

Access to Information Rights in Scotland

**Response to analysis of consultation
responses**

November 2023

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1. Introduction

1. The Scottish Government published its analysis of responses to its recent consultation on Access to Information Rights in Scotland on 30 June 2023.¹ The consultation ran from 29 November 2022 until 14 March 2023.
2. The consultation was based around the recommendations of the former Public Audit and Post-Legislative Scrutiny Committee (the Committee) report on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA), published in May 2020².
3. 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
4. The consultation received 83 responses from members of the public, private, third sector and civil society organisations. Three stakeholder discussion events were also held.
5. This response summarises key outcomes arising from the consultation analysis, and sets out the Scottish Government's position in relation to each.

1.1 Scottish Government position

6. The Scottish Government considers that post-legislative scrutiny of FOISA, and the subsequent Scottish Government consultation has been a useful exercise to examine the operation of access to information rights in Scotland – changes to FOISA having last been made by the Freedom of Information (Amendment) (Scotland) Act 2013. The Scottish Government recognises that there are areas where further amendments to primary legislation could be of some value, to make incremental improvements to the regime. We therefore do not rule out a further FOISA Amendment Bill in the future.
7. However, the Scottish Government believes that the fundamentals of the access to information rights regime, provided by FOISA and Environmental Information (Scotland) Regulations 2004 (EIRs), remain fit for purpose, so we do not propose to introduce new primary legislation to amend FOISA within the current session of the Scottish Parliament. Rather, the Scottish Government proposes to address issues which have been raised in the post-legislative scrutiny process within the framework provided by the existing

¹ [Access to information rights: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/2023/06/30/analysis/summary/summary.html)

² [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 | Scottish Parliament](https://www.parliament.scot/committees/post-legislative-scrutiny/scrutiny-reports/post-legislative-scrutiny-freedom-of-information-scotland-act-2002)

primary legislation – including through the use of existing secondary legislation making powers.

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

2.1 Coverage of legislation

8. The most fundamental issue considered in the first section of the consultation was the Committee's concern that coverage of the legislation has not kept pace with changes in the nature of public service delivery. Respondents were asked a number of questions intended to draw out the extent to which they shared the Committee's concern about this, and how they perceived the nature and extent of any issues in this space. Their views were sought on a number of approaches to tackling this issue:
- Providing greater assurance about the future use by the Scottish Government of its existing power under section 5 of FOISA to extend coverage of the legislation to further entities
 - Providing greater clarity in guidance regarding the FOISA status of information held by contractors to Scottish public authorities.
 - The Committee's proposal to introduce some form of 'gateway clause' within the primary legislation to automatically make bodies subject to FOISA based on their fulfilment of particular criteria (e.g. delivering public services, receiving public money)
 - Broadening the section 5 power within the primary legislation to make it easier for the Scottish Ministers to use
 - Providing greater clarity within the primary legislation regarding the FOISA status of information held by contractors.

Views of respondents

9. The consultation analysis noted a clear divergence between respondents representing the perspectives of Scottish public authorities and those representing civil society and the third sector.
10. Respondents representing the perspectives of Scottish public authorities were generally more likely to consider that the law as it stood was sufficient to ensure that information about services – including those delivered by private and third sector providers under contract – was accessible, whilst civil society and third sector respondents were more doubtful about this. The Scottish Information Commissioner also expressed scepticism about the sufficiency of the existing statutory framework.
11. There was a widely held view among respondents that greater assurance about the Scottish Government's future use of its power under section 5 of FOISA, to extend the legislation to further entities, would be welcome.
12. There was also wide support for greater clarity in guidance about the FOISA status of information held by external contractors – whether in relation to the delivery of 'public' or 'ancillary' services.

