

Minister for Parliamentary Business

Access to Information Rights in Scotland consultation – publication of consultation analysis document

Priority and Purpose

1. Routine. To invite you to approve the draft analysis of responses to the Access to Information Rights in Scotland consultation for publication. Whilst this is a routine submission, early clearance will enable publication of the document before summer recess.

Recommendation

2. Recommends that you approve the analysis for publication and the approach to communications and parliamentary handling set out below.

Context and Issues

3. The Scottish Government consulted to seek views and evidence on access to information rights in Scotland between 29 November and 14 March. The consultation was structured around the recommendations of the Public Audit and Post-Legislative Scrutiny Committee report on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002, published in 2020.
4. The consultation paper asked 31 questions, organised around the following key themes:
 - Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery
 - Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use
 - Improving proactive publication – promoting openness as 'business as usual' in a digital age
 - Technical and other issues – ensuring the Act remains fit for purpose
5. Three stakeholder discussion events were also held during the consultation period, to explore key themes of the consultation: *Proactive Publication*, *Agility of Access to Information Rights* and *Ensuring the Access to Information Rights Regime Remains Fit for Purpose*. Participants included representatives of organisations spanning civil society, and the third, public and private sectors. Evidence from these sessions fed into the analysis document.
6. The consultation received 83 responses from members of the public, private and third sectors. Activists and civil society organisations, including two trade unions, also responded.

7. A summary of the key messages and outcomes from the consultation analysis is provided at Annex A to this submission.

Options Considered and Advice

8. The consultation analysis notes that the Scottish Government will consider options and provide its substantive response to the consultation analysis later in the year.
9. The substantive response will consider the options available to the Scottish Government to respond to the views of respondents within the framework provided by the existing primary legislation, including through the use of secondary legislation and the case for any amendments to primary legislation.

Assessment of Options

10. N/A.

Bute House Agreement Implications

11. There are no immediate implications from the publication of this analysis document. FOI policy is not specifically referenced in the Bute House Agreement or Shared Policy Programme. However, neither is it identified as a matter excluded from the agreement.
12. There will be a need to reach an agreed position on the Scottish Government's substantive response to the consultation analysis.

Financial and Legal Considerations

13. There are no immediate financial and legal implications from the publication of the analysis document. [redacted – 36(1)]
14. There will be a need to consider the financial and legal implications of any policy approaches advanced in the substantive response to the analysis.

Sensitivities

15. [redacted – 30(b)(i)]
16. Additionally, Katy Clark MSP (Scottish Labour, West Scotland) is expected to publish the analysis of her consultation on a proposed Members Bill on FOI reform before the summer recess.

Communications and Parliamentary Handling

17. Proposed media response lines have been agreed with Communications colleagues, and are provided at Annex B.

18. It is proposed that the Scottish Government Economy account will also issue a short tweet to highlight the consultation analysis on the day of its publication.
19. A letter for you to consider sending to Martin Whitfield MSP, Convener of the Standards, Procedures and Public Appointments Committee on the day of publication has also been provided to your office with this submission.
20. The FOI Unit will also advise respondents to the consultation of the publication of the analysis document.

Quality Assurance

21. SG Central Analysis Division colleagues have had input to the development of the analysis document. This submission has been approved by Penny Curtis, Deputy Director, Elections & FOI.

Conclusions and next Steps

22. If you are content to approve the document for publication we will progress its publication as soon as possible, with the aim of publication in week commencing 23 June. We will also take forward the communications and parliamentary handling outlined above.

[redacted – 38(1)(b)]

Directorate for Constitution: Elections and FOI Division

Ext: [redacted – 38(1)(b)]

Cabinet Secretaries and Ministers Copy List	For Action	For Information Portfolio interest	For Information Constituency interest	For Information General awareness
Minister for Parliamentary Business	X			

Officials Copy List
DG Strategy & External Affairs
Dominic Munro
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Michael Birrell
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[redacted – 38(1)(b)]

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[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

SpAds Admin

Gavin Corbett

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

COPFS Chief Executive

SUMMARY OF KEY MESSAGES AND OUTCOMES FROM CONSULTATION ANALYSIS

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

- There was a clear divergence of perspectives between respondents representing the perspectives of Scottish public authorities and other respondents.
- Authorities generally consider that the law as it stands is sufficient, whilst civil society and third sector respondents more sceptical about this. The Commissioner is also sceptical.
- Some third sector organisations also expressed concern about the impact and proportionality of extension of FOISA to third sector service providers.
- There was a widely held view that greater assurance about the Scottish Government's future use of its power under section 5 of FOISA, to extend the legislation to further entities, would be welcome (including by the Commissioner).
- Wide support for greater clarity in section 60 Code about information held by contractors (but Commissioner sceptical about the value of this).
- The Commissioner made a specific proposal for legislative reform, in terms of a new power for the Scottish Parliament to make revisions to Schedule 1 of FOISA and a requirement for the Parliament to periodically review coverage of the legislation.

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

- Wide recognition of the compliance risks which may be posed by the use of so called 'unofficial platforms' for conducting business in Scottish public authorities. Most respondents tended to the view that answers to these questions were likely to lie in stronger guidance and organisational approaches, rather than changes in the law.

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

- There was a general view among respondents that there is scope for improvement to approaches taken by Scottish public authorities to proactive publication, but mixed views on how to best advance that improvement.
- There was also openness on the part of most respondents to the proposed legislative changes advocated by the Scottish Information Commissioner – to replace the existing statutory requirement for each Scottish public authority to maintain a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice. However, some respondents had concerns about the workability of the approach.

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

- There were mixed views on the various ‘technical and other issues’ covered in this section.
- Wide support was received for removal of First Ministerial ‘veto’
- There was strong support for the more technical legislative changes requested by the Commissioner (new exemption for the Commissioner, allowing Commissioner to refer failure to comply with a decision on time to the Court of Session).

PROPOSED MEDIA RESPONSE LINES

A Scottish Government spokesperson said:

“The Scottish Government is grateful to the individuals and organisations who shared their views on access to public information in Scotland.

“The responses will inform our work to improve FOI rules and deliver on our commitment to openness and transparency.

“We will consider the outcomes in the report and respond later this year.”

Background

Scotland has the most open and far-reaching FOI legislation in the UK. The Scottish Government remains committed to its obligations under the Freedom of Information (Scotland) Act 2002 Act.

