



**Freedom of Information Reform (Scotland) Bill  
Consultation by Katy Clark MSP**

**SUMMARY OF CONSULTATION  
RESPONSES**

**December 2023**



## **Introduction**

This document summarises and analyses the responses to a consultation exercise conducted on the proposal to substantially reform the Freedom of Information (Scotland) Act 2002 (FoISA).

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. Section 4 includes Katy Clark MSP's commentary on the results of the consultation.

Where respondents have requested that certain information be treated as confidential, or that the response remain anonymous, these requests have been respected in this summary.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for or opposition to the proposal (or aspects of it). In interpreting this data, it should be borne in mind respondents are self-selecting and it should not be assumed their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. It is appreciated that a consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available at [www.katyclark.org](http://www.katyclark.org). Responses have been numbered for ease of reference, and the relevant number is included in brackets after the name of the respondent.

A list of respondents is set out in the Annex and split into individuals and organisations.

## **List of Contents**

<b>1. Introduction and Background</b>	<b>Page 5</b>
<b>2. Overview Of Responses</b>	<b>Page 9</b>
<b>3. Responses To Consultation Questions</b>	<b>Page 11</b>
<b>4. Member's Commentary</b>	<b>Page 40</b>

**Annex 1 List of Respondents – Organisations**

**Annex 2 List of Respondents – Individuals**

## SECTION 1: Introduction and Background

Katy Clark MSP launched a proposal to reform the Freedom of Information (Scotland) Act 2002, on 1<sup>st</sup> November 2022. The proposal is for a Bill to:

“Reform Freedom of Information legislation in Scotland including to: extend coverage to all bodies delivering public services, services of a public nature and publicly funded services; create a role of Freedom of Information officer; increase the proactive publication of information; improve enforcement where necessary; and improve compliance with human rights law.”

The proposal was accompanied by a consultation document. This document was published on the Parliament’s website, from where it remains accessible: [Proposals for Bills – Scottish Parliament | Scottish Parliament Website](#)

The consultation period ran from 1<sup>st</sup> November 2022 to 14<sup>th</sup> March 2023. Originally the closing date was set for 2<sup>nd</sup> February, however the Scottish Government launched its own [consultation](#) on FoI rights on 29<sup>th</sup> November 2022, which had a closing date of 14<sup>th</sup> March 2023. The Scottish Government adopted a different approach and confirmed its 16-year-old commitment to “operate within FoISA rather than proposing significant changes to it but adjust the regime where it is necessary and sensible to do so.”<sup>1</sup> Therefore, it was decided to align the closing date to 14<sup>th</sup> March to enable stakeholders and interested parties to examine both approaches and to give time to consider the issues raised and submit a response. Several extension requests were also received, which was agreed to.

The following organisations were sent copies of the consultation document or links to it:

- All 14 regional health boards
- All 32 local authorities
- All 31 health and social care partnerships
- The General or Regional Secretaries of 39 trade unions for distribution among branches
- 20 grant-aided or independent special schools
- All 136 members of the Scottish Federation of Housing Associations
- All 6 members of the Scottish Alliance for Lobbying Transparency
- The Improvement Service (IS) for distribution to Community Councils
- COSLA
- STUC
- CBI
- Federation of Small Businesses
- Crown Estate Scotland
- Engender
- Scottish Women’s Aid
- Rape Crisis Scotland
- Edinburgh Rape Crisis Centre

- Care Inspectorate
- Shelter
- Advice Direct Scotland
- Citizens Advice Scotland
- Scottish Youth Parliament
- Health and Social Care Scotland
- Home Care Association
- Clyde Gateway
- Foundation Scotland
- Enable
- Scottish Human Rights Commission
- Chartered Institute of Fundraising
- Covid-19 Bereaved Families for Justice
- Scottish Social Services Council
- Scottish Care
- Serco
- Sodexo
- Carers Trust
- Cornerstone
- Blythswood Care
- Shared Care Scotland
- Inspire Scotland
- Aberlour
- Turning Point Scotland
- Coalition of Carers in Scotland
- Coalition of Care and Support Providers in Scotland
- CrossReach
- Community Energy Scotland
- SSE
- Scottish Power
- Shell
- BP
- Victim Support Scotland

Furthermore, 3 individuals were sent direct copies after they explicitly requested them.

Other steps were taken to make the consultation known:

- A number of press releases were sent to local and national publications, and there were stories in many of these publications over the course of the entire consultation period.
- Columns written by the MSP on the subject were published in Holyrood Magazine and a range of other local and national publications; and other coverage and commentary was published by journalists across Scottish publications.

- The following meetings were held or attended:
  - A consultation event was held at the Scottish Parliament on 3<sup>rd</sup> March 2023 and registration was open to anyone via Eventbrite.
  - An online meeting hosted by the Jimmy Reid Foundation was held on 6<sup>th</sup> March 2023, and registration was open to anyone via Eventbrite.
  - The consultation and wider FOISA reform were discussed at two meetings of the Scottish Public Information Forum (SPIF) on 10<sup>th</sup> December 2022 and 13<sup>th</sup> February 2023.
  - Katy Clark MSP spoke at the annual Holyrood FoI Conference on 29<sup>th</sup> November 2022 along with the Minister for Parliamentary Business George Adam MSP.
  - Katy Clark MSP attended a webinar hosted by the Scottish Council for Voluntary Organisations (SCVO) on 9<sup>th</sup> January 2023.
  - A meeting with the Scottish Police Federation to discuss the consultation was held on 26<sup>th</sup> January 2023.
  - A meeting with Rape Crisis Scotland and JustRight Scotland to discuss the consultation was held on 20<sup>th</sup> February 2023.
  - A consultation meeting was held in Paisley on 25<sup>th</sup> February 2023 at 11am.
  - One-to-one meetings were held with constituents and organisations where specifically requested.

The consultation exercise was run by Katy Clark MSP's parliamentary office. Carole Ewart, Director of the Campaign for Freedom of Information in Scotland, was seconded to the office for one day per week to assist with the consultation exercise.

The consultation process is part of the procedure that MSPs must follow to obtain the right to introduce a Member's Bill. Further information about the procedure can be found in the Parliament's standing orders (see Rule 9.14) and in the *Guidance on Public Bills*, both of which are available on the Parliament's website:

- Standing orders (Chapter 9): [Standing Orders | Scottish Parliament Website](#)
- Guidance (Part 3): <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25690.aspx>





## SECTION 2: OVERVIEW OF RESPONSES

98 responses were received with 2 respondents requesting confidentiality, so these are not included in the following statistical breakdown. The 96 respondents are categorised as follows:

- 13 (13.5%) from representative organisations [e.g. business association, trade union, political party or other body with a role representing its members or supporters' views collectively].
- 22 (22.9%) from public sector organisations [e.g. Scottish/UK Government, Govt agency, local authority, NDPB].
- 2 (2.1%) from private sector organisations [e.g. individual company or business].
- 35 (36.5%) from third sector organisations [charitable, campaigning, social enterprise, voluntary, non-profit].
- 4 (4.2%) from "other" types of organisations [e.g. club, local group, group of individuals, etc.].
- 7 (7.3%) from individual politicians [MSPs, MPs, MEPs, peers, councillors].
- 5 (5.2%) from academics and professionals with experience in a relevant subject.
- 8 (8.3%) from private individuals (members of the public).

In terms of publication:

- 10 (10.4%) anonymous submissions.
- 10 submissions referred to the response submitted by SCVO. For example, the Scottish Football Association stated: "We echo the position of our colleagues at the Scottish Sports Association and Scottish Council for Voluntary Organisations (SCVO) in calling on policymakers to give greater thought to the real purpose of extension and to focus on tailored, proportionate, and financially viable solutions that meet those aims."
- 4 late responses were accepted.

Key themes from the responses:

- In total, **74.5% of respondents to question 5 on the general purpose of the bill were in favour.**
- A clear majority of respondents, 64 were in favour of the Bill, either fully supportive (37) or partially supportive (27).
- 4 respondents are neutral.
- In total, **20.9% of respondents to question 5 on the general purpose of the bill were opposed.**
- 18 respondents either fully opposed (2) or partially opposed (16) the proposals set out in the consultation.
- Subject to the more detailed points made later in this summary, it is noted that more third sector organisations supported the proposals (22)

than opposed them (13), but this minority represented a more significant level of opposition than respondents overall; in total, **62.9% of third sector organisations supported the bill and 37.1% opposed it.**

- All the regulators who responded to the consultation partially supported reform of FoISA: the Office of the Scottish Charity Regulator (OSCR), Scottish Public Services Ombudsman and the Scottish Information Commissioner.

## SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

This section sets out an overview of responses to each question in the consultation document.

