

Access to information rights in Scotland: consultation

Respondent Information Form

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- Individual
 Organisation

Full name or organisation's name

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

Questionnaire

Question 1(a)

Do you or your organisation have direct experience of access to information rights operating in relation to 'outsourced' services?

- Yes
- No
- Not sure

Question 1(b)

If 'yes' how would you rate your experience of access to information rights in relation to such services?

- Not a problem
- Somewhat problematic
- Very problematic

Please provide any detail or context that you can, regarding your experience:

As a member of VOCFS, Victim Support Scotland (VSS) have not, in recent years, made an information request to an outsourced service. However, as an organisation we have utilised FOIs and therefore understand the importance of access to information rights as a third sector organisation advocating for the rights of people affected by crime.

Question 2(a)

If seeking information about a public service delivered under contract by an external provider, how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority on whose behalf the service is being delivered?

[By 'public service' we mean a service which is delivered directly to members of the public, and whose provision would commonly be understood to be the responsibility of the public authority]

- Very confident
- Somewhat confident
- Somewhat doubtful
- Very doubtful
- Not sure

Please provide any reasons for your answer:

With limited experience accessing information from the external bodies, VSS as a member of VOCFS, are not in a position to definitively say this would be achievable.

However, we are reassured by the extension of FOISA to private prisons, secure accommodation, and registered social landlords through a Section 5 Order. VOCFS recognises the importance of these transparency for as they are caring for vulnerable individuals.

Question 2(b)

If seeking information about an ancillary service previously delivered in house - but now delivered under contract by an external provider - how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority to which the service is being delivered?

[By 'ancillary service previously delivered in house' we mean an internal service provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider].

- Very confident
- Somewhat confident
- Somewhat doubtful
- Very doubtful
- Not sure

Please provide any reasons for your answer:

As a member of VOCFS, VSS has not in recent years made an attempt to access information about an ancillary service previously delivered in house. As such, we cannot be fully confident we would be able to access this information through current FOI legislation if required. However, based on our previous experience with FOIs where we have been able to obtain the relevant information through current provisions, we would be somewhat confident.

Question 3(a)

Would you welcome further assurance about the future use of the Scottish Government's section 5 power to maintain and extend access to information rights in Scotland?

- Yes
 No
 Not sure

Question 3(b)

What, if anything, would provide you with greater assurance that the power can be used consistently to ensure coverage of the Act can keep pace with any changes in the delivery of public services?

[by 'public services' we mean any service provided directly to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility]:

As aforementioned, VOCFS believes Section 5 has already proved an adequate tool to extend the coverage of the Freedom of Information Act in response to changes in the delivery of public services.

This has been demonstrated in the extension of FOISA to cover private prisons, secure accommodation and registered social landlords. VOCFS would argue, from the evidence currently available, Section 5 allows for reactive and proportionate extensions if and when they are required.

VOCFS would be eager to review the outcome of the paper setting out the Scottish Government's approach to the future use of the Section 5 Power to establish whether this strategy will be sufficient to ensure the Freedom of Information act keeps pace with developments in models of public service delivery.

Question 4(a)

Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs where this relates to the provision of a public service?: i.e. the direct provision of a service to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility.

- Yes
 No

Not sure

Please give any reasons for your answer:

VOCFS believes that stronger guidance has the potential to ensure public authorities have a greater understanding of what information held by contractors is subject to FOISA, ensure this is accessible and managed in accordance with relevant guidance. This would need to be supported by the enforcement of stronger guidance to ensure this is being followed by local authorities and contractors.

Question 4(b)

Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs where this relates to the provision of an ancillary service, previously delivered in house?: i.e. an internal service provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider.

- Yes
 No
 Not sure

Please give any reasons for your answer:

Please see above response.

Question 5

Do you agree that it is relevant to make a distinction in guidance between public services (i.e. those provided directly to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility) and ancillary services (i.e. internal services provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider)?

- Yes
 No
 Not sure

Please provide any thoughts you may have on the relevance, appropriateness and implications of such a distinction:

VOCFS would agree that a distinction should be made in guidance between public services and ancillary services, recognising the distinction in these services and their role in directly providing public services.

Question 6(a)

What are your views on the introduction of a Gateway clause as a means of making the Act more 'nimble'?

