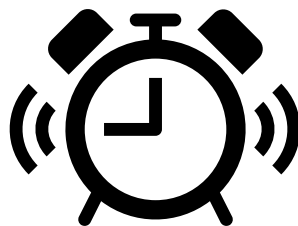




Creating a National Care Service in Scotland Briefing Alert



‘Fol Care Equally Campaign’ Delivering Transparency, Accountability and Scrutiny

October 2022

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About CFoIS

CFoIS was established in 1984 to campaign for robust, accessible and enforceable access to information rights. CFoIS believes that policy and practice on transparency and accountability should keep pace with the needs of a modern democracy. CFoIS offers comment and scrutiny on law and policy, as well as encouraging people to be 'rights aware'. Recent work has focused on strategic action to reform the Freedom of Information (Scotland) Act 2002 (FoISA).

In September 2021, the Campaign for Freedom of Information in Scotland (CFoIS) became a Scottish Charitable Incorporated Organisation (SCIO), number is SC051263. CFoIS welcomes donations, project grants and opportunities to work collaboratively and provide training.

SPIF

CFoIS organises meetings of the Scottish Public Information Forum (SPIF) to increase engagement between rights holders and duty bearers. SPIF is included in the Scottish Government's six FoI principles published in 2007: "We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum."¹ SPIF is an opportunity for the Scottish Government, the public, Third and private sectors, civil society, the Scottish Information Commissioner and members of the public to meet and discuss the practice of rights and the delivery of duties. For more information go to [Scottish Public Information Forum – CFoIS](#)

¹ [Guide to information published by the Scottish Government - gov.scot \(www.gov.scot\)](#)

Foreword by Carole Ewart, Convener of CFoIS

The Campaign for Freedom of Information in Scotland believes that the Freedom of Information (Scotland) Act 2002 (FoISA) has established greater transparency and accountability by providing a legally, enforceable right to access information. After 20 years, action is still needed to ensure the right remains strong when public services change. A current example is the National Care Service (Scotland) Bill, which should be amended to address a transparency and accountability deficit.

The purpose of FoISA is set out in the introductory text: “An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes.”² The NCS Bill allows the Scottish Government to centralise social care and away from local authorities. This new, national service ‘could include adult and children’s services, as well as areas such as justice social work. Scottish Ministers will also be able to transfer healthcare functions from the NHS to the NCS’.³ CFoIS believes that each provider of a service within this new structure should be covered by FoISA whereas the Bill provides that only the umbrella body, ‘the care board’ is covered. In practice that means care services provided directly by a private and third sector body will not be ‘designated’ under FoISA. Direct providers which are a public body or a local authority will continue to be covered by FoISA creating a patchwork of rights and duties. FoI rights should follow the service, not the provider!

Consistency in transparency is a longstanding issue of concern which was amplified during the COVID 19 pandemic. What went on in care homes was of public interest. Initial FoI requests about Covid-19 deaths in individual care homes were unsuccessful but an appeal was lodged with the Scottish Information Commissioner who ruled that “the Registrar General of Births, Deaths and Marriages for Scotland failed to comply with Part 1 of FOISA and was, therefore, required to provide the information requested by 28 June 2021.”⁴ Retrospectively statistical evidence was obtained for each and all care homes using FoISA.⁵ The information should have been pro-actively published under FoISA, as it had been gathered and reviewed.

FoISA itself needs reformed. In January 2020, we published a report which concluded that over half of FoISA’s provisions need to be amended and addressed.⁶ A reform Bill is urgently needed to update the law, address legal loopholes, introduce duties to prohibit practices which undermine legal rights and improve implementation through increased enforcement of duties. Work is underway to achieve legislative reform and an announcement is imminent.

FoISA covers designated, devolved organisations. The UK Freedom of Information Act 2000 applies in Scotland on reserved matters, such as employment law and industrial relations, and is enforced by the UK Information Commissioner.

² [Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2002/36/section/1)

³ [National Care Service \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](https://www.parliament.scot/bills-proposed-laws)

⁴ [Decision 079/2021 Decision 079/2021 | Scottish Information Commissioner \(itspublicknowledge.info\)](https://www.sic.scot/decisions/079/2021)

⁵ [COVID 19 deaths in care homes: FOI release - gov.scot \(www.gov.scot\)](https://www.gov.scot/news/covid-19-deaths-in-care-homes-foi-release/)

⁶ [Reform-FoISA-21st-Jan-2020.pdf \(cfosis.scot\)](https://www.cfosis.scot/reform-foisa-21st-jan-2020.pdf)

1. The National Care Service (Scotland) Bill and FoI

This briefing is an alert on the structural deficiencies in transparency and accountability that will limit scrutiny of social care delivered through our new national care service (NCS). The National Care Service (Scotland) Bill fails to require enforceable access to information rights for all direct providers of care. Consequently the enforceable rights and duties in the Freedom of Information (Scotland) Act 2002 (FoISA) will not apply to private and third sector providers. This legislative omission damages the public interest.