### Question 5: General aim of proposed Bill

**Question 5: Which of the following best expresses your view of the proposed Bill (Fully supportive / Partially supportive /Neutral, Partially opposed, Fully opposed and Unsure)? Please explain the reasons for your response.**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 85 respondents answered the question: 20 individuals and 65 organisations.
- Of the respondents who answered this question, **74.5% were in favour**
- 63 respondents fully supported (37) or partially supported (27) the proposals set out in the consultation.
- 4 respondents were neutral.
- Of the respondents who answered this question, **20.9% were opposed.**
- 18 respondents either fully opposed (2) or partially opposed (16) the proposals set out in the consultation.
- Opinion was divided on the general merits of the proposed Bill, ranging from strong support (e.g. UNISON Scotland) to opposition (e.g. sportscotland), with others (e.g. NHS Forth Valley) unsure.

The main reasons given for supporting the proposed Bill were:

- **Reforming FoISA has been delayed and action is needed:** The National Union of Journalists stated: “FOISA in its current form has not kept pace with changes in technology and the development of outsourcing of public services, and that full reform of the legislation is overdue. This proposed bill does just that.”
- **Increase the pro-active publication of information:** The Scottish Information Commissioner stated: “A number of the legislative proposals contained in the draft Bill would address and resolve some of my current concerns around FOI. I fully support, for example, the proposal that the duty to proactively publish information be refreshed, replacing the current poorly-understood and commonly misinterpreted ‘publication scheme’ duty with a modern, flexible Code of Practice on Publication, enabling the vitally important duty to publish to keep pace with both technological changes and public expectations.”

- **Ensure parity on FoISA rights and duties when Public Services are outsourced:** The Scottish Public Services Ombudsman stated: “We are broadly supportive of the aims of the proposed bill. In particular, the need for reform of the FOI regime and the extension of the regime into areas where public services are being delivered privately or in the third sector.”
- **Increased Transparency and Accountability in the Public Interest:** The Church of Scotland stated: “We stand alongside a broad range of other civil society organisations which support principles in public life which increase transparency and accountability, where this is in the public interest.”
- **Increased Local Authority Accountability:** GMB Scotland stated: “Bodies such as COSLA must be included in FOI legislation. Whilst local authorities are included under existing legislation, much of their strategic functions on key public services are determined by COSLA. On many matters, Scotland’s 32 councils speak with one voice via COSLA – especially when making representations to the Scottish Government. This means that local authorities can effectively hide key information by transferring responsibilities to COSLA. There must be total transparency in our public services and the decision-making process.”
- **Comprehensive Legal Reform:** The Environmental Rights Centre Scotland (ERCS) “believes this Bill offers the possibility of comprehensive reform, in contrast to the minor amendments to FOI law proposed by the Scottish Government in its own consultation”. It added: “It has the potential to reduce delays in accessing information; ensure better compliance; address concerns about how information is stored and transmitted; and improve proactive publication by public authorities as well as third parties currently outside the scope of FOISA.”

## Reasons for opposing the Bill

The main reasons given for opposing the proposed Bill were:

- **Hamper Sports Delivery:** sportscotland stated that it “invests Scottish Government and National Lottery funding in recognised Scottish Governing bodies for sport (SGBs) on a sport-by-sport basis.” It added: “SGBs are primarily volunteer-led organisations and vary in size. The proposed Bill would have significant implications for SGBs, as they would be bound by FOISA. We have concerns that these SGBs, in receipt of investment, and other applicants for grant funding (e.g., for a sports facility) being included. The administrative burden would be unduly high and potentially interfere significantly with their ability to deliver sporting and social benefit.”

- **Regulatory Environment:** SCVO stated that it “supports proportionate regulations that can provide the stable foundations upon which voluntary organisations can thrive”. It added: “Charities already comply with various regulatory models and any proposals to extend FoI should factor in the multiple layers of regulation and regulatory change for their interdependencies. The forthcoming independent review of charity regulation will help policymakers to do this.”
- **Focus on the impact on designated authorities:** The General Teaching Council for Scotland stated: “...The approach taken in this consultation, and the proposals for the Bill itself, does not appear to consider or take in to account the impact on public authorities. There appears to be no exploration or understanding evidenced of the issues and challenges that public authorities, particularly small organisations like GTC Scotland, face in managing information requests. While transparency and accountability are essential and ensuring the Freedom of Information regime is robust and fit for purpose key, to invite and evidence no consideration of the impacts on those who would be required to comply with revised FOI legislation is in our view a significant oversight...”

### **Additional Information from Submissions**

Other points mentioned by respondents were:

- **Practical considerations in being designated under FoISA:** LGBT Youth Scotland stated: “We would like to note that, along with many other registered charities in Scotland, as well as receiving public funds through Scottish Government grants, other public body funding and independent trusts and grants funding, we also generate income through a commercial operation. Clarity therefore around commercial interests and exemptions in section 43 of the FoISA and the limit of FOI requests in relation to this is of significant importance to enable us to protect our staff and our work.”
- **Reform of FoISA, despite concerns, is needed:** One anonymous organisation stated: “Our own experience of using Freedom of Information as a tool for accountability has been mixed. We believe that it could benefit from a more simplified process, more provisions on suitable timescales, and more consistency in the quality of information provided. We are also of the belief that there is more work to be done on compliance levels with existing legislation.”
- **No Gateway Clause to Designation:** The Scottish Information Commissioner provided a detailed analysis of the pitfalls and emphasized the importance of clarity and consistency for requestors, duty bearers and the regulator. It was argued designation under FoISA should be service led rather than focus on the nature of the provider. The Commissioner stated: “Additional challenges may also arise if, for example, the Bill includes a ‘minimal value’ clause, through which only

services of a certain value fall within scope. Such a clause may create challenges in terms of tracking and monitoring funding levels to determine which organisations fall within scope, with services in receipt of funding at levels close to the threshold potentially dropping in and out of coverage as levels fluctuate.”

- **Collaborate on Reform:** Common Weal stated that it “fully supports the aims and approach of this Members Bill, welcomes the recent Government announcement to incorporate some of its aims into their own review (the consultation of which we have also responded) and we shall encourage both groups to cooperate and extend the scope of Government transparency even further”.

## **Question 6: Designation of Private Sector Under FoISA**

**Question 6: Which of the following best expresses your view on the private sector being designated under FoISA if it is publicly funded and the service is of a public nature?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 77 respondents answered the question: 20 individuals and 57 organisations.
- Of the respondents who answered this question, **74% were supportive**.
- 57 respondents were either fully (43) or partially supportive (14).
- 11 respondents were neutral.
- Of the respondents who answered this question, **9.1% were opposed**.
- 7 respondents were either fully opposed (2) or partially opposed (5).
- 2 respondents were unsure.

### **Reasons for supporting the Proposal**

The reasons respondents provided for supporting the proposal included:

- **Clear Majority for Designation of private social care providers:** For example, GMB Scotland “supports the inclusion of private bodies who provide public services, for example private social care providers”.
- **Inconsistent Designation under FoISA:** The National Union of Rail, Maritime and Transport Workers stated: “In the ferry sector, this discrepancy between public and private operators is also clear. CalMac, a publicly owned company which operates the Clyde and Hebrides routes, is covered by FoISA. Whereas, Serco, which operates NorthLink Ferries, is not. Yet both services are in receipt of significant

amounts of public subsidy. This inconsistency is not democratic nor equitable.”

- **Unequal Transparency with FoISA and Environmental Information:** Associated Society of Locomotive Engineers and Firemen stated: “Many of our members have experienced the change in their employer’s obligations under the FoISA. As we represent train drivers, our members working for Scotrail saw this first hand when Abellio was unable to properly and sufficiently run the service. The Scottish Government then brought Scotrail into public ownership, once in public ownership the FoISA applies to Scottish Rail Holdings (the at arm’s length operator) whereas before, the Environmental Information Scotland Regulations (EISRs) were the main information sharing obligation on the private operator, once coming under public ownership the deliverance of this public service has not changed only the ownership structure, yet the FoISA now fully applies. This is an inconsistency that through the proposed amendments could be resolved.”
- **Data Gathering and Publication:** Victoria Park Allotment Association stated: “Data such as demographics and data collected on protected characteristics is valuable as it shows who in Scotland is benefitting from public money/public services. It also shows the gaps in service provision and can stop postcode lotteries across the country. All companies/services should be gathering this type of data to show they are meeting the needs of Scottish citizens who use these services. Infrastructure/transport contracts paid for by the public purse should produce data/information as it shows how the money has been spent.”
- **Delivering on Recommendations from 2020:** UNISON Scotland raised its agreement with the Post-Legislative Scrutiny Committee report on FoISA, which stated “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”. It added: “This is not the case under FOISA and we believe that it is both appropriate and urgent to amend the legislation accordingly.”
- **Practical Issues:** East Dunbartonshire Council was partially supportive, but it stated that the proposal “reduced oversight and awareness in relation to the release of information which relates to the provision of services for which the Council is legally responsible and accountable”. It added: “Indeed the Council may not even know if a request is made to a third party organisation. This could result in sensitive information being released without the Council being able to address or contextualise this information...”