13. Views were more varied in relation to proposed changes to primary legislation to address issues around coverage of the legislation. Civil society and third sector respondents were generally more persuaded of the case for reform to make the primary legislation more agile, in terms of its ability to ensure the 'right' organisations are covered with Scottish public authorities expressing more caution. Some third sector organisations also expressed concern about the impact and proportionality of extension of FOISA to third sector service providers.
14. The proposal for a 'Gateway Clause' to introduce a greater component of automaticity in coverage was supported by a significant minority of respondents, representing a diverse range of organisations. There were divided views about whether there should be exceptions for small and medium-sized enterprises (SMEs) and/or third sector providers from any such measure.
15. There was majority support for broadening the section 5 power to enable extension of FOISA to a wider range of bodies. There was a roughly equal split of views on whether a 'clearer legislative steer' was required in relation to the FOISA status of information held by contractors – whether in relation to 'public' or 'ancillary' services.
16. The Scottish Information Commissioner made a specific proposal for legislative reform, in terms of a new power for the Scottish Parliament to make revisions to Schedule 1 of FOISA and a requirement for the Parliament to periodically review coverage of the legislation.

Scottish Government response

17. The Scottish Government recognises the concern of the Committee, the Scottish Information Commissioner and various other respondents to the consultation to ensure that coverage of the legislation remains robust and up to date. However, we do not consider that changes in primary legislation are the best way to address such concerns.
18. Rather, we consider that these concerns can be better addressed by:
 - Adopting a clear, structured and consistent approach to the future use of Scottish Ministers power under section 5 to extend FOISA to further entities
 - A comprehensive review of Schedule 1 of FOISA to ensure it includes all Scottish public authorities in terms of the Scotland Act 1998, and is kept updated
 - Revising the Code of Practice on the Discharge of Functions by Scottish public authorities under FOISA and the EIRs (Section 60 Code), to provide fuller guidance to Scottish public authorities on handling requests about services delivered by outsourcing partners

Scottish Government commitments

19. The Scottish Government will:
 - Develop and set out a clearer, more structured and consistent approach to the future use of the section 5 power.
20. To develop the approach the Scottish Government will engage further with civil society, local government, Scottish public authorities and the private and third sector – including organisations representing SMEs. The approach will take the Scottish Government’s established ‘factors based approach’ as its starting point³, but will seek to build around this a clear process and approach for identifying and considering potential candidates for extension. We will work in partnership with the Scottish Information Commissioner as we develop the approach.
 - 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.
21. The issue of extension of FOISA to providers of social care services has been the subject of particular focus both in relation to the consultation process and in relation to the wider reform of social care which will be enabled by the National Care Service (Scotland) Bill currently before the Scottish Parliament. The Scottish Government recognises that there are clear arguments for extending FOISA to private and third sector providers of care services.
22. The current reform of social care recognises social care as a key public service, and makes a person centred and human rights based approach central to the delivery of care. The extension of access to information rights within the sector would seem consistent with that ethos.
23. However, there is also a clear need to work with and consult organisations working in the sector and to take account of the experiences of people accessing social care support, their families and support networks and the social care workforce. This will be crucial in order to ensure that any future section 5 order to extend FOISA in the sector takes place on a well considered basis, results in a genuine extension of access to information rights for the public and takes account of the regulatory impact on providers.
24. A full public consultation on a proposed section 5 order will provide the appropriate framework for that engagement. This will take place after the National Care Service (Scotland) Bill has become law. This approach is also consistent with the Scottish Government’s wider commitment to co-design of all aspects of the National Care Service.

³ See [Future orders - Freedom of Information coverage extension: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/future-orders-freedom-of-information-coverage-extension-consultation/pages/2/)

- Undertake a comprehensive review of Schedule 1 of FOISA
25. This work will be carried forward in tandem with the work on section 5. It will seek input from across government and the wider public sector in Scotland to ensure all organisations which meet the criteria to be regarded as a Scottish public authority with mixed functions or no reserved functions, are listed within Schedule 1 of FOISA.
- Revise the Section 60 Code of Practice to provide fuller guidance on the handling of requests about services delivered by outsourcing partners
26. This work will be undertaken as part of a wider review of the Section 60 Code, to consider updates in light of outcomes from this consultation process. The Scottish Government will work in close partnership with the Scottish Information Commissioner on the revision of the Code. There is a statutory requirement for the Scottish Government to consult the Scottish Information Commissioner on any revisions to the Code. We will also engage with partners across civil society, the third, private and public sectors.
27. Any update to the Code will not negate the responsibility of each Scottish public authority to determine the action it considers necessary to comply with its statutory obligations under FOISA, under the oversight of the Commissioner's office.

