

## Consultation Response – Richard Leonard MSP

### Individual response (ID no 19)

#### Freedom of Information Reform (Scotland) Bill

Proposer: Katy Clark MSP

#### 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:**

- 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.)

**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
- 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)

Name/organisation: Richard Leonard MSP

**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.)**

Contact details: Redacted

Note: All answers to the questions may be published (unless your response is “not for publication”).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

### **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.

It is clear that the Freedom of Information (Scotland) Act 2002 (FOISA) requires to be updated to address the changes to the landscape in the funding and delivery of public services. Over the last twenty one years the range of different vehicles for delivery of public services has increased and a number of new organisations have been created

specifically to deliver public services; the commissioning of private, voluntary, charitable, independent and other organisations to deliver services funded by public money has grown significantly. In addition the share of public money being given to these organisations for their work has increased. The principle underlying FoISA that people have a right to know about the decisions, funding and activities of public authorities should be extended so that people have an equal 'right to know' about organisations delivering public services. Transparency, accountability and scrutiny should follow the service not the provider as is currently the case.

I note that opinion polling in 2022 by the Scottish Information Commissioner found that over 80% of those surveyed said it's either 'very' or 'extremely' important that privately-run but publicly funded health and social care services are subject to FoI law.<sup>1</sup> Polling by the Commissioner in 2019 reported 80% of survey respondents agreed that private sector companies that work on contracts for public bodies should be subject to the same FoI laws as public bodies.<sup>2</sup> The Commissioner in his report 'Freedom of Information during and after the Covid-19 pandemic' recommended that "steps should be taken to address disparities in access to information between equivalent public services based on how they are owned or managed".<sup>3</sup> Therefore I believe the will of the public is for continuity in coverage under FoISA and that necessitates legal reform. The 2022 polling by the Commissioner found that how authorities spend money is seen as important by the largest proportion of people (87%), followed by information about decision-making (80%), service delivery (79%), performance (77%) and lastly contracts (71%).<sup>4</sup>

**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.

The current situation is inequitable – only those bodies designated as public authorities are subject to FoISA. However over the last twenty years many other bodies have been established or widened the scope of their services to provide services that would otherwise be delivered by public authorities. This has led to inequality in access to information for those who, for no other reason than the designation of their service

---

<sup>1</sup> [2022-Public-Awareness-Research-summary-of-results.pdf \(itspublicknowledge.info\)](https://www.itspublicknowledge.info/2022-Public-Awareness-Research-summary-of-results.pdf)

<sup>2</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx>

<sup>3</sup> [FOI During and After the Pandemic Special Report.pdf \(itspublicknowledge.info\)](https://www.itspublicknowledge.info/FoI%20During%20and%20After%20the%20Pandemic%20Special%20Report.pdf)

<sup>4</sup> [2022-Public-Awareness-Research-summary-of-results.pdf \(itspublicknowledge.info\)](https://www.itspublicknowledge.info/2022-Public-Awareness-Research-summary-of-results.pdf) pg 2

provider, receive services. For example a person in a care home directly provided by a local authority has enforceable FoI rights whilst a person in a privately run (but publicly funded) care home does not have those same rights. Indeed people will have either lost or gained FoI rights under as their service provider (but not the services itself) has changed as the service has moved from the public sector. In addition to addressing this inequality, the proposals establish an important principle that, irrespective of the designation of the provider it is the principle of public funding that determines whether an organisation is subject to FoI and not the designation of the organisation.

I appreciate many third/charitable/voluntary organisations carry out a range of functions funded by income derived from sources other than public bodies subject to FoI. I would consider that FoISA should apply to only those functions provided by the third/charitable/voluntary sector bodies for or on behalf of those public bodies (either through a contract won by public tender, a commissioned service or secured by other means). It is noted that current regulation, such as through OSCR, and promoted good practice such as on fundraising<sup>5</sup>, requires and encourages transparency to promote and enable accountability and scrutiny.

**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

As we increase equality of access to information through the extension of FoISA it is important that organisations are supported to meet its requirements. The creation of a new statutory officer with designated responsibility for ensuring compliance would be very helpful for organisations subject to FoISA. The creation of this responsibility should improve the current operation of FoISA, reducing the number of appeals to the Scottish Information Commissioner and support authorities to meet their obligations such as on pro-active publication. Many organisations have an internal audit function to ensure appropriate use of public finance and accurate accounting and a statutory officer could perform a similar function in terms of how it meets the requirements of FoISA. Building a strong reputation for compliance with FoISA builds public trust.

---

<sup>5</sup> [Chartered Institute of Fundraising - Scotland \(ciof.org.uk\)](http://ciof.org.uk)

**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.

I fully support the duty to publish information. Organisations subject to FoISA should put information 'held' in the public domain as a default and it should not be incumbent on members of the public to know what information may be available so they can request it. Maintaining an accurate 'disclosure log' can also help reduce the number of duplicate FoI requests as information would be accessible and publicly available. Furthermore contractors, agents, consultants and other third parties gathering, processing, managing and storing information on behalf of the public authority should already be aware of the designated bodies duties under FoISA so should be complying with the existing Model Publication Scheme.