## Reasons for opposing the Proposal

The reasons respondents provided for this opposing the proposal included:

- **Alienating Service Providers:** Glasgow City Council stated that it was “concerned, in the context of a local authority setting, that there is a risk of deterring private bodies from bidding for public sector contracts”. It added: “It is also likely that such obligations would incur additional costs which would be passed on to the public sector”. The Council raised concerns about impact as it “would have the effect of putting Scottish-based companies at a significant competitive disadvantage compared to companies based outwith Scotland as the Scottish company would need to factor in FOI compliance costs which their non-Scottish counterparts would not need to include”.
- **Burden of Designation Will Impact on Services:** Scottish Care stated: “As a charity we represent both private and third sector small to medium sized organisations. We do not believe that FOISA to be an effective methodology for transparency when applied to any independent care providers. While we support an increase in transparency, we would argue that the nature and burden that an extension of FOISA to these organisations would create is impractical and will adversely affect the quality and provision of social care.”
- **Consult with those to be designated under FOISA:** One anonymous organisation stated: “While we appreciate that designation would not cover all aspects of the private sector’s activities, experience under the EIRs has shown how difficult it can be to identify the extent of the organisation’s obligations to disclose information. We are aware that proportionality is an important consideration in decisions about extension of FOISA. We would be concerned if there was an automatic designation under FOISA of SMEs without further consultation with that sector.”
- **Status Quo:** The University of St Andrews stated: “The public authority that channeled public funding to a private body will fall within the legislation. Where that authority has a well governed relationship with what is likely to be a private sector contractor, key information should be available via the Provisions of FOISA, as the authority is likely to hold such. Ideally the public authority should retain responsibility and information should be available from that entity for the activities of private bodies that are engaged to fulfil activities for the authority.”

### Other points made

- **Variation in Business Type:** The Federation of Small Businesses stated: “Data from Businesses in Scotland: 2022 [shows](#) the majority (70%) of businesses in Scotland do not have any employees. Therefore, the resources to comply with FOISA, e.g. having access to a Data Protection Officer would be unavailable to them without adding a



significant increase to their operating costs – or would preclude them from delivering services on behalf of a public body.”

- **Alternative Approach:** Kennedys Scotland LLP stated: “There is no clear threshold to trigger designation. The proposal, as it currently stands, risks unintended consequences, such as reduced tendering for public contracts. Newly designated organisations may not have the infrastructure in place to train staff to ensure compliance with freedom of information (FOI) requirements. While contracting public authorities have a vested interest in promoting proper compliance, those authorities have limited resources to fill that training gap. The consultation does not address the alternative possibility that contractual terms to require private sector organisations to provide information to the public authority commissioning their work could be substantially strengthened, so that the information could then be requested from that public authority by the public using the existing infrastructure and systems.”

### **Question 7: Designation of the Third Sector Under FoISA**

**Question 7: Which of the following best expresses your view on the third/charitable/voluntary sector being designated under FoISA if it is publicly funded and the service is of a public nature?**

A breakdown of responses is provided to understand the detail from and source of respondents:

- 75 respondents answered the question: 18 individuals and 57 organisations.
- Of the respondents who answered this question, **70.7% were supportive**.
- 53 were either fully (36) or partially supportive (17).
- 4 respondents were neutral.
- Of the respondents who answered this question, **22.7% were opposed**. Although 5 did not tick any box, their answers were clearly opposed to this proposal.
- 17 were either fully opposed (6) or partially opposed (11).
- 1 respondent was unsure.

### **Reasons for supporting the Proposal**

The reasons respondents provided for this supporting the proposal included:

- **Broad Cross Sector Support:** The Scottish Information Commissioner, the Scottish Public Services Ombudsman, OSCR, Shetland NHS Board (NHS Shetland), Angus Council, Scottish Veterans Residences, Yorkhill and Kelvingrove Community Council, the Campaign for Freedom of Information in Scotland, Jubilee

Scotland, Liz Albert, Peter Burke, Code the City and 46 other respondents declared their support for this reform.

- **Transparency Threshold:** OSCR stated that it is fully supportive of the proposal as “we support greater transparency and the proposed introduction of a minimum contract value threshold”.
- **Inclusive Designation:** The Educational Institute of Scotland stated that it “welcomes the inclusion of non-charitable not-for-profit organisations such as COSLA and Colleges Scotland within the proposed scope of FOI law. Such organisations play an important role in the democratic government of our nation and their exclusion from FoISA has always represented an ‘accountability gap’”.
- **Follow the Public Pound:** Scottish Autism stated it was partially supportive and sought clarification “as to how ‘publicly funded and the service is of a public nature’ is to be defined, given that the totality of any commissioned service is often funded only in part via public funding”.
- **Requestor Perspective:** Unite the Union Glasgow Not for Profit Sector Branch is fully supportive and stated: “Organisations in these sectors – where our members work – need to be proactive in publishing their funding reports, board minutes, demographic data, policies and accounts. If they do this, the FOI work will not be the burden some have been led to believe that it could be. If their focus is on co-production of services and user involvement, they should be publishing most of their information in accessible formats right now. If they are not, then the question to be asked is, why not? What sort of user involvement are they encouraging if the data/information is not available?”
- **Public Trust:** Fire Brigades Union Scotland stated “There needs to be transparency and accountability, in the same way there is in the public sector, when private companies, or other organisations are receiving, in some cases, huge sums of public money. Trust in institutions and the operation of government depends on it.”
- **Rationale for Designation:** The Health and Social Care Alliance Scotland is “partially supportive” and understands “the rationale that FoISA should extend to cover third sector organisations which are delivering publicly funded services, with the aim of ensuring parity of access to information regardless of what sector is providing a service. However, this must be balanced against the often very limited resources, including staff, available to third sector organisations. This point was raised by a number of our members in response to our call for input to this consultation.”

## Reasons for opposing the Proposal

The reasons respondents provided for this opposing the proposal included:

- **A “One Size Fits All Approach”:** There was a sizeable minority of organisations in the third sector who objected to this specific proposal. Whilst over half of the 35 submissions by self-described third sector organisations were supportive of extension of FoISA to third sector providers of public services, there were 12 organisations which expressed opposition. Of these, 10 submissions referred to the response submitted by SCVO, which stated in its own submission: “While some voluntary organisations actively advocate for a much wider mechanism for extending FoI, the overwhelming message from the voluntary sector is that the proposal to extend FoI in the broad, one-size-fits-all manner set out is not feasible or realistic, as it fails to deliver targeted and proportionate regulation across a unique sector.” One anonymous organisation stated: “A one size fits all approach to FoI legislation would not recognise the varied nature of the third sector social care support for carers – which many would also see as its strength. The unintended consequence could be that small more niche third sector providers – many of whom are providing services to those with more complex levels of need – could be disproportionately impacted by this change and so too could those that they support. It is absolutely essential that any changes to FOI legislation are practical, proportionate and that the costs and benefits are fully understood.”
- **Sustainability of Third Sector:** Paths for All confirmed its support for the SCVO submission and stated: “We support the ambition of maintaining and strengthening people’s access to information rights but also have concerns about the impact some of the proposals might have on the sustainability of the voluntary sector.”
- **Negative Impact on Sport:** The Scottish Football Association stated: “We believe that an extension of Freedom of Information (FOI) regulations to cover voluntary sector bodies, which would include sport’s governing bodies such as the Scottish FA and the clubs we engage with, would be disproportionate, would generate an unnecessary burden that would outweigh any perceived benefit and would have the unintended consequence of reducing the amount of grassroots sporting activity currently taking place across the country.”
- **Impact of reform on organisations:** Scottish Women’s Aid stated that it “believes that it is unhelpful and potentially counter-productive to have a one size fits all approach to extending FoISA coverage to the third sector, to cover organisations which have ‘significant public funding or provide services of a public nature’”. It added: “It is vital that any proposals to extend coverage set out clear parameters and boundaries for FoI coverage across the sector. There would need to be clear definitions of what is meant by public funding and ‘services of a

public nature' and, critically, to undertake detailed impact assessments of those proposals.”