2.2 Confidentiality clauses

28. The agility section of the consultation also considered the Committee's suggestion that there should be a statutory prohibition on reliance on confidentiality clauses between Scottish public authorities and their contractors – similar to provisions within Irish FOI legislation. This had been suggested to the Committee in evidence from the Scottish Information Commissioner.

Views of respondents

29. Relatively few respondents to the consultation had direct experience of 'confidentiality clauses' affecting the release of information. Views were divided on whether the legislation required to be amended to prevent reliance on such clauses.

Scottish Government response

30. The Scottish Government is not persuaded that the case has been made for any amendment to legislation in this area. The use of confidentiality clauses in public contracts is rare. Wherever such a clause is used, it is likely to be justified by appeal to specific sensitivities inherent to the particular context of the agreement. Ultimately, any application of section 36 of FOISA which depends on the legal effect of such a contract remains subject to the oversight of the Scottish Information Commissioner and the courts.

2.3 Structure of section 6 of FOISA

31. Finally, the ‘agility’ section also considered the structure of section 6 of FOISA as it affects the way a ‘publicly-owned company’ is defined by the legislation. The Scottish Government has acknowledged that the effect of the current provision appears to be that companies wholly-owned by a combination of Scottish public authorities are not included in the definition – and therefore not automatically subject to FOISA – where one of the co-owners is the Scottish Ministers.

Views of respondents

32. In responses to the consultation there was wide support for such change, to improve and clarify the operation of section 6 and ensure companies wholly owned by a combination of the Scottish Ministers and other authorities are subject to FOISA.

Scottish Government response

33. The Scottish Government considers that there may be scope to mitigate any consequences of this feature of the legislation through the use of Scottish Ministers’ powers under sections 4 and 5 of FOISA to ensure that any affected organisations are made subject to FOISA where appropriate.

Scottish Government commitments

34. The Scottish Government will undertake an assessment of the impact of this issue, and the number of organisations which may be affected. Outcomes will be taken into account in the development of the approach to the future use of the section 4 and 5 powers – with the aim of ensuring that any company outwith scope of the section 6 provisions purely because it is wholly owned by a combination of the Scottish Ministers and other Scottish public authorities will be become subject to FOISA by other means.

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

35. This section of the consultation considered the Committee’s concerns about the potential for changing modes of information use and developments in information technology to undermine access to information rights, and compliance with FOISA and the EIRs. In particular, the Committee raised concern about the use of ‘unofficial’ platforms such as private email and messaging services (such as WhatsApp) for matters relating to the business of Scottish public authorities and the risk this may undermine compliance with FOISA.

Views of respondents

36. Respondents were asked specifically to consider whether updating the Section 60 Code of Practice to provide clearer guidance on these issues was the best approach. They were also asked for their views on the Committee’s proposal to introduce a fuller definition of the term ‘information’ within the primary legislation.
37. There was recognition by respondents of all types of the compliance risks which may be posed by the use of so called ‘unofficial platforms’ for conducting business in Scottish public authorities. There were a range of views advanced about how to mitigate these risks. However, most respondents tended to the view that answers to these questions were likely to lie in stronger guidance and organisational approaches rather than changes in the law.
38. Opinions on the desirability of introducing a fuller definition of ‘information’ into the legislation were divided. Most respondents agreed that if such a definition were to be introduced, it should mirror that provided in the EIRs i.e.: ‘any information in written, visual, aural, electronic or any other material form’.

Scottish Government response

39. The applicability of FOISA to material held in a range of formats and platforms is already clear. The Section 60 Code, sets out that searches carried out to answer a request should focus on systems (whether paper-based or electronic, corporate or non-corporate) where staff with a working knowledge of the relevant records consider that information may be held. The guidance specifically advises that Scottish public authorities should think beyond the usual places where information might be held to satisfy themselves that searches are robust.
40. The Scottish Government does not consider that legislative change is the solution to the issues considered in this section of the consultation. Rather, we consider clear guidance and strong organisational approaches to be the best way to address these issues.

