

Organisational Response (Organisation ID no 30)

Health and Social Care Alliance Scotland (the ALLIANCE)

Proposed Freedom of Information Reform (Scotland) Bill – Consultation Response

9 March 2023



We consent to the publication of our response.

The Health and Social Care Alliance Scotland (the ALLIANCE) welcomes the opportunity to respond to this consultation. The ALLIANCE support the principles of the Freedom of Information Scotland Act (FoISA) and are keen to engage with how the legislation might be adapted to reflect the experiences in the over 20 years since it entered into force.

The ALLIANCE agree that access to information is an important aspect of public service provision. Services that the public rely on to support them through their lives should be as transparent as possible, enabling individuals to understand how they operate, why specific decisions were taken, and how duties relating to areas such as human rights, equalities and the environment are being fulfilled. In general, the public should rightly expect to be able to access such information about public services, regardless of whether that service is provided by directly by the public sector or contracted out to the private and third sectors.

However, differences in nature, capacity and resource between these sectors must be recognised. For the third sector in particular, insecure funding, a stretched workforce, being volunteer led or reliant on volunteers, and the ongoing impacts of both the COVID-19 pandemic and cost of living crisis are already testing many organisations to, or even beyond, their limits. Adding significant additional statutory duties may be unmanageable. Careful consideration should be given as to how best to achieve the balance of widening and improving access to information, rather than simply lifting and laying the existing FoISA duties of the public sector onto the third sector.

In particular, the ALLIANCE:

- Support extending FoISA provisions to private sector organisations contracted to provide a public service, recognising the strong public interest in being able to determine whether for-profit provision is providing value for money.

- Partially support extending FoISA provisions to third sector organisations contracted to provide a public service, however noting:
 - The financial, staff and time pressures that formal designation may put upon organisations, especially smaller organisations.
 - A preference for ensuring contracting bodies retain ultimate responsibility for managing Fol requests, using already existing information supplemented by additional information provided by third sector organisations outwith the formal Fol process.
 - The need for clarity as to how provision of public service would be defined, recognising the distinction between general grant funding of organisations and specific provision of a public service.
 - The importance of protecting the independence of the third sector, understanding the necessity of open and frank discussion around policy development being able to be undertaken without risk of being misrepresented for political purposes.
- Are unsure as to the proposal to create a statutory position of Freedom of Information officer, noting both the likely compliance benefits of having a single individual named, but also the implications on resource and wellbeing of either necessitating that be a standalone post or integrating it with another role.
- Partially support the creation of a statutory duty to publish information, recognising the benefits of proactive publication, but also the resource implications on smaller organisations in particular.
- Partially support limiting the use of confidentiality clauses only to circumstances they are genuinely necessary.
- Partially support ensuring FoISA extends to cover aspects of procurement policy, but again noting possible resource implications on smaller organisations in particular.
- Believe that strong Fol laws are likely to have a net positive equalities impact, but that widening the scope of bodies designated may increase the risk of malicious and vexatious requests, particularly targeted at organisations working on equalities issues.
- Believe that strong Fol laws are likely to have a net positive impact on sustainability by ensuring greater accountability, but again noting possible resource implications for the third sector, where many organisations are already concerned about the sustainability of their operations.

Response

Question 5: Which of the following best expresses your view of the proposed Bill?
Please explain the reasons for your response.

Partially supportive.

The ALLIANCE recognise the importance of transparency and accountability in service delivery, and agree in principle that Freedom of Information should apply as broadly as possible across all public services. We believe many of the proposals to reform the FoISA are sound. However, as expanded upon in our responses to the relevant questions, we are concerned at the lack of clarity as to how the third sector would be impacted by the proposals, noting the long-standing concerns of the Scottish Council for Voluntary Organisations (SCVO) regarding extending Freedom of Information duties to the third sector.¹

Question 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? Please explain the reasons for your response.

Fully supportive.

As noted in the consultation document, there is currently an inconsistency between services directly provided by the public sector, which are fully covered by FoISA, and those provided by other sectors but funded from the public purse, which are not.

