



**Draft Bill**  
**Freedom of Information (Scotland ) (No 2) Bill**

**Policy Memorandum**

**1. Context**

The draft Freedom of Information (Scotland) (No2) Bill replicates the Scottish Government's approach in 2020, to amending existing legislation to manage Coronavirus.<sup>1</sup> The Bill reforms and updates the Freedom of Information (Scotland) Act 2002<sup>2</sup> (FoISA). It does not seek to replicate duties elsewhere in law.

The draft Bill begins the process of delivering the conclusions of the Public Audit and Post Legislative Scrutiny Committee (PAPLS) Inquiry Report published in May 2020. The cross party membership of the Committee concluded '... there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication.'<sup>3</sup> The Campaign for Freedom of Information in Scotland (CFoIS) has taken the initiative in the absence of Scottish Government led legislation despite the Committee's recommendation to 'consult on the detail of the proposed changes before bringing forward the necessary legislation.'<sup>4</sup>

FoISA is overdue for an overhaul. In January 2020, CFoIS published a legislative overview report which concluded that over half of FoISA's provisions needed to be amended and addressed.<sup>5</sup> FoISA is 20 years old and covers information processing and public service delivery which have changed radically and continue to do so. The law on rights and duties needs to keep up with everyday operations so a reform Bill is urgently needed to update the law, address legal loopholes and introduce duties to prohibit practices which undermine legal rights and improve implementation.

FoISA covers devolved organisations and business and the UK Freedom of Information Act 2000 applies in Scotland on reserved matters and is enforced by the UK Information Commissioner.

**2. Process**

The draft is now subject to a three month consultation process so that a Bill can be introduced in 2022 which is 20 years after FoISA was passed. CFoIS looks forward to the participation of MSPs, Ministers, civil society, trade unions and designated bodies in the process. This draft Bill is designed to commence an informed dialogue on the detail of what should be reformed in FoISA and move the conversation away from **IF** it should be reformed. The draft Bill is issued for a three month consultation,

<sup>1</sup> [Second Coronavirus \(Scotland\) Bill - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>2</sup> The Act is available at <http://www.legislation.gov.uk/asp/2002/13/contents>

<sup>3</sup> At [Post-legislative Scrutiny : Freedom of Information \(Scotland\) Act 2002 - Parliamentary Business : Scottish Parliament](#) and at Para 5 at [PAPLS052020R2.pdf](#)

<sup>4</sup> Ibid

<sup>5</sup> [Reform-FoISA-21st-Jan-2020.pdf \(cfois.scot\)](#)

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so responses are invited by 24<sup>th</sup> April 2022 – which is exactly 20 years since FoISA was passed by the Scottish Parliament. For the detail go to [www.cfois.scot](http://www.cfois.scot)

CFoIS seeks a cross party alliance on legal reform as we all benefit from a law which delivers openness, transparency, accountability and empowerment. In drafting the Bill, CFoIS has chosen to use the word ‘repeal’ instead of ‘deleting’ text to promote reform of the statute law in respect of those provisions which are no longer of practical utility.<sup>6</sup>

The Policy Memorandum should be read alongside the

- Explanatory Notes
- Financial Memorandum
- Statement on Legislative Competence

A useful list of abbreviations is included on page 27.

### 3. Evidence and Reports

Evidence justifying reform of the Freedom of Information (Scotland) Act 2002 (FoISA) is extensive and longstanding and the reports which have informed this draft Bill include:

- Independent public opinion polling in 2017, 2018 and 2019.<sup>7</sup>
- The Scottish Parliament’s Public Audit and Post Legislative Scrutiny (PAPLS) Committee report, of May 2020, which received and heard evidence from civil society, the private sector, MSPs, public authorities and Minister for Parliamentary Business.<sup>8</sup>
- The ‘Model Publication Scheme Monitoring Report’ of 2017 published by the Scottish Information Commissioner (SIC) on Sections 23 and 24 of FoISA<sup>9</sup>. In evaluating compliance, researchers found that 91% provided one or more types of information relating to decision making (minutes of meetings, agendas, strategies and plans) online, only 54% provided all three.<sup>10</sup>
- ‘FOI 10 years on: Are the right organisations covered?’ published by the SIC, 2015.
- ‘Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector’, published in 2010, the University of Strathclyde’s second and final set of findings from its research into FOI use by the voluntary sector in Scotland.<sup>11</sup>
- ‘Celebrating 15 years of Scotland’s First Freedom of Information Act’ published by CFoIS in January 2020.<sup>12</sup>
- Reports and submissions from the Campaign for Freedom of Information in Scotland (CFoIS) in 2016, 2017, 2018, 2019, 2020 and 2021.<sup>13</sup>

<sup>6</sup> [Statute Law \(Repeals\) Act 2013 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>7</sup> [Public Awareness Research 2019 \(itspublicknowledge.info\)](http://itspublicknowledge.info) and [Young people's awareness of FOI rights is "significantly lower" \(itspublicknowledge.info\)](http://itspublicknowledge.info) and [Public Awareness Research 2017 \(itspublicknowledge.info\)](http://itspublicknowledge.info)

<sup>8</sup> [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 \(azureedge.net\)](http://azureedge.net)

<sup>9</sup> [Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>10</sup> [Model Publication Scheme Monitoring Report 2017 \(itspublicknowledge.info\)](http://itspublicknowledge.info)

<sup>11</sup> [Civil Society Research Project \(itspublicknowledge.info\)](http://itspublicknowledge.info)

<sup>12</sup> [Reform-FoISA-21st-Jan-2020.pdf \(cfois.scot\)](http://cfois.scot)

<sup>13</sup> [Publications – CFoIS](http://cfois.scot)

### 4. Support for Legal Reform

The case for reform of FoISA has been made but the problem is the pace and the detail. The post legislative scrutiny of FoISA was prompted by a unanimous motion of the Scottish Parliament on 21<sup>st</sup> June 2017.<sup>14</sup> Launched in 2019, the Public Audit and Post Legislative Scrutiny Committee (PAPLS) inquiry resulted in 58 written submission along with a variety of supplementary evidence in response to the five oral evidence sessions that ran from September to December 2019.<sup>12</sup>

Submissions were made by designated public authorities, as well as rights holders. It is important to remember that the submissions were about FoISA practice across 10,000 designated public bodies rather than being about just the Government. The submissions which provided practical insight into the exercise of the Section 1 right to make a recordable request have been invaluable to drafting amendments to FoISA. CFoIS looks forward to the recommendations made by the Public Audit and Post Legislative Scrutiny Committee, which we hope will urge primary legislation quickly and prompt delivery of secondary legislation which may be more appropriate in some areas.

Those supporting reform included the Scottish Information Commissioner, Professor Kevin Dunion of Dundee University and elected politicians including at a UK level; from civil society organisations including the Give Them Time Campaign, Scottish Youth Parliament and CFoIS; trade unions such as Unite, the National Union of Journalists and UNISON Scotland.<sup>15</sup> The Committee agreed a report in March 2020, delayed publication until May, and concluded there is a clear need to improve the legislation.

In correspondence with the Committee, of 25<sup>th</sup> November 2020 and 25<sup>th</sup> February 2021, the Scottish Government agreed there should be a public consultation exercise<sup>16</sup>, but noted on 25<sup>th</sup> February, that it “takes no view at the present time on whether future primary legislation will be required to improve the current information rights regime. However, we are happy to confirm that we agree that a consultation on legislative change should take place early in the new session of the Parliament, taking the recommendations of the Committee’s report as its starting point. Whether this exercise ultimately leads to new primary legislation will depend in part on the outcomes of the consultation exercise, as well as on the views of the new Parliament.” At the annual Holyrood FoI Conference in November 2021, the Minister for Parliamentary Business announced that there would be no consultation until 2022 and the focus will be on finding out if reform is needed. The momentum for FoISA’s reform outside of Government remains strong and in the absence of a Government led consultation, this draft Bill is designed to speed up the process by encouraging informed debate and parliamentary action.