41. The Scottish Government considers that the revision of the Section 60 Code may also provide a valuable opportunity to consider the impact of wider challenges associated with developments in information technology – such as the issues which may be raised by the development of artificial intelligence.

Scottish Government commitment

42. As a key component of the wider revision of the Section 60 Code – working in partnership with the Scottish Information Commissioner and drawing also on the views of partners across civil society, the third, private and public sectors – the Scottish Government will set out fuller guidance on the responsibility of Scottish public authorities to identify, locate and provide business-related information that may be held on non-corporate or informal systems where such information falls within the scope of any information request.
43. Consideration will also be given to whether other updates to the Code are required to take account of wider issues associated with developments in technology.

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

44. The third section of the consultation asked a series of questions designed to test respondents' views on how well proactive publication requirements are working under the current regime. It also specifically sought respondents' views on the Commissioner's proposal that the current statutory requirement for Scottish public authorities to maintain a publication scheme should be replaced by a statutory duty to proactively publish information supported by a Code of Practice set by the Commissioner subject to approval by the Scottish Parliament.

Views of respondents

45. 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.
46. There was openness on the part of most respondents to the proposed legislative change advocated by the Scottish Information Commissioner – to replace the existing statutory requirement for each Scottish public authority to maintain a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice. However, some respondents had concerns about the workability of the approach. Some respondents suggested alternative approaches.
47. There were mixed perspectives among respondents regarding how satisfied they were with the current availability of information about government and public services in Scotland. Overall, more respondents said they were 'satisfied' than 'dissatisfied'.
48. Respondents provided various perspectives on the types of information they would wish to see authorities proactively making available. The most frequently mentioned was financial/budgetary information. Data/statistical information, information about services, information about/underpinning decisions and policies, performance information, information about contracts, information about people involved in services and their interests, diversity data, demographic data, major projects or other high impact issues were also mentioned by respondents as areas where they would wish to see proactive publication.

Scottish Government response

49. The Scottish Government remains open minded in the long term to the Commissioner's suggestion of replacing the requirement to maintain a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice to be set by the Commissioner. However, we continue to have some concerns about the workability of such an approach.

50. We also consider that the existing statutory regime has some key strengths – which include the latitude it provides to the Commissioner to define and enforce good practice on the part of Scottish public authorities.
51. The Scottish Government acknowledges that there is scope to improve approaches to proactive publication within the existing statutory framework.
52. However, there are also already significant workstreams in flow across government and the wider public sector in Scotland to improve the quantity and quality of information made available about the work of Scottish public authorities.

Existing Scottish Government commitments and workstreams

53. The Scottish Government is engaged in work on a number of fronts to improve the accessibility and transparency of its information. Significant initiatives are being taken forward as part of Scotland’s membership of the Open Government Partnership (OGP), an international agreement that commits members to collaborate with civil society to agree Action Plans that improve government’s openness, transparency and accountability.
54. Since joining OGP in 2016, Scotland has completed two Action Plans and is currently delivering its third, for the period 2021-25. Previous Action Plans (2016-2017, 2018-2020) have included commitments on financial and performance transparency, and improving information sharing. This included work with young people on understanding Scotland’s public finances, making the Scottish Budget more accessible, and improving information sharing about Scottish Government procurement.
55. Scotland’s latest Open Government National Action Plan 2021-2025⁴ includes commitments in relation to:
 - Fiscal openness and transparency – improving the accessibility and usability of our data and information about the public finances.
 - Supporting government openness, transparency and empowerment through open data
56. In addition, as part of the work to embed Open Government principles in Scottish Government there is work underway to ensure the governance and decision making structures of the government consistently follows recognised, open government good practices
57. Full information on each Action Plan is available on the Scottish Government’s Open Government collections page⁵.