- **Targeted use of FoISA to hamper service delivery:** Rape Crisis Scotland stated: “There is also concern within the sector that given that many third sector organisations have a particular motivation or serve a particular community, that they could fall victim of targeted requests for information in such a way as to bring operations to a standstill.” The Scottish Football Association also raised the issue of “vexatious requests” and stated that it was concerned it “would receive a barrage of FOI requests which would cover a range of areas, with very few anything to do with funding we receive. These would create a resourcing burden and would ultimately divert funds from participation and activity to managing such requests”.
- **Disrupt Evidence Based Public Health Policies:** Obesity Action Scotland and the Royal College of Physicians and Surgeons of Glasgow stated: “In addition to these recommendations, we would like to see special protections within FOI legislation for organisations who work on policy advocacy on non-communicable diseases (for example) to improve public health to protect us from these significant corporate vested interests, whose primary motivations are to generate profit and discredit and disrupt advocacy work, and to prevent evidence-based public health policies from being introduced.”

#### **Other points made**

- **Understanding the third sector landscape:** Yorkhill and Kelvingrove Community Council stated: “There are Community Interest Companies and Social Enterprises that received money from the public purse to deliver projects/pay for service provision; these need to be included as well.”
- **Impact:** The Scottish Public Services Ombudsman, whilst fully supportive of the proposal, stated: “It seems reasonable that if public funding is being used and the service is public that the FOI regime should apply so that there is transparency and accountability for the use of public money. While we are fully supportive in principle, we suggest that there needs to be an assessment of the resource impact, particularly on charitable and third-sector service providers, and how that will be met. This would need to consider both the duty to respond, and the duty to publish information.”
- **Impact of designation under FoISA:** OSCR stated it supported increased transparency in the public and charity sector. It added: “However, we recognise and share concerns about potential impact on small and medium sized charities that may not have the resources to comply with the extended FOISA regime.”

- **Consistency in Designation:** The Scottish Information Commissioner stated: “The key issue to be considered when assessing whether FOISA designation is appropriate should be the nature of the function delivered or service provided, rather than the nature of the organisation providing the service. As with other such services, however, designation should only apply in relation to the delivery of those services, rather than to the work of an organisation as a whole.”
- **Extent of Designation:** East Dunbartonshire Council supports, in principle, the designation of third sector organisations which are fully funded by a public body or bodies and is solely performing public or ancillary services being designated under FOISA. However, for the reasons set out in answer 6, the Council would not be supportive of inclusion of third sector organisations that are not fully funded by a public body or bodies and which are only carrying out services on behalf of a public organisation.
- **Vexatious Requests:** Alcohol Focus Scotland stated it was unsure but “endorses the response of SCVO, under section 7.C (concerns relating to vexatious requests)”.

## **Question 8: Creating a new statutory Freedom of Information Officer**

**Question 8: Which of the following best expresses your view on the creation of a new statutory officer within designated authorities – a Freedom of Information Officer?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 72 respondents answered the question: 16 individuals and 56 organisations.
- Of the respondents who answered this question, **63% were supportive.**
- 46 respondents were either fully (36) or partially (10) supportive.
- 15 respondents were neutral.
- Of the respondents who answered this question, **11% were opposed.**
- 8 respondents were partially opposed.
- 3 respondents were unsure.

### **Reasons for supporting the Proposal**

The reasons respondents provided for this supporting the proposal included:

- **Cost vs Benefit:** East Renfrewshire Council stated: “It is unclear from the proposals what status this suggested role would have, in particular whether this would be a stand-alone role or a “bolt-on” to another post, and what seniority would be expected. While a more focussed FOI role could help deliver a quality service and help to ensure high levels of compliance, this proposal has to be balanced against the resource implications at a time of very significant budgetary pressures.”
- **Addressing Legislative Omission:** David Somervell stated: “This was a significant omission in original legislation.”
- **Establishing an Authoritative Role:** The Socialist Health Association Scotland stated: “Current FOI officers are often fairly junior staff who often struggle to get responses from senior managers.”
- **Increased Authority for Role:** NHS Tayside stated that it was “partially supportive of this proposal”. It added that it “agreed this role would give more gravitas to Freedom of Information compliance within public bodies, but consideration must be given to not putting more burdensome requirements on public bodies”. The website openDemocracy stated: “We are supportive of strengthening the role of a FOI officer within organisations.”
- **Resource Implications:** Society of Local Authority Solicitors and Administrations in Scotland (SOLAR) – FOI, Data Protection and Human Rights Group was partially supportive and stated: “We are conscious of the fact that this will require additional resources which will impose financial constraints particularly on smaller Local Authorities.”
- **Consistency and Best Practice:** LINK INSERT Group stated: “Many countries (e.g. Brazil, Croatia) have such a provision in their FOI laws along with specific responsibilities attached to such a post. These are usually responsible officer roles to oversee compliance, to monitor performance, by providing expert internal advice, engaging with the Commissioner etc., and can ensure that FOI requests are handled in a competent and efficient manner. It should be noted that other legislation requires a designated officer. The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 provides that: 3.— (1) Every council and National Park authority shall have a proper officer. (2) Every devolved public body other than a National Park authority shall have a standards officer.”
- **Creation of a Freedom of Information Officer role:** NHS Greater Glasgow and Clyde stated it “does recognise the benefits of the Data Protection Officer role, introduced via GDPR implementation in 2018, which continues to advise senior managers of the Board’s legislative requirements for data protection whilst championing the data protection rights of our service users. Providing the FOI Officer role carried a similar remit then we would fully support this proposal as a driver for greater legislative compliance throughout the organisation”.

## Reasons for opposing the Proposal

The reasons respondents provided for this opposing the proposal included:

- **Difference between DPO and FoI Officer Thresholds:** Zero Tolerance stated: “Many charities who would meet the threshold to appoint a Freedom of Information Officer as stipulated by this bill because of their income, may not need a data protection officer. The GDPR requires an organisation to have a DPO only if they are a public authority or body, or if they carry out certain types of processing activities. All charities must show compliance with GDPR but not necessarily to the extent of having the volume of data that would require a Data Protection Officer or the infrastructure to support it. Most charities would need to seek extra funding to appoint a post dedicated to Freedom of Information Officer.”
- **Unnecessary:** OSCR stated: “Introduction of a new statutory officer as dedicated post is not necessary. All public authorities are required to comply with FOISA and introduction of this new role would be a disproportionate response and a burden on resources. It would be best to leave it up to each organisation to decide internally the most appropriate way to deal with its compliance of the FOISA regime rather than being prescriptive. It is not as simple as just being an add on responsibility for the organisation’s existing Data Protection Officer.”

## Other points made

- **Further Consideration:** The Scottish Public Services Ombudsman stated: “We would suggest more thought should be given to what a similar post for FOI would achieve specifically for the FOI regime before replicating a model that puts a financial burden on organisations when other options may meet those aims more effectively.”
- **Current Practice is Instructive:** North Ayrshire Council stated that it “already has a team dedicated to processing FOI responses, fulfilling a role similar to that of Freedom of Information Officer”. It added: “In our experience it has been beneficial to have staff members whose remit is focused on transparency and openness to ensure that the correct processes are in place.”

## Question 9: A New Statutory Duty to Publish Information

<b>Question 9: Which of the following best expresses your view on the creating a statutory duty to publish information?</b>
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A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not

been included in the following analysis:

- 72 respondents answered the question: 16 individuals and 56 organisations.
- Of the respondents who answered this question, **73.6% were supportive**.
- 53 respondents were either fully (38) or partially (15) supportive.
- 9 respondents were neutral.
- Of the respondents who answered this question, **8.3% were opposed**.
- 6 respondents were either fully (2) or partially opposed (4).
- 4 respondents were unsure.

## Reasons for supporting the Proposal

The reasons respondents provided for this supporting the proposal included:

- **Monitoring and Enforcing the Code of Practice:** Despite supporting the proposal, the Scottish Information Commissioner stated: “A code of practice, would seem a reasonable approach, as it could set out the duty in a way that maintains flexibility. What is also not clear, is how compliance with the duty will be monitored and enforced.” The Scottish Public Services Ombudsman also supported the proposal and in similar terms.
- **Legislation but No Enforceability:** SOLAR stated: “We would be supportive of the idea of a general legislative duty (supported by a Code of Practice) but not an enforceable duty.”
- **Pro-active Publication of Public Interest Information:** The Educational Institute of Scotland stated: “There are matters (in relation, for example, to teacher well-being, and violence in schools) on which we submit FOI requests to Scottish Local Authorities every year. This information is required to prepare reports requested by our membership. A statutory duty to publish data which is requested annually would serve to reduce the overall volume of FOI requests, saving time and money across the public sector.”
- **Consistency:** Transparency International stated: “Ensuring a consistent and inter-operable approach across public bodies would assist in public access to and understanding of the information. For instance, we would support local authority websites operating to a consistent template.”
- **Current Difficulty in Finding Information:** The Human Rights Consortium Scotland stated out that in 2020, it had “used Fol powers to request information from public bodies around how they had taken into considerations their Human Rights Act 1998 duties during 2019, and during the first COVID-19 period.” It added: “The reason we decided to use Fol was because our members, and our own searches had been



unable to find out this information. In particular, our members spoke about policy and practice decisions about care, support and services being taken in the midst of COVID that seriously affected their communities without any information about what, why or how long of these changes. Even after the initial emergency COVID period was over, this information was still not available.”