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<sup>14</sup> Available at Scottish Parliament Official Report

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11021&i=100720> <sup>12</sup>

For more information go to the Public Audit and Post Legislative Scrutiny Committee at <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111249.aspx>

<sup>15</sup> [The Freedom of Information \(Scotland\) Act 2002 Written submissions : Scottish Parliament](#)

<sup>16</sup> Correspondence between the Scottish Government and the PAPLS Committee [Minister for Parliamentary Business dot](#)

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There is global interest in developing access to information rights which are robust and provide transparency and accountability. CfOIS benefits from being part of networks of experts which offer inspiration on how Scotland can do better.<sup>17</sup>

### **5. Purpose of Statutory Rights and Duties**

FoISA has met the positive aim of providing people and organisations with a free, enforceable right to access information held by public authorities. Opening up the decision-making process, knowing who and what information informs decisions and how our money is spent are fundamental to ensuring a fair and equal society. Recovering from a global pandemic creates particular pressures which makes the right to enforce access information rights more precious and critical. In tandem, the right must align with how our democratic institutions operate along with public services, services of a public nature and investment of public money in bodies. A reformed and reinvigorated law must be accompanied by practice and culture which promotes transparency and accountability in Scotland.

The Scottish Parliament was established to be ‘open, accessible and accountable’. From practice, it is established that a purpose clause is important to defining how FoISA should operate as well as provide a structure to use the section 3 and 5 powers to ensure all those bodies which should be covered are, that the public’s right to access information remains strong, that transparency and accountability empower people and enable public participation in informed decision making. It is noted that the ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’, adopted in Aarhus, Denmark on 25 June 1998, known as ‘the Aarhus Convention’, states in Article 1:

“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 the process improves public participation and access to justice. These principles should also be reflected in and listed as intended outcomes of FoISA.

Learning from global practice is essential to ensure the legislation is fit for purpose in a modern democracy. For example, the Deputy First Minister visited New Zealand as the Bill was developed. Civil servants as well as politicians sought to learn from countries which already operated FoI laws. This Bill continues that tradition and draws on text from the Council of Europe’s Tromsø Convention on access to official documents as well as Aarhus and the regional and international human rights law.

### **6. Public and Private Service Delivery**

When FoISA was implemented on 1<sup>st</sup> January 2005, the generous lead in time enabled designated organisation to train, prepare and establish the infrastructure to

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<sup>17</sup> [The Right to Know Declaration 14 12 2021 .docx - Google Docs](#)

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deal with access to information requests ‘promptly’ and no later than 20 working days. Over 10,000 organisations have been designated with the biggest category being individual GP practices as most are run as independent businesses and provide services for NHS boards. Instead of the Health Board being ‘designated’ under FoISA it is the named private company contracted to deliver a public service as ‘NHS boards specify what healthcare services they need and then fund the GPs to do this work through an arrangement called the General Medical Services contract.’<sup>18</sup>

A confused and inconsistent approach to designation has developed under FoISA despite the Section 5 power which has the purpose of providing consistency by updating categories and bodies designated. The onus is on Scottish Ministers to initiate the process. Currently, in too many cases, there is a loss of the enforceable FoI rights due to diversification of publicly funded service providers. This was identified as a problem in the SIC’s report of 2015 “FOI 10 years on: Are the right organisations covered?”.<sup>19</sup> It was also raised by Audit Scotland in its written submission to the PAPLS inquiry.<sup>20</sup>

The SIC’s 2015 report warned that immediate steps must be taken to protect FOI rights from the damage caused by the outsourcing of important public services. Little progress has been made. For example, the 2019 consultation on extending FoISA to care homes run by the private sector, using the existing Section 5 power, has not been progressed despite the urgency of the situation as exposed by the high level of deaths in Scottish care homes during the pandemic<sup>21</sup>.

Scotland will soon set up a National Care Service and it is understood that providers will be from public, Third and private sectors. Therefore addressing designation of all providers of social care is a matter to be addressed now to ensure there are consistent standards of transparency and accountability regardless of who delivers the service.<sup>22</sup> If a potential provider does not wish to be covered, they need not tender. It is useful to note SIC polling in 2019 reported that 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>23</sup>

Another problem caused by FoISA failing to keep pace with the diversification in the delivery of public services is the growing inconsistency with the Environmental Information (Scotland) Regulations (EIRs) which can apply to private services delivering a public function. For example, the SIC has found that Abellio ScotRail Ltd (ASL) is a Scottish public authority under the EISRs as Scottish Ministers can exert decisive influence on the entity’s action during the contract.<sup>24</sup>

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<sup>18</sup> [General Medical Services contract in Scotland: a short guide \(audit-scotland.gov.uk\)](#) pub. by Audit Scotland 2019

<sup>19</sup> [Special Reports \(itspublicknowledge.info\)](#)

<sup>20</sup> [https://archive2021.parliament.scot/S5\\_Public\\_Audit/General%20Documents/50\\_Audit\\_Scotland.pdf](https://archive2021.parliament.scot/S5_Public_Audit/General%20Documents/50_Audit_Scotland.pdf)

<sup>21</sup> [Coronavirus \(COVID-19\): adult care homes - additional data - gov.scot \(www.gov.scot\)](#)

<sup>22</sup> Our submission appears at [CFoIS – The Campaign for Freedom of Information in Scotland](#)  
<sup>23</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx>

<sup>24</sup> Decision 044/2021 [Decision 044/2021 \(itspublicknowledge.info\)](#)

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The PAPLS Committee concluded “that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation. The Committee notes that the Scottish Government’s consultation on the extension of FOISA invites views on whether to include “organisations providing services on behalf of the public sector” not already subject to the Act. The Committee agrees that, in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.”<sup>25</sup>

This view is consistent with the UN Human Rights Committee’s General Comment 34 which defines ‘public bodies’ and states that ‘The designation of such bodies may also include other entities when such entities are carrying out public functions’. <sup>26</sup>

### **7. Accountability of the Third Sector**

Designating those aspects of Third Sector organisations which deliver publicly funded services, is consistent with the regulatory environment and it makes operational sense. The types of organisations to be covered usually have charitable status and seek funds from the public and other grant making bodies. Being transparent and accountable is shown to build public trust and make voluntary donations more likely. Also, the Scottish Charity Regulator (OSCR) requires registered charities to be transparent and accountable.

OSCR’s commissioned report ‘Scottish Charity and Public Surveys 2020’, contains key findings which demonstrate why the proposed amendments in the Bill have advantages for public accountability and building public trust in the designated organisation including:

- Public trust has increased to an average score of 7.02 out of 10 in 2020.
- The importance of a charity’s cause was the most common reason for choosing to support a charity, 56% of those who donate, followed by trustworthiness at 44%.
- 58% of the public said knowing how much of a donation goes to the cause and 55% said seeing evidence of what the charity has achieved would make them feel a charity was trustworthy.
- only 1 in 6 of charities surveyed view being transparent and accountable as mainly a charity’s responsibility, 16%.
- Being open and accountable demonstrates trustworthiness. It is also a crucial aspect of charity governance and plays an important role when seeking funding from funders and the public.

Civil society and Third Sector organisations also have a role in accessing information so they can serve the public and deliver on their objectives. Protecting civic space, enhancing participation, funding and encouraging activity by civil society is an ongoing priority for the UN which acknowledges the core role of accessing

<sup>25</sup> Paras 7 and 8 [PAPLS052020R2.pdf](#)

<sup>26</sup> ‘Article 19: Freedoms of Opinion and Expression’, para 7 and 18 at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

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information:

‘Civic space is the environment that enables civil society to play a role in the political, economic and social life of our societies. In particular, civic space allows individuals and groups to contribute to policy-making that affects their lives, including by accessing information, engaging in dialogue, expressing dissent or disagreement, and joining together to express their views.’<sup>27</sup>

An organisation’s designation under FoISA should be regarded as an asset rather than a liability.