Minister for Parliamentary Business
Minister for Social Care, Mental Wellbeing and Sport
Minister for Community Wealth and Public Finance

RESPONDING TO CALLS FOR EXTENSION OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 TO PRIVATE AND THIRD SECTOR SOCIAL CARE PROVIDERS

Priority and Purpose

1. Routine. To seek the views of Ministers on the Scottish Government response to calls for extension of the Freedom of Information (Scotland) Act 2002 (FOISA) to private and third sector social care providers.

Recommendation

2. Recommends that you: consider the advice outlined in this submission and advise whether you are content that the Scottish Government should commit that there will be a public consultation on extension of FOISA to private and third sector social care providers, to take place after the National Care Service (Scotland) Bill has been passed.

Context and Issues

Core issue

3. A number of stakeholders (see para 15) are calling on the Scottish Government to extend coverage of FOISA to private and third sector social care providers who deliver statutory social care services on behalf of Scottish public authorities. Under the existing delivery model these services are delivered mostly on behalf of local authorities. The principle focus of stakeholders advocating extension is around care homes and 'care at home' services.
4. These calls are longstanding. However, they have renewed impetus: in light of the wider reform of social care being progressed through the National Care Service Bill; in light of responses to the Scottish Government's recent consultation on Access to Information Rights in Scotland, and Katy Clark MSP's recent Member's Bill consultation on FOI reform.
5. At a conference on 24 August the outgoing Scottish Information Commissioner said publicly that one of the biggest risks he saw to the public's right to access information was FOISA's failure to keep up to date with changes in how public services are delivered through bodies which do not fit the definition of public authorities.

FOI policy context

6. FOISA provides a statutory right of access to information held by Scottish public authorities. These range from large authorities such as the Scottish Government to a number of much smaller organisations with a role in the delivery of public services. These include many small providers in the primary care sector, including GP practices, dental practices and pharmacists (in relation to NHS services).
7. The Scottish Government has a commitment to using Scottish Ministers' power under section 5 of FOISA to extend coverage of the Act in order to ensure the public's rights to access information about public services is maintained and strengthened as public service delivery models change and develop. An overview of the section 5 power is provided at Annex A to this note.
8. The Scottish Government has previously indicated that it will consider a number of factors to determine whether an organisation (or class of organisations) is delivering functions of a public nature and should therefore be considered as a candidate for extension of FOISA. An assessment of the position of social care providers against that set of factors is set out in Annex B.
9. The Scottish Government has a commitment to bring forward its substantive response to the analysis of responses to the Access to Information Rights in Scotland consultation by the end of 2023. It will be important in that context to provide a clear indication of how Scottish Ministers envisage the future use of their powers to extend FOISA, in order to ensure the access to information rights of the public in relation to the delivery of public services.

Social Care policy context

10. [redacted – 30(b)(i)]

Substantive issues

11. Calls to enhance and expand access to information rights in the social care sector have a clear logic in light of the significance of the services provided by the sector and the cost of these to the public purse. This is reflected in the 'factors' analysis set out in Annex B.
12. The current reform of the sector recognises social care as a vital public service and explicitly seeks to increase the accountability of the Scottish Ministers for its delivery. It also seeks to make a person centred and human rights based approach central to the delivery of care. Intuitively, extending access to information rights in the sector seems consistent with that overall ethos.
13. The experience of Registered Social Landlords (which became subject to FOISA in 2019) and of primary care providers (which have been subject to FOISA since its inception) would suggest that the business impacts on social care providers of becoming subject to FOISA are likely to be moderate, and proportionate to the scale of the individual provider.

14. Nevertheless it is also true that requiring providers to discharge statutory obligations under FOISA would place additional demands on their resources. This is an important consideration in light of the wider pressures on the social care sector at the current time, [redacted – 30(b)(i)]

15. [redacted – 30(b)(i)]

Views of key stakeholders

16. The Scottish Information Commissioner strongly favours extension of FOISA to private and third sector social care providers. Other stakeholders vocal in calling for extension are the Campaign for Freedom of Information in Scotland (CFOIS), Scottish Trades Union Congress (STUC), UNISON Scotland and a number of MSPs – most notably Katy Clark (Scottish Labour, West Scotland).

17. Public polling commissioned by the Scottish Information Commissioner in February 2022 found that there was strong support for the designation of bodies providing social care, with 80% of respondents saying it is ‘very’ or ‘extremely’ important that privately-run but publicly-funded health and social care services are subject to FOI legislation. The STUC called for FOISA to be extended to all providers of care homes and ‘care at home’ services in receipt of public funding in their June 2022 report, *Profiting from Care*.

18. A number of responses to the Scottish Government’s recent Access to Information Rights in Scotland consultation highlighted the desire to see bodies providing social care designated under FOISA. This was evident in responses from UNISON Scotland, the Campaign for Freedom of Information in Scotland and the Scottish Information Commissioner. The Health and Social Care Alliance Scotland highlighted a need for proportionality around any such extension.

19. The principal representative bodies within the social care sector itself have previously expressed opposition to extension of FOISA to their members. This was expressed by the Coalition of Care and support Providers in Scotland (representing third sector providers) in response to the Scottish Government’s consultation on extension in 2019. Scottish Care (mainly representing private sector providers) publicly expressed opposition to FOISA extension in response to calls for extension by the Scottish Labour Party in 2022.

Options Considered and Advice

Resisting calls for extension

20. [redacted – 30(b)(i)]

21. If we accept the principle that we should at the very least consider in depth an extension of FOISA, there are two options for making the change.

Extension by primary legislation in NCS Bill

22. In principle, extension of FOISA to private and third sector social care providers could be taken forward through primary legislation, by inserting relevant provisions within the NCS Bill.
23. Indeed, there is an expressed preference on the part of the Commissioner and some other stakeholders for extension to be enshrined in the National Care Service Bill. The Commissioner has expressed this in terms of his desire to see access to information as an “essential part of system design and regulation”.
24. [redacted – 30(b)(i)] The timescales associated with the Parliamentary stages of the Bill would also limit the opportunity for consultation with stakeholders and our flexibility to consider the timing of consultation and to shape the nature and timing of any extension in response to the views of stakeholders and the needs of the social care sector.

Consultation on extension by secondary legislation (section 5)

25. Making a commitment to consult on extension by means of Scottish Ministers’ order making power under section 5 of FOISA would enable all the issues around extension to be considered fully in the context of a public consultation. It would provide opportunity for the extension to be shaped and timed with the interests of both service users and providers in mind.
26. Announcing a section 5 consultation would demonstrate Scottish Ministers’ commitment to the active consideration and use of their power to protect and enhance access to information rights and show that Ministers are being responsive to the concerns of stakeholders calling for such rights to be expanded in relation to social care providers.
27. However, representative bodies in the sector may criticise the decision to consult – preferring that their members would not face the prospect of becoming subject to FOI law. Some stakeholders favouring extension may also criticise the decision to consult on section 5 extension – preferring that extension be taken forward by primary legislation.

