disclosure of information is prohibited by a confidentiality clause, such disclosure may give a contractor potential grounds for legal action in the event of disclosure. In that case an authority may have grounds to apply the exemption at section 36(2) of FOISA which provides that information is exempt from disclosure if its release would constitute an 'actionable' breach of confidence i.e. if the basic requirements for a successful legal action against the disclosure appear to be fulfilled.

The Scottish Government considers that the use of confidentiality clauses, of a type which would affect the discharge of a public authority's functions under FOISA, is in fact rare. As the Commissioner's written evidence to the Committee pointed out, the Section 60 Code specifically discourages the use of such clauses. Indeed, standard Scottish Government and wider public sector contracts contain standard clauses which make specific reference to the public authority's requirement to comply with its obligations under FOISA.

Nevertheless, there is nothing in the legislation to prevent the use of confidentiality clauses between authorities and contractors. Therefore, wherever such a clause were in place, it could have effect as a barrier to the release of information under FOISA. Nevertheless, the Scottish Government would need to be satisfied that there were real world incidences of such clauses acting as an unjustifiable barrier to the release of information before we would be inclined to make any changes in primary legislation to address this issue.

Notwithstanding that need to test whether there is a requirement for legislative change in this area, the Scottish Government notes with interest the Committee's reflections on how such concerns might be addressed. Reflecting the Commissioner's evidence, the Committee notes that there is specific provision within Irish FOI legislation which has the effect of preventing reliance on confidentiality clauses between FOI bodies and 'service providers'.

It is important to understand that provision within the wider context of the Irish legislation which, as noted in the previous section, takes an expansive approach to bringing information held by contractors to FOI bodies within scope of the law. Section 35 of the Irish Freedom of Information Act 2014 provides that FOI bodies (i.e. public authorities subject to the Act) may refuse to disclose information if it has been provided to the FOI body by a third party with an expectation of confidentiality and if the FOI body considers that releasing the information would prejudice the likelihood of similar information being shared in the future or if there is a legally binding agreement which prevents disclosure.

However, it further stipulates that this provision will not apply to recorded information created by an FOI body or a service provider unless the release would infringe a duty of confidentiality owed to some third party i.e. some person other than an FOI body or their service provider.[23]

There is no direct equivalent within FOISA to these provisions of the Irish Act. However, as discussed above, section 36(2) of FOISA provides an absolute exemption for information whose disclosure would constitute an actionable breach of confidence (i.e. where the basic requirements for a successful legal action against the disclosure would appear to be fulfilled).

One scenario which could give rise to an 'actionable breach of confidence' would be where release would be in contravention of a legally binding confidentiality agreement. It is in the context of applications of 36(2) therefore that the issue of 'confidentiality clauses' is most likely to be of relevance.

In principle, an amendment to FOISA could specify that the provisions of 36(2) are only applicable where an actionable breach of confidence would arise in relation to a party other than a contractor, in relation to services delivered under contract. This would have a similar effect - in respect of confidentiality clauses with contractors - to the section 35(2) provisions in the Irish Act.

For the reasons explained earlier, Scottish Government is sceptical about the extent to which such a change would have a significant real world effect on the handling of requests under FOISA. We believe the use of confidentiality clauses is rare.

Nevertheless, we acknowledge that restricting the use section 36(2) could be of some value in reducing the risk of any inappropriate reliance on confidentiality clauses by authorities.

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?

☐ Yes, I am aware of at least one such instance

☐ No, I am not aware of any such instances I do not consider it necessary to amend the legislation

☐ I don't know/would prefer not to say

[23] See Section 35 - Irish Freedom of Information Act 2014

Please provide details or any further reflections:

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?

☐ Yes, I would favour making this amendment

☐ No, I would not favour making this amendment

☐ I don't know/have no view

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

2) Address 'anomaly' around jointly owned bodies

In the Scottish Government's own written evidence to the Committee we suggested that the 'loophole' whereby companies wholly owned by a combination of authorities do not fall within the definition of a 'publicly-owned company' within section 6 of FOISA should be closed.