This inconsistency may mean members of the public accessing fundamentally the same service but through different routes, or in different locations, have differing rights of access to information about that service and how it is delivered. In some cases, individuals may not even be aware that there is a distinction between a public service delivered by the public sector and one delivered by the private sector, nor should they be expected to.

In general terms, private sector provision of services operates on a “for-profit” basis. Whilst that is not necessarily inconsistent with publicly funded provision or public services, it does mean there is particular need for transparency around how funding is being used, to reassure the public that it is being invested in services rather than being used for private gains.

There is therefore a strong public interest argument for designating under FoISA any private sector organisation which is receiving funding to deliver a public service. This would ensure the same degree of access to information as applies to services delivered through the public sector and assist the public and government in determining whether they are getting value for money.

Question 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? Please explain the reasons for your response.

Partially supportive.

As noted in the consultation document, there is currently an inconsistency between services directly provided by the public sector, which are fully covered by FoISA, and those provided by other sectors but funded from the public purse, which are not.

This inconsistency may mean members of the public accessing fundamentally the same service but through different routes, or in different locations, have differing rights of access to information about that service and how it is delivered. In some cases, individuals may not even be aware that there is a distinction between a public service delivered by the public sector and one delivered by the third sector, nor should they be expected to.

We therefore understand the rationale that FoISA should extend to cover third sector organisations which are delivering publicly funded services, with the aim of ensuring parity of access to information regardless of what sector is providing a service. However, this must be balanced against the often very limited resources, including staff, available to third sector organisations. This point was raised by a number of our members in response to our call for input to this consultation.

Particularly at a local level, many of the services commissioned from the third sector by the public sector are provided by small organisations, with a small staff team who are focused almost entirely on delivery of their service. It may not be possible or practical to put extensive duties through the FoISA on such organisations, which are likely to lack the administrative and financial capacity to respond to requests, or to train staff in how to do so.

We share the specific concern highlighted by SCVO in their response about the consultation document stating that “If a potential provider does not wish to be covered, they need not tender.” Although this was in the context of private providers of social care, it isn’t made clear whether the same sentiment is held relating to third sector organisations.

Especially for these local services, the expertise and connections they offer may simply be impossible to replicate through a larger, less local organisation. In these cases, given the choice between withdrawing an important and well-regarded service entirely or continuing to provide it but without being directly subject to FoISA, the public interest is likely to be best served by continuing to offer the service.

The consultation document suggests that the value of a contract could be used as the threshold to determine whether an organisation should be designated under FoISA. It also makes earlier reference to the highest income charities, as provided by OSCR. It is not entirely clear whether this earlier reference was merely in passing

or intended as a complementary, or alternative, means of determining the threshold for FoISA designation.

If choosing between these two measures, the ALLIANCE would consider the overall income of a third sector organisation, accounting for any ring-fenced grant funding, as more useful than the value of the contract. Whilst a small organisation is unlikely to receive a high value contract, a large organisation that is more capable of meeting the duties under FoISA may nonetheless be commissioned for lower value contracts, and it would seem to go against the spirit of Freedom of Information to exempt them from designation purely on the basis of contract value. Particularly given large organisations may be commissioned for multiple services, it is also likely to lead to greater operational complexity, and thus additional cost and confusion, for an organisation to have to manage duties under FoISA inconsistently across different contracts.

However, even in such cases, pressures on the sector are such that it should not simply be assumed larger organisations automatically have the capacity to take on the full responsibility under FoISA. The ALLIANCE agree with many of the points raised in SCVO's response to the concurrent FoISA consultations relating to the need for any extension to be proportionate, properly funded and appropriately tailored. We would further echo their suggestion that, wherever possible, contracting authorities should retain the ultimate responsibility for managing FoI requests relating to contracted public services.

Rather than formally designating the relevant third sector organisation, this would make use of existing expertise and capacity relating to FoISA, whilst reflecting the reality that significant data is already held centrally about the organisations that have been contracted. Where further information is necessary, strengthening partnership working such that the third sector organisation shares the information, and the contracting authority formally processes the FoI request, would help ensure access to information without undue burden.