- I support the introduction of a Gateway Clause
- I oppose the introduction of a Gateway Clause
- Not sure/have no view

Please provide more information about your views below, including any thoughts you have on how any 'gateway clause' might relate to:

a) outsourced public services (i.e. any service provided directly to members of the public, for which the authority itself is regarded as having ultimate responsibility):

b) ancillary services, previously delivered in house (i.e. any internal service within an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider):

VOCFS echoes concerns that an expansion of FOISA via a 'gateway clause' could have significant consequences for outsourced public services, specifically third sector and charitable organisations. We are especially concerned by the impact such a clause could have on the small and medium organisations within our forum.

Introducing legislation which would make organisation subject to FOISA could place significant financial strain on funding and resources for third sector and voluntary organisations. Voluntary organisations would face specific challenges in particular due to the nature of their funding structure. For example, if a voluntary organisation was only funded a limited amount for 18 months to provide a public service, a significant amount of its short-term funding would have to go towards ensuring they are able to manage FOI requests. This would require a significant level of resources when they will only be providing a public service for a limited period. As such, there is a lack of clarity surrounding how the 'Gateway Clause' would make the act 'more nimble' without having significant consequences for the resources and finances of voluntary and third sector organisations.

This is of further concern when placed in the context of the current economic climate and the challenges this has created for many voluntary organisations across Scotland. For example, the Scottish Government's [The Cost of Living Crisis in Scotland: Analytical Report](#), highlights some of the key challenges third sector organisations are facing in delivering services in the current economic climate.

The report, published in November 2022, noted the Scottish Government are facing considerable challenges regarding the funding of public services. The report notes: *"The effects of inflation means that the Scottish Government 2022-23 Budget is already worth £1.7 billion less in real terms than it was in December. The UK Government's existing spending plans, coupled with latest inflation forecasts, mean that at the time of writing it is anticipated that the Scottish Government's funding could fall by up to 4.5% in real terms this year."*

Against this backdrop of the challenges the Scottish Government faces in funding public services, it is difficult to envision a scenario where additional funding could be made available to voluntary and third sector organisations to support the additional resources which would be required should they become subject to FOI. This issue is further compounded when we consider the background of significant [funding cuts taking place across local authorities](#).

Considering the cost implications, the 'gateway clause' could have on small and medium size voluntary and third sector organisations, during a time when so many are struggling to provide essential services, we do not agree that this is the best route to extending FOISA.

VOCFS understands the importance of transparency from voluntary and third sector organisations, particularly those who provide essential public services to some of the most vulnerable in society. However, we would seek to explore alternative means to extend FOISA to the relevant organisations which reduces the potential impact on small and medium voluntary organisations, considering their funding structures and the challenges they face in the current economic climate.

Question 6(b)

If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for small and medium-sized enterprises (SMEs)? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

- I would favour a specific exclusion for SMEs
- I would oppose a specific exclusion for SMEs
- Not sure/have no view

Please provide more information about your views below:

VOCFS understands that SMEs would face similar challenges if a gateway clause introduced into legislation, and this may act as a barrier to being able to tend for government contracts.

However, VOCFS would seek to emphasise the difference in funding structures between SMEs and third sector organisations. As such, we cannot say for certain that a specific exclusion would be preferential.

Question 6(c)

If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations? (the Scottish Ministers would still retain the power to extend to such organisations by order under section 5, following consultation, where they are considered to be delivering functions of a public nature)

- I would favour a specific exclusion for third-sector organisations
- I would oppose a specific exclusion for third-sector organisations
- Not sure/have no view

Please provide more information about your views below, including your thoughts on whether a distinction should be made between large and small/medium sized third sector bodies (e.g. those employing fewer than 250 staff members):

In light of the issues raised in our response to Question 6A, VOCFS believe there should be a specific exclusion for small/medium sized third sector bodies. We believe that this exclusion would account for the funding and resource challenges they would face in responding to FOI requests.

We believe that organisations which could be considered for this exclusion would be those who employ less than 250 people and/or have an annual turnover of less than £100,000. We also believe that exemptions should be considered for third sector and voluntary organisations who are only contracted to provide outsourced public services for a limited period (24 months or less.)