In our response to the Committee's report we clarified that this appears only to be an issue in relation to jointly-owned companies where one of the owning authorities is the Scottish Ministers. There are in fact various examples of companies wholly-owned by a combination of Scottish public authorities (e.g. companies owned by two or more local authorities), which are generally understood to be subject to the Act by virtue of the provisions of section 6.

The structure of section 6(1) does however suggest that companies wholly-owned by a combination of the Scottish Ministers and other schedule 1 authorities would be outwith the definition.

We have already expressed our view that this anomaly in the legislation should be rectified when an opportunity presents itself. It is the Scottish Government's starting point therefore that if taking forward wider legislative change to FOISA, we would seek to make change in this area. However, we still wish to consult in order to seek the views of stakeholders and to gauge the level of concern about this issue.

Until such time as an appropriate legislative opportunity arises, we will seek to use Scottish Ministers' powers under sections 4 and 5 of the Act to ensure that any companies wholly owned by a combination of the Scottish Ministers and other authorities are made subject to FOISA.

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?

☐ Yes, I am aware of at least one such instance

☐ No, I am not aware of any such instances

☐ I don't know/would prefer not to say

Please provide details or other comments below:

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'?

☐ Yes, I would favour making this change

☐ No, I would not favour making this change

☐ I don't know/have no view

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

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

The Committee raised concerns about whether developments in information technology, and the use of new methods of information storage and communication within public authorities may be undermining the access to information rights provided by FOISA. Central to this was the Committee's concern about the use of '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.

The Committee suggested that further guidance for authorities, from both the Scottish Government and the Commissioner, on this matter may be helpful. However, the Committee also suggested that it may be helpful to amend FOISA to incorporate a specific definition of the term 'information', in order to make the meaning of the term more explicit, "***the Committee considers that there may be merit in the legislation being amended to make explicit what is meant by the term "information***."[24]

The Scottish Government recognises that the use of unofficial platforms for the conduct of official business does pose risks in relation to FOISA compliance as well as in relation to sound information governance practices generally. It would not be our expectation that the use of unofficial platforms would be commonplace for conducting the core business of any Scottish public authority. Nevertheless we recognise that from time to time there will be instances where the staff or officers of an authority will find it convenient to use unofficial platforms to communicate on work related matters.

Where this occurs, the law is already clear that such information is to be considered 'held' by the authority for the purposes of FOISA. The Section 60 Code of Practice published by the Scottish Ministers advises authorities to of the need to think beyond conventional places where information may be held, when conducting searches:

> **Searches should be proportionate and focus on systems (whether paper-based or electronic) where staff with a working knowledge of the records relating to the information request consider what information might be held. Reference to "systems" do not relate only to IT systems but may include any other system, including paper records, informal systems such as officers' notes, and temporary records. Authorities should think beyond conventional places where information might be held to satisfy themselves that full and robust searches have been undertaken.**
> **(Section 60 Code of Practice, para 6.2.2)**

[24] Para 16 & 128 - Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002 (azureedge.net)

We also recognise the concerns expressed to the Committee by witnesses including the former Scottish Information Commissioner Kevin Dunion that the legal position regarding information held off official systems may not be universally understood, and that there is a risk of staff members and officers of Scottish public authorities inadvertently committing offences under section 65 of FOISA as a result.

In the Scottish Government's response to the report we undertook to consider whether the advice in the Section 60 Code could be strengthened further, when we next revise the Code. It seems to the Scottish Government that stronger guidance for, and within, authorities is the only approach likely to provide greater assurance around this issue - since the statutory position would appear already to be unambiguous: all recorded information held by an authority, its officers or staff members for business purposes is subject to FOISA.

We would propose that a revised Section 60 Code should contain a dedicated section, explicitly setting out the position regarding information held on unofficial platforms, and providing guidance for authorities around how the compliance risks associated with the use of such platforms can be mitigated.

4.1 Definition of 'Information'

The Scottish Government remains to be convinced that amendments to FOISA itself can have value in addressing issues around information held on unofficial platforms. Nevertheless, we would welcome the views of stakeholders on this matter. The Committee's suggestion is that a clearer definition of the term 'information' on the face of the legislation may help to promote better understanding of authorities' obligations.

It seems clear to us that any definition in legislation must remain broad, capturing all recorded information regardless of the platform or format used to record it. Any closed list of possible platforms or formats would be unlikely to be comprehensive and, even if satisfactory at the time of enactment, would require constant updating as technologies develop.