Building on existing Scottish Government commitments

⁴ [Scotland's Open Government action plan: 2021 to 2025 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/open-government-action-plan-2021-to-2025/pages/introduction/)

⁵ [Open Government - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/open-government-collections/pages/introduction/)

58. The Scottish Government will continue to work with its partners, including the Scottish Information Commissioner, civil society and the wider public sector in Scotland to build on our existing commitments. We recognise the importance of ensuring not only that information is published, but that citizens are enabled to find and make use of that information.

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

59. The final section of the consultation addressed a number of diverse technical and other issues relating to the operation of access to information rights in Scotland. This section of the response summarises the views of respondents in relation to these and sets out the Scottish Government's position in relation to each.

5.1 Approach to estimating cost of compliance

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

Views of respondents

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

Scottish Government response

62. The Scottish Government recognises that the current approach to defining excessive cost may not always be as clear as it could be to requesters. Whilst the de facto cost limit has remained fixed at 40 working hours for most requests, we would recognise that at a minimum there will be a need to update the relative values within the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 at some point. A nominal £600 figure may eventually appear outdated due to the cumulative effect of inflation. When doing so we would intend to maintain the existing position that the cost limit is approximately equivalent to 40 working hours of staff time.

5.2 Transfer of requests between authorities

63. The consultation sought views on the Committee's recommendation that the Scottish Government should consult on amending FOISA to permit the transfer of FOI requests between authorities, where the authority which has received the request does not hold the information requested, but believes another authority to do so. There are currently no provisions to do this within FOISA, but there are provisions to do so within the EIRs. A number of public authorities who provided evidence to the Committee suggested that making

similar provisions within FOISA might improve the administration of requests, and be helpful to individuals seeking information.

Views of respondents

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

Scottish Government response

65. The Scottish Government is not persuaded of the merits of making this change. Evidence suggests that equivalent provisions within the EIRs are used infrequently and views of respondents to the consultation were divided. The Scottish Government therefore does not propose to take the matter further.

5.3 Seeking clarification

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

Views of respondents

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

Scottish Government response

69. The Scottish Government is not persuaded that the case has been adequately made for changes to legislation in this area. In evidence to the Committee during the post-legislative scrutiny process the former Scottish Information

Commissioner indicated that he did not consider intentional delays in seeking clarification were widespread.⁶ Nevertheless, we acknowledge that it is important that authorities only seek clarification from requesters where necessary and that in such instances, clarification should be sought as promptly as possible.

Scottish Government commitment

70. The Scottish Government will consider updates to the guidance for authorities on seeking clarification as part of the wider revision of the Section 60 Code. We will work in partnership with the Scottish Information Commissioner listening also to the views of partners across civil society, the third, private and public sectors.

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

71. The consultation sought views on whether the current prohibitions within section 48 of FOISA - which prevent the Scottish Information Commissioner from considering appeals about: a) the handling of information requests by his own office; b) the handling of information requests by the Lord Advocate in her capacity as head of the prosecution system and procurators fiscal – should, in principle be removed.
72. The consultation highlighted that with regard to the latter of these, the original policy memorandum for the Freedom of Information (Scotland) Bill took the view that it would not be within the legislative competence of the Scottish Parliament to empower the Commissioner to consider appeals about decisions of the Lord Advocate.⁷ This relates to the provisions of section 48 of the Scotland Act 1998 (the Act which established the Scottish Parliament) which stipulate that decisions of the Lord Advocate as head of the system of prosecution and investigation of deaths in Scotland are to be ‘taken by him independently of any other person’.

Views of respondents

73. There was majority support among respondents for removal of section 48 prohibitions on the Scottish Information Commissioner considering appeals about information request handling by his own office and decisions of the Lord Advocate (in her capacity as Head of the systems of prosecution and investigation of deaths in Scotland) and procurators fiscal, with relatively few actively opposing the proposal. However, some respondents with expertise (e.g. Environmental Rights Centre for Scotland & Centre for Freedom of Information – University of Dundee) did express concern about the principle of the Commissioner’s office considering appeals about its own decisions.