CFoIS has campaigned on this matter for many years so the issues have been aired and evidenced repeatedly.⁷ Although the Scottish Government launched a consultation in 2019 to add private and third sector providers to FoISA, no action has been taken to date (October 2022). The impact of COVID 19 amplified existing concerns about the provision of care across Scotland and provided further impetus to make FoISA apply equally to publicly funded care services. Therefore the Bill, as currently drafted, is a disappointment.

The Scottish Government's NCS Bill will centralise care and establish Care Boards. Although the Bill adds a "Care Board" to FoISA⁸ a deficiency is created by failing to cover individual providers of care. Under the Bill, individual providers operated by public authorities will be covered but those provided by the private and third sectors will not. Therefore a goal of the NCS fails at the start: to deliver consistent and high standards in health and social care services.⁹

The benefits of transparency, accountability and scrutiny (TAS) are clear in building trust and enabling family, carers, organisations, politicians, the wider public sector, trade unions and journalists to make informed decisions on services:

- Policy is put into practice such as on care, health and human rights.
- Compliance with legal duties is evidenced through pro-active publication of information and data.
- Enables people to thrive and fulfil their potential, and communities to flourish and prosper.¹⁰
- Evidences the way public money is being spent and its impact such as on staff pay and conditions.
- Corruption is prevented, detected and addressed.
- Problems are prevented or at least detected at an early stage by those who have experience of the individual providers and who ask the right questions.

The NCS Bill remains the perfect vehicle to effect reform and that can be commenced at Stage 1 of consideration of the Bill. A general principle of the Bill must be that whoever provides care must be equally covered by FoISA so that we equally benefit from the rights and duties in FoISA which can be independently

⁷ For example see CFoIS submission to the Scottish Government's consultation on the way social care is delivered, published in November 2021 [2021 – CFoIS](#)

⁸ Schedule 2 section 3 [National Care Service \(Scotland\) Bill \(parliament.scot\)](#)

⁹ [Social care - gov.scot \(www.gov.scot\)](#)

¹⁰ The National Care Service principles, section 1 of the Bill

enforced by the Scottish Information Commissioner (Commissioner). FoISA was passed 20 years ago, effective from January 2005, and its impact should grow progressively not curtailed.

2. General Principle of NCS is enforceable FoI rights

FoISA provides people with the right to make an information request to designated public bodies and receive it 'promptly' or within 20 working days. If the body refuses to provide all or part of the information, an internal review can be requested and if still unsuccessful an appeal can be submitted to the independent regulator, the Commissioner. A designated body may refuse to provide information if there is a legal exemption. Challenging the exemption cited is the reason why many appeal to the Commissioner.¹¹ Bodies covered include local authorities, colleges, the police, regulators, health boards and individual GP surgeries resulting in over 10,000 bodies being covered.

According to the Scottish Government "Social care means all forms of personal and practical support for children, young people and adults who need extra support. It describes services and other types of help, including care homes and supporting unpaid carers to help them continue in their caring role."¹² Whatever complex arrangements for delivering the NCS are set up, exercising rights and fulfilling obligations under FoISA must be at the core of care, adopted as a 'business as usual culture', and remain a simple process.

The NCS Bill's approach is inadequate as in paragraph 3, schedule 2 care boards are added to the list of Scottish public authorities designated under FoISA.¹³ "This means that they will be subject to the requirements that FoISA places on public bodies, including requirements to respond to information requests and adopt a scheme for the pro-active publication of information they hold."¹⁴ However this approach avoids designation of the direct providers of care services. An unequal environment is allowed to persist public providers will be individually covered by FoISA but not those from the Third and private sectors. Therefore addressing designation of all providers of care is a matter to be agreed now through primary legislation to ensure there are consistent standards regardless of who delivers the service.¹⁵ If a potential provider does not wish to be covered, they need not tender for an advertised contract.

Refusing to designate individual providers of care and forcing requestors to go through an intermediary such as a 'Care Board', the Scottish Government, a health board or a regulator is clunky and risks delays in information being sourced and disclosed. To create a new system where all the component parts are not covered by FoISA is also alarming. Twenty years ago, MSPs voted for FoISA which is "An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for

¹¹ Helpful information about exercising your rights and the rules on charging appear at [Freedom of information at a glance \(itspublicknowledge.info\)](https://itspublicknowledge.info)

¹² [Social care - gov.scot \(www.gov.scot\)](https://www.gov.scot)

¹³ Care Boards are added to schedule 1 of FoISA

¹⁴ Pg 20 of the Explanatory Notes [Explanatory Notes accessible \(parliament.scot\)](https://www.parliament.scot)

¹⁵ The submission appears at [CFoIS – The Campaign for Freedom of Information in Scotland](https://www.cfois.org.uk)

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connected purposes.”¹⁶ Setting up an NCS which fails to ‘designate’ organisations ‘providing services for public bodies’, contradicts the agreed purpose of FoISA. Therefore, this primary legislation needs to be amended.

CFoIS believes there has been a loss of the enforceable FoI rights due to diversification of publicly funded, service providers. This was also identified as a problem in the Commissioner’s report of 2015 ‘FOI 10 years on: Are the right organisations covered?’.¹⁷ The Commissioner’s report warned that immediate steps must be taken to protect FOI rights from the damage caused by the outsourcing of important public services.

Little progress has been made. For example, the 2019 consultation on extending FoISA to care homes run by the private sector, using the existing Section 5 power under FoISA, has not been progressed despite the urgency of the situation as exposed by the high level of deaths in some Scottish care homes during the pandemic¹⁸. The STUC’s report on social care, of June 2022, reported that:

- Nearly 25% of care homes run by big private providers had at least one complaint upheld against them in 2019/20, compared to 6% of homes not run for profit.
- In older people’s care homes, staffing resources are 20% worse in the private sector compared to the not-for-profit sector.¹⁹
- Privately owned care homes only spend 58% of their revenue on staffing, compared to 75% in not-for-profit care homes.

One of the report’s recommendations is that “Freedom of Information legislation should be extended to all care providers in receipt of public funding.”²⁰

The Commissioner has made submissions for FoISA to cover organisations that provide care services to the public as they are functions of a public nature and ‘an essential part of system design and regulation.’ The Commissioner ‘suggests that the right to information should be a key aspect to be considered in any rights-based approach to care. It is a crucial enabler in the stated aims of involving and empowering people to engage in the decisions that affect them, achieving consistency and accountability, and building a system with human rights at its heart.’ The Commissioner suggests primary legislation ‘would enable information rights to be an inherent part of the design of the “significant cultural and system change.”²¹

The Scottish Parliament voted unanimously for post legislative scrutiny of FoISA in June 2017 and the subsequent report published by the Public Audit and Post Legislative Scrutiny Committee, in May 2020, concluded “that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation. The Committee agree that, in

¹⁶ Introductory Text [Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁷ [Special Reports \(itspublicknowledge.info\)](https://itspublicknowledge.info)

¹⁸ [Coronavirus \(COVID-19\): adult care homes - additional data - gov.scot \(www.gov.scot\)](https://www.gov.scot)

¹⁹ 28th June 2022 [Profiting from Care Report.pdf \(stuc.org.uk\)](https://stuc.org.uk)

²⁰ Pg 45 [Profiting from Care Report.pdf \(stuc.org.uk\)](https://stuc.org.uk)

²¹ [Response from SIC to national care service consultation.pdf \(itspublicknowledge.info\)](https://itspublicknowledge.info)

principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.”²² The issue had also been raised by Audit Scotland in its written submission to the Committee.²³ This view is consistent with the UN Human Rights Committee’s General Comment 34 which defines ‘public bodies’ and states that ‘The designation of such bodies may also include other entities when such entities are carrying out public functions’.²⁴

The power of FoISA is the enforceability of the right and the obligation to comply with the duty. Scotland’s voluntary ‘Open Government Partnership’ initiative (OGP)²⁵ is no replacement for FoISA despite agreeing a third National Action Plan which focuses on ‘Health and Social Care’ as well as ‘Financial Transparency, Climate Change, Participation, and Data and Digital.’ This voluntary initiative is welcome but it cannot replace the legal framework on enforceable rights and duties which FoISA provides. Furthermore, FoISA was prompted by an inadequate voluntary regime which was set out in the 2001 ‘Explanatory Notes’ accompanying the Freedom of Information (Scotland) Bill:

‘The Code of Practice on Access to Scottish Executive Information is a non-statutory scheme which requires the Scottish Executive and its associated agencies to make certain information available to the public and to release information in response to specific requests. The Bill creates a statutory right of access and provides for a more extensive scheme for making information publicly available, covering a much wider range of public authorities ...’.²⁶

The NCS Bill should embed the rights and duties set out in FoISA. Therefore it should be a **general principle of the Bill** that FoISA applies to all those who provide social care and that includes private and Third sector providers, but only in so far as the functions they perform in delivery of the NCS.