One option in principle could be to adopt a definition which mirrors the definition of 'environmental information' in the Environmental Information (Scotland) Regulations 2004 (EIRs). The EIRs define environmental information as, "any information in written, visual, aural, electronic or any other material form" (on environmental matters, as defined in parts (a)-(f) of the definition).

A similar definition of 'information' incorporated into FOISA could perhaps have some value in underlining the principle that information may be held in a number of different material forms.

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 obligations in relation to information held on unofficial platforms?

☐ Yes

☐ No

☐ I don't know/have no view

Please give any reasons for your answer:

Question 15

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

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

Please give any reasons for your answer:

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? [Please specify]:

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

A key original aim of FOISA was to bring about a more robust approach to proactive publication of information by Scottish public authorities. Section 23 of FOISA currently requires each authority to adopt and maintain a publication scheme setting out information to be published by that authority. Publication schemes must be approved by the Commissioner, and authorities thereafter have a duty to publish the information in accordance with the scheme. To make the process of adopting and approving schemes more workable, section 24 of FOISA gives the Commissioner powers to produce a model publication scheme, which authorities may adopt.

In practice, the Commissioner strongly recommends that Scottish public authorities adopt the model publication scheme, and all invariably do so. The Model Publication Scheme requires authorities to publish information in nine classes, if such information is held by the authority:

> **Class 1: About the authority:** Information about the authority, who we are, where to find us, how to contact us, how we are managed and our external relations.
> **Class 2: How we deliver our functions and services:** Information about our work, our strategies and policies for delivering our functions and services and information for our service users.
> **Class 3: How we take decisions:** and what we have decided Information about the decisions we take, how we make decisions and how we involve others.
> **Class 4: What we spend and how we spend it:** Information about our strategy for, and management of, financial resources (in sufficient detail to explain how we plan to spend public money and what has actually been spent).
> **Class 5: How we manage our human, physical and information resources**: Information about how we manage our human, physical and information resources.
> **Class 6: How we procure goods and services from external providers:** Information about how we procure goods and services and our contracts with external providers.
> **Class 7: How we are performing:** Information about how we perform as an organisation and how well we deliver our functions and services.
> **Class 8: Our commercial publications:** Information packaged and made available for sale on a commercial basis and sold at market value through a retail outlet e.g., bookshop, museum or research journal.
> **Class 9: Our open data:** The open data we make available as described by the Scottish Government's Open Data Strategy and Resource Pack, available under an open licence

Authorities have some discretion about exactly what to publish under each category but they have an obligation to consider the public interest. The Commissioner produces a Guide for authorities on the model scheme. The full Model Publication

Scheme and the Commissioner's Guide for authorities are available on the Commissioner's website.[25]

The current system has some clear advantages:

- It sets a clear statutory obligation to proactively publish information
- It gives a clear role to the Commissioner in setting out the broad expectation for authorities, in terms of the categories of information they ought to publish
- It provides a clear framework within which the Commissioner can provide oversight to this aspect of authorities' FOISA compliance.

Nevertheless, in evidence to the Committee both the Scottish Government and the Commissioner suggested the requirement to maintain a publication scheme may reflect a somewhat outmoded conception of how the public wish to access information about the work of public authorities.

The Committee recommended that the Scottish Government should consult on a specific proposal made in the Commissioner's written evidence to the Committee for the current statutory publication scheme obligations to be replaced with a simple statutory duty to publish information, supported by a new 'legally enforceable Code of Practice on Publication':

5.1 Replacing current statutory duty to maintain a publication scheme with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication

The Commissioner proposes that such a Code would set out certain key requirements and principles for all authorities such as:

- what must be published (if held by the authority);
- how the published information must be made available and searchable;
- how long it should be available for.

The Commissioner considers that such an approach, based on a legally enforceable Code of Practice would be more flexible than the current 'publication scheme' requirements and better future-proofed, since the Code could be updated in light of developments in Scottish public authorities' use of information, developments in technology etc.

The Commissioner proposes that his own office may be best placed to prepare the Code, but that the content should also be subject to approval in the Scottish Parliament through negative procedure (i.e. where no vote is required unless one is called for).

