

Organisational Response (Organisation ID no 52)

Scottish Community Alliance Response to Consultation on proposed Freedom of Information Reform (Scotland) Bill

About the Scottish Community Alliance

The Scottish Community Alliance (SCA) is a coalition of community-based national networks and intermediaries, each representing a different aspect of Scotland's diverse community sector. Each network is very different in terms of their specific interests and areas of specialist knowledge, but we all share a commitment to the principles of community empowerment and subsidiarity.

I am content for this response to be attributed to me or my organisation: Scottish Community Alliance.

Scottish Community Alliance position

The Scottish Community Alliance welcomes the opportunity to respond to this consultation. We support the public policy aim of maintaining and strengthening people's access to information rights, and we have been a strong and consistent voice calling for greater transparency in this and other public policy areas.

The primary focus of our responses is with respect to proposals to extend the coverage of the Freedom of Information (Scotland) Act to bodies, including community and voluntary organisations, delivering services of a public nature and receiving public funding. We are not opposed in principle to the extension of FOISA. However, it is essential that any such extension must be proportionate and practical, and not cause harm to third sector organisations or those they serve.

The consultation document raises a number of concerns for the community and voluntary sector, notably:

- The apparent misunderstanding/misrepresentation of the role, nature and finances of the great majority of the voluntary sector;
- The lack of clarity as to the types of bodies that might be covered by any extension of FOISA;
- The apparent "take it or leave it attitude" to service providers;
- The lack of explanation as to why a blanket approach to extending FOISA is preferable to use of existing mechanisms;
- The lack of consideration of impact of additional proposals on the community/voluntary sector.

The role, nature and finances of the voluntary sector

We consider that the consultation document paints a misleading picture of Scottish charities. It highlights OSCR's list of the 300 highest income charities (many of which are already designated under FOISA) but does not acknowledge that these bodies, which make up little more than 1% of Scottish charities yet account for 76% of total income, are far from representative of the sector.

Some potential impacts of the proposals are mentioned but generally underplayed: e.g. "being designated under FOISA may cause operational problems for some small organisations that receive small amounts of money to deliver services on a shoestring or through volunteers". There is no recognition of either the scale of the impacts or the extent to which the charity sector predominantly comprises "small organisations that receive small amounts of money to deliver services on a shoestring or through volunteers".

The Scottish Charity Regulator (OSCR) already requires registered charities to be transparent and accountable. The Scottish Government is currently consulting on amendments to the Charities and

Trustee Investment (Scotland) Act 2005 to increase transparency further and SCA is supportive of these proposals.

The consultation document suggests that the OSCR report ‘Scottish Charity and Public Surveys 2020’ contains key findings which demonstrate why coverage under FOISA has advantages for public accountability and building public trust. However, we note that whilst this report demonstrates the importance of openness and accountability it makes no mention of FOISA, and the suggested measures to increase transparency are included in the Scottish Government proposals noted above.

The consultation document also claims that “Designating those aspects of third sector organisations which deliver publicly funded services is consistent with the regulatory environment and makes operational sense.” We believe the opposite to be true in practice: partial designation is likely to be an operational nightmare for third sector organisations.

The income of community bodies is often a mix of public and non-public streams, which cannot be simply split into specific and distinct services. Funding is typically partial, short-term, and requires a mix of different streams for individual projects and staffing, all of which would make it challenging in terms of identifying what is subject to FOI and potentially increase reporting beyond public funds.

Definition of proposed scope

The consultation document states “I am consulting on a draft proposal for a bill to improve existing freedom of information legislation including to ... extend FOISA to those bodies delivering public services, services of a public nature and publicly funded services”. However, nowhere in the document are “public services”, “services of a public nature” or “publicly funded services” defined.

The document provides specific examples: care homes run by the private sector and providers of health and social care services under the proposed National Care Service, and quotes evidence of support for extending FOISA, such as the STUC report’s recommendations that “Freedom of Information legislation should be extended to all care providers in receipt of public funding”¹ and the results of public surveys: “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.”²

Whilst SCA recognises the strength of evidence in favour of FOISA extension with respect to care provision, the consultation proposals are so broadly and vaguely worded that they could be interpreted to cover almost all voluntary sector organisations receiving any public funds in any form. Indeed, as the consultation document characterises them: “The types of organisations to be covered usually have charitable status and seek funds from the public and other grant making bodies.”