- **Reform Needed:** East Dunbartonshire Council “is of the view that the publication scheme is outdated and is underutilised and does not reflect modern practice”. It added: “The Council is in support of a duty to publish supported by a Code of Practice.”

## Reasons for opposing the Proposal

The reasons respondents provided for this opposing the proposal included:

- **Pro-active Publication:** Ayrshire & Arran Health Board stated: “Are you proposing to repeal section 23 of FOISA and replace it with a schedule of information that requires to be published? If the classes of information to be published (and kept up to date) is not overly onerous then this would be sensible. However, one size does not fit all and public bodies are usually best placed to decide what information requires to be published. The Board is very keen to proactively publish information identified through FOI requests to be more effective and efficient in managing requests.”
- **Extra Work:** An anonymous submission from an organisation stated: “Publishing information may lead to additional requests and an increase in work for the organisation.”
- **Impact:** Glasgow City Council is fully opposed to the proposal and stated: “We would welcome a general obligation to publish information relevant to the public interest, along with supporting guidance, however imposing a statutory duty to publish information would, we believe be excessive in terms of cost and resourcing. This may also result in crucial resources being diverted from front line services in order to meet further statutory duties in this regard. It is not clear how this duty can be written given the scope of organisations subject to FOISA. Furthermore, it is unclear what information publication is being sought over and above what is currently being voluntarily published. Further information is required defining the information sought to be published. The indication is that this would be a legally enforceable code of practice, however would this be at the instance of the Commissioner only and not at the instance of private individuals or companies? Further clarification would be helpful around this.”

## Other points made

- **Mandatory Disclosure Log:** Ann Wilson stated: “I am totally opposed to the idea of making a disclosure log mandatory. Maintaining a disclosure log can be time consuming and resource intensive. Requesters in my experience do not use these logs unless they have advanced search engines that can locate information readily and easily. Most public bodies would have to purchase software to facilitate this function and I am not convinced the cost would be proportionate to any possible benefit to either the public body or requester.”
- **Query the Practical Impact:** NHS Tayside stated that it “aims to proactively publish as much information as possible”. It added: “However, we have found that much of what is being requested is more granular than that published and we are not certain that having a statutory duty to publish more information would be of benefit to both requestors and public bodies.”
- **Importance of Information Refresh Periods:** The University of St Andrews was unsure and stated: “The present mechanisms for proactive publication (publication schemes) do not work well. Ideally, materials should be placed in a publication scheme with defined refresh periods. If expenses are published in a publication scheme annually an authority should be able to refer and rely on those for a response, whilst those materials are available via the publication scheme.”

## **Question 10: Reducing Exemptions Under FoISA**

**Question 10: Which of the following best expresses your view on reducing exemptions under FoISA?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 87 respondents answered the question: 17 individuals and 70 organisations.
- Of the respondents who answered this question, **47.1% were supportive.**
- 41 respondents were either fully (30) or partially (11) supportive.
- 13 respondents were neutral.
- Of the respondents who answered this question, **12.6% were opposed.**
- 11 respondents were either fully (4) or partially opposed (7).
- 22 were unsure.

### **Reasons for supporting the Proposal**

The reasons respondents provided for this supporting the proposal included:

- **Correcting Disparity in Exemptions:** LINK INSERT Group proposed that “where exemptions apply, they should be subject to the harm and public interest test”. It stated: “There are no absolute exceptions under the Environmental Information Regulations, so there could be a disparity if a request includes environmental and non-environmental information.”
- **Public Interest Test:** WhatDoTheyKnow/mySociety stated: “We agree that all exemptions should be subject to a public interest test.”
- **Simplifying the System:** Langstane Housing Association Ltd stated: “Simplifying the practice of responding to FOI requests is welcome, however it is unclear what exemptions are likely to be removed.”
- **Resource for Third Sector Organisations:** Scottish Autism stated: “There needs to be a careful balance struck to ensure that commercial confidentiality is not compromised. We as an organisation do not have internal legal expertise, and would likely require to purchase on a retained/ad hoc basis with the knock-on resource implications. Consideration should be given to developing an independent resource for third sector organisations to seek advice on exemptions, thus removing the need for expensive legal advice.”
- **Changing Culture and Practice to Presume Disclosure:** The Jimmy Reid Foundation stated: “In Part 2 of FoISA, 17 other exemptions are listed in sections 26-41 and that number needs to be reduced, drawing on practice in other jurisdictions. Also, changing the cultural and legal approach to exemptions which should be to regard them as exceptional/rare.”

## Reasons for opposing the Proposal

The reasons respondents provided for this opposing the proposal included:

- **Lack of evidence:** NHS Shetland stated: “While the consultation document outlines some valid reasons why **some** exemptions should be amended or removed, we would be wary of a blanket assumption that the number of exemptions should be reduced. The statement that the ‘number [of exemptions] needs to be reduced’ (page 26) is not accompanied by evidence or explanation as to why this might be the case.”
- **Harm:** COSLA is “concerned about any potential erosion of the exemption under Section 30, which covers prejudice to effective conduct of public affairs”. It stated: “The exemptions under Section 30(b), which covers the free and frank provision of advice or exchange of views... and the free and frank provision of advice (section(b)(i)) exemption would be crucial to allow COSLA to continue fulfil its special

adviser role to our politicians and allow this advice to be kept confidential if the advice is of a sufficiently sensitive nature to outweigh the public interest of disclosure.” COSLA stated: “It may have an effect on the breadth and depth of discussions during Leaders’ meetings, COSLA’s main decision-making body comprised of the political leaders of Scotland’s 32 councils. Whilst much of what is discussed at Leaders’ meetings may not fall under this exemption, the provision to exempt certain aspects of discussion from disclosure must be retained to protect genuinely sensitive information.”

- **Current System Works Well:** North Ayrshire Council stated: “The current exemptions to the duty to disclose information work well. There are none which the Council considers require to be repealed. Provided that the exemptions are applied correctly, they should not unduly restrict the disclosure of information.” Angus Council stated: “There are some aspects of the information requested that continue to require the protection of exemptions – to reduce these would cause more harm than benefit.”
- **Reform But No Change:** East Renfrewshire Council stated: “Several exemptions are in effect absolute, so requiring a public interest test in these cases would simply add a layer of bureaucratic process which would not change the outcome of a decision and would help neither the applicant nor the public authority.”

#### **Other points made**

- **Valued Role of Scottish Information Commissioner:** COSLA expressed a “view that the public interest test in its current form functions well and that the guidance produced by the Scottish Information Commissioner on applying the test is a valuable resource”.
- **Overlap:** OSCR stated: “We would support a review of the exemptions in order to provide greater clarity. There is some overlap between the exemptions as such they could be reduced and tightened. Interpretation of the exemptions and the application of them can be complicated.”

### **Question 11: Use of Confidentiality Clauses**

**Question 11: Which of the following best expresses your view on amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 67 respondents answered the question: 17 individuals and 50 organisations.
- Of the respondents who answered this question, **65.7% were supportive.**
- 44 respondents were either fully (36) or partially (8) supportive.
- 13 respondents were neutral.
- Of the respondents who answered this question, **9% were opposed.**
- 6 respondents were either fully (5) or partially opposed (1).
- 3 respondents were unsure.

## Reasons for supporting the Proposal

The reasons respondents provided for supporting the proposal included:

- **Public Safety is Paramount:** Associated Society of Locomotive Engineers and Firemen stated: “On the railways we have seen different operators delivering the contracts/franchises over the years since privatisation by the Railway Act 1993. These operators could hide behind NDAs [non-disclosure agreements] to not be fully open and transparent with the public that they serve. With the nature of the railways, transparency and accountability are essential to ensuring the running of a safe and efficient network for passengers and businesses. To this end we are fully supportive of amending FoISA to prevent the use of confidentiality clauses between public authorities and contractors providing public services.”
- **Good Practice:** Ayrshire & Arran Health Board stated: “The Board does not employ non-disclosure clauses, our T&Cs reference we may be asked for information under FOISA. The Board agrees that blanket non-disclosure clauses are unnecessary nor good practice in relation to the use of public funds for the provision of services to the public.”
- **Public Interest Served:** UNISON Scotland stated: “It is very difficult to see circumstances where such clauses work more in the interests of the public than the contractor. Transparency should be a condition of access to the public purse.”
- **Prevent Inappropriate Use of Confidentiality Clauses:** openDemocracy stated: “We are fully supportive of amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services. It is absolutely in the public interest to scrutinise the delivery of public services by contractors, and inappropriate confidentiality clauses get in the way of that.”
- **Prevent Abuse:** The Environmental Rights Centre for Scotland (ERCS) stated that it “supports provisions to limit the use of confidentiality clauses and Non-Disclosure Agreements to prevent access to information, since these are open to abuse and can be

adopted to circumvent statutory duties relating to the right to access information”. It added: “We would want to see provisions in the Bill that guarantee the ability of organisations to withhold sensitive data and protect equality groups. Nevertheless, we hope this Bill has the potential to hand more power to workers, whistleblowers, and marginalised groups seeking to disclose information in the public interest.”