**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.

It is my view that there should be as few exemptions as possible within FoISA and amendments to the Act should reduce these. This would help demonstrate that the Parliament's founding principles of 'openness, accountability, the sharing of power and equal opportunities' are reflected in the legislation the Parliament passes. Furthermore the use of confidentiality clauses (or non-disclosure agreements) in contracts between providers of goods and services and public authorities to prevent access to information should be reformed so that only information proven to be commercially sensitive is withheld.

**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.

The use of confidentiality clauses (or non-disclosure agreements) in contracts between providers of goods and services and public authorities to prevent access to information contradicts the purpose of FoISA. FoISA should be reformed to prevent designated bodies entering into such agreements and to strengthen duties and enforcement powers so that only information that is proven to be commercially sensitive is withheld. We can learn from the operation and practice in other jurisdictions in relation to this – specifically from the Irish Freedom of Information Act 2014.

**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

As it currently stands there is a difference based on the status of the contractor to a public authority on whether it is subject to FoISA and the Environmental Information Scotland Regulations. If the body contracted to provide the goods or services is another public authority it is – however other organisations are not.

We know that many commissioning bodies in the public sector face significant financial challenges and the monitoring and management of external contracts can be challenging. It is essential that contracts which should improve the “economic, social, and environmental wellbeing of the authority’s area.”are delivered and there is transparency and accountability on impact.

**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.

### **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.

The proposals are designed to address a transparency deficit. Currently people are discriminated against in respect of FoISA rights if they receive public services from a non-designated body. This is inequitable and raises human rights issues such as Articles 14 and 10 of the ECHR – the equal right to form an opinion by receiving and imparting information and ideas.

### **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?

The proposed purpose clause for FoISA makes clear that transparency boosts accountability and scrutiny and that enables informed civic engagement, access to justice and democratic participation. As the consultation points out the Environmental Information (Scotland) Regulations give effect to the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998). Article 1 states:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each party shall guarantee the rights of access to information, public

participation in decision-making, and access to justice on environmental matters in accordance with the provisions of this Convention.”

The clear intention is that there will be a general gain to the public by an individual request and that introducing a purpose clause to FoISA will send a clear message about rights, duties and impact which will change organisational culture and practice. I agree with the consultation that a new purpose clause could be drafted using the following texts:

- Amending the existing, introductory text to FoISA
- Article 1 of the Aarhus Convention<sup>6</sup>
- Adapting existing text from the EISRs on participation in decision-making
- The preamble to Tromsø Convention, the Council of Europe Convention on Access to Official Documents<sup>7</sup> (see section on Tromsø Convention below)
- The wording of Article 10 of the European Convention on Human Rights

## 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)?**

FoISA is 21 years old so inevitably there will be parts which are no longer fit for purpose and from practice it is clear that there needs to be legal reform to deliver stronger rights and enhanced enforcement on duties. Transparency boosts public trust and that is essential to the successful delivery of public services. I remain concerned about the delay in progressing the recommendations of the PAPLS Committee report of May 2020. The robust report recommending reform drew on evidence from 58 submissions and 5 oral evidence sessions in 2019. This engagement with the public, public sector, civil society and the private sector should not be ignored. In addition Scottish Information Commissioners, journalists and others who rely on FoI to do their jobs and improve transparency and the sustained campaigning from civil society in support of legal reform particularly the Campaign for Freedom of Information in Scotland needs to be acted upon. I also think we should promote FoI as part of a healthy functioning democracy, ie it is too much in the service of lobbyists, businesses and journalists not citizens

## Privacy Notice

I confirm I have read the privacy notice which can be found [here](#).

✓ 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.

## Thank You

---

<sup>6</sup> Known as The Aarhus Convention [cep43e.pdf \(unece.org\)](#)

<sup>7</sup> [TROMSØ CONVENTION \(coe.int\)](#) Ratified by the Council of Europe in December 2020 but the UK has neither signed nor ratified it.

## **31. How to Respond to This Consultation**

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

### **Format of responses**

If possible, please submit your response electronically – preferably in a MS Word document. Please keep formatting of this document to a minimum.

Please make clear whether you are responding as an individual (in a personal capacity) or on behalf of a group or organisation. If you are responding as an individual, you may wish to explain briefly what relevant expertise or experience you have. If you are responding on behalf of an organisation, you may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

Please include with your response contact details (e-mail if possible, or telephone or postal address) so we can contact you if there is any query about your response.

### **Where to send responses**

Responses prepared electronically should be sent by e-mail to:

[clarkkatyfoi@parliament.scot](mailto:clarkkatyfoi@parliament.scot)

Responses prepared in hard copy should be sent by post to:

Katy Clark MSP  
The Scottish  
Parliament Edinburgh  
EH99 1SP

### **Deadline for responses**

All responses should be received no later than **2<sup>nd</sup> February 2023**. Please let me know in advance of this deadline if you anticipate difficulties meeting it.