The Scottish Government is open in principle to the broad approach proposed by the Commissioner. We are inclined to agree that if a statutory code of practice on proactive publication were adopted, responsibility for preparing the code should rest

[25] See - Publication schemes | Scottish Information Commissioner (itspublicknowledge.info)

with the Commissioner, rather than the Scottish Ministers. This would represent a natural evolution of the Commissioner's current responsibility for producing a model publication scheme, and in providing guidance and oversight to authorities in terms of their compliance.

However, it must be acknowledged that the content of any code of practice, albeit set under statute, cannot itself rise to the status of legislation. It is unlikely therefore that the content of such a code could be 'legally enforceable' in its own right. If taking forward future primary legislation in this area in the future we would therefore wish to work with the Commissioner to develop an approach which gives the Commissioner levers to require proactive publication which are at least equivalent to those provided by the current regime.

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?

☐ Yes, I agree there is a need to update the provisions

☐ No, I do not agree there is a need to update the provisions

☐ I don't know/have no view

Please explain the reasons for your answer:

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

Question 19

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

☐ Yes

☐ No

☐ I don't know/have no view

If 'yes', please elaborate:

5.2 Improving approaches to proactive publication within the existing statutory framework

The Scottish Government is clear about the importance and value of government and public services in Scotland proactively sharing and disseminating information about their work. The Open Government National Action Plan 2021-2025 includes commitments to improving the accessibility and usability of official information, including in relation to public finances and to improving access to open data.[26]

There is clearly scope across the public sector in Scotland to further develop and improve approaches to the proactive publication of information - making it easier for members of the public to seek out and use information about the services they use and decisions which affect their lives.

All public authorities in Scotland should give consideration to how they can most effectively provide the public with access to information about their work. Whilst it is not for the Scottish Government to direct other public authorities in their fulfilment of their proactive publication obligations, this consultation exercise does provide an opportunity to gather views on how well proactive publication is working across the public sector in Scotland.

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?

☐ Very satisfied

☐ Somewhat satisfied

☐ Neither satisfied nor dissatisfied

☐ Somewhat dissatisfied

☐ Very dissatisfied

Please provide reasons for your answer:

[26] Scotland's Open Government action plan: 2021 to 2025 - gov.scot (www.gov.scot)

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?

Question 20(c)

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

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

The Committee proposed that the Scottish Government should consult on a number of further areas, where it considered changes might strengthen FOISA, or address specific problems in the legislation. These recommendations are generally for very specific alterations to the legislation. In some cases these are measures which had been suggested in evidence submitted to the Committee by the Commissioner.[27]

It will be less relevant in this section to consider alternative approaches to primary legislation, since the areas identified generally relate to very particular proposed alterations to FOISA. Therefore the Scottish Government's task here is more a more straightforward one - to consider the merits of each proposal for change and to weigh up whether the case for any particular change is sufficiently strong to merit new primary legislation. Responses to the questions posed in this section will assist us in making that assessment.

The Committee recommended that the Scottish Government should consult on the following:

Replacing current requirement in section 12 of FOISA for authorities to estimate the cost of compliance with a requirement to estimate the staff time involved (associated changes to the fees regulations also required).

Section 12 of FOISA provides that Scottish public authorities are not required to respond to requests for information if the cost of doing so exceeds an upper cost limit. The cost limit is set by Scottish Ministers in regulations, subject to the approval of the Scottish Parliament.

The current cost limit of £600 is set in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004. When estimating the cost of responding to a request an authority is only permitted to take into account the cost of locating, retrieving and providing the information requested. It is not allowed to estimate any cost for time spent considering whether exemptions apply to the information requested.

Whilst the limit of £600 has remained unchanged since FOISA came into force in 2005, there has been limited real erosion of the cost limit through inflation, since the maximum hourly rate the regulations permit authorities to impute when estimating the cost of staff members' time has also remained fixed at £15 per hour.

The setting of both the cost limit and the maximum hourly rate at constant values has meant that for many years the cost limit has remained effectively equivalent to 40 working hours for most requests. There are some exceptions. For example, where costs other than staff time - such as printing or postage - form a significant part of the costs of responding to a request, these can also be included in the cost calculation.

