



Briefing on Section 1 of the Bill Exercising Your Right to Know & How to Access Information

Legal Reform of FoI Law Overdue

The Campaign for Freedom of Information in Scotland (CFoIS) believes the Freedom of Information (Scotland) Act 2002 (FoISA) is outdated and needs to be reformed. Therefore we are working to build all party support for the [Freedom of Information Reform \(Scotland\) Bill](#), introduced by Katy Clark MSP, to deliver transparency by design, strengthen accountability and enable informed scrutiny.

The Stage 1 consultation process on the Bill is now underway, led by the Standards, Procedures and Public Appointments (SPPA) Committee of the Scottish Parliament. It is inviting submissions on the Bill's general principles by [22nd October](#). See our answers to the eleven questions below.

1. To what extent do you believe the proposals in the Bill will help achieve its primary aim of improving transparency in Scotland by strengthening the Freedom of Information (Scotland) Act 2002 (FoISA)?

The Bill is a proportionate response to evidenced problems. Reforming FoISA is overdue. The Bill updates the 23 years old FoISA to ensure the original policy objective is met “to introduce an effective freedom of information regime”.¹ FoISA is outdated as it covers information processing and public service delivery which have radically changed and continue to do so. The law on rights and duties needs to keep up with the everyday operation of our public services.

The Bill addresses the outstanding recommendations in the Public Audit and Post Legislative Scrutiny (PAPLS) Committee report, of May 2020, on the operation of FoISA including “... a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication.”² The Bill is also the result of a robust, public consultation process by Katy Clark MSP³ which resulted in 98 responses⁴: 13.5% from representative organisations, 22.9% from public sector bodies, 2.1% from private sector bodies, 36.5% from third sector bodies, 4.2% from “other” types of organisations, 7.3% from individual politicians, 5.2% from academics and relevant professionals and 8.3% from private individuals. All of the regulators who responded to the

¹ The commitment in Partnership for Scotland and the Scottish Executive's Programme for Government – quoted in the foreword to “Freedom of Information Consultation on Draft Legislation”, published by Scottish Executive, March 2001.

² At Post-legislative Scrutiny : Freedom of Information (Scotland) Act 2002 - Parliamentary Business: Scottish Parliament and at Para 5 at PAPLS052020R2.pdf

³ Katy Clark MSP - Consultation on a Proposed Freedom of Information Reform (Scotland) Bill

⁴ Summary of Consultation Responses available at <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/final-version--foi-consultation-summary.pdf>

consultation partially supported reform of the FoI Act: the Office of the Scottish Charity Regulator (OSCR), Scottish Public Services Ombudsman and the Scottish Information Commissioner.

In total, 74.5% of respondents to the question on the general purpose of the Bill were in favour and the main reasons were: reforming the FoI Act has been delayed and action is needed for comprehensive legal reform; legal reform will increase the pro-active publication of information; legal reform will ensure parity with FoISA rights and duties when public services are outsourced; legal reform will increase transparency and accountability in the public interest.

2. Do you support the proposal that when a public authority is deciding whether to withhold information under a qualified exemption, it must begin from the position that the information should be disclosed?

Yes. A policy objective of the Bill is to change culture and practice by introducing a presumption in favour of disclosure, unless the requested information is subject to an absolute exemption, and require an FOI officer to be designated in each public authority whose functions are listed in section 16.

The Scottish Parliament was established to be open, accessible and accountable but more needs to be done to ensure the default setting for official minds and processes switches from a culture of secrecy to one of transparency. Sustainable Development Goals (SDGs) are given effect through Scotland's National Performance Framework (NPF) which impacts on all aspects of our lives. SDG 16 promotes peaceful and inclusive societies for sustainable development, provides access to justice for all and builds effective, accountable and inclusive institutions at all levels.⁵

3. Do you agree with the repeal of the current provisions in relation to publication schemes and the introduction of a proactive publication duty and code of practice?

Yes. On creating a statutory duty to publish information, 73.6% of the respondents who answered this question, were supportive and 8.3% were opposed. Nine respondents were neutral and four were unsure.

The public has consistently used their access to information rights, with 75% of the FoI requests resulting in some or all of the information being disclosed. This means that, if you [make a request](#), the most likely outcome is that you will receive the information you are looking for. By discounting cases where the information requested is not actually "held" by the public body, the proportion of cases where some or all information is provided rises to 83%. Disclosure means there is no reason to withhold information so why is it not routinely published? After an information request is made and information disclosed, there should be organisational and operational learning to choose pro-active disclosure for that and related categories of information going forward.

⁵ <https://sdgs.un.org/goals/goal16>

Delivery of the new duty, under section 15 of the Bill, will cover information listed in the Code of Practice on Information which is to be consulted upon and then enforced by the Commissioner. The categories of information listed in the Code will be the subject of consultation and the public will have their say on what they routinely want to see e.g. from a health board or local authority such as Minutes of meetings, how a decision on the spend of public money is made and the monitoring arrangements of contracts and services.

4. Do you support the proposal that the 20-day period for a response to be provided should be paused rather than reset in relation to requests on which the public body seeks clarification from the requester?