Assessment of Options

28. On balance it is the view of the FOI Unit and Directorate for Social Care and National Care Service Development, that the strongest approach would be to commit to a clear timetable for consultation on extension of FOISA to private and third sector providers of care home and ‘care at home’ services (for statutory social care services delivered on behalf of Scottish public authorities) using Scottish Ministers’ extension power under section 5 of FOISA.
29. We consider that this would strike the most appropriate balance between taking seriously the strong prima facie arguments for extension in order to advance transparency and openness, whilst allowing for fulsome consultation with

interested stakeholders to understand the potential impacts on service users and providers and to shape the approach.

30. A full summary of options considered by the FOI Unit and Directorate for Social Care and National Care Service Development is provided in Annex C to this note.

Bute House Agreement Implications

31. There is no commitment to FOISA extension within the Bute House Agreement or in the Scottish Government and Scottish Green Party (SGP) Shared Policy Programme. However, FOI policy is not among the areas excluded from the agreement, so is therefore subject to it. The Shared Policy Programme does commit both parties to social care reform through the creation of a National Care Service seeking to deliver 'a rights based, person centred, and user led approach to social care'.
32. Special Advisors and SGP have discussed and SGP have confirmed they are content with the policy direction and that this forms part of the formal response to the Access to Information Rights in Scotland consultation. Special Advisers will keep SGP updated on the overall approach as it develops.

Financial and Legal Considerations

33. Proceeding with an extension in the social care sector would have resource implications for care providers, since they will need to comply with new statutory obligations. We anticipate that these will be moderate in scale based on the experience of extending FOISA to registered social landlords. Nevertheless, any additional costs for providers are likely to be reflected ultimately in higher prices for Scottish public authorities securing care services from private and third sector providers. [redacted – 30(b)(i)]
34. It is convention that the Scottish Government provides additional funding to the Scottish Information Commissioner to cover costs within the first year of any changes to the Commissioner's functions. It would then be for the Scottish Parliament Corporate Body (SPCB) to factor these into the Commissioner's funding in subsequent years. When FOISA was extended to Registered Social Landlords (RSLs) in 2019, £160k was provided (via SPCB) to cover the costs to the Scottish Information Commissioner.
35. Any extension to private and third sector social care providers would be the largest extension the Scottish Ministers have made to date, in terms of the number of new organisations which would become subject to FOISA. The extension to RSLs in 2019 made around 240 organisations subject to FOISA. It is likely that extension to care home and 'care at home' providers would make in excess of 800 further organisations subject to FOISA.
36. [redacted – 36(1)] It should be noted that in response to previous Scottish Labour Party calls for extension of FOISA to private and third sector care providers, industry body Scottish Care previously warned that its members may

seek to mount legal action in response to any move to expand coverage of FOISA.

Sensitivities

37. [redacted – 30(b)(i)]

38. [redacted – 30(b)(i)]

Quality Assurance

39. This Submission has been approved by Lorna Gibbs.

Conclusions and Next Steps

40. We would invite Ministers to confirm whether they wish work to be undertaken to scope the possible content of a draft section 5 order and the timing of a public consultation exercise, with a view to Ministers being able to make a commitment to this as part of Scottish Ministers' formal response to the Access to Information Rights in Scotland consultation analysis to be published this Autumn [redacted - 30(b)(i)].

Michael Birrell

Head of FOI Policy

Directorate for Communications and Ministerial Support: Improving Public Engagement Division

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Cabinet Secretaries and Ministers Copy List	For Action	For Information Portfolio interest	For Information Constituency interest	For Information General awareness
Deputy First Minister and Cabinet Secretary for Finance		X		
Cabinet Secretary for NHS Recovery, Health and Social Care		X		
Lord Advocate		X		
Solicitor General		X		

Officials Copy List

DG Corporate
DG Health & Social Care

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Donna Bell

Andy Bruce

Nick Ford

[redacted – 38(1)(b)]

Simon Cuthbert-Kerr

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Iona Colvin

Ian Turner

Iain MacAllister

Derek Grieve

Angie Wood

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Lorna Gibbs

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SpAds Admin

SCOTTISH MINISTERS' POWERS TO EXTEND COVERAGE OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (FOISA) (SECTION 5)

Any organisation designated as a Scottish public authority for the purposes of FOISA is required to comply with three principal duties under the legislation:

- proactively publishing information
- responding to requests for information
- providing advice and assistance to requesters

Generally, organisations subject to FOISA are those listed as Scottish public authorities within Schedule 1 to the Act.

Section 5 of FOISA grants Scottish Ministers a power to extend FOISA to persons or bodies that:

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

This power under section 5 is for persons or bodies that are not themselves public (and therefore could not be added to Schedule 1) but which deliver public functions or services. Section 5 bodies are subject to FOISA only in relation to those functions or services listed in the relevant section 5 order.

Before using the power the Scottish Ministers have a statutory obligation to consult with the organisations to be designated, or their representatives.

Previous discussion and use of section 5 power

Previous section 5 orders have extended FOISA to:

- (a) arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities (2013 Order)
- (b) grant-aided schools and independent special schools (2016 Order)
- (c) providers of secure accommodation (2016 Order)
- (d) Scottish Health Innovations Limited (2016 Order)
- (e) private prison contractors (2016 Order)
- (f) registered social landlords (2019 Order)

The Scottish Ministers are required to lay a report in the Parliament on a biennial basis explaining how the power has been exercised during the reporting period or the reasons for leaving it unused. The next such report is due to be laid in October 2023.

The 2017 biennial report outlined the Government's intention to assess options for further section 5 orders with the objective of ensuring coverage is robust and reflects

changing patterns of public service delivery. In particular, we indicated that we would:

- (a) explore whether certain organisations – or classes of organisation – **delivering health and social care functions**, but currently not subject to the Act, should be brought within scope of the legislation
- (b) liaise with Audit Scotland for our joint interests in its project assessing the **delivery of council services by arms-length external organisations** (some of which were designated in the first section 5 order)
- (c) engage with the third sector **because third sector bodies can be publicly funded to exercise functions which may be considered to be of a public nature, or to provide services which are functions of an authority**

In 2019 the Scottish Government ran a consultation exercise on the future use of the section 5 power. In response to that consultation the Scottish Information Commissioner recommended that the consideration should be given to extending FOISA to:

- 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

In his response to the Scottish Government's more recent consultation on Access to Information Rights in Scotland the Scottish Information Commissioner has called for more consistent use of the section 5 power to respond to ongoing changes in the public sector landscape.