[27] See Scottish Information Commissioner written submission to PAPLS Committee (19_Scottish_Information_Commissioner.pdf (parliament.scot))

However, the overwhelming majority of requests are now responded to electronically, with the effect that staff time has become the only significant cost in most cases. This certainly is the experience of the Scottish Government, and we anticipate the same will be true for other authorities.

In its written evidence to the Committee the Scottish Government suggested replacing the requirement for authorities to estimate the financial cost of compliance with a requirement simply to estimate the staff time required. The Government indicated its view that this would be simpler for authorities to apply but also easier for requesters to understand.

Plainly, any change to the requirements of section 12 would also require a revision of the fees regulations. Some link between staff time and financial cost would need to remain within the regulations, since this would still be required for the calculation of fees, by those authorities which elect to exercise their right to charge fees.

It would be open to a future administration to revisit the maximum hourly rate for staff time in the regulations. However, at the current time the Scottish Government would not propose to take any action which would increase the amount which could be charged for responding to requests or which would alter the effective upper cost limit, currently equivalent to 40 working hours.

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)?

☐ Yes, I would support changes of this nature

☐ No, I would not support changes of this nature

☐ I don't know/have no view

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

6.1 Amending FOISA to allow requests to be transferred between Scottish public authorities (similar to the way in which EIRs requests can be transferred).

There is no provision within FOISA for any Scottish public authority to directly pass a request under FOISA onto another authority. Instead, where an authority does not hold the information requested but believes that another authority may do so, they should respond with a formal notice under section 17(1) of FOISA to advise the requester that the authority does not have the information requested. They should also signpost the requester to the relevant authority which may hold the information, in accordance with their duty under section 15 of FOISA to provide advice and assistance to requesters.

The EIRs, by contrast, do contain specific provision for authorities to pass requests onto other authorities in some circumstances. Regulation 14 states that where an authority has received an EIR request for which it does not hold any information, but believes that another public authority holds that information it may either:

(a)transfer the request to the other authority; or
(b)supply the applicant with the name and address of that other authority,[28]

In either case the authority which originally received the request is still required to issue a formal response to the requester, confirming that it does not have the information.

As the Scottish Government's response to the Committee's report detailed, it is our understanding and experience that the option of transferring EIR requests directly from one authority to the other is used relatively infrequently. This may be partly because of concern on the part of authorities about the data protection implications of passing a requester's details onto another authority where the requester has not explicitly asked for this to happen. The Section 60 Code of Practice is clear that authorities should not transfer requests without the requester's agreement. There is perhaps limited advantage therefore, in terms of streamlining the service to the requester, in transferring the request to the relevant authority as opposed to merely signposting the requester to contact that authority directly.

Nevertheless, the Scottish Government can see why some authorities may feel this option would enable them to provide a more joined up service to their customers, particularly in cases where the authority seeking to transfer the request has a very close association with the authority considered to hold the information. In the Committee session on 7 November 2019 witnesses referred to instances where local authorities may wish to transfer requests to their own 'arms-length' organisations, many of which are separate Scottish public authorities in their own right.[29]

Witnesses also referred to the position of Health and Social Care partnerships in which the local authority and local NHS Board work together under the oversight of an Integration Joint Board to deliver services. Local authorities, NHS Boards and

[28] The Environmental Information (Scotland) Regulations 2004 (legislation.gov.uk)
[29] PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE - 25th Meeting 2019, 7 November (parliament.scot)

Integration Joint Boards are each listed separately as Scottish public authorities in schedule 1 of FOISA, so where one receives a request which might have been more fruitfully directed to another, it can only signpost the requester to redirect their request.

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?

☐ Yes

☐ No

☐ Not sure/don't know

Please elaborate:

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

6.2 Amending the provisions of FOISA 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.

Section 1(3) of FOISA provides that if an authority requires further information in order to identify and locate the information sought in a request, and has advised the requester of that need, specifying the information required, then the authority is not obliged to respond to the request until the requester has provided the additional information. Section 10(1)(b) stipulates that in instances where this provision applies the authority's statutory 20 working day timescale begins on the date that further information has been received.