Further, clarity on the exact definition of a public service under the scope of the FoISA would be useful. Many third sector organisations receive a large part of their funding through grants from the Scottish Government, but not all of their work relates to direct delivery of public services. Given the role that third sector organisations play in policy development and scrutiny, that funding is an essential component of a healthy democracy, so long as it is provided without favour and the independence of the third sector is maintained.

It is not clear whether the duties under FoISA in this proposed reform bill would apply to the day-to-day operations of grant funded third sector organisations. Whilst the third sector should uphold high standards of transparency, it is by definition not part of the government or public sector, nor should it be treated as such. The sector

should be able to operate without fear or favour, particularly with regards to policy development, which may include internal discussions that are frank, honest, and critical of governments, public bodies, or particular political parties.

An overly broad application of FoISA to the sector could have a chilling effect, whereby these discussions are avoided or policy development and scrutiny is hampered by a fear that they may be made public not as a matter of transparency, but instead as a means of scoring political points. The ALLIANCE would therefore welcome greater clarity on this point, and what balance the member foresees between ensuring transparency of and access to information, with the independence of the third sector.

Question 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? Please explain the reasons for your response.

Unsure.

As the consultation document itself notes, the creation of a Freedom of Information Officer would be consistent with the principles of other data and information related laws, in particular the requirement under General Data Protection Regulation (GDPR) for organisations to designate a Data Protection Officer. Having an individual within an organisation who is ultimately responsible for compliance with FoISA would help to provide both accountability and leadership as it relates to Freedom of Information.

Further clarity on the exact details of the Freedom of Information Officer would however be welcome, for example as to whether the role must not be held by the same individual who holds another regulatory role. Considering the third sector in particular, were FoISA to be extended, the need for an entirely additional role could put significant pressure on resources, whereas allowing the role to be jointly held with other positions could lead to undue burden being put on a single individual. Ensuring that there is adequate support for the role, for example via resources produced and maintained by the Scottish Information Commissioner, would be of particular aid to smaller organisations who find themselves designated under FoISA.

Question 9. Which of the following best expresses your view on creating a statutory duty to publish information? Please explain the reasons for your response.

Partially supportive.

Within bodies designated under FoISA, developing a process and culture of proactive publication is likely to have advantages both for the organisations in question, and for the wider public. For organisations, embedding publication within

existing workstreams is likely to be more efficient than later having to identify where information is stored and then publishing it later, and will limit the time spent formally processing and responding to FoI requests. Similarly, individuals would be less likely to need to submit a request in the first place, assuming appropriate signposting to find the necessary information quickly.

As with our responses to other questions, such a duty may prove significantly more burdensome on smaller than on larger organisations, and on the third sector rather than public bodies, as they may lack the administrative, financial and technical resources to meet requirements. Careful consideration should be given to what kinds of information this duty would apply to, and how it would be expected to be published.

Question 10. Which of the following best expresses your view on reducing exemptions under FoISA? Please explain the reasons for your response.

Fully supportive.

The ALLIANCE generally agrees with the examples given in the consultation document, and with the suggestion that exemptions under FoISA should be reviewed subject to a public interest test. Exemptions to bodies already designated under FoISA should only apply in circumstances where the public interest in disclosure does not justify the release of information.

Question 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? Please explain the reasons for your response.

Partially supportive.

Where information would be covered by FoISA for a service delivered by a public body, that same information should be covered for a publicly funded service provided by a private sector contractor. Confidentiality clauses should only apply in cases of genuine commercial sensitivity, and should not be used as a means of avoiding scrutiny or obscuring information.

Ensuring that there is clarity as to what is meant by “inappropriate” is essential, yet there is very limited indication of this within the consultation document. It’s very easy to say as a matter of principle that something inappropriate should not be done. However, assessments of what is and is not appropriate are likely to vary between individuals and organisations. Insofar as is possible, the circumstances where confidentiality clauses are appropriate should be clearly laid out.

Question 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? Please explain the reasons for your response.

Partially supportive.