### 8. Power to designate

The PAPLS Committee report states:

“The Committee is concerned at the slow pace by which organisations have been designated under section 5 of the Act. Witnesses commented that even where consultation has taken place, there has been considerable delay before a designation has been made. This suggests that the current legislation is insufficiently nimble to keep pace with the changing nature of the public sector landscape. As such, the Committee considers that changes need to be made to FOISA to address this.” (para 9)

It is anticipated that the broader and more agile definition of bodies proposed for designation in Section 3 of the Bill will reduce the need for section 5 orders in future years. FoISA already places a duty on Ministers to report on delivery of the Section 5 duty every two years, beginning in October 2015, and updates will continue to be provided.

There is an imbalance in the consultation process as, thus far, Ministers have appeared to place a greater importance on the views of the bodies proposed for designation rather than those of the public, civil society and journalists. This approach is out of step with jurisprudence of the European Court of Human Rights (ECtHR) so requires to be reformed. The ECtHR has highlighted the role of access to information laws in enabling people to form an opinion and have highlighted the importance of journalists, bloggers and civil society organisations in obtaining information in the public interest which they share widely. (see section 14 below)

The Bill’s proposed reform is in step with public opinion. Independent polling for the Scottish Information Commissioner in 2019 reported that when asked, 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>28</sup> However no action has so far been taken on the latest Scottish Government consultation, of 2019 to extend designation such as to private care homes. In October 2021, the Scottish Government updated the Scottish Parliament on its failure to use the Section 5 power between 2019 and 2021 but advised that it “intends to bring forward a policy paper in the near future, setting out the Scottish Ministers’ broad approach to the use of their section 5 power over the coming years, drawing on the evidence gathered during our 2019 consultation.” CFoIS believes the proposed amendment to the Section 3 power will help deliver the Scottish Government’s goal to ‘ensure that

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<sup>27</sup> [OHCHR | ProtectingCivicSpace](#)

<sup>28</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx>

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coverage is robust and reflects changing patterns of public service delivery.<sup>29</sup>

It is useful to note that 'Registered Social Landlords and FOI: One Year On', a report from the SIC, found that 97% of responding organisations were confident in their ability to respond effectively to FOI requests, 84% of requests for information held by organisations resulted in some or all of the requested and 81% were publishing more information due to FOI. FOI was extended to Scottish RSLs and their subsidiaries in November 2019 so they are able to meet a need for information.<sup>30</sup>

### 9. Publicly Owned Companies

Under Section 6 of FoISA, publicly owned companies are automatically covered. However research published by CFoIS has demonstrated that there is a gap in the recorded number of publicly owned companies and those known to the Scottish Information Commissioner. Our briefing of 2020 indicated that as many as 99 are unknown to the SIC<sup>31</sup> and we have insufficient information to reason why. Therefore, a new offence of failing to be designated is introduced.

### 10. Role of Freedom of Information Officer (FIO)

Under Section 1 (2) of the Public Records (Scotland) Act, an authority's records management plan must "identify the individual who is responsible for management of the authority's public records, and if different, the individual who is responsible for ensuring compliance with the plan". Designating a person is an approach also adopted under the UK's Data Protection Act and the EU's General Data protection Regulation (GDPR). The GDPR requires the appointment of a data protection officer (DPO) in public authorities or body, or if it carries out certain types of processing activities. Through the Data Protection Act 2018 (DPA), the GDPR is given further effect and also includes the role of Data 'Controller'<sup>32</sup>. This important line of accountability and independent scrutiny is a model for consistent compliance and accountability. Including it in the Bill marks an acknowledgement of the importance of FoISA within organisations and the need to manage risk in terms of legal compliance and public reputation.

### 11. New Technology

Private communication channels used by Government Ministers, public sector officials and those in governance and elected roles in designated organisations, including the use of WhatsApp messages, are already covered by FoISA. FoISA also covers online meeting software whose use soared during the pandemic. However ensuring that information requests are answered fully, including the 'held' information on personal devices, such as computers and phones, is a recognised problem or practice and perception. This is a UK wide problem.

The UK Information Commissioner's Office (ICO) announced in July [an investigation into the use of private correspondence at the Department of Health and Social Care](#).

<sup>29</sup> 'Freedom of Information (Scotland) Act 2002: report on exercise of section 5 power' pub. 29<sup>th</sup> October 2021, Paras 23 and 28 [Freedom of Information \(Scotland\) Act 2002: report on exercise of section 5 power - gov.scot \(www.gov.scot\)](#)

<sup>30</sup> [Registered Social Landlords 'responding well' to FOI \(itspublicknowledge.info\)](#)

<sup>31</sup> [Briefing-on-Public-Company-Case-Final.pdf \(cfois.scot\)](#)

<sup>32</sup> See section 6 at <http://www.legislation.gov.uk/ukpga/2018/12/section/6/enacted>



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The ICO also clarified its investigation into private communication channels used at DHSC would include the use of WhatsApp messages and there are worries that information in private email accounts or messaging services is forgotten, overlooked, autodeleted or otherwise not available. The ICO is concerned as “This frustrates the freedom of information process, and puts at risk the preservation of official records of decision making. I also worry that emails containing personal detail are not properly secured in people’s personal email accounts.”<sup>33</sup>

The reform of FoISA is an opportunity to address the issue through enforcement.

### **12. Open Government Partnership OGP**

CFoIS is concerned that legal rights will be undermined by voluntary ‘Open Government Partnership Initiative’ (OGP)<sup>34</sup>. For example, the third OGP National Action Plan is currently being developed which includes ‘health and social care’ as one of five proposed areas of work. Measures to promote ‘openness’ are welcome. However, if put into practice, it cannot replace the stronger legal framework on enforceable rights and duties which FoISA provides and which replaced an existing voluntary regime.

The 2001 ‘Explanatory Notes’ which accompanied the Freedom of Information (Scotland) Bill made the case for a statutory and enforceable right and explained that: ‘The Code of Practice on Access to Scottish Executive Information is a non-statutory scheme which requires the Scottish Executive and its associated agencies to make certain information available to the public and to release information in response to specific requests. The Bill creates a statutory right of access and provides for a more extensive scheme for making information publicly available, covering a much wider range of public authorities ...’.<sup>35</sup> The inadequacy and inconsistencies provided by the voluntary ‘Open Government Partnership’ (OGP) framework being promoted by the Scottish Government is similarly inadequate and no replacement for statutory rights and enforceable duties to access information.

The governments of Estonia, Korea, Morocco, Nigeria and the United Kingdom have been elected to serve a three-year term on the OGP Steering Committee, beginning on October 1, 2021.<sup>36</sup> The political enthusiasm for the OGP regime provides an opportunity to explicitly link OGP with the statutory duty to pro-actively disclose information under Sections 23 and 24 of FoISA<sup>37</sup>. Making information available which people want and providing a disclosure log of answers to information requests may reduce the number of individual requests for information. This part of access to information laws deserves better attention by designated bodies so there is a strategic and integrated approach to comprehensive proactive disclosure.

### **13. Sustainable Development Goals (SDGS)**

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<sup>33</sup> Independent Online accessed 11<sup>th</sup> August 2021 [‘Every effort’ should be made to retrieve Covid messages on minister’s ‘broken’ device, says Angela Rayner \(msn.com\)](#) article by Ashley Cowburn

<sup>34</sup> [Open Government Partnership Open Government Partnership - Scottish Government Blog \(blogs.gov.scot\)](#) and at [Improving public services: Open Government Partnership - gov.scot \(www.gov.scot\)](#)

<sup>35</sup> [b36s1en.pdf \(parliament.scot\)](#) para 5, published 27<sup>th</sup> September 2001

<sup>36</sup> [2021 Government Steering Committee Elections \(opengovpartnership.org\)](#)

<sup>37</sup> [Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](#)

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The amendments to FoISA are influenced by the wording and expected outcomes of, the Sustainable Development Goals (SDGs). In Scotland the SDGs are given effect through the National Performance Framework (NPF)<sup>38</sup>. The proposed reforms align the rights and duties under FoISA with SDG 16:

- 'Peace, justice, and strong institutions, (16.3);
- transparent, accountable institutions (16.6);
- responsive, inclusive, participatory, and representative decision-making (16.7);
- and public access to information (16.10).'<sup>39</sup>

Reform of FoISA is part of Scotland's compliance with and promotion of the SDGs.