⁶ see paragraph 230, [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 | Scottish Parliament](#)

⁷ See paragraph 115 – [Freedom of Information \(Scotland\) Bill – Policy Memorandum, 2001](#)

74. Significant numbers of respondents also indicated that they did not know/had no view on these issues.

Scottish Government response

75. The Scottish Government is not persuaded in principle of the merits of removing the statutory prohibition on the Commissioner's consideration of appeals regarding his own decisions as it seems that this may add limited value.
76. Under the existing law the Commissioner's office is required – like all Scottish public authorities – to carry out an internal review of its handling of any information request where such a review is sought by the requester. For requesters to most Scottish public authorities, appeal to the Commissioner represents a valuable additional level of escalation and a further level of independent assessment should they remain dissatisfied following internal review.
77. In the case of requests received by the Commissioner's office, and considered by his office at review, the value added by an additional level of escalation within the same organisation is less apparent. The Scottish Government recognises the point made by the former Commissioner that the current law does not provide a statutory right of appeal to the Court of Session for any requester who remains dissatisfied following the Commissioner's decision at review, as it does for requesters who are dissatisfied following the Commissioner's decision at appeal.⁸ The only recourse for a requester in such circumstance would be to seek a judicial review. Nevertheless, the Scottish Government is not persuaded at the current time that it is necessary to alter its position on this issue from that set out by the former Scottish Executive in its Policy Memorandum for the Freedom of Information (Scotland) Bill in 2001.⁹
78. The Scottish Government notes that many respondents to the consultation would wish the Scottish Information Commissioner to be able to consider appeals about the Lord Advocate in her capacity as Head of the systems of prosecution and investigation of deaths in Scotland and about procurators fiscal.
79. However, as noted in the consultation document, the Policy Memorandum for the Freedom of Information (Scotland) Bill sets out a clear position that amending the legislation in order to bestow this power on the Commissioner would be outwith the legislative competence of the Parliament. There has been no reassessment of that position. Whilst we are open to exploring the position further at some juncture, we regard this issue as having limited impact on the effectiveness of access to information rights overall. As a further indication of the narrowness of the impact of this provision, it should be noted that the Commissioner has considered a number of appeals concerning

⁸ See page 33 - [Access to Information Rights in Scotland: a consultation - Response from the Scottish Information Commissioner](#)

⁹ See paragraph 114 – [Freedom of Information \(Scotland\) Bill – Policy Memorandum, 2001](#)

the Crown Office and Procurator Fiscal Service where these have not related to matters pertaining to prosecutions or the investigation of deaths.

5.5 First Ministerial veto

80. Section 52 of FOISA provides that the First Minister may issue a certificate to overrule a decision of the Commissioner in respect of the handling of any request by the Scottish Administration (i.e. by the Scottish Ministers, or any non-Ministerial office holder or department), where the information in question is considered to be of exceptional sensitivity. The consultation sought views on whether this power should be removed.

Views of respondents

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

Scottish Government response

82. The Scottish Government acknowledges the view of many respondents that the power is unnecessary, and contrary to the principles of Freedom of Information. Nevertheless, the power was originally included to provide a backstop against any disclosure of exceptionally sensitive information. The Scottish Government remains open in principle to considering this issue further in the future. However, noting that no First Minister has ever found occasion to use the 'veto' power, we regard this issue as having limited day to day impact on the operation of access to information rights in Scotland. We therefore do not propose to prioritise new legislation in relation to this issue.

5.6 Presumption in favour of disclosure

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

Views of respondents

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

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

85. The former Scottish Information Commissioner indicated that he had changed his perspective, having initially advocated the change during the post-legislative scrutiny process.¹⁰

Scottish Government response

86. The Scottish Government does not see a need for any amendment to legislation in this area. That there is an existing presumption in favour of disclosure is already widely recognised.

5.7 Failure to comply with a decision on time

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

Views of respondents

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

Scottish Government response

89. The Scottish Government notes the former Commissioner's reasons for wishing to see this change. However, 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.