This is with the understanding that Scottish Government Ministers would retain the right to extend the power under Section 5 of the Freedom of Information Act.

We also have concerns that this will lead to more public service contracts going to private sector organisations who may be better able to absorb the additional costs associated with meeting FOI requests.

VOCFS believes that the Scottish Government should also engage with larger third sector and voluntary organisations regarding any attempt to introduce a gateway clause, to fully understand the impact this will have on resources and to ensure organisations understand what would be required of them.

Question 7

What are your views on the desirability of broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies?

- I support broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies
- I oppose broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies
- Not sure/have no view

Please provide more information about your views, including any thoughts you have on how a broadened section 5 power might operate:

As previously noted, VOCFS believes existing powers under current Freedom of Information legislation is sufficient in enabling ministers to extend powers in a manner which is proportionate, targeted and responsive to the changing nature of public service delivery. We believe that this will ensure information rights strengthened and extended to a broader range of organisations where necessary without placing undue financial and resource pressures on third sector and voluntary organisations through blanket clauses.

However, VOCFS would seek further consultation with the Scottish Government regarding its future approach to the use of Section 5 and the specifications of where this would be applied. For example, we would seek clearer definitions regarding what constitutes a public service and 'significant funding.'

Question 8(a)

What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of public services (i.e. any service provided directly to members of the public, for which the authority itself is regarded as having ultimate responsibility) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs:

- I consider it necessary to amend the legislation
- I do not consider it necessary to amend the legislation
- Not sure/have no view

Please provide more information about your view, including any thoughts you have on how any such approach might work:

VOCFS are unsure whether legislative amendments are required in order to provide a clearer legislation steer about when information held by contractors about the delivery of public services is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs.

We note that amendments to the UK Act were suggested by the Information Commissioner following her 2019 report on the impact of outsourcing on access to information rights. However, without further clarification on what such amendments would look like and the wider ramifications of these, we cannot say with certainty that this would be our preference.

Question 8(b)

What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of ancillary services previously delivered in house (i.e. any internal service within an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs:

- I consider it necessary to amend the legislation
- I do not consider it necessary to amend the legislation
- Not sure/have no view

Please provide more information about your view, including any thoughts you have on how any such approach might work:

As above, we would note that without a clearer proposal on what such amendments would look like and what would constitute 'greater legislative steer' we cannot say for certainty that amending legislation is necessary or proportionate.

We would echo Scottish Government concerns regarding wanting to establish the full ramifications of any legislative change to third sector organisations to ensure they are unduly burdened.

This is particularly true for ancillary services where the scope for the type of service provided is relatively wide and may vary significantly in its relevance to the public interest.

Question 9

Do you have other thoughts on how the Committee's general concern about the agility of the legislation, in terms of its ability to keep pace with developments in the way public services are delivered, might be addressed? This could be either through non-legislative or legislative means:

As noted above, VOCF's primary concern regarding this matter is that if a broad legislative approach is taken to amend the Freedom of Information Act to keep pace with developments, this will have unintended consequences for third sector and voluntary organisations who provide public services.

A flexible and responsive approach is required to keep pace with developments whilst understanding the nature of this diverse sector and the variety of roles organisations play in delivering services both in the short and long-term.

Any firm legislative change has the potential to burden these organisations and divert resources from the front-line which could have a significant wider impact on service delivery.

Whilst we wholly support the upholding of access to information rights, we would encourage the Scottish Government to consider achieving this via a method which is proportionate and accounts for feedback from the sector.

Question 10

Do you have any experience of a confidentiality clause agreed between a Scottish public authority and its contractor - as opposed to a wider concern to respect commercial interests - acting as a barrier to the release of information under FOISA?

- Yes, I am aware of at least one such instance
- No, I am not aware of any such instances I do not consider it necessary to amend the legislation
- I don't know/would prefer not to say

Please provide details or any further reflections:

Question 11

Do you favour amending FOISA to prevent Scottish public authorities from relying on confidentiality clauses with contractors as a basis for withholding information?

- Yes, I would favour making this amendment
- No, I would not favour making this amendment
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 12

Are you aware of any specific instances where access to information through FOISA has been frustrated as a consequence of the current structure of the section 6 provisions?