It is in light of these provisions that the statutory 20 working day timeframe within which any authority must respond to a request under FOISA is considered only to begin at the point at which the authority has received a request which is sufficiently clear to enable it to identify the information being sought by the applicant. Authorities should only seek 'clarification' in this formal sense when a request is not sufficiently clear to allow it to identify and locate the information being sought.

The Committee noted the concerns of some witnesses about public authorities failing to seek clarification in a timely manner. The Committee suggested that a potential mitigation to this issue could be provided by amending the legislation to provide that the 'clock' on the statutory timeframe is merely paused at the point at which an authority issues a request for clarification, rather than 'reset'. That is, that the number of working days which have elapsed between receipt of the original request by the authority and the issuance of the authority's request for clarification should be deducted from the statutory timeframe within which the authority must respond to the request once adequate clarification has been received.

It seems to the Scottish Government that there is a need to consider carefully the appropriate balance between allowing authorities sufficient time to respond to a clarified request once it has been received, and the legitimate expectations of requesters that they be asked for clarification promptly, if clarification is required.

The requirement to respond within the 20 working day statutory timeframe can be challenging for authorities, particularly when handling large or complex requests. Authorities cannot be expected to take forward the response to a request which does not describe the information requested with sufficient clarity to allow the authority to identify the information requested. It therefore seems reasonable that provided clarification has been sought promptly, the authority should have the full 20 working days available to respond from the date that a sufficiently clear request has been received.

Nevertheless, it is also the case that requesters will feel justifiably aggrieved if requests for clarification are not issued promptly, thereby substantially increasing the overall timeframe within which they can expect to receive a response.

One compromise could be to make provisions in the legislation preserving authorities' right to seek clarification if a request is insufficiently clear, but also specifying that unless this is done within a particular time frame, then any additional

days delay in seeking clarification will be deducted from the statutory timescale for response. This would help to incentivise authorities to issue requests for clarification promptly, whilst also ensuring that authorities would continue to have the full 20 working day timeframe for responding to the request, provided they had done so.

This approach could have certain merits in striking a balance between setting reasonable expectations on authorities and ensuring prompt service to requesters. However, it would also add a degree of complexity to what is currently a fairly straightforward position.

Question 24

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

☐ Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested

☐ Amending FOISA to allow an authority a defined period in which to seek clarification if the request is unclear, after which any additional days delay will be deducted from the statutory timescale for response

☐ Leaving the provisions of the legislation unchanged in respect to timescales

☐ None of the above/No preference

Please provide comment/reasons for your answers:

6.3 Removal of (section 48) prohibitions against appeals being made to the Commissioner against: the Commissioner himself; procurators fiscal; the Lord Advocate in his capacity as head of the systems for criminal prosecution and the investigation of deaths

The Scottish Information Commissioner is listed as a Scottish public authority within schedule 1 of FOISA, and is required to provide information in response to requests on the same basis as all other authorities to which FOISA applies. This creates an apparent issue in terms of the appeal process, since there could be a perceived conflict of interest should the Commissioner be asked to consider appeals against the decisions of his own office.

To avoid this problem, section 48 of FOISA stipulates that appeals cannot be made to the Commissioner in respect of the Commissioner's own decisions. However, this has the effect of meaning that the requester's only recourse if dissatisfied following

the conclusion of the internal review process is to appeal to the Court of Session on a point of law only. This is the same recourse that requesters would ordinarily have available to them if they remained dissatisfied following the outcome of the appeal process.

In his written evidence to the Committee the Commissioner argues that the provision of section 48, preventing appeals to the Commissioner against the Commissioner's decisions, is not necessary. The Commissioner highlights that the UK Information Commissioner's Office (ICO) is able to consider appeals against its own decisions in relation to requests made under the UK Act, and indicates that the equivalent model could operate in Scotland.

We anticipate that before accepting the case for changes in this area the Parliament would wish to be assured that the appeal process could operate within the Commissioner's office with sufficient independence for it to add genuine value to the internal review process. We are also interested in the views of members of the public and other stakeholders on the issues of principle raised here. This consultation exercise provides an opportunity to gather evidence of these.

Section 48 of FOISA also prevents the Commissioner from considering appeals concerning the handling of requests by procurators fiscal or by the Lord Advocate in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland. This measure is intended to safeguard the independence of the prosecution service.