### 14. Human Rights

Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights provide for the right and the freedom to form an opinion by seeking, receiving and imparting information and ideas ...'<sup>40</sup>. These human rights are given effect via FoISA and how these rights are implemented informs the Bill. For example in *Magyar Helsinki Bizottsag v Hungary*, the Grand Chamber of the European Court of Human Rights (ECtHRs), the public interest of the requesting non-government organisation (NGO) was key. The ECtHR was 'satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest' and the 'refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest' so there was a breach of Article 10 of the ECHR. It further stated that acting on and for the public interest is a purpose of an NGO.<sup>41</sup>

The ECtHRs quoted from the case of *Claude Reyes et al. v. Chile* (judgment of 19 September 2006) at the Inter-American Court which found that:

"...The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."<sup>42</sup>

Therefore, being able to share the information disclosed is part of the process of ensuring public accountability and organisational transparency. However there is concern in Scotland at statements included in FoI responses appearing to warn people about the consequences of sharing information. For people not used to dealing with legal matters, alerts that they must comply with 'copyright law' and the 'Open Government Licence' are concerning and may stifle information sharing. Greater attention is needed on reassuring the public that it is ok to share the

<sup>38</sup> [National Performance Framework | National Performance Framework](#)

<sup>39</sup> [SDG Indicators — SDG Indicators \(un.org\)](#)

<sup>40</sup> Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>41</sup> Judgement at paras 164-165 and at 197 at European Court of Human Rights at <http://hudoc.echr.coe.int/eng?i=001-167828>

<sup>42</sup> *Ibid*, para 61

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information disclosed and that may be through a public information campaign.

It is also useful to note that under Section 12 of the Human Rights Act 1998, a court “must have particular regard to the importance of” the ECHR right to freedom of expression and, to journalistic, literary or artistic material which is in the public interest to be published. The public interest in accessing and sharing information should be central to FoISA’s reform. The right will be balanced with the right to privacy which can vary how the information is released rather than censoring it.<sup>43</sup>

### 15. UNGPs

In 2011, the UN approved 31 ‘Guiding Principles on Business and Human Rights’ (UNGPs) setting out the States duty to protect human rights and the corporate responsibility to respect human rights<sup>44</sup>. Remedies must also be available to prevent and address human rights abuses. Transparency and accountability are key to the delivery of the UNGPs such as numbers 8, 15(b) and 31(e). The UNGPs provide an integrated framework for making the UK, and Scotland, fairer and more accountable.

To put the global agenda in a domestic context, the Scottish Parliament hosted a global conference, in October 2010, to discuss the issues which was attended by over 80 countries as well as by UN staff.

The UK was the first country to adopt a ‘National Action Plan on Business and Human Rights’, in 2013, based on the UNGPs and has periodically reviewed and updated commitments such as in May 2020<sup>45</sup>. There is no separate Scottish document despite a published baseline assessment<sup>46</sup>. However the Scottish Government is already committed to delivering the UNGPs.<sup>47</sup>

The UNGPs apply to public procurement, such as numbers 4, 5 and 6, which have implications for this Bill as well as the development of a national care service for Scotland<sup>48</sup>.

### 16. Tromso Convention

The Council of Europe Convention on Access to Official Documents<sup>49</sup>, known as the Tromsø Convention, has not yet been signed or ratified by the UK Government. Although that process is a reserved matter, the Scottish Government can ensure that FoISA’s reform complies. The preamble sets a useful context for rights:

“Considering that exercise of a right to access to official documents: (i) provides a source of information for the public; (ii) helps the public to form an opinion on the state of society and on public authorities; (iii) fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their

<sup>43</sup> [Human Rights Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>44</sup> At [GuidingPrinciplesBusinessHR\\_EN.pdf \(ohchr.org\)](#)

<sup>45</sup> At [UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK \(www.gov.uk\)](#)

<sup>46</sup> Advertised in May 2015 at [National Baseline Assessment on Business and Human Rights \(government-online.net\)](#) and progress at [Business and Human Rights – Scotland's National Action Plan for Human Rights \(snaprights.info\)](#)

<sup>47</sup> [Human rights - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>48</sup> [A National Care Service for Scotland - Scottish Government - Citizen Space \(consult.gov.scot\)](#)

<sup>49</sup> [Council of Europe Convention on Access to Official Documents](#)

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legitimacy”.<sup>50</sup>

Article 10 is also instructive on pro-active publication:

“At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.”

The Tromsø Convention has been ratified by countries, including Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, Norway, the Republic of Moldova, Sweden and Ukraine.

### 17. Unequal Request Response Times

FoISA has been amended but not all the impacts are progressive. The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016, permits all grant-aided schools and independent special schools to have up to 60 days to respond to cover all ‘school holidays’. At the time, CFoIS opposed the amendment:

‘State schools, provided by Scotland’s 32 local authorities, have been covered by the Freedom of Information (Scotland) Act 2002 (FoISA) since it became effective on 1 January 2005. When the public’s enforceable right to access information was introduced by the Scottish Parliament, an important principle was established: that all bodies covered by FoISA had to follow, equally, the same rules. For example, that all information requests should be answered promptly, and within 20 working days. Now that important principle is under threat as the Scottish Government is proposing a two-tier system for a new category of body covered by FoISA: grant-aided schools and independent special schools.’<sup>8</sup>

Yet there is no clear evidence that during all school holidays grant-aided and independent special schools are actually closed. The consultation itself stated “... many of these schools in effect close down for extended periods during the summer.” That is where the nimbleness of FoISA shines as it states that information requests must be answered within 20 **working** days so if a school was actually closed then it cannot count as one of the ‘working days’.

The problem arises again with the Minister for Parliamentary Business and Veterans’ evidence to the Public Audit and Post Legislative Scrutiny Committee on 19<sup>th</sup> December 2019 where he suggested that:

‘If we were to bring in an amendment that saw the clock stopped at midnight on 24 December and restarted at midnight on 3 January, that would provide that once-a year break, when everyone tends to be on holiday anyway. If that had been in place this year, it would have added only three days to the process, which is not very long.

I accept it would add to the wait for receiving responses, but I think that, on balance, that would be worth doing. That would be the only time in the year when I would suggest a break of that nature, and I hope that it is a suggestion that the committee

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<sup>50</sup> Text and Explanatory Notes at [16809f5c1a \(coe.int\)](#)

## **Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill**

might give some consideration to.<sup>51</sup>

This idea seems innocuous but on balance there is no need to change the law on 'working days' as the term is quite clear. Yes, services an authority may operate such as cleansing, nursing and child protection continue but those who administer the services may be off or on rota duty for emergencies only. In practice the 'public authority' is not working. This may happen at other times such as the May Bank Holiday (closed both Friday and Monday) as well as Easter breaks. Therefore, the precedent is unhelpful, and may lead to further timed breaks in FoISA operating.

Furthermore, 20 working days is the maximum response time and in practice the information should be disclosed 'promptly and in any event not later than 20 working days'.<sup>10</sup> Particular information may be considered sensitive at a time such as over the Christmas period e.g. A & E waiting times. If the statistics are automatically gathered daily, they should be readily available and disclosure prompt. Better still it should be pro-actively published to avoid the need for FoISA to be engaged at all. CFoIS believes the law currently caters for precisely the scenario presented by the Minister and no change is necessary.