FACTORS BASED APPROACH – INITIAL ANALYSIS

The Scottish Government has consistently set out that it will consider a number of factors in to determine whether an organisation (or class of organisations) is delivering functions of a public nature and should therefore be considered as a candidate for extension. In our 2019 consultation we indicated that we consider these factors to include:

- (a) the extent to which particular functions are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities;
- (b) the extent of public funding of the activity;
- (c) whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them;
- (d) whether the body exercises extensive or monopolistic powers;
- (e) the extent to which the body is subject to state regulation, oversight or control.

More widely, we would also consider as part of this assessment process:

- (a) whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;
- (b) whether coverage would impose a significant administrative burden that may be considered to have a disproportionate business impact;
- (c) the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

The following table provides an initial analysis of private and third sector providers of care home and 'care at home' services, considered against the above factors and additional considerations:

Factor	Position of private and third sector social care providers
(a) the extent to which particular functions are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities;	<ul style="list-style-type: none"> • There are clear statutory underpinnings for the delivery of social care services e.g. in the Social Work (Scotland) Act 1968, Community Care and Health (Scotland) Act 2002, Public Services Reform (Scotland) Act 2010 and Public Bodies (Joint Working) (Scotland) Act 2014 and other legislation • Local authorities have principal responsibility for the delivery of social care services. Following initial agreement with COSLA, the National Care Service Bill currently progressing through Parliament will seek to provide Ministers with shared accountability for the service.

	<ul style="list-style-type: none"> • The Scottish Government is clear that it regards social care as a key public service.
(b) the extent of public funding of the activity	<ul style="list-style-type: none"> • There is considerable public funding for recipients of care homes and 'care at home' services. • Any adult assessed by their local authority as having personal or nursing care needs is entitled to have these funded. • On a means tested basis many adults are also entitled to support with residential care costs. • 64% of all long stay residents in private care homes for older people are mainly publicly funded. The equivalent figure for voluntary providers is 47%.¹
(c) whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them;	<ul style="list-style-type: none"> • Similar functions to those provided by private and third sector social care providers are already delivered directly by public authorities in many instances e.g. in local authority run care settings. • Local authorities (and in future, the National Care Service) have statutory obligations to provide care. They would be obliged to provide services directly in the absence of any available third or private sector delivery partners.
(d) whether the body exercises extensive or monopolistic powers;	<ul style="list-style-type: none"> • Individual care providers do not exercise extensive or monopolistic powers. • However, an individual's initial choice of provider may be circumscribed by the availability of alternatives. • It is also the case that there are often barriers to changing provider if the service user is dissatisfied.
(e) the extent to which the body is subject to state regulation, oversight or control.	<ul style="list-style-type: none"> • Social care services in Scotland are subject to regulation by the Care Inspectorate. • The social care workforce is regulated by the Scottish Social Services Council.

¹ See Table 3: [Care Home Census for Adults in Scotland \(publichealthscotland.scot\)](http://publichealthscotland.scot)

Additional consideration	Position of private and third sector social care providers
(a) whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;	<ul style="list-style-type: none"> • No immediate change to access to information rights will be brought about by the creation of the new National Care Service. • There has been a shift towards greater use of private and third sector providers over time. However, this has been a moderate trend over the period since FOISA was introduced. • Care Home Census statistics show that in 2002 local authority and health board run homes accounted for 15% of available places. By 2022 this had fallen to only 10%. ² • The private sector has been dominant in the provision of care home places since FOISA was enacted – accounting for 73% of places in 2002, rising to 79% of places in 2022.³
(b) whether coverage would impose a significant administrative burden that may be considered to have a disproportionate business impact;	<ul style="list-style-type: none"> • It is anticipated that overall information request numbers to social care providers would be moderate and in proportion to the size of the provider. • Nevertheless, the wider pressures on the sector [redacted - 30(b)(i)] may give rise to concerns about possible disproportionate business impact.
(c) the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.	<ul style="list-style-type: none"> • Social care services are widely regarded as an important public service • The ethos of the National Care Service reform will be to strengthen the recognition of social care as a public service and the accountability of the Scottish Ministers for its delivery.

² Comparison of figures for 2002 in [Statistical Bulletin: Health Series: Care Homes, Scotland, 2009 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/statistical-bulletin/health-series/care-homes-scotland-2009-2019/pages/23-24.aspx) with latest Care Home Census Data for 2022: [Care Home Census for Adults in Scotland \(publichealthscotland.scot\)](https://www.gov.scot/publications/care-home-census-for-adults-in-scotland/pages/2-3.aspx)

³ Comparison of figures for 2002 in [Statistical Bulletin: Health Series: Care Homes, Scotland, 2009 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/statistical-bulletin/health-series/care-homes-scotland-2009-2019/pages/23-24.aspx) with latest Care Home Census Data for 2022: [Care Home Census for Adults in Scotland \(publichealthscotland.scot\)](https://www.gov.scot/publications/care-home-census-for-adults-in-scotland/pages/2-3.aspx)

ANALYSIS OF CORE OPTIONS FOR RESPONDING TO CALLS FOR EXTENSION OF FOISA TO PRIVATE AND THIRD SECTOR SOCIAL CARE PROVIDERS

OPTION A – COMMIT TO TIMETABLE FOR CONSULTING ON EXTENSION USING POWER UNDER SECTION 5 OF FOISA

If Ministers are minded accept this option then further advice will be provided setting out options around the timing and scope of any proposed section 5 order. The analysis below assumes a commitment to consult on a section 5 order within the year following commencement of the new legislation.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> • Provides clear process for consultation with the sector and wider public. • Demonstrates commitment to considering seriously access to information rights in the sector. 	<ul style="list-style-type: none"> • [redacted – 30(b)(i)] • Participation in the consultation will require use of resource within the sector.
<ul style="list-style-type: none"> • Allows the Scottish Government to maintain the initiative in this area of policy. • Significantly strengthens credibility of the Scottish Government’s response to the Access to Information Rights in Scotland consultation. • [redacted – 30(b)(i)] 	<ul style="list-style-type: none"> • Will not fully satisfy stakeholders calling for extension – including the Commissioner – given their expressed preference for extension within the NCS Bill. • Uncertainty over ultimate outcome will remain until consultation process is complete.
<ul style="list-style-type: none"> • Flexibility around timing of consultation and roll out any extension allows us to balance the need to expand rights with sensitivity to the needs of the sector. 	<ul style="list-style-type: none"> • Scope for ongoing contention around the exact nature and scope of a future extension order.

