

Consultation on a proposed Freedom of Information Reform (Scotland) Bill by Katy Clark MSP

General Teaching Council for Scotland

Organisational Response (ID no 27)

SECTION 1 - ABOUT YOU

1. Are you responding as:

- an individual – in which case go to Q2A
- on behalf of an organisation? – in which case go to Q2B

2A. Which of the following best describes you? (If you are a professional or academic whose experience or expertise is not relevant to the proposal, please choose “Member of the public”)

- Politician (MSP/MP/Peer/MEP/Councillor)
- Professional with experience in a relevant subject
- Academic with expertise in a relevant subject
- Member of the public

2B. Please select the category which best describes your organisation:

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- Public sector body (Scottish/UK Government/Government agency, local authority, NDPB)
- Commercial organisation (company, business)
- Representative organisation (trade union, professional association)
- Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
- Other (e.g. club, local group, group of individuals, etc.)

Independent Statutory Body – included in FOISA Schedule 1 as a Public Authority

3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

- I am content for this response to be attributed to me or my organisation

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- I would like this response to be anonymous (the response may be published,

but no name)

I would like this response to be confidential (no part of the response to be published)

4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

[Redacted]

Section 2 YOUR VIEWS ON THE PROPOSAL

Note: All answers to the questions may be published (unless your response is “not for publication”).

Aim and approach

5. Which of the following best expresses your view of the proposed Bill?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response.

There is an ongoing Scottish Government consultation in relation to the Freedom of Information (Scotland) Act 2002 and access to information rights in Scotland. Running this consultation in tandem has duplicated work for our organisation, which is small and has limited resource. In addition, there appears to be no proposed Bill to enable respondents to review proposed wording, therefore making it difficult to properly respond to the proposals and understand what they are.

We consider the consultation currently being run by the Scottish Government to be comprehensive and taking a balanced approach in considering the views of both requesters and public authorities which is welcomed. The Scottish Government consultation includes the ability to provide a written response as well as attending in-person meetings to collate views and demonstrates an understanding of the current regime both from the perspective of requesters as well as public

authorities. We consider this to be the right, equitable and inclusive approach to considering any changes to the current FOI regime.

The approach taken in this consultation, and the proposals for the Bill itself, does not appear to consider or take in to account the impact on public authorities. There appears to be no exploration or understanding evidenced of the issues and challenges that public authorities, particularly small organisations like GTC Scotland, face in managing information requests. While transparency and accountability are essential and ensuring the Freedom of Information regime is robust and fit for purpose key, to invite and evidence no consideration of the impacts on those who would be required to comply with revised FOI legislation is in our view a significant oversight.

While we do not oppose all the proposals made and outlined in this consultation, we do oppose the proposal of a Bill being brought in this way when a Scottish Government consultation is underway at the same time.

Detail of the proposal

6. Which of the following best expresses your view on the private sector being designated under FoISA if it is publicly funded and the service is of a public nature?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response.

Transparency must of course follow public funding. If public services are being provided by private sector organisations, funded by public money, then it is sensible and appropriate that information in relation to those services ought to be accessible through Freedom of Information legislation. However, it is unclear what is meant by 'designated under FOISA' and how this will be achieved. It is unclear whether what is intended is for there to be a general definition for the application of FOISA or if such private sector organisations will be listed. If the former, this has the potential of creating a complex system based on interpretation of legislation and may not provide the clarity or certainty that is required. If the latter, this will continue to create issues for future proofing the legislation.

There is no clarity or clear proposal within the consultation document of how this may be achieved. Therefore, while in principle this would be a beneficial step to ensure that transparency and accountability spans widely to capture information held by private sector organisations when carrying out publicly funded services, without any specificity in the proposal it is difficult to provide further comment.

See page 13-17 for reference.

7. Which of the following best expresses your view on the third/charitable/ voluntary sector being designated under FoISA if it is publicly funded and the service is of a public nature?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response.

While again, transparency must follow public funding as a general principle, it is difficult to provide a clear and full response to this proposal without clarity on the proposal itself and how it would be achieved. As above, in principle, this would be a beneficial step to ensure continued transparency, however any such provision would require to be targeted, proportionate and reasonable, taking in to account the real pressures on organisations, particularly small organisations, that Freedom of Information requests can create.

See page 16 for reference.

8. Which of the following best expresses your view on the creation of a new statutory officer within designated authorities – a Freedom of Information Officer?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response

The introduction of Data Protection Officer was welcomed and appropriate, to ensure proper compliance and accountability with Data Protection Legislation. Given the importance of Freedom of Information, and the pressures and complexities involved for organisations to ensure compliance, this would seem like a positive step which we would support.

While in principle we agree that this would be a positive step, we would, however, wish to see the proposals for any such post, in order to fully understand the mechanics and requirements of the creation of any such role, and the impact that may have on a small organisation, as we are.

See page 21 for reference.

9. Which of the following best expresses your view on creating a statutory duty to publish information?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

We consider that this obligation already exists through current legislation.

Any such change would be to the way in which such a duty was to be implemented, likely moving away from the publication scheme to a more holistic approach to sharing information, must be proportionate and demonstrably recognise the competing interests and obligations an organisation faces, be that data protection legislation or the requirement to ensure accessibility of its information. While enhancing the requirement and practice of proactive publication is important, it may be more beneficial and impactful to concentrate on the way in which that duty is supported and enforced – for example, an enhanced Code of Practice to provide greater clarity and guidance to authorities would be desirable.

See page 21 for reference.

10. Which of the following best expresses your view on reducing exemptions under FoISA?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

Exemptions are essential in ensuring the proper functioning of Freedom of Information while protecting organisational information where it is appropriate to do so. While FOI legislation does have numerous exemptions, these apply to different organisations carrying out different functions. For example, our own organisation has only a limited number of exemptions which may legitimately apply to it given our role and remit, and the work that we are involved in.

Exemptions are a critical way of ensuring that information is withheld from disclosure where it should be. We do not dispute that the public interest test would be a reasonable and proportionate addition to each exemption, to ensure continued transparency and accountability, but it is essential that exemptions are properly applied and available to organisations.

FOI legislation does not exist in a vacuum. It exists within a context of complex legislation, including data protection legislation, official secrets and legal privilege. This context must be appropriately reflected. To dilute the availability of exemptions would be troublesome for many and may create conflicts in complying with other areas of legislation in Scotland.

To comment further we would ask for further detail of what is proposed. We would also welcome further information and detail in relation to the application of the public interest test beyond a short mention within the consultation document.

See page 26 for reference.

11. Which of the following best expresses your view on amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

We do not have direct experience in this area, however we would expect that the inappropriate use of confidentiality clauses is, of course, best avoided. We do not have a strong opinion on whether this should be included in amended FOI legislation, or whether this could be better managed through appropriate guidance.

See page 26 for reference.

12. Which of the following best expresses your view on FoISA being updated to ensure aspects of procurement policy set by the Scottish Government are covered?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed

Unsure

See page 31 for reference.

There is not sufficient clarity or detail to provide comment. It appears that this proposal would link to the concept that any private organisation carrying out public services, funded by the public purse, are subject to FOI legislation. This would therefore capture public procurement elements. However, without such clarity in the proposals, it is not possible to comment further.

Financial implications

13. Any new law can have a financial impact which would affect individuals businesses, the public sector, or others. Do you think any cost is outweighed by the public interest benefit?

Yes

No

Not Sure

Please explain the reasons for your answer.

'Any' cost cannot be outweighed – there has to be proportionality in all proposed new legislation. At present, and particularly through this consultation, there appears to be a disparity in cost to some organisations which is not readily recognised nor is it explored. Reference is made to the dispensation methods for third sector organisations, for example. However, even within the public authority sphere there can be significant disparity between the demands placed on organisations and the resource implications.

By way of illustration, we, GTC Scotland, are a small organisation of around 70 employees, with 81,500 registrants and are funded through the fees that our registrants (Scottish teachers) pay. We are an independent statutory body. We are not funded by the Scottish Government for our work. In 2021/22 we received 74 FOI requests. For the year 2022/23 so far, as at 10/3/23 we have received 76 FOI requests.

This is in comparison to a peer regulatory body, SSSC, who have approximately 165,800 registrants and 314 employees, with the vast majority of their income received by Scottish Government grant in aid. In 2021/22 the SSSC responded to 32 requests under Freedom of Information legislation (as per SSSC Annual Report 2021/22).

GTC Scotland receives a comparatively high number of FOI requests. Any resource, or additional resource / funding, required to manage increasing requirements arising from Freedom of Information has a significant impact given we are a small organisation with finite resource – to repeat, we are not funded by the Scottish Government for our work.

While it is accepted that large organisations may be in a position to “absorb within planned resources” the cost of implementation, the vast number and increasing complexity of Freedom of Information requests put real pressure on our ability to comply as a small organisation. Additional compliance costs for GTC Scotland cannot and will not be met by Scottish Government.

Therefore, we cannot accept that 'any' cost outweighs the public interest. GTC Scotland acts in the public interest in all that it does to ensure standards in teaching. A proportionate balance must be struck recognising and understanding objectively both the cost and benefit.

Equalities

14. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?

Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

It is unclear what 'this proposal' refers to, however, Public Authorities under Freedom of Information will be required to comply with either the specific or general equality duty, ensuring that they at least pay due regard to the need to eliminate discrimination; advance equality of opportunity; and foster good relations. Therefore, organisations should be taking this in to account when considering their duties under Freedom of Information.

As noted earlier, Freedom of Information does not exist in a vacuum and must be considered alongside all other relevant legislation and legal requirements placed upon an organisation. This does not, however, require Freedom of Legislation to narrate all elements of applicable legislation. Guidance and support should be provided to ensure organisations understand their obligations under Equality Legislation.

Sustainability

15. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?

Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?

It is unclear what 'this proposal' refers to, however, much like our response in relation to equalities, Freedom of Information must work together with other pieces of legislation and public aspirations.

General

16. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses

to earlier questions)?

As noted above, we do not consider this to be a comprehensive exploration of the current Freedom of Information regime, nor does it seek to address some of the key difficulties faced by organisations. For example, there is reference to time for compliance and potential amendment of that timeframe. There is no further discussion or exploration of a key element of the current Freedom of Information regime, while there is reference within the consultation to the time to comply (20 working days) being 'excessive'. This is a critical and significant statement but given no opportunity to explore. It does not allow for the views to be heard of organisations whose resources are already greatly pressured by the growing volume and complexity of FOI requests.

The approach taken to this consultation appears to be one-sided and does not allow for fair discussion of the key issues facing the Freedom of Information regime, both for the requesters and those receiving requests. There is no dispute that it is time for Freedom of Information legislation to be reviewed, over 20 years since its enactment, however, to do so requires in-depth discussion and thought allowing space for all stakeholders' views to be considered fully.

We endorse the Scottish Government review of FOI, and we will be responding to the ongoing Scottish Government consultation on access to information rights in Scotland. It is considered that this is the appropriate channel for these discussions to be had and to ensure no additional, excessive time and resource is required to respond to two consultations on the same matter.

Data Protection

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or ask for your response not to be published. I will not publish your signature or personal contact information.

Information on how I process your personal data is set out in my **privacy notice**, which can be found [here](#). Please confirm that you have read the privacy notice by ticking the box below.

- I confirm that I have read and understood the **privacy notice** (referred to above) to this consultation which explains how my personal data will be used.

If a respondent is under 12 years of age, I will need to contact you to ask your parent or guardian to confirm to us that they are happy for you to send us your views.

- Please tick this box if you are under 12 years of age.

I may also edit any part of your response which I think could identify a third party unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the FoISA. So if the information you send me is requested by third parties the Scottish Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, potentially even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FoI. Further information about Freedom of Information can be found at:

www.itspublicknowledge.info.