### **18. Records Management and Operational Matters**

FoISA established a legal framework to provide the public with an enforceable right, but the process can seem legalistic and complicated in delivery particularly given the amount of case law that has been developed over the last 16 years. Lord Wallace of Tankerness, who piloted the Bill through Parliament, observed "just how technical and legalistic much of this has become".<sup>6</sup> That has been a surprise partly influenced by an approach that treats all cases as if they may end up in court. As so few people ever have the resources to go there, it seems a disproportionate routine way of working. FoISA also depends on good records management so that a designated authority can be sure what information is held within an authority. Cuts in staff and resources, as evidenced by UNISON research, weakens the framework in which FoISA operates.

This Bill focuses on legal reform but the process of examining the law will highlight practice issues which may prompt further amendments.

### **19. Costs to Requestors**

The charging policy permitted under FoISA is set out in The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004.<sup>52</sup> It is anticipated that the issue of costs to requestors will arise during debate on this Bill. A separate parliamentary process can be initiated on charging which accounts for cost of living increases to the current fee regime.

### **20. Costs of the Scottish Information Commissioner (SIC)**

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<sup>51</sup>Graeme Dey, at page 8 of the Official Report

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12437&mode=pdf> <sup>10</sup>  
Section 10 of FoISA

<sup>52</sup> [The Freedom of Information \(Fees for Required Disclosure\) \(Scotland\) Regulations 2004 \(legislation.gov.uk\)](http://legislation.gov.uk)

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Schedule 2 of FoISA makes provision for funding the work of the SIC. Whilst there is no need to change the legislation, ensuring this Bill is effective necessitates an increase in budget. Therefore the Scottish Parliament, as part of its consideration of the Bill, may consider what increase is required to cover the additional functions and powers held by the SIC as a result of the proposed amendments.

At Section 4A, FoISA already requires, before the start of each financial year, for the SIC to prepare 'proposals for the use of resources and expenditure during the year (a "budget") and, by such date as the Parliamentary corporation determines, send the budget to the Parliamentary corporation for approval.' Schedule 2 also provides that the Commissioner may, 'in the course of a financial year, prepare a revised budget for the remainder of the year and send it to the Parliamentary corporation for approval.' As the Commissioner 'must ensure' that the resources 'will be used economically, efficiently and effectively', it will be useful for the Parliament to take evidence from the Commissioner as to what budget is considered reasonable in all the circumstances.

Sufficient funding for the Commissioner is imperative for the effective functioning of the law.

**Draft Bill  
Freedom of Information (Scotland ) (No 2) Bill**

**Explanatory Notes**

1. The following documents are published to accompany the Freedom of Information (Scotland) (No 2) Bill. CFoIS believes the legislative reform process should be announced by 28<sup>th</sup> May 2022<sup>53</sup>, exactly 20 years since Scotland's first Freedom of Information Bill received Royal Assent. The Explanatory Notes contain a Financial Memorandum and a Statement on Legislative Competence.
2. These Explanatory Notes have been prepared to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.
3. The Bill creates, restores and strengthens the right of access to information held by Scottish public authorities established by the Freedom of Information (Scotland) Act 2002 (FoISA) as amended by the Freedom of Information (Amendment) (Scotland) Act 2013. It extends rights and duties to those bodies delivering public services, services of a public nature and publicly funded services.
4. The Bill permits people to apply for access to documents, or copies of documents, as well as to the information itself.
5. Since 2002, how information is stored and transmitted has drastically changed but FoISA has remained agile and covers recorded information such as What's App message groups. However practical and operational loopholes have emerged so the Bill expands the legal consequences for non-compliance.
6. With so much fake news available especially on social media, it is essential to maintain and develop a robust right to access official and accurate information in a timely manner.

**Part 1 - Purpose**

7. A purpose clause has been inserted for clarity and consistency on the law's impact. Duties and rights are designed to make publicly funded services transparent and accountable and boosts empowerment through informed scrutiny. The new purpose clause is made up of:
  - Amending the existing introductory text to FoISA.
  - Article 1 of the United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)<sup>54</sup>

<sup>53</sup> Legislative details at [Session 1 Bills - Parliamentary Business : Scottish Parliament](#)

<sup>54</sup> Known as The Aarhus Convention [cep43e.pdf \(unece.org\)](#)

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- Adapting existing text from the Environmental Information (Scotland) Regulations 2004 (EISRs) to promote participation in decision-making.
- The preamble to Tromsø Convention, the Council of Europe Convention on Access to Official Documents<sup>55</sup>.
- The wording of Article 10 of the European Convention on Human Rights.

### **Section 1 General entitlement**

8. Inevitably, how FoISA has been delivered will vary from what was anticipated. Section 1(3) is a clear example that necessitates legal clarification. The current wording is:  
If the authority—  
(a)requires further information in order to identify and locate the requested information; and  
(b)has told the applicant so (specifying what the requirement for further information is),  
then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
9. In practice that means that instead of pausing the request response, the clock is effectively reset to zero and a new 20 day deadline applies from the date on which the clarification was received. The amendment requires the clock to be paused, rather than set back to zero.
10. The amendment is necessary to speed up responses and ensure that requests for clarification cannot be used as a delaying tactic.

### **Section 2 - Effect of exemptions**

11. Given the Bill sets out the clear purpose of FoISA and requirement for parliament to comply with human rights law, each listed exemption under FoISA must now be subject to a public interest test.

### **Section 3- Defining Public Authorities**

12. The proposed amendments will add consistency to coverage of publicly funded services.
13. Coverage applies to only those parts of services and contracts which are delivered by the private and other sectors which are paid for by public money or are public in nature. The wording has been adapted from section 6(5)<sup>56</sup> of the Human Rights Act 1998 and the judgement in the English Court of Appeal London and Quadrant Housing Trust ("the Trust") V Weaver in 2009.<sup>57</sup>
14. The proposed amendment also has the effect of amending section 4 to remove the discretion of Scottish Ministers in designating "any other Scottish public authority with mixed functions or no reserved functions (within the

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<sup>55</sup> Known as the Tromsø Convention [TROMSØ CONVENTION \(coe.int\)](https://www.coe.int/t/treaties/TROMS0_CONVENTION) Ratified by the Council of Europe in December 2020 but the UK has neither signed nor ratified it.

<sup>56</sup> [Human Rights Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1998/42/section/6)

<sup>57</sup> [London & Quadrant Housing Trust v Weaver, R. \(On the application of\) \[2009\] EWCA Civ 587 \(18 June 2009\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/2009/587.html)



## **Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill**

meaning of the Scotland Act 1998”.

### **Section 3 - Information Held**

15. The PAPLS Committee understood that “tools” such as WhatsApp messages and texts used for official business along with private email accounts are covered by FOISA. However the Committee decided “there may be merit in the legislation being amended to make explicit what is meant by the term “information.”<sup>58</sup> The amendment to section 3 adopts a slightly different approach by explicitly defining “information held” as extending to personal devices if the information concerns the delivery of public authority business.
16. It is understood that a proper balance needs to be achieved in legislation to ensure all information relevant to a request under section 1 is accessible and disclosed. Public authorities should ensure they have a clear strategy and a transparent ‘use your own device’ policy ‘UYOD’ agreed with employees. The right to privacy is a human right, protected by Article 8 of the ECHR, and the rights and duties need to be balanced. A clear purpose in the agreement, including and the management and deleting of information, password protection and device security is advisable for all designated bodies.

### **Section 4 - Amendment of schedule 1**

17. The amendments to Section 4 are intended to ensure that those new categories of bodies covered by FOISA are included in Schedule 1. The amendments also permit Scottish Ministers to remove them from Schedule 1 when they no longer meet the criteria set out in Section 3.