OPTION B – RESIST CALLS FOR EXTENSION

This option, whilst straightforward, does present challenges. It is the case that private and third sector providers have had a longstanding role in the provision of social care services in Scotland. They have not previously been subject to FOISA, so to that extent a decision not to extend represents a continuation of the status quo.

Nevertheless, [redacted - 30(b)(i)]

• STRENGTHS	• WEAKNESSES
<ul style="list-style-type: none"> • Avoids further administrative and financial burden of regulation on an already pressed sector. 	<ul style="list-style-type: none"> • Would miss opportunity to extend access to information rights in an important sector. • Would seem inconsistent with wider ethos of reform.
<ul style="list-style-type: none"> • Would demonstrate the opposition expressed by some in the sector has been taken on board and that SG understands the difficult economic landscape the diverse range of providers are working in. 	<ul style="list-style-type: none"> • [redacted – 30(b)(i)] • [redacted – 30(b)(i)]
<ul style="list-style-type: none"> • Could lead to requests being directed through care boards and the Scottish Ministers over time, which might be sufficient to ensure adequate access to information about services. 	<ul style="list-style-type: none"> • May lead to greater pressure of FOI requests on Care Boards and the Scottish Ministers, as requesters seek to access information via the Boards.
<ul style="list-style-type: none"> • Would avoid any possible public concern about care budgets being diverted to fulfil obligations under FOISA. 	<ul style="list-style-type: none"> • Does not address public concern to see all elements of social care covered (as per OSIC 2022 polling) • Public concern around the impact of the coronavirus outbreak in care homes has brought the need for greater transparency within the sector into sharper focus.

OTHER OPTIONS CONSIDERED

Extension by Primary Legislation within NCS Bill

[redacted – 30(b)(i)]

Furthermore, acceding to calls for measures within the Bill would limit the opportunity for consultation with the sector and the flexibility to consider the timing of this and the roll out of any extension.

[redacted – 30(b)(i)] [full page]

Minister for Parliamentary Business

Access to Information Rights in Scotland consultation – publication of consultation analysis document

Priority and Purpose

1. Routine. To invite you to approve the proposed Scottish Government response to the analysis of responses to the Access to Information Rights in Scotland consultation. Whilst this is a routine submission, early clearance will enable publication of the document on the date of your address to the Holyrood Communications FOI Conference on 28 November.

Recommendation

2. Recommends that (subject to consideration of any comment to be provided by the Scottish Green Party) you approve the response document for publication and the approach to communications and parliamentary handling set out below.

Context and Issues

3. The Scottish Government consulted to seek views and evidence on access to information rights in Scotland between 29 November 2022 and 14 March 2023. The consultation was structured around the recommendations of the Public Audit and Post-Legislative Scrutiny Committee report on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002, published in 2020.
4. The consultation paper asked 31 questions, organised around the following key themes:
 - Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery
 - Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use
 - Improving proactive publication – promoting openness as 'business as usual' in a digital age
 - Technical and other issues – ensuring the Act remains fit for purpose
5. Three stakeholder discussion events were also held during the consultation period, to explore key themes of the consultation: *Proactive Publication*, *Agility of Access to Information Rights* and *Ensuring the Access to Information Rights Regime Remains Fit for Purpose*. Participants included representatives of organisations spanning civil society, and the third, public and private sectors. Evidence from these sessions fed into the analysis document.

6. The consultation received 83 responses from members of the public, private and third sectors. Activists and civil society organisations, including two trade unions, also responded.
7. An analysis of responses was published on 30 June 2023. The response document summarises key outcomes from that analysis and sets out the Scottish Government's position in relation to each of the issues considered in the consultation in light of those outcomes.
8. A summary of the commitments made in the response document, and the positions taken by the Scottish Government in relation to each of the issues taken in the consultation is provided at Annex A to this note.

Options Considered and Advice

9. The proposed response document sets out an overall Scottish Government position that, whilst it remains open to considering a new FOI Amendment Bill at some point in the future, the existing legislation is sound in its fundamentals. New primary legislation in this area is therefore not a priority for progression in the current parliament.
10. Instead, the Scottish Government will focus on addressing issues raised by the post-legislative scrutiny process within the framework provided by the existing primary legislation – including through the use of secondary legislation making powers. This includes commitments in relation to the future consideration and use of the Scottish Ministers' power to extend coverage of FOISA to further entities.

Assessment of Options

11. N/A.

Bute House Agreement Implications

12. FOI policy is not specifically referenced in the Bute House Agreement or Shared Policy Programme. However, neither is it identified as a matter excluded from the agreement.
13. Details of the approach proposed in the Scottish Government response document have been shared with the Scottish Green Party. Comment is awaited from them. A further update will be required once their comment has been received.

Verity House Agreement Implications

14. There has been engagement with local government in the consultation process, which received responses from a number of local authorities.
15. We will continue to engage with local government as we implement the various commitments in the response.

Financial and Legal Considerations

16. [redacted – 36(1)]

17. The document contains a clear commitment to consult on the extension of FOISA to private and third sector care homes and ‘care at home’ providers. This commitment has already been agreed with Ministers. The response will also commit to set out a clearer and more robust approach to the consideration use of Scottish Ministers’ extension power generally.

18. Any future use of the extension power will likely be associated with a requirement to provide year one funding for the Scottish Information Commissioner to meet costs associated with the expansion of his functions. The extend of such funding would need to be agreed with the Scottish Parliament Corporate Body (SPCB) – with funding requirements in future years met by SPCB.

Sensitivities

19. [redacted – 30(b)(i)]

20. Additionally, Katy Clark MSP (Scottish Labour, West Scotland) is expected to publish the analysis of her own consultation on a proposed Members Bill on FOI reform and final Bill proposal in the coming weeks. The FOI Unit will provide advice on that when it is published.

Communications and Parliamentary Handling

21. Proposed media lines regarding the consultation response will be agreed with Communications colleagues, and will be provided for clearance under separate cover.

22. It is proposed that you should announce the publication of the response document and the key commitments contained within it in your address to the Holyrood Communications FOI Conference on 28 November. A proposed speech has been provided along with this submission.

23. A letter for you to consider sending to Martin Whitfield MSP, Convener of the Standards, Procedures and Public Appointments Committee on the day of the announcement will be prepared and submitted to your office under separate cover.

24. The FOI Unit will also advise respondents to the consultation of the publication of the response document.

Quality Assurance

25. This submission has been approved by Lorna Gibbs, Deputy Director, Improving Public Engagement Division.

Officials Copy List

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

Nick Ford

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

Dave Watson

Eilidh Mclaughlin

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

Donna Bell

Rachael McGruer

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 30(c)]

[redacted – 38(1)(b)]

[redacted – 30(c)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 30(c)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

Jeanette Campbell

SpAds Admin

Gavin Corbett

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

[redacted – 38(1)(b)]

COPFS Chief Executive

SUMMARY OF KEY SCOTTISH GOVERNMENT COMMITMENTS AND POSITIONS ON ISSUES CONSIDERED IN THE CONSULTATION

The response commits the Scottish Government to:

- Develop and set out a clearer, more structured and consistent approach to the future use of the section 5 power.
- Consult on extension of FOISA to private and third sector providers of care home and 'care at home' services, following passage of the National Care Service Bill.
- Undertake a comprehensive review of Schedule 1 of FOISA, using the section 4 power to make appropriate updates to entities listed
- Identify and consider the FOISA status of companies wholly-owned by a combination of the Scottish Ministers and other Scottish public authorities.
- In consultation with the Scottish Information Commissioner - revise the section 60 Code of Practice to provide updated guidance for Scottish public authorities about:
 - Handling of requests about services delivered by outsourcing partners
 - Use of non-corporate platforms, and other developments in IT
 - Seeking clarification
 - Making the relationship between FOISA and the EIRs clearer for requesters

Scottish Government positions on specific issues considered in the consultation:

Issue	Scottish Government position
Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery	
Concern that coverage of the legislation is insufficient/is not responsive to varied models of service delivery	<ul style="list-style-type: none"> • Primary legislation not best approach to addressing issue • Concerns should be addressed through use of existing secondary legislation making powers and clearer guidance for Scottish public authorities. (see specific commitments above)
Proposal for statutory prohibition on reliance on confidentiality clauses to withhold information.	<ul style="list-style-type: none"> • Not persuaded that case has been made for any change to legislation in this area. • Use of confidentiality clauses in public contracts is rare. • Any reliance on them is subject to scrutiny by the Scottish Information Commissioner
Proposal for amendments to FOISA definition of a publicly-owned company to ensure companies jointly owned by the Scottish Government with	<ul style="list-style-type: none"> • No commitment to amend primary legislation • SG considers there may be scope to mitigate any impacts of this issue through use of primary legislation. (see specific commitment above)

other authorities are included.	
Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use	
Concern that use of non-corporate platforms (private email, messaging services) for the business of Scottish public authorities may undermine compliance with FOISA	<ul style="list-style-type: none"> • Legal position already clear that all recorded information relating to official business is subject to FOI law • Changes in primary legislation not required • Clear guidance and strong organisational approaches are the best way to address these issues (see specific commitment above re revision to Section 60 Code)
Improving proactive publication – promoting openness as 'business as usual' in a digital age	
Proposal that requirement for authorities to maintain a publication scheme be replaced by statutory Code of Practice on Proactive Publication to be set by Commissioner	<ul style="list-style-type: none"> • Scottish Government remains open minded to suggestion in the long term • However, continues to have some concerns about workability. • Response summarises ongoing work within Scottish Government on proactive publication and commits to build on this.
Technical and other issues – ensuring the Act remains fit for Purpose	
Proposal to change approach to estimating cost of compliance to refer directly to staff time, rather than financial cost to be clearer for requesters.	<ul style="list-style-type: none"> • We recognise there will be a need to update Fees regulations at some point since nominal £600 limit will eventually appear outdated. • When doing so, we would seek to maintain the position that cost limit is functionally equivalent to 40 working hours of staff time
Proposal to amend FOISA to enable transfer of requests between authorities.	<ul style="list-style-type: none"> • Scottish Government not persuaded of merits of change • Equivalent provisions under Environmental Information (Scotland) Regulations 2004 rarely used.
Proposal to amend FOISA so that seeking clarification from a requester only pauses (rather than resets) 'clock' on statutory timeframe.	<ul style="list-style-type: none"> • Scottish Government not persuaded of merits of change • Intentional delays by authorities in seeking clarification not widespread. • Will consider updates to guidance for authorities in section 60 Code (see specific commitment above)
Proposal to remove prohibition on Commissioner	<ul style="list-style-type: none"> • Scottish Government not persuaded at the current time of case for change.

considering FOI appeals about his own office	<ul style="list-style-type: none"> • Change would seem to add limited value.
Proposal to remove prohibition on Commissioner considering FOI appeals about Lord Advocate/COPFS	<ul style="list-style-type: none"> • There has been no reassessment of the position taken in the Policy Memorandum for FOI Bill in 2001 that giving this power to the Commissioner would be outside the legislative competence of the Parliament. • Issue has limited impact on effectiveness of access to information rights overall.
Proposal to remove FM 'veto' on release of exceptionally sensitive information	<ul style="list-style-type: none"> • Scottish Government understands views of those who would wish this power to be removed. • Power has never been used by any First Minister. • Open to considering further in the future, but issue has limited impact on day to day operation of rights.
Proposal to incorporate a presumption in favour of disclosure into FOISA	<ul style="list-style-type: none"> • No need for change in legislation since it is already widely understood that there is a presumption in favour disclosure. • Response notes that former Commissioner also dropped his support for this change.
Proposal to amend FOISA to allow the Commissioner to refer late compliance with Decision Notices to the Court of Session.	<ul style="list-style-type: none"> • Further consideration of the potential implications would be required before the Scottish Government could commit to any future change. • The Scottish Government remains open to continued engagement with the Commissioner's office about this matter.
Proposal to amend the definition of 'information' within FOISA to specifically exclude environmental information (covered by the EIRs)	<ul style="list-style-type: none"> • Scottish Government shares concerns of some respondents to the consultation about possible unintended consequences of any such change. • The former Commissioner also reached this view, having previously supported the change • There may be scope to make relationship between FOISA and EIRs clearer to requesters without changing primary legislation • There may be merit in considering revisions to guidance for authorities in section 60 code (see specific commitment above)
New exemption for Commissioner, for information provided to him by authorities for the purpose of carrying out his role in consideration of appeal cases.	<ul style="list-style-type: none"> • Scottish Government open to considering further in future if this would help the Commissioner. • However, existing arrangements appear to have operated effectively since the legislation came into force in 2005, so not a matter of urgency.