FoISA is about accessing information but if people want to access personnel information, a separate regime operates which is ‘data protection’. Those who collect information about individuals for any reason (other than for their own personal, family or household purposes) need to comply. The UK data protection regime is set out in the Data Protection Act 2018, along with the UK GDPR. The UK Information Commissioner regulates and enforces data protection and offers ‘advice and guidance.’²⁷

3. Being transparent from Day Zero

The NCS Bill allows Scottish Ministers to transfer social care responsibility from 32

²² Paras 7 and 8 [PAPLS052020R2.pdf](#)

²³ https://archive2021.parliament.scot/S5_Public_Audit/General%20Documents/50_Audit_Scotland.pdf

²⁴ ‘Article 19: Freedoms of Opinion and Expression’, para 7 and 18 at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

²⁵ [Open Government Partnership Open Government Partnership - Scottish Government Blog \(blogs.gov.scot\)](#) & [Improving public services: Open Government Partnership - gov.scot \(www.gov.scot\)](#)

²⁶ [b36s1en.pdf \(parliament.scot\)](#) para 5, published 27th September 2001

²⁷ [Some basic concepts | ICO](#)

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local authorities to a new, national service.²⁸ The decision to centralise services has many implications and creates opportunities to promote transparency, accountability and promote scrutiny from day one. The organisational expertise in complying with FoISA can be transferred to the new structure such as from local authorities, all NHS Boards, the Common Services Agency for the Scottish Health Service²⁹, Healthcare Improvement Scotland³⁰ and Scottish Ministers. Existing bad practice may also be replicated.

The Bill provides the detail for setting up the NCS drawing together staff from different organisations. Getting systems in place to ensure legal compliance and operational consistency will be a challenge. Key to delivery is staff culture, training and ensuring the 'new' service delivers consistently and can evidence compliance. The FoISA regime is a prompt and an incentive to aid this organisational process. FoISA duties are underpinned by effective record keeping and management so documenting and recording relevant information is fundamental to enabling rights to be realised.

More widely, the staff who gather, store and share information will have to engage with consumers to meet changing as well as existing expectations. Employees need the skills to liaise with customers through chats, emails and social media to deliver a digital first approach and face to face engagement. Customer service representatives need soft skills like listening and empathy as well as problem solving abilities to resolve more complex queries.³¹ What they do with that information needs to be addressed so the NCS can pro-actively and reactively share information.

Emphasis needs to be given to creating information trails, such as relevant drafts, memos, emails, correspondence and minutes of meetings, which show how key decisions have been reached and how public funds have been spent. Also to include diverse communication tools such as WhatsApp messages and texts used for official business along with private email accounts by staff. Training can make explicit what is meant by the term "information", include a duty to record with clear definitions of what should be documented and underpinned by guidance to ensure that such information is retained and accessible in an appropriate format so that it can be provided under FoISA.³²

In 2017 independent polling for the Commissioner revealed that 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.³³ Right to information laws allow people to ensure officials make good decisions as well as holding duty bearers to account in real time and retrospectively.

²⁸ Section 36 at [National Care Service \(Scotland\) Bill \(parliament.scot\)](#)

²⁹ NHS National Services Scotland is the common name of the Common Services Agency for the Scottish Health Service nss.foi@nhs.scot

³⁰ [Freedom of information \(healthcareimprovementscotland.org\)](#)

³¹ [How to build a customer-focused workforce \(webinar\) | PERSONNEL TODAY \(livestorm.co\)](#)

³² [PAPLS052020R2.pdf Paras 15-17](#)

³³ <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

The NCS Bill can also address an inequality in rights. The services which children and people with disabilities use appear to be disproportionately delivered by private and Third sector providers taking them out of direct coverage under FoISA. This is a deficit in transparency, accountability and scrutiny.

4. Example of Public Interest in Each Care Home

On 28th September 2020, an information request was sent to the Registrar General of Births, Deaths and Marriages for Scotland (the Registrar General) for information, which included "... a breakdown of the number of confirmed Covid-19 deaths in Scotland by 1a) Individual care homes 1b) Care home provider and ... a breakdown of the number of suspected Covid-19 deaths in Scotland by 2a) Individual care homes 2b) Care home provider."