## **Reasons for opposing the Proposal**

The reasons respondents provided for this opposing the proposal included:

- **Risk of Litigation:** Kennedys Scotland LLP stated: “Under Section 33(1)(b) of FOISA, an authority may withhold information if disclosure would “prejudice substantially the commercial interests of any person”. This will apply whether or not there is a confidentiality clause in place and can protect any person, legal or natural. This is subject to a public interest test. A confidentiality clause in a contract between a service provider and public authority could also lead to an authority invoking Section 36(2) of FOISA, which creates an exemption for information if its disclosure by the authority would constitute a breach of confidence actionable by the contractor or any other person. This is not subject to a public interest test. In our view, this is reasonable as it would be inappropriate for the public interest test to require a public authority to put itself at risk of litigation related to a breach of confidence.”
- **Clarification of Problem:** Glasgow City Council stated: “Confidentiality clauses do not have the effect of excluding information from release under FOI. We therefore do not feel that these amendments would be necessary. We note the reference to the inappropriate use of Confidentiality Clauses, we also believe that this is a misunderstanding of when and why such clauses are entered into. It is also unclear who determines this when such clauses would be “inappropriate”. Further clarification would be required to confirm what is not working with the current legislation that requires such a change.”

## **Other points made**

- **Clarity of Purpose:** Fire Brigades Union Scotland stated: “Greater clarity is needed on when uses of such clauses are appropriate.”
- **Guidance vs Legislation:** The General Teaching Council stated that it does “not have direct experience in this area”. It added: “However, we would expect that the inappropriate use of confidentiality clauses is, of course, best avoided. We do not have a strong opinion on whether this should be included in amended FOI legislation, or whether this could be better managed through appropriate guidance.”

## **Question 12: Procurement Policy**

**Question 12: Which of the following best expresses your view on FoISA being updated to ensure aspects of procurement policy set by the Scottish Government are covered?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 64 respondents answered the question: 17 individuals and 47 organisations.
- Of the respondents who answered this question, **56.25% were supportive**.
- 36 respondents were either fully (30) or partially supportive (6).
- 19 respondents were neutral.
- Of the respondents who answered this question, **6.25% were opposed**.
- 4 respondents were either fully (3) or partially opposed (1).
- 5 respondents were unsure.

### **Reasons for supporting the Proposal**

The reasons respondents provided for this supporting the proposal included:

- **Transparency:** An anonymous organisation was fully supportive and stated: “The consideration of economic, social and environmental aspects should be transparent within the procurement process and the decision making, updating FOISA would make these considerations and decisions much more transparent”.
- **Pro-active Publication:** Common Weal pointed out “while we understand the need for commercial sensitivity at certain times such as ongoing negotiations, once procurement contracts are agreed then the terms and other relevant information should be proactively disclosed or, failing this, available to FOI requests. We should reiterate that Common Weal’s ‘Glass Wall’ principle of transparency demands that all information that could conceivably be disclosed by an appropriate FOI request either under current or future expanded legislation should, instead, be proactively disclosed wherever possible. This would obviate the need for an FOI at all (though finding the information may still require communication with an information officer or other data handler)”.
- **Accountability:** Associated Society of Locomotive Engineers and Firemen stated: “This update would lead to greater transparency and accountability on the railways as it would help to open up fleet rolling stock operating companies (ROSCOs) whom are presently relied upon

to provide train rolling stock, to having their economic and social wellbeing requirements in securing a bid detailed. Presently a lot of public money is paid to these ROSCOs without the same kind of accountability and transparency that one would expect from a business profiting large sums from the public purse for their involvement in the deliverance of a public service.”

### Reasons for opposing the Proposal

- **Commercial Sensitivities:** Aberdeen City Council stated: “There can be potential commercial sensitivities around the application of evaluation criteria, evaluation decisions and commercially sensitive aspects of the bidder’s response in individual procurement exercises. There are also concerns if the request is centered on delivery of requirements/outcomes or the timings applicable to delivery. It can be a subjective judgement whether an outcome is truly delivered (and when) in whole or in part and this could present a consistency issue in responding to FOISA requests. Social value requirements are commonly designed over the life of the contract as opposed to specific expectations in any given year. Some aspects of delivery are entirely within the bidder’s control, and some are not e.g. access to schools to complete requirements for school visits.”
- **No Evidence of a Problem:** Kennedys Scotland LLP stated: “In our view, the consultation offers no obvious proposals on procurement or explanation as to why changes would be needed in this regard. It is therefore not possible to offer detailed comment on this point or to support a proposal in these terms.”

### Other points made

- **FoISA Coverage:** Glasgow City Council was neutral in its response as “All recorded information is covered and as such, it is unclear what updates are proposed in this regard”.
- **Change Unnecessary:** Ayrshire & Arran Health Board stated: “The information as to the weight of tendering in respect of wellbeing etc. would be held by the public authority and therefore as the public authority would hold this information as described, unsure that there is a requirement for this proposed change.”

### Question 13: Financial implications

**Question 13: Any new law can have a financial impact which would affect individual businesses, the public sector, or others. Do you think any cost is outweighed by the public interest benefit?**

A breakdown of responses is provided to understand the detail from and source of respondents. Other responses may have indicated in other ways



whether or not they supported the general aims of the Bill, but these have not been included in the following analysis:

- 68 respondents answered the question: 16 individuals and 52 organisations.
- Of the respondents who answered this question, **45.5% were supportive**.
- 31 respondents replied “yes”.
- Of the respondents who answered this question, **25% were opposed**.
- 17 respondents replied “no”.
- 20 respondents are “not sure”.

### **Reasons for responding “yes”**

The reasons respondents provided included:

- **Public Cost of Secrecy:** The Cross-Party Group on Chronic Pain stated: “Individuals, businesses, campaigners, the public are financially impacted by NOT getting legitimate information. Hundreds of hours – not just a few hours - are burned up by some trying to find the truth.”
- **Resilience:** UNISON Scotland stated: “If an organisation can’t promise it will meet basic requirements for transparency and information then there is a strong argument that it lacks the resilience to be trusted with services.”

### **Reasons for responding “no”**

The reasons respondents provided included:

- **Cost of Rights and Duties:** The General Teaching Council for Scotland said there must be proportionality in all proposed new legislation. It stated: “Within the public authority sphere there can be significant disparity between the demands placed on organisations and the resource implications. By way of illustration, we, GTC Scotland, are a small organisation of around 70 employees, with 81,500 registrants and are funded through the fees that our registrants (Scottish teachers) pay. We are an independent statutory body. We are not funded by the Scottish Government for our work. In 2021/22 we received 74 FOI requests. For the year 2022/23 so far, as at 10/3/23 we have received 76 FOI requests.”
- **Compliance Burdens:** An anonymous organisation stated: “While transparency in use of public funds is always to be welcomed, imposing additional compliance burdens on organisations which are already stretched for resources would not be the best use of public funds.”

## Other points made

- **Cost Benefit Analysis:** SOLAR was unsure and stated: “We are unable to undertake any cost benefit analysis as it is not sufficiently clear what the resource implications would be.”
- **Disincentive:** Langstane Housing Association Ltd was unsure and stated: “There needs to be an understanding of the resource burden that FOISA will have on some newly designated bodies should the changes take effect. It is also possible that the procurement process will be made more difficult if the burden of adhering to FOISA requirements is too high and certain contractors that would provide excellent services make a business decision not to bid for contracts that incorporate obligations under FOISA.”

## Question 14: Equalities

**Question 14: Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?**

Respondents provided a variety of commentary and observations.

- **Human Rights:** NHS Shetland stated: “Any changes to the legislative framework that increase transparency around the spending of public resources and that extend and uphold human rights are to be welcomed.”
- **No Harm:** UNISON Scotland stated: “We can see no reason that a greater transparency around the provision of public services would have a negative outcome for any group with a protected characteristic.”
- **Consequences of Extending FOISA to Third Sector:** Voluntary Health Scotland stated: “We would also have concerns about organisations working to protect marginalised communities who could be subject to malicious information requests. In their response, SCVO also noted the particular difficulties and misrepresentations that have recently affected organisations campaigning on equalities issues, in particular relating to LGBTQ+ people. We appreciate FOI does not cover personal and private information, but targeted campaigns of vexatious requests could have significant resource implications for organisations working in these spaces. Voluntary organisations need certainty that people and organisations cannot use FOI nefariously to bring undue burden to their organisations, their staff and volunteers, and other organisations supporting people with protected characteristics.”

- **Harming Effectiveness of Organisation and Services:** JustRight Scotland stated that like many third-sector organisations, it “provides vital services to some of the most marginalised and vulnerable groups in our society, including in areas such as gender-based violence, trans, and LGBTQ+ rights and immigration.” It added: “We are also concerned that protections are put in place to ensure that organisations like ours are not targeted by vexatious FoI requests, in an attempt to drain resources, obstruct service delivery or silence our organisation and our partnerships.”

### **Question 15: Sustainability**

**Question 15: Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?**

Respondents provided a variety of commentary and observations.

- **Environmental Rights Centre for Scotland (ERCS)** stated: “Strengthened FOI laws could have a beneficial impact, allowing citizens and civil society to gain information on adverse impacts of private companies delivering public services, and stimulating improvements in such areas. We agree that it is a progressive step to comply with the Sustainable Development Goal 16, with the caveats outlined in our response to Q7 with regard to the need for a proportionality test.”
- **The Campaign for Freedom of Information in Scotland** stated: “The proposals will help Scotland deliver on the Sustainable Development Goals (SDGs). SDG 16 is designed to ‘Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. Specifically, SDG 16.10 states: ‘Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements’. Therefore, reforming FoISA so that all providers of public services are covered and increasing regulation of duties helps deliver SDG 16. The SDGs are given effect through Scotland’s National Performance Framework which impacts on all aspects of our lives and presupposes delivery of some services through the private and third sectors.”
- **The Scottish Football Association** stated: “Voluntary sector organisations deliver a range of benefits across all strands of Scottish society, including health and wellbeing. As previously outlined, the proposals outlined would generate additional burdens for these organisations for little clear benefit. These additional burdens would result in less capacity for service delivery, creating a negative impact

on the contributions of voluntary sector organisations to Scotland's communities."

### **Question 16: General**

**Question 16: Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?**

Respondents provided a variety of observations, comments and suggestions including:

- **Timed Review of FoISA:** The Scottish Information Commissioner stated: "The FOISA Reform Bill could introduce a requirement for the Scottish Parliament to consider further updates to Schedule 1 on a periodic basis – e.g. every five years. Such a measure would enable the Parliament to not only ensure FOISA is fit-for-purpose for the society it serves today, but also that it can be 'future-proofed' through regular reviews to meet future challenges."
- **Assimilating fee regimes:** mysociety/Whatdotheyknow stated that different cost regimes means that "...it can be harder to get environmental information than non-environmental information..." and "...recommended aligning the fee limit for the EIR with the appropriate limit for Fol..."
- **Vexatious Requests:** Zero Tolerance stated: "The proposed extension of FOI legislation to include charities will put those organisations who work with or are led by marginalised or structurally disadvantaged groups at disproportionate risk of vexatious FOI requests... Zero Tolerance calls for consultation with those charities most at risk of vexatious requests with the aim to include them in the creation of procedures that would safeguard their operational capacity and reduce the risk of FOI legislation becoming yet another barrier for workers from marginalised groups." Alzheimer Scotland also raised this concern and stated: "The resource implication for responding to requests under the scope of FOISA may be untenable in situations where requests are too numerous to manage, or in instances of vexatiousness. The re-allocation of resources, time and effort by staff, paid or unpaid, creates a distraction from the delivery of services that third sector organisations should be focused on delivering. Third sector organisations have never been more critical to the delivery of public services and resources as they plug the gap in the delivery of statutory services and provisions."
- **Cost of Compliance:** Development Trusts Association Scotland stated: "Around 65% of our membership has paid staff but of those, the overwhelming majority (84%) have fewer than 10 paid staff. Our members are also reliant on volunteers, with over half having more than 10. Nevertheless, our members deliver vital services within their

communities, from running foodbanks and warm banks to childcare and managing community centres.” It went on to request that “In the event that Freedom of Information is extended to third sector organisations such as our members, DTA Scotland strongly encourages that a clear definition is provided of who would be affected and what the requirements might be. We also ask that practical solutions to the challenges are found and additional funding and resources be made available to build capacity within the sector to help manage the additional risks and responsibilities that this would entail.”

- **Public Benefit:** LINK INSERT Group stated: “There is currently an ‘unlevel playing field’, where third sector and public sector bodies could both be bidding for the same contract, but different standards apply in terms of the level scrutiny each entity is subject to. It is therefore important that FOI laws keep pace with such developments. Freely accessible information is fundamental to democratic oversight and accountability, and can improve the overall functioning and responsiveness of service providers to serve the public good.”
- **Power of Veto:** Transparency International stated: “The First Ministerial ‘veto’ power should be removed. To leave this power in the hands of the First Minister would be to allow the executive to be both judge and jury over what information is and is not released into the public domain. Considering the partiality of government, this would result in a dangerous concentration of power with an attendant and heightened risk of its abuse.”
- **COSLA Designation:** COSLA stated that it “should not become subject to FoISA at this time because of the resource and staff time implications of becoming designated and the potential for this to have a detrimental impact on the core work of the organisation.” COSLA stated: “[Although] the Local Government Association (LGA) in England is now covered by Freedom of Information (FOI) legislation, it does not justify an argument for COSLA becoming a designated public authority in Scotland. A better comparison can be made between COSLA and the Welsh Local Government Association (WLGA) which is not a designated public authority under FOI legislation and it is of a more similar size to COSLA in terms of staffing and resources, as compared to the LGA.”
- **Enforcement:** Alastair P. Sloan stated: “In my opinion, section 48 should be repealed in its entirety. There seems to me to be no cogent basis for the provision at all. The exclusions contained within section 48 are peculiar to Scotland; the Freedom of Information Act 2000 (“the UK Act”), which applies to English, Welsh and Northern Irish public authorities as well as authorities operating on a UK or GB wide basis, does not exclude the Information Commissioner’s Office, the Crown Prosecution Service or the Public Prosecution Service of Northern Ireland.”

- **Reform Appeals Process Against Commissioner Decisions:** Alastair P. Sloan argued that Section 56 of FOISA requires amendment. He stated he had drafted an amendment which he argued “would strike the right balance between ensuring that more meritorious appeals are brought (with the consequential benefits that flow from those appeals) while limiting possibilities for abuse as much as possible”.
- **Current Appeals Process Has Merit:** WhatDoTheyKnow/mySociety recommended “bringing together discussion of reform in both FOISA and the UK’s FOIA”. They added: “There is a real balance to be struck between an appeal system that can speedily and cheaply bring about the release of information, and there being a real prospect of review of the decisions of the Information Commissioner. People in both systems see positive features in the other, which reflects that possible middle routes may be desirable. More generally that there is a lot to be gained by clearer understanding of how different regimes in the UK are operating, so that problems can be better understood, and good approaches shared.”
- **Resources:** NHS Greater Glasgow and Clyde stated: “It is also important to acknowledge that any increase in the number of requests received under FOISA as a consequence of legislative reform will prove challenging in terms of securing any additional resources in the current fiscal climate faced by Health Boards given the need to prioritise frontline service delivery.”
- **Human Rights:** The Human Rights Consortium Scotland stated: “Holding any government to account requires transparency. If the Scottish Government are serious about human rights, they need to improve transparency across sectors which either provide a statutory duty, public service or provide care which upholds human rights. This includes both improving Fol, but also improving collaboration with organisations to ensure proactive publication of information, ensuring that Fol is a last resort function.”

## SECTION 4: MEMBER'S COMMENTARY



I am very grateful to all who made submissions to the consultation on reforming the Freedom of Information (Scotland) Act 2002 (FoISA). I am pleased so many of those organisations who could be impacted by the proposed changes made submissions and engaged with the consultation in other ways.

I attempted to reach out to organisations who already have experience of FoISA, are campaigning for reform or extension, or are likely to be affected by the proposals. I did this particularly in relation to proposals to extend FoISA to organisations such as private companies, charities and third sector organisations which are now substantially involved in delivering public services or services of a public nature.

Many of those who engaged with the consultation had extensive experience of FoISA. Some who attended events said their views had changed as a result of the discussions at those events with others in different sectors.

It was interesting that many only responded to the parts of the consultation which directly affected them or where they had strong views or knowledge, and did not give firm support or opposition to other aspects of the proposals. I have been keen to listen throughout this process and I am particularly mindful to ensure that my Bill addresses the concerns of the Scottish Information Commissioner, who has noted that he is “supportive of further extension of FoISA to non-public bodies responsible for performing public functions or delivering public services” but believes it is “equally important to ensure that any such extension is measured, understandable and enforceable”.