MINISTER FOR PARLIAMENTARY BUSINESS
Meeting/Event Briefing

What	Holyrood FOI Conference 2023
Who	<p>Audience mainly of public sector FOI practitioners but journalists and representatives of civil society groups advocating for greater openness and transparency among other speakers.</p> <p>Chaired by Dr Sean Whittaker, Executive Director, Centre for Freedom of Information and Lecturer in Law, University of Dundee.</p> <p>Speaking between chair's opening remarks and the Scottish Information Commissioner to be followed by questions. Other speakers and biogs listed in Annex D.</p>
When	<p>Tuesday 28 November 2023 10:00-15:00</p> <p>Ministerial address – 10:05–10:45</p>
Where	<p>COSLA Verity House 19 Haymarket Yards Edinburgh EH12 5BH</p>

Official support	<p>[redacted – 38(1)(b)] Michael Birrell, [redacted – 38(1)(b)] [redacted – 38(1)(b)]</p>
Comm/Media	<p>[redacted – 38(1)(b)]/[redacted – 38(1)(b)]/[redacted – 38(1)(b)]</p>

Intended outcome	<p>To engage with key stakeholders in relation to Freedom of Information and the Scottish Government's wider openness and transparency agenda.</p> <p>To promote publication of substantive consultation response on Access to Information Rights and announcement of consultation on extension of FOISA to private and third sector social care providers.</p> <p>To announce a commitment to launch a consultation of the extension of FOISA, to Social Care sector after the NCS Bill has passed.</p>
Key message	<p>The Scottish Government wants to protect access to information rights in Scotland and improve and expand them where we can. Our response to the Access to Information Rights in Scotland consultation demonstrates this commitment.</p>

Sensitivities	[redacted – 30(b)(i)]
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Agenda/ Running Order (agreed with participants)	09:15-10:00	Breakfast, Registration and Networking
	10:00-10:05	Chair’s opening Remarks – Dr Sean Whittaker (Centre for Freedom of Information, Dundee University)
	10:05-10:15	Ministerial address – Minister for Parliamentary Business
	10:15-10:25	Keynote address – Scottish Information Commissioner
	10:25-10:45	QA - Minister and Scottish Information Commissioner
	10:45	Minister departs
	10:45-11:25	Assessing the Impact of Potential Reform – Gillian Mapstone (National Records of Scotland), Nick McGowan-Lowe (National Union of Journalists) and Katy Clark MSP (Scottish Labour)
	11:25-11:50	Comfort Break
	11:50-12:40	Breakout A – Transforming you FOI Performance: Strategies for Improvement – Ann-Marie Noble (University of Edinburgh), Wendy Barber (Falkirk Council) and Paul Mutch (Scottish Information Commissioner’s Office)
	11:50-12:40	Breakout B – Managing Vexatious Requests – Lorraine Currie (Anderson Strathern)
	12:40-13:30	Lunch
	13:30-14:00	The FOI Escape Room with eCase
	14:00-14:15	Comfort Break
	14:15-14:55	Developing the Skills of FOI Staff – Dr Amy Leckie (NHS Education for Scotland)
14:55-15:00	Chair’s Closing Remarks - Dr Sean Whittaker (Centre for Freedom of Information, Dundee University)	

Briefing Contents	Annex A – FMQ style briefing on consultation response Annex B – FMQ style briefing on FOI and Transparency issues Annex C – Overview of SG positions in Access to Information Rights consultation response Annex D – Key participants and organisations represented
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FMQ STYLE BRIEFING ON CONSULTATION RESPONSE

The Scottish Government consultation on Access to Information Rights in Scotland ran from 29 November 2022 until 14 March 2023. The consultation was structured around the recommendations of the 2020 parliamentary report on post-legislative scrutiny of FOISA.

The analysis of responses was published by the Scottish Government on 30 June. The Scottish Government's response to the analysis sets out the Scottish Government's position on each of the detailed issues considered in the consultation (a detailed summary is provided at Annex C).

The response commits the Scottish Government to:

- Develop and set out a clearer, more structured and consistent approach to the future use of the section 5 power.
- Consult on extension of FOISA to private and third sector providers of care home and 'care at home' services, following passage of the National Care Service Bill.*
- Undertake a comprehensive review of Schedule 1 of FOISA, using the section 4 power to make appropriate updates to entities listed
- Identify and consider the FOISA status of companies wholly-owned by a combination of the Scottish Ministers and other Scottish public authorities.
- In consultation with the Scottish Information Commissioner - revise the section 60 Code of Practice to provide updated guidance for Scottish public authorities about:
 - Handling of requests about services delivered by outsourcing partners
 - Use of non-corporate platforms, and other developments in IT
 - Seeking clarification
 - Making the relationship between FOISA and the EIRs clearer for requesters

[redacted – 30(b)(i)]

TOP LINES

[redacted – 30(b)(i)]

COVERAGE OF FOISA

[redacted – 30(b)(i)]

CONSULTATION ON EXTENSION IN SOCIAL CARE SECTOR

[redacted – 30(b)(i)]

DEVELOPMENTS IN IT

[redacted – 30(b)(i)]

PROACTIVE PUBLICATION

[redacted – 30(b)(i)]

REVISION OF SECTION 60 CODE

[redacted – 30(b)(i)]

ONGOING ENGAGEMENT

[redacted – 30(b)(i)]

FMQ STYLE BRIEFING ON FOI ISSUES

ISSUES

[redacted – out of scope]

We continue to await publication of the final Member's Bill proposal from Katy Clark MSP. Ms Clark previously indicated this would be brought forward in October.

[redacted – out of scope]

[redacted – 30(b)(i)]

[redacted – out of scope]

OVERVIEW OF SG POSITIONS IN ACCESS TO INFORMATION RIGHTS CONSULTATION RESPONSE

Issue	Scottish Government position
Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery	
Concern that coverage of the legislation is insufficient/is not responsive to varied models of service delivery	<ul style="list-style-type: none"> • Primary legislation not best approach to addressing issue • Concerns should be addressed through use of existing secondary legislation making powers and clearer guidance for Scottish public authorities. (see specific commitments above)
Proposal for statutory prohibition on reliance on confidentiality clauses to withhold information.	<ul style="list-style-type: none"> • Not persuaded that case has been made for any change to legislation in this area. • Use of confidentiality clauses in public contracts is rare. • Any reliance on them is subject to scrutiny by the Scottish Information Commissioner
Proposal for amendments to FOISA definition of a publicly-owned company to ensure companies jointly owned by the Scottish Government with other authorities are included.	<ul style="list-style-type: none"> • No commitment to amend primary legislation • SG considers there may be scope to mitigate any impacts of this issue through use of primary legislation. (see specific commitment above)
Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use	
Concern that use of non-corporate platforms (private email, messaging services) for the business of Scottish public authorities may undermine compliance with FOISA	<ul style="list-style-type: none"> • Legal position already clear that all recorded information relating to official business is subject to FOI law • Changes in primary legislation not required • Clear guidance and strong organisational approaches are the best way to address these issues (see specific commitment above re revision to Section 60 Code)
Improving proactive publication – promoting openness as 'business as usual' in a digital age	
Proposal that requirement for authorities to maintain a publication scheme be replaced by statutory Code of Practice on	<ul style="list-style-type: none"> • Scottish Government remains open minded to suggestion in the long term • However, continues to have some concerns about workability. • Response summarises ongoing work within Scottish Government on proactive publication and commits to build on this.