The Registrar General responded on 2nd October 2020. He stated "he was unable to provide a breakdown of the deaths by individual care homes as disclosure of the data at this level might allow identification of deceased individuals and thus cause damage or distress to the living relatives of those individuals. As such, he stated the information was exempt from disclosure in terms of section 38(1)(b) (personal information) of FOISA. He further stated he did not hold the information regarding care home providers." The requestor sought an internal review of the decision and then appealed to the Commissioner who ruled that the information should be disclosed. The Commissioner's decision involved a number of factors including that "the information held by the Registrar General is factual". The Commissioner concluded "there is a strong public interest in disclosure of the information, to ensure that older people and their relatives have the necessary information to make an informed decision when choosing a care home or care home provider. He considers that to deny those individuals the access to this relevant information would indeed be a lack of transparency, which is not in the public interest."³⁴ The decision was welcome and the public interest in individual care homes agreed.

It is useful to note that the Commissioner's decision was issued on 13th May 2021 seven months after the original information request was made. Under FoISA the requestor should have received it within 20 working days.

5. Example of the NHS

So far, over 10,000 bodies are 'designated' under FoISA including local authorities, health boards, Police Scotland, regulators, Universities, Colleges, and individual GP practices which are the biggest single category. Most GP practices are run as independent businesses and provide services for NHS boards. Instead of the Health Board being 'designated' under FoISA, as the way to make an information request to a GP, it is the individual GP company contracted to deliver the public service. The current administrative and funding arrangement are that 'NHS boards specify what healthcare services they need and then fund the GPs to do this work through an arrangement called the 'General Medical Services contract.' The Memorandum of Understanding (MoU) agreed as part of the 2018 contract set out the

³⁴ The full decision is available at [Decision 079/2021 | Scottish Information Commissioner \(itspublicknowledge.info\)](https://itspublicknowledge.info/Decision_079/2021)

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responsibilities of all parties to deliver on the elements of the contract during the three year implementation period to 2021³⁵. However, this deadline was missed so the BMA's Scottish GP Committee (SGPC) has negotiated further elements to the contract. The NCS Bill contradicts the established approach of the NHS.

As currently drafted, the Bill adds to the confused and inconsistent approach to designation which has developed under FoISA. FoISA provides a Section 5 power to update categories and bodies designated and provide consistency. The onus is on Scottish Ministers to initiate the process but the power has been used infrequently which has led to a loss of enforceable FoI rights due to the diversification of publicly funded service providers. MSPs have the opportunity rectify the problem and ensure FoI rights follow the spend of public money in delivering care.

6. Example of Police Scotland

Transparency, accountability and scrutiny lead to better public policy decisions in the short, medium and longer term. The audit and investigative work on the establishment of Police Scotland is one example to inform the architecture of the NCS.

Police services in Scotland have been designated under FoISA since rights and duties became enforceable on 1st January 2005. Initially, individual police forces were covered by FoISA and from 2013 the single structure of Police Scotland was added through the Chief Constable, and the Scottish Police Authority was covered too.³⁶ Audit Scotland set out the impact of legal change:

“The Police and Fire Reform (Scotland) Act 2012 (the Act) created a new structure for providing police services in Scotland. The Act brought together ten bodies into two national bodies and the new structure became operational on 1 April 2013. The restructure transferred around £1.1 billion of annual spending and over 24,000 people into the new bodies. It transferred responsibility for policing from local government to central government. It is one of the largest and most complex reforms of the Scottish public sector since devolution and the most significant change in policing since 1967.”³⁷

Its 2013 audit assessed the efficiency and effectiveness of the planning and early implementation of the new arrangements for police services in Scotland. A key message was that “Planning the move to a single police service was hampered by poor baseline information, a lack of clarity in roles and responsibilities, and difficult relationships between the Scottish Government, the SPA and Police Scotland. There have been significant changes to governance arrangements and some important strategies and plans are still under development.”³⁸ Its key recommendations included that the Scottish Government, the SPA and Police Scotland should continue to work together to develop positive and effective working relationships, based on a mutual understanding of and respect for each other's roles, including agreement on

³⁵ [Memorandum of Understanding \(MoU\)](#)

³⁶ Schedule 1 of FoISA Section 50 and 50A [Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](#)

³⁷ Police reform: Progress update 2013 paras 1-2 [Police reform \(audit-scotland.gov.uk\)](#)

³⁸ Pg 8 Ibid

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the responsibilities relating to sponsorship, governance and delivery of police services.”³⁹ It went on to state that “Better information is needed to support effective scrutiny of police performance⁴⁰.