### **Section 5 – Further Power to Designate Public Authorities**

18. There is an imbalance within FOISA which gives greater weight to the designated bodies and government over the public’s views as well as those of civil society. For example, section 5(5) of FOISA permits Scottish Ministers to designate other public bodies for coverage by FOISA but before that happens, they must ‘consult every person to whom the order relates, or persons appearing to them to represent such persons, and must also consult such other persons as they consider appropriate.’ There is no explicit duty to give due regard<sup>59</sup> to the opinions of the public and civil society.
19. This imbalance is further evidenced in the recommendations of the PAPLS Committee report which recommended that the Scottish Government “consults on the legislative changes proposed in this report and works with the SIC and public authorities across Scotland, as appropriate, to address the areas where implementation of the Act could be strengthened.”<sup>60</sup> Civil society and the public’s interest should equally be considered too. Currently there is too much weight given to the internal operations and staffing of those bodies designated, or may be designated, and their views can be in conflict with

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<sup>58</sup> Para 16.

<sup>59</sup> ‘Due regard’ means that, in making any strategic decision, active consideration views is undertaken of fairly obtained views. It requires participation such as by those directly affected by the decision under consideration. Proportionality is key as how much regard is due requires steps to address inequalities of outcome. The process should be reasonable in all the circumstances.

<sup>60</sup> Para 1 PAPLS Committee Report , May 2020, Para 244.

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those of the public and their right to know.

20. In 2015, the SIC warned the Scottish Parliament that immediate steps must be taken to protect FOI rights from the damage caused by the outsourcing of important public services. In her report, she explained that the provision to extend FOI to non-public sector organisations delivering public functions had been "woefully underused" in the ten years since FOI law came into effect, with the consequence that some public functions were no longer open to full public scrutiny. Actions to address her concerns included addressing the loss of rights as a result of changes in delivery of public functions and services, and creating access to information rights for the first time, where it is in the public interest to do so.

21. There are clear inconsistencies between designated bodies under FOISA and those covered by the Human Rights Act 1998. For the sake of consistency and to provide a single route of complaint to the Scottish Information Commissioner (SIC) i.e. bodies are covered if they are delivering public services, services of a public nature or are funded by public money. Whilst this problem can be addressed using the current Section 5 power under FOISA, this Scottish Government has been slow to act. For example still not designating private bodies delivering care homes despite the pandemic and a public consultation in 2019.<sup>61</sup>

### **Section 6 Publicly Owned Companies**

22. The amendment addresses the current practice whereby bodies jointly owned by two or more public authorities are not considered to fall within the scope of FOISA.

### **Section 8 – Requesting Information**

23. The amended section seeks to balance the right to privacy under Article 8 of the ECHR with the process of making an information request. As the process is 'applicant blind' and the request is valid because of the nature of the written request, this approach is reasonable and consistent with the Tromso Convention<sup>62</sup>. At the stage of appeal to the SIC, it is understood that disclosure of the applicant's identity is required to follow the legal process. The amended provision makes this possible.

### **Section 10 Time for compliance**

24. The amendment repeals The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 which, for the first time, introduced a two tier system for FOI request response times. It allows grant-aided schools and independent special schools to take up to 60 working days to respond to FOI requests. The current practice is inadequate in protecting the rights of requestors and delivering transparency and accountability in publicly funded services. It also sets a very bad precedent as Scotland increases the number of bodies and functions to be covered by FOISA.

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<sup>61</sup>

<sup>62</sup> Section 4(2) and (3) of Tromso

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25. The 60 working day response time may also be discriminatory. FoISA was innovative in introducing the right of children to make requests under section 69. The UN Convention on the Rights of the Child (UNCRC), which will be given domestic effect via the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill<sup>63</sup>, provides a number of rights that are undermined by this exception:

- Article 3(1) requires that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
- Article 13 (1) states “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
- Article 28 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity...<sup>64</sup>

26. Children need enhanced not reduced rights protection. The preamble of the UNCRC states: “in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance” and that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection...” Therefore FoISA, by delaying the flow of information to requestors from two categories of education providers, undermines the human rights of children, their families, carers and those journalists and civil society organisations who are seeking information in the public interest. It is especially worrying that independent special schools, which educate some of our most vulnerable children, are permitted such extended response times.

27. The significance and value of information requested under FOISA can diminish over time, so it is important that requestors are able to access information to which they are entitled promptly and without delay. The same principle applies to the timescales for internal reviews. In practice children and their families may wait a combined 120 days before they can complain to the SIC whereas children who attend schools other than grant-aided schools and independent special schools, wait a maximum of 40 working days (if no clarification is sought or fees levied).

### **Section 14A, B & C - Freedom of Information Officers**

28. A new office of ‘Freedom of Information Officer’ is created with similar powers and duties to Data Protection Officers provided under Sections 69-71 of the Data Protection Act 2018.<sup>65</sup>

### **Section 21 Review by Scottish Public Authority**

<sup>63</sup> [United Nations Convention on the Rights of the Child Incorporation Scotland Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

<sup>64</sup> [OHCHR | Convention on the Rights of the Child](#)

<sup>65</sup> [Data Protection Act 2018 \(legislation.gov.uk\)](#)

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29. The extended response times provided for grant-aided schools and independent special schools are abolished.

### Sections 23 - 24 Model Publication Scheme (MPS)

30. The PAPLS Committee accepted that “the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information.” The Committee opted for “a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency.”<sup>66</sup>
31. A Code of Practice must be based on existing legislation that directly impacts on the efficient delivery of FoISA duties. For example the [Public Records \(Scotland\) Act 2011](#), which came into force on the 1st January 2013, provides for designated bodies to ensure that all employees, contractors, agents, consultants and other trusted third parties who have access to any information held, are fully aware of and abide by their duties under the Act. Designated bodies must also submit a Records Management Plan (RMP) to be agreed by the Keeper of the Records of Scotland. The RMP means that records are well managed and can therefore be more easily proactively published or accessed if there is an FoI request.
32. The duty to publish information in the Code operates along with compliance with section 66 ‘Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.’
33. Pro-active publication is provided for in a new section 24 as, practice has shown, a legal duty is required to force the pace and detail of disclosure. Text is adapted from other sources including section 10 of Tromso. The duty is enhanced by a legal duty to maintain a disclosure log which may also reduce the need for some FoI requests as the information is already available.

### Section 31- National security and defence

34. The Bill proposes repeal of section 31 (2) and (3) as the power of Scottish Ministers to issue a certificate is no longer required. For example, despite Glasgow hosting COP 26 in November 2021, no certificate certifying the need for an exemption was issued in the build up to, or during the international conference attended by global leaders.

### Section 33 – Exemptions

35. The text has been drafted in line with the recommendation from the PAPLS Committee as it “considers that the Scottish Government should consult on amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.” Part of the text from section 35(2) has been omitted as already covered by section 26 of FoISA ‘prohibitions on disclosure’.

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<sup>66</sup> Para 20

## **Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill**

### **Section 48 - When application excluded**

36. Section 48 of FOISA provides no appeal to the SIC in respect of the SIC, a procurator fiscal, or the Lord Advocate (to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigations of deaths in Scotland). There is no equivalent provision in the Freedom of Information Act 2000 (FOIA) relating to the Crown Prosecution Service (CPS) or limiting the powers of the UK ICO. The ICO investigates and issues decisions in respect of the CPS. Therefore section 48 is proposed for deletion to provide consistency in enforceable rights across reserved and devolved FoI rights.

### **Section 51 - Enforcement Notices**

37. This section delivers on the recommendation of the SIC, in his submission to PAPLS Committee Inquiry, that Parliament extends ‘the scope of enforcement notices to include failures to comply with the Codes of Practice, either immediately, or after a practice recommendation has not been actioned.’<sup>67</sup>

### **Section 52 - Exception from duty to comply with certain notices**

38. Removes the Ministerial veto to a decision notice or enforcement notice which is given to the Scottish Administration. Currently this section undermines the purpose of FoISA.