Proactive Publication to be set by Commissioner	
Technical and other issues – ensuring the Act remains fit for Purpose	
Proposal to change approach to estimating cost of compliance to refer directly to staff time, rather than financial cost to be clearer for requesters.	<ul style="list-style-type: none"> • We recognise there will be a need to update Fees regulations at some point since nominal £600 limit will eventually appear outdated. • When doing so, we would seek to maintain the position that cost limit is functionally equivalent to 40 working hours of staff time
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Proposal to remove FM 'veto' on release of exceptionally sensitive information	<ul style="list-style-type: none"> • Scottish Government understands views of those who would wish this power to be removed. • Power has never been used by any First Minister. • Open to considering further in the future, but issue has limited impact on day to day operation of rights.
Proposal to incorporate a presumption in favour of disclosure into FOISA	<ul style="list-style-type: none"> • No need for change in legislation since it is already widely understood that there is a presumption in favour disclosure. • Response notes that former Commissioner also dropped his support for this change.

<p>Proposal to amend FOISA to allow the Commissioner to refer late compliance with Decision Notices to the Court of Session.</p>	<ul style="list-style-type: none"> • Further consideration of the potential implications would be required before the Scottish Government could commit to any future change. • The Scottish Government remains open to continued engagement with the Commissioner’s office about this matter.
<p>Proposal to amend the definition of ‘information’ within FOISA to specifically exclude environmental information (covered by the EIRs)</p>	<ul style="list-style-type: none"> • Scottish Government shares concerns of some respondents to the consultation about possible unintended consequences of any such change. • The former Commissioner also reached this view, having previously supported the change • There may be scope to make relationship between FOISA and EIRs clearer to requesters without changing primary legislation • There may be merit in considering revisions to guidance for authorities in section 60 code (see specific commitment above)
<p>New exemption for Commissioner, for information provided to him by authorities for the purpose of carrying out his role in consideration of appeal cases.</p>	<ul style="list-style-type: none"> • Scottish Government open to considering further in future if this would help the Commissioner. • However, existing arrangements appear to have operated effectively since the legislation came into force in 2005, so not a matter of urgency.

KEY PARTICIPANTS AND ORGANISATIONS REPRESENTED

[redacted – out of scope]

From: Michael Birrell

Sent: Tuesday, June 13, 2023 12:39 PM

To: Campbell J (Jeanette) (Special Adviser) <Jeanette.Campbell@gov.scot>

Cc: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; Spads Admin <Spads_Admin@gov.scot>; Minister for Parliamentary Business <MinisterforPB@gov.scot>

Subject: FOI policy discussion points for meeting with Mr Adam this afternoon

Jeanette,

[redacted – out of scope] I think it's probably helpful if we share the key points we plan to talk over with the Minister at 15:00:

Access to Information Rights in Scotland consultation – development of consultation analysis:

- The document is close to completion, having now been commented on by SG Central Analysis Division colleagues [redacted – 30(c)]. We will send it to the Minister for clearance asap with a view to publication by the end of the month.
- It is our intention to keep this document purely as an analysis of the consultation responses, with a substantive Scottish Government response to the consultation analysis to be produced later in the year.
- The draft 'Next steps' in the document currently says:

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

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

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

- Is the Minister content with this broad approach?

Key outcomes coming from the consultation analysis itself:

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

- Clear divergence of perspectives between respondents representing the perspectives of Scottish public authorities and other respondents.
- Authorities generally consider that the law as it stands is sufficient, whilst civil society and third sector respondents more sceptical about this. Commissioner also sceptical.
- However, some third sector organisations also expressed concern about the impact and proportionality of extension of FOISA to third sector providers.

- Widely held view that greater assurance about the Scottish Government's future use of its power under section 5 of FOISA, to extend the legislation to further entities, would be welcome (including by the Commissioner).
- Wide support for greater clarity in section 60 Code about information held by contractors (but Commissioner sceptical about the value of this).
- The Commissioner made a specific proposal for legislative reform, in terms of a new power for the Scottish Parliament to make revisions to Schedule 1 of FOISA and a requirement for the Parliament to periodically review coverage of the legislation.

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

- Wide recognition of the compliance risks which may be posed by the use of so called 'unofficial platforms' (WhatsApp, private email etc) for conducting business in Scottish public authorities. Most respondents tended to the view that answers to these questions were likely to lie in stronger guidance and organisational approaches, rather than changes in the law.

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

- There was a general view among respondents that there is scope for improvement to approaches taken by Scottish public authorities to proactive publication, but mixed views on how to best advance that improvement.
- Openness on the part of most respondents to the proposed legislative changes advocated by the Scottish Information Commissioner – to replace the existing statutory requirement for each Scottish public authority to maintain a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice. However, some respondents had concerns about the workability of the approach.

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

- Mixed views on the various 'technical and other issues' covered in this section.
- Wide support for removal of First Ministerial 'veto'
- Strong support for the more technical legislative changes requested by the Commissioner (new exemption for the Commissioner, allowing Commissioner to refer failure to comply with a decision on time to the Court of Session).

Possible ground to cover in substantive Scottish Government response to the consultation analysis (for discussion):

Agility/coverage of the legislation:

[redacted – 30(b)(i)]

Developments in information technology (unofficial platforms):

[redacted – 30(b)(i)]

Improving proactive publication:

[redacted – 30(b)(i)]

Technical and other issues:

[redacted – 30(b)(i)]

Thanks

Michael

Michael Birrell (he/him)
Interim Head of Policy
Freedom of Information Unit
Scottish Government
2W, St Andrew's House
Edinburgh, EH1 3DG

Mob: [redacted – 38(1)(b)]
(Alternative contact: [redacted – 38(1)(b)])

[Yammer: @FOI - Community](#)

I am currently working from home.