It is useful to note that Audit Scotland’s Annual Report on the 2013/14 Audit of Police Scotland expressed concern “because aspects of the accounting records and access to information and explanations in the areas of property, plant and equipment, bank and cash, and for the computation of certain accruals were considered to be of poor quality.” The auditor reported that “adequate accounting records had not been kept in respect of these areas.”⁴¹

Clearly a number of lessons to inform the Bill and delivery of the NCS.

7. Examples of FoI Compliance Issues

The Scottish Information Commissioner’s scrutiny of the Scottish Government’s delivery of its duties under FoISA began in 2017, resulted in a Level Three Intervention and remains ongoing.⁴² Under Section 1 of FoISA, every request must be treated equally regardless of whether the requestor is a politician, trade unionist, community group, journalist, Blogger or member of the public. A complaint that the ‘applicant blind’ principle of FoISA was being ignored in the Scottish Government’s handling of information requests was confirmed in the Commissioner’s report of 2018:

“The proportion of late responses and failures to respond was considerably higher for journalists, particularly in 2015/16 and 2016/17. In a number of 2016 and 2017 cases I observed unjustifiable, significant delays and disregard for the statutory timescales.”⁴³ The Commissioner’s Progress report published in May 2022 into the Scottish Government’s compliance with the Improvement Action Plan, agreed in 2018, following the Level Three intervention noted “the ending of the inappropriate practice of handling requests from journalists and political researchers differently from other requesters.”⁴⁴

FoISA depends on good records management so that a designated authority can be sure what information is held within an authority. Cuts in staff and resources weakens the framework in which FoISA operates. The Commissioner’s report identified a continuing weakness in records management citing “evidence of widespread failures to comply with records management requirements when handling FOI requests.” The Commissioner concludes that “while significant improvements have been made in a number of areas, further work is required if FOI

³⁹ Pg 9 Ibid.

⁴⁰ Paragraphs 109-119 Ibid.

⁴¹ Pg 4 Audit Scotland pub December 2014 [Scottish Police Authority Annual report on the 2013/14 audit \(audit-scotland.gov.uk\)](#)

⁴² [Intervention Report - Scottish Government 201702106.pdf](#) and [Intervention 201702016 Scottish Government \(itspublicknowledge.info\)](#)

⁴³ Pg 5 [Microsoft Word - Intervention Report - Scottish Government 201702106 \(itspublicknowledge.info\)](#)

⁴⁴ [Scottish Government intervention | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

performance is to be raised and sustained.”⁴⁵

FoISA also covers online meeting software whose use soared during the pandemic. Ensuring that information requests are answered fully, including the ‘held’ information on personal devices, such as computers and phones, is a recognised problem, practice and perception. This is a UK wide issue. The UK Information Commissioner’s Office (ICO) conducted a yearlong investigation, into practices by Ministers and officials at the Department of Health and Social Care (DHSC) during the pandemic. The investigation found that the lack of clear controls and the rapid increase in the use of messaging apps and technologies – such as WhatsApp – had the potential to lead to important information around the government’s response to the pandemic being lost or insecurely handled. The ICO concluded that there “were real risks to transparency and accountability within government and has now called for a review of practices as well as action to be taken to ensure improvements are made in relation to how officials and Ministers use private correspondence channels moving forward.”⁴⁶

Using communications and storing records out with the scrutiny of colleagues and regulators happens in the private sector too. In September 2022, it was extensively reported that “U.S. regulators reached settlements with a dozen banks in a sprawling probe into how global financial firms failed to monitor employees’ communications on unauthorized messaging apps, bringing total penalties in the matter to more than \$2 billion.”⁴⁷ Therefore, when setting up the NCS a realistic approach to using communication channels and managing records is needed to protect the public interest.

8. Human Rights Obligations

The independent review into adult social care led by Derek Feeley recommended that Scotland’s care service reform should place human rights compliance at its centre.⁴⁸ The Bill states that the NCS principles are to be regarded “as an investment in society” and “essential to the realisation of human rights...”⁴⁹

Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights provide for the right and the freedom to form an opinion by seeking, receiving and imparting information and ideas ...’⁵⁰. Other UN ratified treaties also include this right including: Article 13 of the UN Convention on the Rights of the Child provides “the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the

⁴⁵ [Scottish Government Intervention Progress Report published | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

⁴⁶ ‘Behind the Screens’ pub July 2022 [Behind the Screens \(ico.org.uk\)](#)

⁴⁷ [Wall Street hit with \\$2 billion in fines over employees using WhatsApp and other unauthorized messaging apps | Fortune](#)
[SEC.gov | SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures](#)

⁴⁸ [Independent Review of Adult Social Care - gov.scot \(www.gov.scot\)](#)

⁴⁹ Section 1(a)(i) of the Bill [National Care Service \(Scotland\) Bill \(parliament.scot\)](#)

⁵⁰ Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

form of art, or through any other media of the child's choice..."⁵¹; Article 21 of the UN Convention on the Rights of People with Disabilities places a duty on governments "to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice"⁵². These human rights are given effect via FoISA.