### **Section 63 - Disclosure of information to Scottish Public Services Ombudsman or to Information Commissioner**

39. The purpose of amending Section 63 is to ensure that the annual audit of Scotland’s largest public sector organisations is joined up across regulators. According to Audit Scotland:

“Public audit plays a key role in providing assurance that public money is well managed and in providing independent and objective evidence on the performance of public bodies. That assurance is important for the public and decision-makers and will become even more important as Scotland assumes greater fiscal autonomy within the UK. We want the public interest, trust and confidence to be at the heart of Audit Scotland’s work.”<sup>68</sup>

40. Compliance with FoISA must be integrated with the annual audit, given the investment of public money in delivering and maintaining a robust FoI regime. In 2017 independent polling for the SIC reported 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.<sup>69</sup> Public trust is built through transparency which delivers accountability and enables scrutiny. Therefore FoI is not an add on but intrinsic to the delivery of public services.

41. Audit Scotland provides the Auditor General and the Accounts Commission with the services they need. It gives “independent assurance to the people of

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<sup>67</sup> Para 27(ii) [19\\_Scottish\\_Information\\_Commissioner.pdf \(parliament.scot\)](#)

<sup>68</sup> [Audit quality | Audit Scotland \(audit-scotland.gov.uk\)](#)

<sup>69</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

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Scotland that public money is spent properly, efficiently and effectively” across 223 public bodies including: the Scottish Police Authority, Scottish Fire and Rescue Service, and Scottish Water, 23 NHS bodies, 32 councils, 72 joint boards and committees (including 30 health integration boards) and 21 further education colleges.<sup>70</sup> Audit Scotland has a key role to play in maintaining a culture and practice of compliance with FoISA.

The proposed text roots the duty to disclose information within the statutory responsibilities of Audit Scotland which CFoIS understands is set out in the Public Finance and Accountability (Scotland) Act 2000.<sup>71</sup> As a result of the debate on the Bill, the text may be expanded to ensure information is shared which relates to the audits of individual authority’s performance, thematic reports and the issuing of independent assurance to the people of Scotland that public money is spent properly, efficiently and effectively.

42. The effect of the amendment is to give effect to the PAPLS Committee conclusion that designated bodies need to understand “FOI as an essential element of public service provision and ensure that it is resourced accordingly.”<sup>72</sup>

### Section 64 – Concealing ‘held information on private devices

43. The SIC’s intervention in the Scottish Government’s performance, begun in 2017, is ongoing.<sup>73</sup> The involvement of Special Advisers (SPADs) in the handling of FoI requests has already been investigated. The use of modern communication apps on devices such as mobile phones, raises issues about the procedures for handling information that should be disclosed but is held on private computers and mobile devices. Balancing privacy with duties is key to effective reform. The amendment seeks to balance the public interest with the right to privacy.

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<sup>70</sup> [Audit Scotland | Audit Scotland \(audit-scotland.gov.uk\)](https://www.audit-scotland.gov.uk)

<sup>71</sup> P.g. 8 at [Annual report and accounts 2020/21 \(audit-scotland.gov.uk\)](https://www.audit-scotland.gov.uk)

<sup>72</sup> Para 26 of PAPLS Inquiry Report

<sup>73</sup> [Intervention Report - Scottish Government 201702106.pdf](#) and [Intervention 201702016 Scottish Government \(itspublicknowledge.info\)](#)

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Freedom of Information (Scotland ) (No 2) Bill**

**Financial Memorandum**

1. The Scottish Executive's Financial Memorandum, published in 2001, required designated bodies to 'absorb within planned resources' the costs of implementing the Bill. Therefore the centrality of delivering openness and accountability was understood to be part of business as usual for public bodies.
2. In 2001 it was estimated that the cost to public funds of implementing the proposals in the Bill 'might fall within the range of £2.5 million to £4.8 million per year.'<sup>74</sup>
3. It was acknowledged "that many Scottish public authorities already handle, within existing resources, large volumes of requests for information – and make a great amount of information available to the public proactively as well as in response to requests – whether or not under a formal regime. Many public authorities will therefore have existing structures in place to support the provision of information under the Bill."<sup>75</sup>
4. It is useful to note that 'In An Open Scotland, the Executive's FOI consultation document published in November 1999, an early estimate of the cost to Scottish public authorities arising from freedom of information was given as between £9 million and £12.5 million per annum.'<sup>76</sup>
5. 'Registered Social Landlords and FOI: One Year On', published in March 2021 by the SIC, confirmed that RSLs have not been overwhelmed by FOI, with 57% reporting a 'small' impact on staff workload, and 95% reporting 24 requests or fewer during 2020. Most organisations used existing staffing and structures to resource FOI, with only 8% of organisations employing new staff.
6. New bodies designated under FoISA in the Private sector may not be routinely answering information requests to the public but they do communicate with their shareholders, banks, auditors and regulators such as the UK ICO and the health and Safety Executive. They will have been supplying information to the public bodies that contracted services or goods from them.
7. The cost of individual organisation's liability to meet the infrastructure of proactive publication and compliance, such as meeting statutory timescales and providing advice and assistance, is a business decision that may stop bodies tendering for contracts. It may feature as part of the contract advertisement that the value of the contract includes an element to pay for compliance with FoISA.

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<sup>74</sup> Para 208 and 212 at [b36s1en.pdf \(parliament.scot\)](#)

<sup>75</sup> Para 210 Ibid

<sup>76</sup> Para 211, Ibid.

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8. Third Sector organisations will only be covered by FoISA if they meet the criteria e.g. to deliver publicly funded services. Due diligence will have been undertaken on whether they have the skill set and capacity to undertake a contract and the tendering process will also mean that they have the correct system in place to be trusted with public money e.g. compliance with GDPR and health and safety. If they choose to conduct business with the public sector, they must establish the correct infrastructure to ensure compliance with FoISA. An alternative approach is to replicate the model adopted by some RSLs who have contracted with a central organisation rather than provide an inhouse service.
9. Third Sector organisations already pro-actively publish a lot of information about their work to build public trust and to encourage donations<sup>77</sup> to sustain the positive impact they make<sup>78</sup>. Also they have a range of statutory duties such as reporting to OSCR if they are a charity or a SCIO and compliance with Data protection Law to the UK ICO. They must have existing structures in place able to support the provision of information.
10. Under section 13, there is provision for fees for disclosure in specific circumstances. A Scottish public authority may charge a fee, determined in accordance with regulations for the communication of the requested information. Charging happens comparatively rarely. The regulations, agreed in 2004, were subject to the negative resolution procedure. Updating the charges, in line with 18 years of inflation, is the subject of separate process.
11. The Scottish Information Commissioner (SIC) is an independent office holder who promotes and enforces FoISA. Concurrent discussions are needed with the SIC to agree costs for running the office of the SIC given the new functions as well as investigative and enforcement powers contained in the Bill.
12. The SIC is responsible for compliance with other legislation too but is not anticipated that FoISA's reform will significantly impact on that workload.<sup>79</sup>

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<sup>77</sup> 25,413 charities are registered with OSCR [OSCR | Home](#) – accessed 26<sup>th</sup> November 2021

<sup>78</sup> [Chartered Institute of Fundraising - Scotland \(ciof.org.uk\)](#)

<sup>79</sup> [FOI law in Scotland \(itspublicknowledge.info\)](#)