The Commissioner highlights that these restrictions have prevented his office from considering a number of appeals concerning decisions made by procurators fiscal or the Lord Advocate in relation to requests under FOISA. He also notes that the ICO is able to consider appeals against decisions made in relation to requests under FOIA by the Crown Prosecution Service in England & Wales. The Commissioner argues that his inability to consider appeals against the equivalent institutions in Scotland represents a deficit in information rights in Scotland.

The Policy Memorandum which accompanied the Freedom of Information (Scotland) Bill introduced in the Scottish Parliament on 27 September 2001 stated a clear view by the Scottish Government, formerly known as the Scottish Executive, that enabling an appeal to the Commissioner of a decision of the Lord Advocate, as head of the systems of criminal prosecution and investigation of deaths in Scotland, was not within the competence of the Scottish Parliament.[30] There has been no new assessment of the position in relation to this matter since that time. The Scottish Government will therefore consider any comments on proposals to amend the provision whilst also taking into account the position as previously stated.

Notwithstanding any issue of legislative competence, as also stated in the previous Policy Memorandum, before accepting the case for any changes in this area the Scottish Government would wish to be satisfied that there is no risk of undermining to the independence of the prosecution service in Scotland. We are also interested

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

in the views of members of the public and other stakeholders on the issues of principle raised here. This consultation exercise provides an opportunity to gather evidence of these.

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

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)?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

6.4 Removal of First Ministerial 'veto' power (section 52)

Section 52 of FOISA provides that the First Minister may overrule a decision of the Commissioner in respect of the handling of any request by the Scottish Administration (i.e. by the Scottish Ministers, or any non-Ministerial office holder or department), where the First Minister considers the information in question to be of exceptional sensitivity.

In his written evidence to the Committee the Commissioner suggests that this 'veto' power under the Act, should be removed. The Commissioner argues that the power is inimical to the wider principles of the Act. He also argues the fact that the power has never been used illustrates that it serves no purpose.

The Scottish Government has historically taken the opposite view, considering the 'veto' power as an important safeguard. The fact that no Administration has yet used the power illustrates that it has in fact been regarded as the exceptional measure it is intended to be. Ultimately, the First Minister would be held democratically accountable by the Parliament and the wider electorate for any future use of the power.

Nevertheless, we are interested in the views of members of the public and other stakeholders on the issues of principle raised here.

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

Please provide reasons for your answer:

6.5 Add provision 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'.

Regulation 10(2) of the EIRs provides that in considering the various exceptions to the duty to provide environmental information, contained within paragraphs 4 and 5 of Regulation 10, authorities must:

(a)interpret those paragraphs in a restrictive way; and
(b)apply a presumption in favour of disclosure.

These requirements mirror the wording of the Aarhus Convention, on which the Regulations are based.

In his written evidence to the Committee the Commissioner suggested that a similar requirement be incorporated into FOISA, with regard to the consideration of the various exemptions to the duty to provide information within the Act. The Commissioner argues this would enhance the international standing of the information rights regime in Scotland.

The Scottish Government is open minded on this question. As our response to the Committee's report indicated, we are of the view that it is already well understood that there is a presumption in favour of disclosure under FOISA.

Furthermore, the requirement within the EIRs for authorities to adopt a restrictive interpretation of the exceptions, seems particularly relevant in the context of Regulation 10 since Regulations 10(4) and 10(5) contain some exceptions with very wide applicability. For example Regulation 10(4)(e) provides an exception for all 'internal communications' of public authorities.

The exceptions within FOISA by contrast are more numerous, but also more precisely defined, lending themselves more naturally to a narrow interpretation. As the Commissioner concedes, section 1 of FOISA sets a clear expectation that disclosure is the default position.

Nevertheless, the Scottish Government is not averse to any change which might more fully underline the obligation on authorities to disclose information whenever they can. We are therefore interested in the views of the public and other stakeholders on whether this would represent a positive addition to the legislation.