In line with answers to previous questions, the same information that would be available under FoISA from a public body should equally be available from a private sector body contracted to provide a publicly funded service. Where this relates to procurement and award of contracts, and specifically the sustainable procurement duty, there is clear public interest in being able to access information which may evidence adherence to the relevant duties. However, we would again highlight the difficult resource position facing many third sector organisations, and the risks of creating an unmanageable burden if these provisions applied equally to the third sector.

Question 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? Please explain the reasons for your response.

Not sure.

In general terms, the ALLIANCE would agree that the costs of broadening the scope of FoISA are outweighed by the public interest benefit. However, as noted in responses to earlier questions, for small third sector organisations in particular which are providing publicly funded services, the regulatory costs may be unmanageable. Careful consideration should be given as to the thresholds at which third sector organisations may be designated under FoISA, and whether bringing third sector organisations under the scope of FoISA may create significant difficulties

Question 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.

Broadening the scope of the FoISA is likely to have a net positive impact on equalities, by making it easier to access information which may be used to help evidence existing inequalities in public service provision. Such information is in the public interest and can be used to help identify specific issues and develop solutions which reduce those inequalities.

However, it also carries the risk of malicious requests being made which seek to identify individuals belonging to particular protected characteristics, for example through informal staff networks, or which are intended to find non-existent proof of undue external influences on policy and decision-making. Whilst FoISA has safeguards against malicious and vexatious requests, which allow for the non-disclosure of information in these circumstances, broadening the scope of organisations designated under it would therefore increase the number of organisations who may receive such requests.

Whilst they would be under no obligation to release the information, resource would still be required to process and respond to these requests accordingly, potentially to the extent of having to defend refusals in court. Beyond this resource burden, this could cause significant distress for any individuals concerned.

In their response, SCVO also highlight the particular difficulties and misrepresentations that have recently affected organisations campaigning on equalities issues, in particular relating to LGBTQ+ people. Especially if designation was widely extended to the third sector, there is a risk of opening an additional avenue for malicious and misleading behaviours targeting such organisations.

Question 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?

Similarly, broadening the scope of FoISA is likely to have a net positive impact in these areas. Greater transparency within public services serves to enable more effective scrutiny of the work of governments and public services and improves accountability. However, the sustainability of the third sector is already far from assured, and the additional burden arising from an extension of FoISA to cover the third sector could have a long term negative impact on the sector.

Question 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)?

In general, there needs to be significantly more clarity on how, if third sector organisations were to be designated under FoISA, that would be expected to operate. As noted throughout this response, the capacity of the third sector is significantly more limited than that of the public sector, not least as the public sector now has decades of experience operating under FoISA.

For example, response timescales appropriate for the public sector are unlikely to be suitable for the third sector. As noted in the SCVO response, the third sector is more likely to have less staffing capacity overall, and a significantly higher rate of part-time working. In many cases, it simply may not be possible for a third sector organisation to respond within 20 working days, or to do so without significant disruption to other work.

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About the ALLIANCE

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for a range of health and social care organisations. We have a growing membership of over 3,000 national and local third sector organisations, associates in the statutory and private sectors, disabled people, people living with long term conditions and unpaid carers. Many NHS Boards, Health and Social Care Partnerships, Medical Practices, Third Sector Interfaces, Libraries and Access Panels are also members.

The ALLIANCE is a strategic partner of the Scottish Government and has close working relationships, several of which are underpinned by Memorandum of Understanding, with many national NHS Boards, academic institutions and key organisations spanning health, social care, housing and digital technology. Our vision is for a Scotland where people of all ages who are disabled or living with long term conditions, and unpaid carers, have a strong voice and enjoy their right to live well, as equal and active citizens, free from discrimination, with support and services that put them at the centre.

The ALLIANCE has three core aims; we seek to:

- Ensure people are at the centre, that their voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.
- Support transformational change, towards approaches that work with individual and community assets, helping people to stay well, supporting human rights, self management, co-production and independent living.

- Champion and support the third sector as a vital strategic and delivery partner and foster better cross-sector understanding and partnership.

Contact

[Redacted]

¹ SCVO, 'Freedom of Information extension of coverage' (December 2019), available at: <https://scvo.scot/p/33704/2019/12/04/freedom-of-information-extension-of-coverage>