In *Magyar Helsinki Bizottsag v Hungary*, the Grand Chamber of the European Court of Human Rights (ECtHRs), ruled there was a breach of Article 10 of the ECHR as a non-governmental organisation (NGO) had been prevented from obtaining and sharing information. The ECtHR was 'satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest' and the 'refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest'. It further stated that acting on and for, the public interest is a purpose of an NGO.⁵³

In 2021, the UN marked 10 years of its 31 Guiding Principles on Business & Human Rights (UNGPs). The UNGPs should be followed in public procurement and in how companies owned by public bodies operate. Compliance with the 31 UNGPs, especially numbers 4 - 6, requires transparency, accountability and scrutiny in Scotland.⁵⁴ The UNGPs set out our Government(s) duty to protect human rights and the corporate responsibility to respect human rights⁵⁵. Remedies should also be available to prevent and address human rights abuses by state and non-state bodies.

In 2013, the UK was the first country to adopt a 'National Action Plan on Business and Human Rights' based on the UNGPs which has been updated and progress reports issued, such as in May 2020⁵⁶. However the UK Government emphasises the voluntary nature of the regime. There is no separate Scottish document despite a published baseline assessment⁵⁷ and a statement of commitment from the Scottish Government.⁵⁸ To put this global agenda into a domestic context, the Scottish Parliament hosted a conference, in October 2010, to discuss the issues which was attended by over 80 countries and UN staff. So far, progress has been slow on mainstreaming the UNGPs across the UK's territorial jurisdiction.

9. Support Reform of FoISA

FoISA is 20 years old and covers information processing and public service delivery

⁵¹ [Convention on the Rights of the Child | OHCHR](#)

⁵² [Convention on the Rights of Persons with Disabilities | OHCHR](#)

⁵³ Judgement at paras 164-165 and at 197 at European Court of Human Rights at <http://hudoc.echr.coe.int/eng?i=001-167828>

⁵⁴ [Contracts during 2016-2021 parliamentary sessions: FOI release - gov.scot \(www.gov.scot\)](#)

⁵⁵ At [GuidingPrinciplesBusinessHR_EN.pdf \(ohchr.org\)](#)

⁵⁶ At [UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK \(www.gov.uk\)](#)

⁵⁷ Advertised in May 2015 at [National Baseline Assessment on Business and Human Rights \(government-online.net\)](#) and progress at [Business and Human Rights – Scotland's National Action Plan for Human Rights \(snaprights.info\)](#)

⁵⁸ [Business and Human Rights – Scotland's National Action Plan for Human Rights \(snaprights.info\)](#) and [Human rights and business - Human rights - gov.scot \(www.gov.scot\)](#)

which have changed radically and continue to do so. Poor practice in some designated bodies has also become an issue prompting calls for greater enforcement of legal duties and the need to close 'loopholes'. The PAPLS inquiry report of 2020, recommended significant reform of FoISA: '... there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication.'⁵⁹ The Scottish Government committed to consulting people on access to information rights, in February 2021, but has not committed to reforming FoISA. That consultation has yet to be published.

Frustrated by inaction, CFoIS drafted the Freedom of Information (Scotland) (No2) Bill along with Explanatory Notes⁶⁰ which was subject to a public consultation. The feedback has incentivised our ambition for progressive reform.⁶¹ The law on rights and duties needs to keep up with everyday operations so reform is urgently needed to improve the law, address legal loopholes, introduce duties to prohibit practices which undermine legal rights and improve general implementation.

Another problem with FoISA failing to keep pace with the diversification in the delivery of public services is the growing inconsistency with the Environmental Information (Scotland) Regulations (EIRs) which can apply to private services delivering a public function. For example, the Commissioner ruled that Abellio ScotRail Ltd (ASL) was a Scottish public authority under the EISRs as Scottish Ministers can exert decisive influence on the entity's action during the contract.⁶² Now that Scotrail has been nationalised, it is automatically covered by FoISA.

The reform of FoISA does not operate in isolation. For example the Sustainable Development Goals (SDGs) influenced the CFoIS Bill. Goal 16 sets two relevant targets for the Scottish Government: to develop effective, accountable and transparent institutions at all levels (16.6); to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (16.10). Compliance has increased in importance and in 2019, the UN upgraded the status of an indicator to measure access to information within the SDGs. Scotland has declared that the 'National Performance Framework (NPF) and the Goals share the same aims.' Therefore the NCS Bill should establish "effective, accountable and transparent institutions at all levels and ensure public access to information."

CFoIS is now delighted to be working with an MSP to bring forward a member's Bill to reform FoISA. The consultation, which is the first stage of the process, will shortly be launched and will be subject to a three month consultation.

10. Next Steps

CFoIS urges MSPs to halt the neglect of enforceable access to information rights. Creating a care service fit for purpose is a welcome goal. However individual care providers need to be added to Schedule 2 of the Bill so that the stated purpose is

⁵⁹ At [Post-legislative Scrutiny : Freedom of Information \(Scotland\) Act 2002 - Parliamentary Business : Scottish Parliament](#) and at Para 5 at [PAPLS052020R2.pdf](#)

⁶⁰ On CFoIS website at [Bill/Publications – CFoIS](#)

⁶¹ <https://theferret.scot/freedom-of-information-scottish-government-stalling/>

⁶² Decision 044/2021 [Decision 044/2021 \(itspublicknowledge.info\)](#)

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realised: “By bringing forward proposals for the creation of a National Care Service, the Scottish Government aims to make sure that these services are offered in the same way and at the same standard throughout Scotland.”⁶³

The NCS is about people: service users and service providers, those who govern and those who regulate, staff at every level of care, friends and families. Whoever delivers the NCS, consumers must receive a high quality person centred service and be empowered by the process. Accessing factual information must be a key element of the national service to enable informed opinions and address disinformation.

Independent public opinion polling carried out by the Commissioner in 2013, 2014, 2015, 2017, 2018, 2019 and 2022 provides valuable intelligence about the popularity of FoI and how the law can be improved. The public supports action. For example polling in 2022 by the Commissioner found that ‘over 80% said it's either 'very' or 'extremely' important that privately-run but publicly funded health and social care services are subject to freedom of information (FOI) law.’⁶⁴

The Scottish Government consultation of 2019 to extend designation of bodies under FoISA such as to private care homes has not been progressed. In October 2021, the Scottish Government updated the Scottish Parliament on its failure to use the Section 5 power of FoISA between 2019 and 2021. Although it stated an intention “to bring forward a policy paper in the near future, setting out the Scottish Ministers’ broad approach to the use of their section 5 power over the coming years, drawing on the evidence gathered during our 2019 consultation”, it is not yet published (October 2022). The Scottish Government also stated its goal is to ‘ensure that coverage is robust and reflects changing patterns of public service delivery.’⁶⁵ The Section 5 power is an inadequate mechanism to update the number and range of designations. As MSPs are currently considering the NCS Bill, there is an opportunity to act and install, equally, transparency for all care providers funded by public money. Therefore the NCS Bill should be amended at Stage 1 to specify the general principle that all providers of care funded by public money must be subject to FoISA. Concurrently, reforming FoISA will strengthen duties and rights.

An issue deserving further scrutiny is that the Bill allows Scottish Ministers to transfer responsibility for social work to a new, national service, under their direct control. Social care, social work and community health services would be planned and delivered by new care boards. There will be FoI implications for these changes and, potentially, in adult and children’s services plus justice social work.

The Bill is complex and is being scrutinised by a wide variety of people and organisations. CFoIS provides this briefing to assist that process and to build support for amending the Bill.

⁶³ Health, Social Care and Sport Committee 29th Meeting, 2022 (Session 6), Tuesday, 25 October 2022 National Care Service (Scotland) Bill Note by the clerk, para 3 [Note by the Clerk \(parliament.scot\)](#)

⁶⁴ [Public awareness of FOI | Scottish Information Commissioner \(itspublicknowledge.info\)](#) and [Young people's awareness of FOI rights is "significantly lower" \(itspublicknowledge.info\)](#)

⁶⁵ ‘Freedom of Information (Scotland) Act 2002: report on exercise of section 5 power’ pub. 29th October 2021, Paras 23 and 28 [Freedom of Information \(Scotland\) Act 2002: report on exercise of section 5 power - gov.scot \(www.gov.scot\)](#)