¹⁰ See page 36 - [Access to Information Rights in Scotland: a consultation - Response from the Scottish Information Commissioner](#)

5.8 Handling Environmental Information – Relationship between FOISA and the EIRs

90. The consultation considered whether the definition of ‘information’ within FOISA should be amended so as to specifically exclude environmental information – recognising that requests for environmental information require to be responded to under the EIRs.
91. The former Scottish Information Commissioner had originally proposed this change in written evidence to the Committee as an approach to simplifying responses to requests for environmental information. Currently, responses made to requests under FOISA need to apply the exemption at section 39(2) of FOISA (environmental information) in order to proceed to consider the request under the EIRs. This is generally regarded as adding to the complexity of responses.

Views of respondents

92. There was wide support for the proposal to specifically exclude environmental information from FOISA in order to improve the approach to handling environmental information and the relationship between FOISA and the EIRs. Those supporting change generally considered this could make the access to information regime clearer for requesters. However, some had concerns about the risk of unintended consequences.
93. Specifically, a number of respondents expressed concern about unintended consequences associated with the UK Government’s Retained EU Law (Revocation and Reform) Bill (now Act), and the possibility of this affecting the regime in relation to access to environmental information. This included the Scottish Information Commissioner who qualified his previous support for the measure in those terms. These concerns may have abated however, in light of the UK Government’s change of approach, now enacted within the Retained EU Law (Revocation and Reform) Act 2023.

Scottish Government response

94. The Scottish Government acknowledges the concern that the current interaction between FOISA and the EIRs can be unclear for requesters. However, we would share the broad concern expressed by some respondents about the possibility of unintended consequences were environmental information to be removed from the scope of FOISA altogether. Our judgement is that the inclusion of all information within the scope of FOISA, with a specific exemption for environmental information to be considered under the EIRs, is likely to remain the most robust approach to ensure the efficacy of access to information rights across the board.
95. It is an important principle that the onus should be on Scottish public authorities to ensure that they handle requests for information under the appropriate regime and that decisions in relation to the handling of requests are communicated with clarity to requesters. The Scottish Government

considers there may be merit in re-considering the guidance provided to authorities in the section 60 code in this regard.

Scottish Government commitment

96. As part of the revision of the Section 60 Code, the Scottish Government will work in partnership with the Scottish Information Commissioner to consider whether there is scope to make the relationship between FOISA and the EIRs clearer for requesters without the need for amendments in primary legislation.

5.9 New exemption for Scottish Information Commissioner

97. The consultation sought views on the proposal for a new exemption, available for use only by the Scottish Information Commissioner, applicable to information received by the Commissioner obtained by him under, or for the purposes of, fulfilling his statutory role under FOISA.
98. The Commissioner's office may sometimes receive requests for information provided to his office in connection with appeals being considered by the Commissioner. Information requested may include that which has been provided to his office by a Scottish public authority for the purpose of enabling the Commissioner to make a determination on whether that same information should be released by the authority.
99. The Commissioner generally considers that it would be undermining of the process and his own role in it if his office were to release such information against the wishes of the relevant authority. For reasons explained in the consultation paper, the Commissioner does not consider that that provisions of section 45 of FOISA (confidentiality of information obtained by or furnished to the Commissioner) provide him with a sufficient legal basis for refusing to do so. His office therefore generally relies on exemptions with FOISA, such as section 30(c) (substantial prejudice to the effective conduct of public affairs) in order to avoid doing so.

Views of respondents

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

Scottish Government response

101. The Scottish Government remains open to legislating in the future to create a new exemption, if that would be helpful to the Commissioner and if there is clear evidence that so doing would have a material impact. However, the Scottish Government also notes that existing arrangements appear to have

operated effectively since the legislation came into force in 2005, so does not perceive this issue to be a matter of urgency.

6. Conclusion

102. The Scottish Government considers that this consultation to seek further views on the outcomes of post-legislative scrutiny of FOISA has been a valuable exercise to identify opportunities to improve the operation of access to information rights in Scotland within the primary legislative framework provided by the Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004.
103. The Scottish Government commits 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
104. The Scottish Government considers that the access to information rights regime remains robust in its fundamentals, and therefore is not persuaded that it is necessary to make changes to primary legislation in the current Parliament. Nevertheless, the Scottish Government remains open to making modifications to develop and strengthen the regime in the future.



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