Yes. Currently, under section 10 of FoISA, when a public authority receives an FoI request, it should respond “promptly” and no later than in 20 working days. However, if it seeks “reasonable” clarification from the requester, this timescale is reset to zero and a new 20 working day deadline applies from the date on which the reasonable clarification is received. CFoIS and other respondents raised that some public authorities may seek clarification that is considered to be unreasonable and use a clarification request as a delaying tactic.

The Bill proposes a simple amendment: the clock will be paused rather than reset, speeding up responses, instilling good practice and removing any perceived advantage in requesting clarification which does not meet the test of “reasonableness”. Additionally, under section 15(1) of FoISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. People concerned about how to draft an FoI request have the right of free advice and assistance from the public authority which is amplified by the service provided by the office of the Scottish Information Commissioner.

5. Do you think that the provisions of the Bill in relation to the reporting by Scottish Ministers of the use of ‘section 5’ powers to designate new public authorities would, as the Policy Memorandum contends, “incentivise Scottish Ministers to regularly use their section 5 powers and at a pace which enables the system of independent regulation to operate effectively”?

Yes, but Parliament should keep this provision under review. There is apparent resistance to using the section 5 power despite the diversification in public service delivery which means that the service does not fall under the scope of FoISA because the provider is not a ‘public authority’ i.e. it is privately provided or via the third sector. A legal change in 2013 to speed up the pace of designations under FoISA was unsuccessful.

By mirroring the process of consultation and decision making on new designations under FoISA, a failure of Scottish Ministers to act can be promptly remedied by MSPs at the Scottish Parliament. Consultation is core to the process, of those bodies to be designated as well as the public, ensuring that the extent of the designation and timescale for introduction is realistic. For

example, a realistic lead in time so that the bodies can learn from best practice, train staff and ensure the right systems are embedded to meet legal obligations.

6. Do you support the requirement for all public authorities subject to the Act to designate a Freedom of Information officer?

Yes. This question was posed in the consultation. 63% of respondents were supportive, 11% were opposed, three were unsure and 15 were neutral.

Fol staff's abilities and attitudes affect the success of FoISA's implementation. Those who answer requests and respond to complaints are the key players in the implementation process. Along with Fol officers, records managers ensure that it goes smoothly. A key finding of a 2022 survey of Fol practitioners by the Scottish Information Commissioner was that they would like their profile and the profile of Fol elevated within organisations.⁶ The role will ensure those who govern the public authority accept the need to provide sufficient resources and authority to staff who handle requests and publish information.

The role will also provide consistency. Under section 1(2) of the Public Records (Scotland) Act⁷ an authority's records management plan must "identify the individual who is responsible for management of the authority's public records, and if different, the individual who is responsible for ensuring compliance with the plan". Selecting a bespoke officer is also the approach taken in data protection law. The EU's General Data Protection Regulation (GDPR)⁸ retained in UK law as the UK GDPR requires the appointment of a data protection officer in public authorities or bodies if they carry out certain types of processing activities. The Data Protection Act 2018 (DPA)⁹ gives these provisions further effect and clarifies the role of a data "controller". A line of accountability and independent scrutiny should be followed as a model for consistent compliance under FoISA.

The Fol officer role has similar powers to those of Data Protection Officers under sections 69-71 of the DPA. Codifying this requirement, the need to manage risk in terms of legal compliance and public reputation are fully impressed upon designated bodies.¹⁰

7. The Bill proposes the introduction of an offence to prevent destruction of information with the intent to prevent disclosure, even when no information request has been made. Do you support this proposal?

Yes. This provision is a response to evidenced problems. It is already a criminal offence under section 65 of FoISA to "alter, deface, block, erase,

⁶ FOI Practitioner Survey 2022

⁷ Public Records (Scotland) Act 2011

⁸ Regulation (Eu) 2016/679 Of The European Parliament And Of The Council - 2016

⁹ Data Protection Act 2018

¹⁰ The UK Data Protection and Digital Information Bill is noted but currently sits at the Committee Stage in the House of Lords <https://bills.parliament.uk/bills/3430>

destroy or conceal” information with intent to “prevent disclosure” following an information request being made. However, there is a need to strengthen enforcement and provide greater clarity on who such an offence applies to.

The Scottish Government has been in special measures over its FoI performance over its practice and performance since 2017.¹¹ The involvement of special advisors in the handling of FoI requests has been established.¹² The Commissioner has raised concerns in light of the findings of the Covid-19 inquiry, which found that ministers had on many occasions deleted messages that referred to government business. This resulted in a second intervention launched in 2024 to specifically support improvements in the Scottish Government's communications and records.¹³

Section 1(5) of FoISA is clear that deletion of information should not be used to circumvent the release of information. This amendment explicitly lays out that attempts to delete or evade publication of information which requestors have an unequivocal right to access is a prosecutable offence, and this offence applies to both the public body and the staff member under its instruction. There is a legitimate public interest in pursuing such a provision.

8. Do you support the proposal to remove the power of the First Minister to ‘veto’ certain decision of the Scottish Information Commissioner in relation to information deemed to be of “exceptional sensitivity”?