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

6.6 Amend section 53(1)(a) to make it clear that failure to comply with a decision on time can also be referred to the Court of Session

FOISA gives the Commissioner powers to issue various types of formal notice to Scottish public authorities:

- Information Notice - requiring a public authority to provide information to the Commissioner
- Decision Notice - containing the Commissioner's decision on an appeal case (these may require compliance by the authority)
- Enforcement Notice - requiring an authority to take steps to ensure its compliance with FOI law

The Commissioner can refer the failure of an authority to comply with any of the above types of notice to the Court of Session. However, at present, once an authority has complied with a Decision Notice no further action can be taken, even if the compliance has occurred outwith the required timescale. This is different from the position in respect to Information and Enforcement notices, where authorities can still be held in contempt of court if they have complied outwith the required timescale.

The change proposed by the Commissioner would allow him to certify to the Court of Session when an authority has complied with a Decision Notice, outwith the timescale for compliance set by the Commissioner in the Notice. This would mean that an authority could be held in contempt of court where it has complied late with a Decision Notice.

Bringing the position in respect to Decision Notices into line with that for Information and Enforcement notices would represent a material strengthening of the Commissioner's powers in relation to authorities, since authorities would risk being held in contempt of court should they comply late with a Decision Notice.

The Scottish Government can see why there might be merit in making such a change, in order to ensure timeous compliance with Decision Notices on the part of public authorities. However, we would also wish to consider the views of authorities, requesters and the wider public in regard to whether such a change is required, and whether it would be a proportionate measure to ensure timeous compliance by authorities.

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

6.7 Amend definition of "information" to exclude environmental information as defined in the EIRs

The Commissioner proposed this change in order to negate the need for the exemption at section 39(2) of FOISA, covering information, to be applied in order to allow requests for environmental information to be considered under the EIRs rather than FOISA. This goes further than the Scottish Government's own suggestion of making the exemption at section 39(2) absolute.

As the Commissioner notes in his written evidence, information that falls within the definition of environmental information, as set out in Regulation 2(1) of the EIRs requires to be considered substantively under the EIRs, rather than FOISA. However, because the requirement in section 1 of FOISA to provide information on request relates to all information, and does not exclude information capable of being considered under the EIRs, where the requester has indicated that their request is made under FOISA it is necessary to respond under FOISA, applying the exemption

at section 39(2) before moving on to consider the request substantively under the EIRs regime. This makes EIRs response letters longer, and more confusing for members of the public than they might otherwise be.

The Scottish Government is open to this proposal, as a way of making the information request process more user friendly and easier to understand.

We are interested in the views of the public and other stakeholders on whether changes of this nature would be of value in simplifying the information rights landscape.

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

6.8 Provide an exemption for information provided to the Commissioner under or for the purposes of FOISA

The Commissioner proposed this change due to his concern that section 45 of FOISA as it stands does not fulfil the Scottish Parliament's original intention of providing a statutory prohibition on his release of information, which has been provided to him by public authorities to enable him to fulfil his role in the consideration of appeals.

As the Commissioner explains in his written evidence, section 45 has the appearance creating a statutory prohibition on the Commissioner's disclosure of information provided to him for the purposes of fulfilling his role under FOISA, except in very limited circumstances. However, the wording of section 26 of FOISA, which provides an exemption for information subject to a statutory prohibition on disclosure

only provides that information is exempt if its disclosure is prohibited by or under an enactment other than under FOISA.

The Commissioner therefore takes the view that the provisions of section 45 do not provide a robust basis for him to refuse to release information provided to him for the purpose of fulfilling his role. He therefore relies on other exemptions - particularly section 30(c) (substantial prejudice to the effective conduct of public affairs) in order to avoid doing so.

The Commissioner proposes the creation of a new exemption which would specifically allow him to withhold information which has been obtained by him under, or for the purposes of, FOISA.

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?

☐ Yes, I would be in favour of such a change

☐ No, I would not be in favour of such a change

☐ I don't know/have no view

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

7. Next steps following this consultation exercise

Following the conclusion of this consultation exercise, and our analysis of the responses the Scottish Government will provide a formal response to the consultation setting out our next steps.

Any future Bill containing specific measures to amend FOISA would be subject to a further full public consultation exercise in the usual way. We will also continue to engage widely on the development of access to information rights within the existing statutory framework.

Scottish Government
Riaghaltas na h-Alba

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