Before supporting any proposals to extend FOISA to the community and voluntary sector, SCA requires clarification as to:

- The areas of provision to which any extension will apply;
- Whether this extension covers all arrangements, or only those where a community / voluntary body is tendering against the private sector;
- The type of funding arrangement(s) covered: whether this is confined to services delivered through service level agreements and long term contracts or if it includes all grant funding;
- Whether funding from the National Lottery is considered “public funding” in this context (The National Lottery Community Fund is a non-departmental public body³).

Attitude to service providers

¹ <https://stuc.org.uk/media-centre/news/1659/scotland-s-social-care-rip-off-why-scotland-can-t-afford-privatised-social-care>

² <https://www.itspublicknowledge.info/sites/default/files/2022-05/2022-Public-Awareness-Research-summary-of-results.pdf>

³ <https://www.tnlcommunityfund.org.uk/about>

The consultation document suggests that “If a potential provider does not wish to be covered, they need not tender.” Often, however, community bodies are delivering services in order to maintain or enhance public provision and there is no feasible alternative public or private sector provider, including a considerable number of community-based organisations receive public (and other) funding to deliver a wide range of health and well-being initiatives:

- Men’s Sheds providing community spaces for people to connect, converse and create, tackling mental health challenges arising from loneliness and isolation;
- Community woodland groups creating new recreation infrastructure, delivering health walks, Green Gym and Branching Out⁴ projects;
- Local Development Trusts taking on responsibility for service provision, from public toilets to swimming pools, from which Local Authorities have withdrawn.

Many community organisations are volunteer-led and run, with very limited resources: extending FOISA coverage to such bodies would simply be adding further obstacles and would almost certainly lead to reduced public provision. It also runs contrary to Scottish Government policy on Community Empowerment which is predicated on supporting communities to do things for themselves and take a more proactive role in both the planning and delivery of services.

Reform of section 5 vs blanket approach

We recognise that there are legitimate concerns around the impact on access to information rights of increased outsourcing of public services, however SCA considers that whilst further extension of FOISA to e.g. private care homes or services provided under PFI/PPP/NPD contract arrangements may be desirable, this should be delivered using the existing Section 5 powers.

As the consultation document notes, Section 5(2)(b) of FOISA grants Scottish Ministers the power (following consultation) to designate persons or bodies that:

- i. appear to the Scottish Ministers to exercise functions of a public nature; or
- ii. provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority.

Since 2013 these powers have been used to progressively extend coverage of FOISA to e.g. arms-length organisations delivering culture and leisure services on behalf of local authorities, private prisons, and registered social landlords, and there are now over 10,000 bodies designated.

SCA’s view is that if additional public service providers are to be brought within the scope of FOISA then this mechanism is the means by which it should happen. If there are concerns that this section of the legislation is not working as it should (e.g. for private sector care home providers) then the first step should be to reform Section 5, rather than taking the blanket approach apparently favoured by the consultation document.

Other proposals

The consultation document contains other proposals of concern, including a new statutory role of Freedom of Information Officer, which would be a very significant burden for small community bodies, and providing for anonymous requests.

The consultation document claims that “requesting information has become overly bureaucratic by having to provide a name” and states that “the proposal is to amend section 8 to balance rights with duties”. One of the areas of greatest concern for community sector organisations is the potential for vexatious requests. We consider that any proposal to remove the requirement for applicants to identify themselves would be a charter for abuse.

Additionally, SCA notes that bringing voluntary organisations within scope of FOISA would necessitate meeting a range of existing demands, such as the Section 23 requirement to adopt and

⁴ Branching Out is an outdoor therapeutic programme for adults who use mental health services.

maintain a publication scheme. These would bring additional burdens for community sector bodies, and would require significant support and a rewriting of the existing guidance, which is designed for large, public sector bodies.

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.