Yes. The wording of this question describes only part of the problem that section 13(c) of the Bill seeks to fix. Currently, Scottish Ministers have a veto over directives to abide by the Commissioner’s decision notices or enforcement notices under section 52 of FoISA. Should the public interest require that information be withheld, there are exemptions within the legislation which are available for Scottish Ministers to apply and, where Ministers disagree with the Commissioner’s conclusions on any case, an appeal can be made, as in all other circumstances, to the Court of Session on a point of law. Removing the veto strengthens FoI law in Scotland and applies FoI law equally to all Scottish public authorities.

The power has never been used and is unnecessary.

9. Do you support the proposals to strengthen the general functions and enforcement powers of the Scottish Information Commissioner, and to introduce an exemption for information provided to the Commissioner during the investigation of appeals?

Yes. The right to information under FoISA is only effective because of the enforcement by the independent Scottish Information Commissioner. Therefore FoISA requires robust enforcement and that can only be achieved through reform

¹¹ Scottish Government Intervention - Practice and Performance - SIC

¹² FOI Release - May 2018

¹³ Probe launched over Scottish government's informal messages – 4 February 2024, BBC

to deal with legal loopholes, operational practice and emerging issues with information management.

For example, the current Model Publication Scheme has become discredited as a way to pro-actively publish information despite the subject headings covering information that people want to see. Therefore by making enforceable the Code of Practice, to deliver the Pro-active publication duty, will make the duty effective. The Commissioner will be equipped with the enforcement powers to take action in the event of a breach of mandatory elements of the Code which will enable greater control and influence over the standard of proactive publication, and improvements in the quality, consistency and accessibility of information across the public sector.

Providing the Commissioner with a duty to prepare the new Code, capitalises on over 20 years of experience of overseeing compliance with the publication duty. The Code, as with current FoI Act Codes, are subject to parliamentary approval, under the affirmative procedure.

10. Do you have any views on the estimated costs and savings associated with the proposed changes set out in the Bill?

When FoISA was passed in 2002 it was at no cost to the Scottish or central government as Government Ministers said that providing information to the public is a key part of public service delivery. That approach has been consistently followed as more organisations are designated under FoISA such as private prisons and RSLs.

Procedurally, it is challenging to disaggregate costs of processing FoI as IT and software packages can be interlinked with other functions such as GDPR compliance.

Desktop research and FoI requests have been unable to catalogue costs as the information is not routinely collected or published since it is part of 'business as usual' for public authorities. In 2024, polling for the Commissioner revealed that only 6% of the public felt that FoI is a waste of public money which is the lowest proportion since this question was first asked in 2011.¹⁴

Cost savings will be achieved by changing culture and practice to pro-actively disclose information avoiding the need for FoI requests in the first place. The digital first approach taken by public authorities has resulted in investment in software to process FoI request, streamline records management and enable a quicker and more reliable document retrieval system.

eCase, a public sector correspondence management service, reports that it saves customers 52 minutes per case on average. The service facilitates the logging, processing and responding to all correspondence, improving performance and consistency. Fivium, suppliers of the eCase service, have

¹⁴ <https://www.foi.scot/sites/default/files/2024-05/Public%20Awareness%20Research%20Report%202024.pdf>

consistently reported a 31.8% reduction in the time spent managing each FOI request. They have also reported an increase in FOI requests due to increased awareness of FOI legislation, which has led to more people and organisations turning to technology to assist them in lowering the time and costs associated with responding to requests.¹⁵

11. Please use the text box below to set out any further comments you wish to make about the Bill.

The Bill has followed Parliamentary rules and was tabled in sufficient time for the three stages to be completed by March 2026 in advance of the Holyrood elections. Therefore it is important to ensure the Bill becomes law and listens to public opinion that FOI builds trust through transparency and accountability. Polling shows a high level of [public awareness](#) and support: in 2024, 88% of people had heard of FOI and 97% agreed that it was important for the public to access the information held by public bodies.

What happens in Scotland matters globally. At a time when other countries are restricting FOI rights and their enforcement, such as Mexico and Tunisia, Scotland has the opportunity to deliver progressive reform. The Citizens Network Watchdog Poland believes the Bill's "passage would make Scotland a global point of reference — a true beacon of transparency, accountability, and scrutiny." It points out that "experience also shows that without strong legal guarantees and effective enforcement, the right to information can easily be restricted or ignored."

Conclusion

The General Principles of the Bill will change culture, practice and strengthen the architecture of transparency and accountability in Scotland so people's human right to receive information to form opinions is upheld.

If you have any questions, please contact us at info@cfois.scot

What Can You Do?

Please support our campaign by writing to your [MSP](#) to ask them to support the Bill and explain the Bill strengthens the outdated FOI law in Scotland by:

- Introducing a new, enforceable duty to pro-actively publish information
- Improving legal compliance by designating an FOI officer in each public body
- Strengthening the enforcement powers of the Scottish Information Commissioner
- Support the [CFoIS](#) all party campaign in support of the Bill.

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¹⁵ [eCase Website](#), eCase Customers Save 52 Minutes Per Case on average