**Draft Bill**  
**Freedom of Information (Scotland ) (No 2) Bill**

**Statement on Legislative Competence**

1. The Campaign for Freedom of Information in Scotland (CFoIS) believes that the provisions of the Freedom of Information (Scotland) No 2 Bill are within the legislative competence of the Scottish Parliament.
2. The Scotland Act 1998, Section 29, requires MSPs to comply with the European Convention on Human Rights (ECHR). Article 10 of the ECHR is the right to information to form an opinion and case law rules it applies when requests for information are in the public interest which is defined by four tests:
  - the purpose of the information request;
  - the nature of the information sought;
  - the particular role of the seeker of the information in “receiving and imparting” it to the public; and
  - whether the information is ready and available.<sup>80</sup>
3. CFoIS believes the Bill delivers the range of amendments necessary to update compliance.
4. UNESCO is the custodian of SDG indicator 16.10.2 on access to information. In 2019 the indicator changed from a Tier 11 to Tier 1 in recognition of its status as a top-level way for assessing progress on SDG implementation, as a basic human right and a key tool for promoting the rule of law. It is an enabler for sustainable development in areas such as health, environment, addressing poverty and fighting corruption. UNESCO has been designated by the UN General Assembly as the custodian agency for global monitoring of Indicator 16.10.2 in respect of pro-active and reactive publication of information.<sup>81</sup>
5. CFoIS believes the Bill delivers the range of amendments necessary to update compliance.
6. The Scottish Government complies with the SDGs through the National Performance Framework (NPF): *The National Performance Framework (NPF) and the Goals share the same aims. The National Performance Framework is Scotland's way to localise the SDGs. The NPF has a focus on tackling inequalities so that no one in Scotland is left behind as we work together to achieve the Goals.*<sup>82</sup>

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<sup>80</sup> For example, the Grand Chamber decision in the case of on Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) 8<sup>th</sup> November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30<sup>th</sup> January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435>

<sup>81</sup> [Access to information gets an upgrade in SDG indicators framework \(unesco.org\)](https://www.unesco.org/en/news/2019/11/access-to-information-gets-an-upgrade-in-sdg-indicators-framework)

<sup>82</sup> [Sustainable Development Goals | National Performance Framework](https://www.gov.scot/Topics/Information-Data/Performance-Framework)

## Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill

7. CFoIS believes the Bill delivers the amendments necessary to update compliance.
8. In reporting on progress with compliance in Scotland, the Open Government Partnership<sup>83</sup>, as a comparatively recent voluntary framework, is no replacement for legally enforceable FoI rights since 2005<sup>84</sup>. Monitoring compliance and identifying any dilution of commitments and reductions in practice remains ongoing at a global level.<sup>85</sup> The UK reports on progress and delivery too<sup>86</sup>.
9. Legislation that has a direct impact on what should be recorded and proactively published, will influence the detail of the Bill and debate at the Scottish Parliament including:
  - The Public Record (Scotland) Act 2011<sup>87</sup>.
  - The Re-use of Public Sector Information Regulations 2015<sup>88</sup> along with the Copyright, Designs and Patents Act 1988<sup>89</sup>, which has implications for those who want to re-use the information disclosed, in full or in part, for public interest purposes including campaigning.
  - The Procurement Reform (Scotland) Act 2015
  - The Public Contracts (Scotland) Regulations 2012.<sup>90</sup>This is a matter for the Scottish Parliament to address in greater detail.

**24th January 2022**

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<sup>83</sup> [Scotland and the sustainable development goals: a national review to drive action - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>84</sup> FoISA became effective on 1<sup>st</sup> January 2005

<sup>85</sup> [Freedom of Information Advocates Network – Measuring SDG 16.10.2 \(foiadvocates.net\)](http://foiadvocates.net) and [Political Integrity - Global Data Barometer Handbook](http://www.barometer.org)

<sup>86</sup> [Indicator 16.10.2 - Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information - U.K. Indicators For The Sustainable Development Goals \(sdgdata.gov.uk\)](http://sdgdata.gov.uk)

<sup>87</sup> Available at <http://www.legislation.gov.uk/asp/2011/12/contents>

<sup>88</sup> Available at <http://www.legislation.gov.uk/uksi/2015/1415/contents/made>

<sup>89</sup> Available at <http://www.legislation.gov.uk/ukpga/1988/48/contents>

<sup>90</sup> See Scottish Government website at

<https://www2.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/procurementlegislationfaqs>

## Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill

### List of Abbreviations

CFoIS understands that abbreviations are challenging , there are so many and each one refers to an important Act, regulation, organisation or public servant. Therefore this list aims to assist people to understand the Bill's accompanying documents. It is designed to be inclusive, especially those with PMFA (Poor Memory For Acronyms).

- ATI – access to information
- Aarhus Convention - Convention of Access to Information, Public Participation in Decision-Making Procedures and Access to Justice in Environmental Matters
- ALEOs - Arms-length external organisations
- CFoIS - Campaign for Freedom of Information in Scotland
- COSLA - Convention of Scottish Local Authorities
- CYPCS – Children and Young People’s Commissioner Scotland
- DPA - Data Protection Act
- ECHR - European Convention on Human Rights
- ECtHRs - European Court of Human Rights
- EHRC - Equalities and Human Rights Commission
- EISRs - Environmental Information (Scotland) Regulations 2004
- Fol - Freedom of information
- FoIA – Freedom of Information Act 2000 (UK)
- FoISA - Freedom of Information (Scotland) Act 2002
- GDPR - General Data Protection Regulation
- HRA - Human Rights Act 1998
- ICCPR - International Covenant on Civil and Political Rights
  - ICO - Information Commissioner’s Office
- MPS - Model Publication Scheme
- NPF - National Performance Framework
- OGP Open Government Partnership
- RTI – right to information
- RSLs - Registered Social Landlords
- SHRC -Scottish Human Rights Commission
- SIC - Scottish Information Commissioner
- SICO - Scottish Information Commissioner’s Office
- SPICe - Scottish Parliament Information Centre
- SPIF - Scottish Public Information Forum
- UK ICO – UK Information Commissioner’s Office
- UNCRC - United Nations’ Convention on the Rights of the Child
- UNCRC Bill - United Nations’ Convention on the Rights of the Child (Incorporation (Scotland) Bill
- UNDP - United Nations’ Development Programme
- UNGPs – United Nations’ Guiding Principles on Business and Human Rights (31 of them)

## Accompanying Documents, Freedom of Information (Scotland ) (No 2) Bill

### About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation at a Scottish level. CFoIS is independent of government and works collaboratively. On 16th September 2021, the Office of the Scottish Charity Regulator (OSCR) accepted CFoIS meets the charity test and the legal requirements for being a Scottish Charitable Incorporated Organisation (SCIO). Our charity number is SC051263.

CFoIS organises the Scottish Public Information Forum (SPIF) to promote the public interest. SPIF's remit is to 'enable the long-term effectiveness of FoISA and the EIR(S)s' and its role is incorporated in the Scottish Government's Six FoI principles published in 2007 as a way to 'maintain effective relationships with key stakeholders'.<sup>91</sup> SPIF is an opportunity for rights holders and duty bearers to meet and discuss the right to information (RTI) and access to information (ATI) in Scotland and consider how laws are operating.

More information at [www.cfois.scot/](http://www.cfois.scot/) Contact [info@cfois.scot](mailto:info@cfois.scot) Connect @CFoIScot

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- The debate and feedback to meetings of the Scottish Public Information Forum (SPIF).
- The Public Audit and Post Legislative Scrutiny Committee for its evidence sessions and post legislative scrutiny report published in May 2020.
- The Public Audit and Post-legislative Scrutiny (PAPLS) Committee's Session 5 [Legacy Paper](#)
- The Public Audit Committee (PAC) letter, of 10th September 2021, to the Standards, Procedures and Public Appointments (SPPA) Committee regarding the PAPLS Committee's post-legislative scrutiny work on the Freedom of Information (Scotland) Act 2002.<sup>92</sup>
- The diligent work of the Scottish Information Commissioner and his staff.
- The Scottish Government for its positive attitude towards the formal intervention by the Scottish Information Commissioner<sup>93</sup>.

<sup>91</sup> More information at Scottish Government <http://www.gov.scot/About/Information/FOI/6principles>

<sup>92</sup> <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-public-audit-committee/correspondence/2021/session-5-post-legislative-scrutiny-of-freedom-of-information-and-lobbying-scotland-acts>

<sup>93</sup> 9<sup>th</sup> July 2018 [Response to Scottish Information Commissioner's report on FOI handling - gov.scot \(www.gov.scot\)](http://www.gov.scot/Response-to-Scottish-Information-Commissioner's-report-on-FOI-handling)