There have been several previous consultations on FoISA which have subsequently not led to legislative reform. The Commissioner has made clear his view that reform is needed in a number of areas. It is also clear that an ever greater number of public services are being provided by non-publicly owned bodies, and that the disparity in the disclosure of information required by bodies providing public services using taxpayers' money is determined primarily by the nature of ownership. The care home sector was repeatedly cited as an example. However, transport trade unions also provided examples such as rail and ferries which have been both publicly and privately owned. The consultation has provided many examples of bodies providing public services not covered by FoISA but also of many bodies which could be designated in the future. Public sector trade unions in particular highlighted significant benefits of FoISA reform.

It is clear that FoISA must keep pace with:

- Global attention on transparent government and our international obligations<sup>[1]</sup>
- The forthcoming Human Rights Bill for Scotland and the public's right to access information<sup>[2]</sup>
- Changes in sectors such as social care<sup>[3]</sup> and the privatisation, outsourcing and tendering of substantial public contracts
- The expansion of the role of private companies and third sector organisations receiving public money to deliver public services and services of a public nature
- Increasing concern about the unnecessary, unjustifiable use of confidentiality clauses in public contracts

A lack of transparency in the third and private sector delivering public services around issues such as executive pay, and the pay and conditions of the workforce were raised throughout the consultation process. There was particular concern about the lack of scrutiny relating to excessive executive pay which is effectively being paid for by the public purse. The lack of access to information about procurement chains and links of some private organisations receiving public contracts, licenses and awards, was also highlighted. To that end, extension of FoISA would ensure transparency, raise ethical practices and encourage compliance with public policy. It must be noted that FoISA was only achieved after substantial campaigning and pressure. The transfer of many functions to other bodies has eroded many of the rights and duties which were won by the campaigning of members of the public and organisations.

The responses to the consultation highlight the longstanding concern from some in the third and voluntary sector about FoISA being extended to cover them. Whilst almost two thirds of the responses from that sector were supportive of the overall Bill, there was greater opposition from respondents in the sector to the proposal to extend FoISA to cover third sector organisations which carry out publicly funded services or services of a public nature (terms used in the Human Rights Act 1998<sup>[4]</sup>). During the consultation, I attempted to explore the nature of those objections and whether they could be addressed. Some of those concerns came from organisations which would not be covered by the proposals as they are not delivering public services or services of a public nature. Others would be affected. In many cases, it would only be part of the work of the third sector organisation which would be covered by these proposals.

It must be noted that some third sector organisations are in receipt of large amounts of public money to provide public services, yet the public's right to know is substantially less when the service is provided in that way. Nevertheless, it is clear there were different views expressed by organisations in this diverse sector. There were specific concerns raised

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[1] UN website at [Goal 16 | Department of Economic and Social Affairs \(un.org\)](https://www.un.org/sustainabledevelopment/goal-16)

[2] [Human rights - gov.scot \(www.gov.scot\)](https://www.gov.scot/human-rights)

[3] [National Care Service \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](https://www.scottish.parliament.uk/bills/national-care-service-scotland)

[4] <https://www.legislation.gov.uk/ukpga/1998/42/section/6>



about vexatious and repeated requests, particularly by third sector organisations providing services relating to violence against women and girls. It is unlikely much of the work of these organisations would be covered by these proposals as they would not fall within the definition of a “public service”. However, I do recognise that there are already robust protections in place in relation to vexatious requests<sup>[4]</sup>. Regardless, I am determined to ensure my Bill sets out clear parameters and definitions as to what is considered a public service or service of a public nature and reiterates existing safeguards relating to repeated and vexatious requests.

A number of submissions noted that there has been an increase in the use of various organisational models and arm’s length organisations<sup>[5]</sup>, thereby avoiding FoISA compliance. It is clear that the current legislation and how it is being operated has created many inconsistencies which are impossible to justify. In the consultation I also attempted to explore the circumstances where it might be appropriate for information to be kept confidential e.g. during an active tendering process and, contrarily, where there seems to be little justification for confidentiality, such as when contracts have already been signed.

The consultation process has shed light on many important issues:

- The need for legislative reform given the failure to address operational problems and legislative inadequacies.
- The extent of migration of publicly funded services from publicly owned bodies
- The delay in designating bodies under FoISA
- The administrative burden on the Office of the Scottish Commissioner created by designating many more bodies under FoISA at the one time.
- The need to extend FOISA in a manageable and proportionate way, with appropriate training, guidance and advice provided to each sector (and, importantly, service-users and the wider public) in advance of commencement date(s).
- The need for a proactive duty to provide information and the significant imbalance between the public sector and others providing public services in relation to the provision of information
- The need for legislation to be drafted in such a way to create general powers which address new circumstances
- The need for legislative changes which are proportionate and reasonable given the support for them indicated in this consultation and previous consultations
- The need to build on the work of the Public Audit and Post Legislative Scrutiny Committee following their inquiry into the operation of FoISA published in 2020

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<sup>[4]</sup> [Scottish Information Commissioner - FOISA Guidance on Vexatious or repeated requests, Frivolous or vexatious applications](#)

<sup>[5]</sup> See also non-public entities such as HUBCOs: [The National Hub Programme - hub North Scotland](#)

I look forward to lodging my proposal for a Members Bill.

A handwritten signature in black ink, appearing to read 'Katy Clark', written in a cursive style.

Katy Clark MSP  
December 2023

## ANNEX 1 List of Respondents – Organisations

Organisation Reference Number	Organisation
2	Aberdeen City Council
3	Alcohol Focus Scotland
4	Alzheimer Scotland
1	Anonymous
6	Anonymous
8	Anonymous
38	Anonymous
72	Anonymous
73	Anonymous
5	Angus Council
9	Associated Society of Locomotive Engineers and Firemen
10	Ayrshire & Arran Health Board
11	Brunstane Bank Residents
12	Campaign for Freedom of Information in Scotland
13	Church of Scotland
14	Code the City
15	Common Weal
16	COSLA
17	Scottish Parliament Cross Party Group on Chronic Pain
18	Development Trusts Association Scotland
19	Unlock Democracy
20	East Dunbartonshire Council
21	East Renfrewshire Council
22	Educational Institute of Scotland
23	Environmental Rights Centre for Scotland
25	Federation of Small Businesses
24	Fire Brigades Union Scotland
26	Food Train
27	General Teaching Council for Scotland
28	Glasgow City Council
29	GMB Scotland
30	Health and Social Care Alliance Scotland
31	Human Rights Consortium Scotland
32	Jimmy Reid Foundation
33	Jubilee Scotland
34	JustRight Scotland
35	Kennedys Scotland LLP
36	Langstane Housing Association Ltd
37	LGBT Youth Scotland
39	National Union of Rail, Maritime and Transport Workers
40	NHS Forth Valley
41	NHS Tayside
42	NHS Greater Glasgow & Clyde
76	NHS Western Isles

43	North Ayrshire Council
44	National Union of Journalists
45	Obesity Action Scotland and the Royal College of Physicians and Surgeons of Glasgow
46	OSCR
47	openDemocracy
48	Paths for All
49	Rape Crisis Scotland
50	Scottish Autism
51	Scottish Care
52	Scottish Community Alliance
53	Scottish Environment Link
54	Scottish Football Association
55	Scottish Information Commissioner
56	Scottish Public Services Ombudsman
57	Scottish Sports Association
58	Scottish Veterans Residences
59	Scottish Women's Aid
60	SCVO
61	Shetland Health Board
62	Socialist Health Association Scotland
63	Society of Local Authority Solicitors and Administrations in Scotland – FOI, Data Protection and Human Rights Group
64	sportscotland
65	Transparency International UK
66	TSI Scotland Network
67	UNISON Scotland
68	Unite the Union Glasgow – Not for Profit Sector Branch
69	University of St Andrews
70	Victoria Park Allotment Association
71	Voluntary Health Scotland
7	WhatDoTheyKnow/mySociety
74	Yorkhill and Kelvingrove Community Council
75	Zero Tolerance

## ANNEX 2 List of Respondents – Individuals

Individual Reference Number	Individual
24	Albert, Liz
3	Anonymous
5	Anonymous
6	Anonymous
20	Anonymous
16	Baillie, Jackie
23	Burke, Peter

14	Choudhury, Foysol
8	Cunningham, Brian
12	Halden, Derek
13	Harrison, Ellie
19	Leonard, Richard
10	McDonald, Janis
18	McLennan, Neil
9	Mochan, Carol
1	Sloan, Alistair P.
11	Smyth, Colin
7	Somervell, David
2	Wilson, Ann