

Consultation on a proposed Freedom of Information Reform (Scotland) Bill

Organisational response (Organisation ID no 56)

Questions

You are required to complete questions 1-5. Please complete the remaining parts of the consultation that are of interest. You do not need to answer all the questions.

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: Scottish Public Services Ombudsman

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.)

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Note: All answers to the questions may be published (unless your response is “not for publication”).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

We are broadly supportive of the aims of the proposed bill. In particular, the need for reform of the FOI regime and the extension of the regime into areas where public services are being delivered privately or in the third sector. More detail is needed in some areas, for example the FOI officer role, the Code of Practice provisions and the specific exemptions that are being removed or changed.

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. *See page 13-17 for reference.*

It seems reasonable that if public funding is being used and the service is public that the FOI regime should apply so that there is transparency and accountability for the use of public money.

While we are fully supportive in principle, we suggest that there needs to be an assessment of the resource impact, particularly on charitable and third-sector

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service providers, and how that will be met. This would need to consider both the duty to respond, and the duty to publish information.

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. *See page 16 for reference.*

See above

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

See page 21 for reference.

The DPO post has not, in our experience, had the impact that was envisaged by the GDPR legislation. Other aspects of that legislation, such as the need for impact assessments, has been more impactful. Organisations who could resource this post internally often added this onto the obligations of existing officers. We opted for an external post, and while we have seen some benefit, it has occasionally confused the public who were unsure who to contact and we have had to work hard to ensure that the DPO understood our use of information. We would suggest more thought should be given to what a similar post for FOI would achieve specifically for the FOI regime before replicating a model that puts a financial burden on organisations when other options may meet those aims more effectively

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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.

See page 21 for reference.

We support the aim of this provision but would like to see more detail. The principle behind model publication schemes remains integral to the duty to proactively publish information, the advantage of it being that it enables flexibility for organisations in the specific information and documents it makes available. It is unclear from the current detail how a duty to publish will be articulated, as it potentially creates additional burdens on public bodies to produce recordable information that it might not currently have an operational or statutory need to produce. A code of practice, would seem a reasonable approach, as it could set out the duty in a way that maintains flexibility. What is also not clear, is how compliance with the duty will be monitored and enforced.

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.

See page 26 for reference.

The paper doesn't provide individual arguments in support of removing or changing existing exclusions but asks for comments on which ones are not needed. Before legislation is changed, we would expect there to be more consultation on this, supported by evidence about how exemptions are used and which ones are thought to be unhelpful or unsupportive of openness and transparency. Making all exemptions subject to a public interest test, would in practice mean there are no absolute exemptions. What is unclear is how this would interact with other legislation that imposes statutory restrictions in relation to disclosure of information.

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Section 26 of the Act ensures that legal provisions preventing disclosure are not undermined by the FOI legislation. Our Act, the SPSO Act 2002, includes statutory provisions against disclosure to protect individuals and our investigations.. In passing legislation such as the SPSO Act, Parliament has considered the public interest and it is not clear how an additional public interest test could be applied.

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.

See page 26 for reference.

It is unclear what is meant by inappropriate or the circumstances in which that might be. For example, if it were to prevent additional restrictions on contractors that would enable information that would otherwise be obtainable from a public body, then we would support this in principle.

We currently employ a number of contractors who are required to maintain confidentiality because of duties under data protection legislation in relation to the processing of personal data, and restrictions in SPSO legislation. We ensure contractors, often commenting on very sensitive information, are subject to the same restrictions as we are under. We do not think these are the type of contractual clauses that the proposed bill is keen to displace but it is important that contractual arrangements reflect the complexity of access to information legislation and other statutory provisions. We would need to see more detail to be reassured that contractors with access to personal data or data protected by statute can still be subject to appropriate contractual restrictions. It is also unclear from the detail provided, how this would apply to commercially sensitive information held by contractors.

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?

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

See page 31 for reference.

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.

Without the detail that would be available in a bill, it is difficult to assess, particularly in relation to additional duties to publish and the impact on charities and third sector.

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 important that those accessing services or seeking to find information can do so easily and accessibly. It is not clear what the requirement will be for public bodies to provide specific assistance. A code of practice could include reference to the need to ensure information is accessible.

Sustainability

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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?

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)?

Thank You

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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.