- Yes, I am aware of at least one such instance
- No, I am not aware of any such instances
- I don't know/would prefer not to say

Please provide details or other comments below:

Question 13

Do you agree that the wording of section 6 of FOISA should be amended so as to ensure all companies wholly-owned by any combination of schedule 1 authorities, including the Scottish Ministers, fall within the definition of a 'publicly-owned company'?

- Yes, I would favour making this change
- No, I would not favour making this change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 14

Do you agree that updating the Section 60 Code of Practice, to provide explicit guidance on mitigating the risks associated with any use of unofficial platforms, would be the best way to provide greater assurance that authorities are fully appraised of their obligation in relation to information held on unofficial platforms?

- Yes
- No
- I don't know/have no view

Please give any reasons for your answer:

Question 15

Do you believe there would be value in amending FOISA to incorporate a fuller definition of the term 'information' within the legislation?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please give any reasons for your answer:

Question 16

If a definition of information were incorporated within FOISA should this definition be:

- 'any information in written, visual, aural, electronic or any other material form'; or
- something else? [Please specify]:

Question 17

Do you agree that the current provisions of sections 23 and 24 of FOISA, in regard to publication schemes, require to be updated?

- Yes, I agree there is a need to update the provisions
- No, I do not agree there is a need to update the provisions
- I don't know/have no view

Please explain the reasons for your answer:

Question 18

Do you agree with the Commissioner's proposal that the requirement to adopt and maintain a publication scheme should be replaced by a simple duty to publish information, supported by a Code of Practice on publication, set by the Commissioner subject to Parliamentary approval?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 19

Is there any other alternative, that you see as preferable to the Commissioner's proposed approach?

- Yes
- No
- I don't know/have no view

If 'yes', please elaborate:

Question 20(a)

How satisfied are you with the availability of information about the work of government and public services in Scotland in the public domain?

- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied

Please provide reasons for your answer:

Question 20(b)

Specifically, what types of information regarding the work of government and public services in Scotland do you consider should be made available proactively?

Question 20(c)

How would you prefer to access information about government and public services in Scotland?

Question 21

Do you support changes to FOISA, and to the fees regulations, to permit authorities to estimate excessive cost of compliance in terms of staff time, rather than financial cost (the limit being set at 40 working hours)?

- Yes, I would support changes of this nature
- No, I would not support changes of this nature
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 22

Are you aware of any examples or evidence of how the existing power to transfer requests under the EIRs regime has affected the service provided to requesters, either positively or negatively?

- Yes
- No
- Not sure/don't know

Please elaborate:

Question 23

Do you favour introducing a provision into FOISA to allow the transfer of requests between authorities, similar to that contained within Regulation 14 of the EIRs?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 24

Which of the following approaches in relation to the effect of seeking clarification do you most favour:

- Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested
- Amending FOISA to allow an authority a defined period in which to seek clarification if the request is unclear, after which any additional days delay will be deducted from the statutory timescale for response
- Leaving the provisions of the legislation unchanged in respect to timescales
- None of the above/No preference

Please provide comment/reasons for your answers:

Question 25

In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of the Commissioner's own office, subject to assurances about the internal independence of that process?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 26

In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of procurators fiscal and the Lord Advocate (relating to the systems of criminal prosecution and investigation of deaths)?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 27

Do you support the retention of the First Minister's 'veto' power in relation to the release of information held by the Scottish Administration, or do you consider the power should be removed from FOISA?

- I support the retention of the First Minister's veto power
- I consider that the power should be removed
- I don't know/have no view

Please provide reasons for your answer:

Question 28

Do you agree that specific provisions requiring the restrictive interpretation of exemptions and a presumption in favour of disclosure require to be incorporated within FOISA?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 29

Do you support amending section 53(1)(a) to make it clear that failure to comply with a decision notice on time can be referred to the Court of Session?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 30

Do you favour amending the definition of 'information' within FOISA so as to specifically exclude environmental information, within the definition of Regulation 2(1) of the EIRs?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

Question 31

Do you support the creation of a new exemption, available only for use by the Commissioner, specifically for information provided to the Commissioner under, or for the purposes of FOISA?

- Yes, I would be in favour of such a change
- No, I would not be in favour of such a change
- I don't know/have no view

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure: