



**CFoIS**  
Promoting the Right to Information in Scotland

# Celebrating 15 years of Scotland's First Freedom of Information Act

This report sets out how the Freedom of Information (Scotland) Act 2002 (FoISA), which came into force on 1<sup>st</sup> January 2005, should be reformed in 2020. As we complete the first fifth of the 21<sup>st</sup> Century, accepting that reform is necessary is not accepting failure but in fact realising that in a fast-paced environment such as information, inevitably change must happen to keep up to date. Also, we can learn from implementing Scotland's first Freedom of Information legislation, so reform is common sense.

Produced by the Campaign for Freedom of Information in Scotland, this report takes a critical look at each section of FoISA and provides a status on whether the rights and duties are fit for purpose: red for urgent need of reform, amber for requiring refinement and green where the right remains robust. The report is timely given that FoISA is currently under review by the Public Audit and Post Legislative Scrutiny Committee of the Scottish Parliament and the committee's report is due early in 2020.

**21<sup>st</sup> January 2020**

**Campaign for Freedom of Information in Scotland**  
[www.cfois.scot/](http://www.cfois.scot/) [info@cfois.scot](mailto:info@cfois.scot) @CFoIScot

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### About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation at a Scottish level. CFoIS is independent of government and relies on donations and income generated through training. [www.cfois.scot/](http://www.cfois.scot/) [info@cfois.scot](mailto:info@cfois.scot) @CFoIScot

CFoIS organises two meetings per year of the Scottish Public Information Forum (SPIF) to promote the public interest. SPIF's remit is to 'enable the long-term effectiveness of FoISA and the EIR(S)s' and its role is incorporated in the Scottish Government's Six FoI principles published in 2007 as a way to 'maintain effective relationships with key stakeholders'.<sup>1</sup> SPIF is an opportunity for rights holders and duty bearers to meet and discuss the right to information (RTI) and access to information (ATI) in Scotland and consider how laws are operating. For more information and for the dates of the meetings in 2020 go to the CFoIS website at [www.cfois.scot/](http://www.cfois.scot/)

### Thanks to....

UNISON Scotland for providing the funds to CFoIS to undertake this work.

To Fiona Montgomery from UNISON for looking at the draft and providing comments.

To the civil society organisations and journalists who have shared their experiences of using the legislation over the last 15 years, and their ambitions for the future of enforceable access to information rights in Scotland.

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<sup>1</sup> More information at Scottish Government <http://www.gov.scot/About/Information/FoI/6principles>

## List of Abbreviations

- ATI – access to information
- Aarhus Convention - Convention of Access to Information, Public Participation in Decision-Making Procedures and Access to Justice in Environmental Matters
- ALEOs - Arms-length external organisations
- CFoIS - Campaign for Freedom of Information in Scotland
- COSLA - Convention of Scottish Local Authorities
- DPA - Data Protection Act
- ECHR - European Convention on Human Rights
- ECtHRs - European Court of Human Rights
- EHRC - Equalities and Human Rights Commission
- EISRs - Environmental Information (Scotland) Regulations 2004
- FoI - Freedom of information
- FoISA - Freedom of Information (Scotland) Act 2002
- GDPR - General Data Protection Regulation
- HRA - Human Rights Act 1998
- ICCPR - International Covenant on Civil and Political Rights
- MPS - Model Publication Scheme
- NPF - National Performance Framework
- RTI – right to information
- RSLs - Registered Social Landlords
- SCVO - Scottish Council for Voluntary Organisations
- SPICe - Scottish Parliament Information Centre
- SPIF - Scottish Public Information Forum
- UNCRC - United Nations' Convention on the Rights of the Child
- UNDP - United Nations' Development Programme

## **Amending the Freedom of Information (Scotland) Act 2002<sup>2</sup> (FoISA)**

### **1. The Case for Reform**

#### **Introduction**

FoISA has met the positive aim of providing people and organisations with a free, enforceable right to access information held by public authorities. Opening up the decision-making process, knowing who and what information informs decisions and how our money is spent are fundamental to ensuring a fair and equal society. That is the good news, but the purpose of this report is to draw on evidence and propose radical reform of FoISA to ensure the right remains robust and align its implementation with how our democratic institutions operate along with public services, services of a public nature and investment of public money in bodies.

A reformed and reinvigorated law must be accompanied by a culture of transparency and accountability in Scotland. We cannot take that culture for granted as, for example, research has shown that civil society in Scotland may not feel confident in using FoI to scrutinise government and the public sector for fear of the repercussions. However, FoISA does provide a good baseline and springboard to inform the changes needed.

#### **Context to FoISA**

How people communicated, how organisations operated, and the world of information technology were all very different in 2000 when the first official consultations on FoISA got underway in Scotland. The process played ‘catch up’ with the Westminster Parliament which agreed to pass a UK wide Freedom of Information Act covering reserved matters in 2000. Scotland was able to learn from ‘in country’ practice as well as from countries which already operated FoI laws. For example, the Deputy First Minister visited New Zealand as the Bill in Scotland was being developed.

Scotland already had access to information laws in place covering the environment and access to local government records:

- Local Government (Access to Information) Act 1985 ‘An Act to provide for greater public access to local authority meetings, reports and documents subject to specified confidentiality provisions; to give local authorities duties to publish certain information; and for related purposes.’<sup>3</sup>
- The ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ was adopted in Aarhus, Denmark on 25 June 1998 and is known as ‘the Aarhus Convention’. The European Union and the United Kingdom have signed the Convention.<sup>4</sup>

At the time the UK and Scotland were considering adopting FoI legislation, there were considerable resources available to inform thinking such as the Article 19 publication listing the nine key principles of the freedom of information legislation:

1. Maximum disclosure
2. Obligation to publish

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

<sup>3</sup> See Act in full at <http://www.legislation.gov.uk/ukpga/1985/43?view=extent>

<sup>4</sup> A framework had been in place since the 1990s, see ICO website at <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/>

3. Promotion of open government
4. Limited scope of exceptions
5. Processes to facilitate access
6. Costs (kept to a minimum to encourage and enable access rights are equally enjoyed)
7. Open meetings
8. Disclosure takes precedence
9. Protection for whistleblowers

The reflective learning from other jurisdictions, being able to copy best practice and learn from the mistakes of others means that sections of FoISA remain fit for purpose. However, it is inevitable that over time some sections have lost their relevance and impact so need to be upgraded. Also, there are cultural and practice issues to be addressed as well as sections added to cover the unexpected.

Realistically FoISA is one part of a wider set of rights and duties that create open and accountable government and complement existing laws eg to protect whistleblowers. The delivery of FoISA also fits with good practice models such as the European Ombudsman's Code of Good Administrative Behaviour. Delivery of FoISA also addresses domestic priorities, such as being a mechanism to deliver on the National Performance Framework (NPF).

CFoIS has regularly provided scrutiny of FoISA over the last 15 years and issues of concern have included: the independence and effectiveness of civil society in Scotland to feel confident in using FoI to scrutinise government and the public sector<sup>5</sup>; the growth of publicly-funded service-delivery vehicles that operate in the shadows and outwith FoISA, such as a number of arms-length external organisations (ALEOs); the tactics of some designated bodies to circumvent FoISA, such as not taking minutes of meetings; the need for designated bodies to improve the gathering of information to improve the quality of evidenced based decision making and being able to publish it in an accessible place/format so people are better informed and the information is useful.

### **Putting FoISA into operation**

The irony is that although FoISA established a legal framework to provide the public with an enforceable right, there are concerns that people are put off as the process seems too legalistic and complicated. That was never the intention. Lord Wallace of Tankerness observed “just how technical and legalistic much of this has become”.<sup>6</sup> That has been a surprise partly influenced by the thinking to treat all cases as if they may end up in court but as so few people ever have the resources to go there that seem a disproportionate routine way of working.

FoISA also depends on good records management so that a designated authority can be sure what information is held within an authority. Therefore, cuts in staff and

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<sup>5</sup> See research report ‘Imperfect Information: Experiences and Perceptions of the use of Freedom of Information in the Scottish Voluntary Sector, available on the Scottish Information Commissioner website <http://www.itspublicknowledge.info/home/SICResources/voluntarysectorresearch.aspx>

<sup>6</sup>Speech at the opening of the Centre for Freedom of Information at the University of Dundee, January 1999.

resources weakens the framework in which FoISA operates. How FoISA is amended to include a duty to resource the rights it provides presents challenges.

### **Amending FoISA**

The Scottish Government has taken a deliberately slow pace to designate new bodies under FoISA, using its Section 5 powers. For example, currently only Leisure Trusts are automatically designated rather than all arm's length external organisations. The Scottish Government has also taken a slow pace to reform as it's Six FoI Principles of 2007 state that the focus is to 'operate within FoISA rather than proposing significant changes to it'.<sup>7</sup> Extending the designation of bodies under FoISA is a longstanding problem and attempts were made in the Freedom of Information Amendment (Scotland) Act 2013 to rectify the problem by incentivising the process of change through biannual reports to the Scottish Parliament. However, more needs to be done.

Furthermore, where additions have been made not all are progressive. In its submission on the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016, CFoIS pointed out that:

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

However, our concerns were ignored and now all grant-aided schools and independent special schools have up to 60 days to respond to cover all 'school holidays'. Yet there is no clear evidence that during all school holidays they are actually closed. The consultation itself stated "... many of these schools in effect close down for extended periods during the summer." That is where the nimbleness of FoISA shines as it states that information requests must be answered within 20 **working** days so if one of the schools was actually closed then it cannot count as one of the 'working days'.

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

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

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<sup>7</sup>See Scottish Government website <http://www.gov.scot/About/Information/FoI/6principles>

<sup>8</sup> At CFoIS website at <https://www.cfoi.org.uk/wp-content/uploads/2016/08/CFoIS-FoISA-time-for-compliance-regulations-2016-response.pdf>

I accept it would add to the wait for receiving responses, but I think that, on balance, that would be worth doing. That would be the only time in the year when I would suggest a break of that nature, and I hope that it is a suggestion that the committee might give some consideration to.’<sup>9</sup>

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

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

## **Conclusion**

The post legislative scrutiny of FoISA was prompted by a unanimous motion of the Scottish Parliament on 21<sup>st</sup> June 2017, which was also critical of the Scottish Government’s FoI performance but welcomed the adoption of its policy to pro-actively publish all material released ‘to ensure that it is as widely available as possible.’<sup>11</sup> The process has resulted in 58 written submission along with a variety of supplementary evidence in response to the five oral evidence sessions that ran from September to December 2019.<sup>12</sup> It is important to remember that the submissions were about FoISA practice across 10,000 designated public bodies rather than being about just the Government. The submissions which provided practical insight into the exercise of the Section 1 right to make a recordable request have been invaluable to drafting amendments to FoISA. CFoIS looks forward to the recommendations made by the Public Audit and Post Legislative Scrutiny Committee, which we hope will urge primary legislation quickly and prompt delivery of secondary legislation which may be more appropriate in some areas.

This document has also been informed by the Scottish Government’s consultation on the use of its Section 5 powers under FoISA and we look forward to an ambitious and prompt plan to extend the designation of FoISA to many more bodies receiving public money.

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<sup>9</sup> Graeme Dey, at page 8 of the Official Report

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12437&mode=pdf>

<sup>10</sup> Section 10 of FoISA

<sup>11</sup> Available at Scottish Parliament Official Report

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

<sup>12</sup> For more information go to the Public Audit and Post Legislative Scrutiny Committee at <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111249.aspx>

## 2. Amending FoISA

**The proposals for reform have been specified or inspired by reports, commentary and analysis, research, practical experience and the work of the Scottish Information Commissioners over the last 15 years. The recommendations also draw on international best practice. Clearly the process and detail of reform is a huge task so this remains a work in progress and can be classed as a ‘living document’ designed to inform the specific detail of legal reform.**

The proposals also seek to improve consistency such as:

- Just as applicant blind, propose that it should be ‘service delivery blind’.
- Duty to advise and assist at initial stage of request should equally apply at internal review and appeal stages;
- Subject each decision to independent scrutiny and therefore proposes discussion on either establishing an upper tribunal, which is free to access, or improve access to the current appeal system in the Scottish courts.
- Consideration of making a single person responsible within the designated authority for compliance in line with the Data Protection Act (DPA) and the General Data Protection Regulation (GDPR) and the ‘named person’ for children in Scotland (which is no longer a statutory provision but is still policy)<sup>13</sup>.
- A move away from regarding FoISA as a matter of legal compliance to understanding it also as a vehicle for community empowerment and development.

A bank of legislation has been passed in the last 17 years that impact on FoISA in a number of ways, as well as legislation that pre-dates FoISA but whose impact is still significant such as:

- A duty to provide records, gather and publish information to enable regulation such as for RSLs.
- Legislation that has a direct impact on what should be recorded, such as The Public Record (Scotland) Act 2011<sup>14</sup>.
- The Re-use of Public Sector Information Regulations 2015<sup>15</sup> along with the Copyright, Designs and Patents Act 1988<sup>16</sup>, which has implications for those who want to re-use the information disclosed, in full or in part, for public-interest purposes including campaigning.
- Legislation that defines behaviours in how the public pound is spent and which creates information such as The Procurement Reform (Scotland) Act 2015 and the Public Contracts (Scotland) Regulations 2012.<sup>17</sup> All

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<sup>13</sup> See Scottish Government at <https://www.gov.scot/policies/girfec/named-person/>

<sup>14</sup> Available at <http://www.legislation.gov.uk/asp/2011/12/contents>

<sup>15</sup> Available at <http://www.legislation.gov.uk/uksi/2015/1415/contents/made>

<sup>16</sup> Available at <http://www.legislation.gov.uk/ukpga/1988/48/contents>

<sup>17</sup> See Scottish Government website at

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



procurement in the public sector is subject to the EU principles including those of proportionality, non-discrimination, equal treatment and transparency.<sup>18</sup>

- International developments which help shape how FoI rights operate in practice, particularly human rights law. For example, the CFoIS report 'The Post Legislative Scrutiny of FoISA-Improving access to information rights in Scotland by examining international practice', cited Article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>19</sup> and The UN Human Rights' Committee's General Comment 34, adopted in 2011.
- The four 'special' reports from the Scottish Information Commissioner and commentary on the law in Scotland – see Bibliography

Additionally, the current post-legislative scrutiny of FoISA has produced a rich seam of information, commentary and experiences about asserting rights and fulfilling duties.

### Reforming FoISA

This section of the report is a line by line scrutiny of FoISA, highlighting problems, offering commentary and proposing reform. The numbers against headings refer to the section of FoISA as listed in the amended text.<sup>20</sup>

### Introductory Text

An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them, and for connected purposes.

**Status: Amber as it remains fit for purpose, but consideration should be given to inserting a purpose clause.**

### Commentary

The purpose of FoISA is to increase transparency and accountability of Scottish public authorities or by persons providing services for them. However, the purpose of FoISA is not included in the legal text. There is a purpose to promote participation in environmental decision-making found in the Environmental Information (Scotland) Regulations 2004 (EISRs) and a similar approach should be considered. Inspiration can be drawn from Section 23 (3) of FoISA which states a purpose to disclosing information to the public:

'In adopting or reviewing its publication scheme the authority must have regard to the public interest in:

(a) allowing public access to information held by it and in particular to information which: (i) relates to the provision of services by it, the cost to it of providing them or the standards attained by services so provided; or (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it;

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<sup>18</sup> For more information on procurement see the Scottish Parliament website at <https://www.parliament.scot/abouttheparliament/65742.aspx> and the Scottish Government website at <https://www2.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/procurementlegislationfaqs>

<sup>19</sup> Pub 22<sup>nd</sup> June 2017 at <https://www.cfoi.org.uk/wp-content/uploads/2018/03/Post-Legislative-Scrutiny-of-FoISA-learning-from-others-report.pdf>

<sup>20</sup> Available at <http://www.legislation.gov.uk/asp/2002/13/contents>

(b) the publication of reasons for decisions made by it.’

The Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples’ Rights and published on 23 October 2002 states:

‘The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies.
- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest.
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.’<sup>21</sup>

There are a number of sources of inspiration and guidance from which Scotland can learn.

## **Part 1 Access to information held by Scottish public authorities**

**Status: Amber as amendment needed to change the prominence of this section in FoISA**

Insert new 1A

### **“Saving for existing powers of disclosure**

Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.”

### Commentary

The text comes from current Section 66 of FoISA but is brought to the fore as the purpose of the law is to enforce the right and to set out when a designated body can justify withholding information. Therefore, FoISA entitles but does not necessarily oblige a designated body to withhold the requested information. Just because an exemption exists does not mean it needs to be used. In practice, there is concern that the process of asking for information has become too formal and that ‘business as usual’ requests are being treated under FoISA introducing delays in response and all sorts of complications. These concerns have been echoed during the post legislative scrutiny process.

## **Right to information**

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<sup>21</sup> Part IV (2) and quoted in judgement in the case of Magyar Helsinki Bizottsag v Hungary, para. 63, European Court of Human Rights at <http://hudoc.echr.coe.int/eng?i=001-167828>

**Status: Amber due to how FoISA is operating in practice.**

1. General entitlement

Insert new 1(3)(3)(a)

Subject to section 1(3)(3), the 20-working day response duty will be paused on the day the request for further information is received by the applicant, and will continue on the day the designated body receives the clarifying response which can help them identify and locate the requested information.

Commentary – Recorded

FoI law is triggered if the request is 'recorded'. This was a deliberate decision to enable routine telephone request for information, such as from journalists, to carry on as usual and for other 'business as usual' purposes. However, some designated authorities seem to be insisting that any requests for information must be processed under FoISA. Why that should be is unclear, but it introduces delays in receiving information and adds to costs. For example, journalists point out that '...NHS National Services Scotland insisted on treating a question about their response to the declaration of a climate emergency as an FoI request, when 29 other public bodies did not do so.'<sup>22</sup>

What's App is a new form of communication and its use has been accompanied by new rules over how it is used and what is done with the information contained in message groups as well as between individuals. For example, destroying the What's App group just as soon as an event or situation has concluded. It is important that checks and monitoring of what is 'held' is integrated in the legislation as well as measures to tackle resistance, avoidance or concealment so that information is never held or retained in the first place. Deliberate measures and systematic resistance to ensure information is kept off record and decisions off paper, using non-official emails or networks like WhatsApp, must be prevented.

Given the amount of spending by the Scottish Government, health boards, local government and public bodies there is a reasonable expectation that the official records will be robust. However as has been recently confirmed in the Northern Ireland's RHI scandal, there seems to have been 'a hidden, parallel decision-making system ... Key decisions were made outside of official channels, via mobile texts and private or party emails (with a later refusal to give them up). Contacts with key stakeholders outside of government went either unrecorded or took place in very odd places ...'<sup>23</sup>

FoISA needs to be tightened up to ensure the business of government is properly recorded and therefore information will be 'held' which can subsequently be disclosed.

Commentary – Applicant Blind

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<sup>22</sup> Additional evidence dated October 2019 at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Supplementary\\_evidence\\_from\\_Journalists\\_22\\_October\\_2019.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Supplementary_evidence_from_Journalists_22_October_2019.pdf)

<sup>23</sup> Blog by Dr Ben Worthy at <https://politicalquarterly.blog/2020/01/20/light-and-shadows-the-rhi-scandal-and-the-temptations-of-secrecy/>

Regardless of who makes the information request, the process for answering should remain the same. However, it is publicly documented that different approaches may be taken depending on who is responding and what information is involved<sup>24</sup>. A submission from Inksters Solicitors makes the connection with data protection requirements and states that the matter ‘could be adequately addressed within the code of practice issued by the Scottish Ministers under section 60 of FoISA’:

“In normal circumstances, public authorities should probably be removing personal data such as a requester’s name, place of work and job title (where included) from a request before sending it out to those who need to perform searches for information or those who, in accordance with the authority’s internal procedures, need to approve responses before they’re issued. Only where the identity of the requester is directly relevant to the response, such as where consideration is being given to refusing the request on the grounds that it is vexatious, should the identity of the requester be disclosed otherwise it may amount to a breach of data protection law.”<sup>25</sup>

### Commentary - Purpose

Requestors do not need to mention FoISA or state the purpose for which the information will be used. It is noted that the ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’, adopted in Aarhus, Denmark on 25 June 1998 and is known as ‘the Aarhus Convention’ states in Article 1:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice on environmental matters in accordance with the provisions of this Convention.”

The clear intention is that there will be a general gain to the public by an individual request and that the process improves public participation and access to justice. These may also be the intended outcomes of FoISA. Such ambitions are also articulated in the case of Magyar Helsinki Bizottsag v Hungary. In that case the Grand Chamber of the European Court of Human Rights (ECtHRs) stated that it was ‘satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest’ and the ‘refusal to grant the request effectively impaired the applicant NGO’s contribution to a public debate on a matter of general interest’ so there was a breach of Article 10 of the European Convention on Human Rights (ECHR). It further stated that acting on and for the public interest is a purpose of an NGO (Non-Governmental Organisation).<sup>26</sup>

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<sup>24</sup> For example see the letter of the Scottish Information Commissioner to the Minister for Parliamentary Business dated 2<sup>nd</sup> February 2018 along with other correspondence on progress to date on compliance with FoISA at <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

<sup>25</sup> Para 8 at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/01\\_Alistair\\_Sloan\\_Inksters\\_Solicitors.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/01_Alistair_Sloan_Inksters_Solicitors.pdf)

<sup>26</sup> Judgement at paras 164-165 and at 197 at European Court of Human Rights at <http://hudoc.echr.coe.int/eng?i=001-167828>

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

“...The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.”<sup>27</sup>

Therefore, being able to share the information disclosed is part of the process of ensuring public accountability and organisational transparency. However organisations and people complain that they are alarmed at statements included in Fol responses appearing to warn people about the consequences of sharing information and, for people not used to dealing with legal matters, alerts that they must comply with ‘copyright law’ and the ‘Open Government Licence’ are concerning and may stifle information sharing. Greater attention is needed on reassuring the public that it is ok to share the information disclosed and that may be through a public information campaign undertaken by the Scottish Information Commissioner.

## 2. Effect of exemptions

**Status: Green but under consideration**

## 3. Scottish public authorities

**Status: Amber as no longer fit for purpose**

### Commentary – Designated Body

The General Data Protection Regulation (GDPR) requires the appointment of a data protection officer (DPO) in public authorities or body, or if it carries out certain types of processing activities. Through the Data Protection Act 2018 (DPA), the GDPR is given further effect and also includes the role of Data ‘Controller’<sup>28</sup>. This important line of accountability and independent scrutiny is a role model for Fol compliance and can be adopted in the reform of FoISA. Therefore, it is recommended that an ‘Fol Officer’ should be appointed within each designated body who has statutory responsibility to:

- Monitor internal compliance, inform and advise on legal duty and the practice of rights and responsibilities.
- Be independent, an expert in law, adequately resourced, and report to the highest management level.
- Demonstrate compliance within the body and to external regulators and be part of the enhanced focus on accountability.
- May be an existing employee or externally appointed.

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<sup>27</sup> Ibid, para 61

<sup>28</sup> See section 6 at <http://www.legislation.gov.uk/ukpga/2018/12/section/6/enacted>

- In some cases, several organisations can appoint a single officer between them.<sup>29</sup>

A double layer of professional duty and accountability should be introduced for FoISA: the Chief Executive or most senior paid officer is appointed as the FoI Controller; the FoI Officer has daily responsibility and operates within the organisation, or across organisations for economies of scale.

#### Commentary – Information Held

How information is created and stored does not always reflect how the public requests information or on what subjects. Written evidence submitted by the ‘Give them Time Campaign’ to the Scottish Parliament’s Post Legislative Scrutiny of FoISA points out that local authorities sometimes do not know what information they hold and it was able to guide the authority to statistics already published which showed their performance in a better light.<sup>30</sup> Academics at Dundee University also point out that:

‘Public authorities create and store information in a sectoral manner, with information on issues such as waste, water and air being created and stored separately. One reason for this sectoral approach is because it reflects the structure of the legal obligations imposed on Scottish public authorities. However, this approach does not match how users of the right request access to information, which tends to focus on specific locations rather than on sectoral areas. Such a mismatch is significant as it can lead to lengthy delays in responding to requests. Critically, the issue strikes at the heart of general data management. Consequently, what is required is either an overhaul of how information is stored or a redesign of the information regime to account for this mismatch.’<sup>31</sup>

After 15 years of FoISA, there is a need for time to be invested by designated bodies in reflective learning on what information is gathered, in what format and steps taken to pro-actively publish it in the public interest. In the Scottish Parliament Information Centre (SPICe) briefing for the post legislative scrutiny of FoISA it pointed out that in the April 2017 report ‘Proactive Publications: time for a rethink?’ the Scottish Information Commissioner stated:

*“Crucially, Public authorities must have regard to the public interest in allowing access to the information they publish, particularly in relation to: provision of services, costs of services, facts or analysis that inform decisions (of importance to the public) and decisions and their reasons.”*<sup>32</sup>

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<sup>29</sup> Inspired by information produced by the UK ICO at <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-officers/>

<sup>30</sup> Available at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/57\\_Give\\_Them\\_Time\\_Campaign.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/57_Give_Them_Time_Campaign.pdf)

<sup>31</sup> Evidence from Dundee University academics at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/03\\_Prof\\_Reid\\_Academics\\_Dundee\\_University.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/03_Prof_Reid_Academics_Dundee_University.pdf)

<sup>32</sup> ‘Freedom of Information’, September 2019 [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/SPICe\\_FOIA\\_paper.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/SPICe_FOIA_paper.pdf)

Under FOISA there is no duty to document. The legislation focuses on the provision of information that is 'held' by public authorities and that can vary between authorities too.

#### Commentary – Information not held

Another operational problem has been repeatedly discussed but often the examples are anecdotal. However, journalists have been able to cite specific recent examples of public bodies opting not to record information to avoid FoISA. Examples include:

- The chief executive of Scottish Environmental Protection Agency opted not to produce a written report on fish farm pesticide usage and instead made a verbal report to avoid that information being retrieved under FoISA'.<sup>33</sup>
- Highland Council in 2018 admitted arranging face-to-face meetings to ensure it did not have to write down data from fish farm companies on sea lice infestations.<sup>34</sup>

It is useful to note that the SPICe briefing stated this can be a problem in other jurisdictions too such as Sweden.<sup>35</sup>

The duty to record information, which in practice gives the right to access information power, needs to be addressed in parallel to reform of FoISA.

#### Commentary – purpose of 'holding' information

It is useful to examine international practice on why public authorities 'hold' information and there has been much discussion about whether it is for the effective conduct of public affairs, for regulatory purposes or to provide an evidence trail of decisions to prove they were competently made. The issue has been covered elsewhere such as in 'The Declaration of Principles on Freedom of Expression in Africa', adopted by the African Commission on Human and Peoples' Rights and published on 23 October 2002. It states under Part IV. Freedom of Information:

"1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."<sup>36</sup>

#### Commentary – Get it Minuted Campaign

In 2017, CFoIS launched a 'Get it Minuted Campaign' as from its research on record keeping of routine and special meetings and having sought information on the rules or protocols for civil servants and Scottish Government Ministers on keeping notes, minutes and agendas of meetings we concluded:

"...that on a day today basis the process can be interpreted as both lacking precision, and too complex due to the spread of 'guidance' on who is responsible for what and when. This vagueness and complexity create loopholes which, without a committed culture of openness, can be exploited. Consequently, there is a negative

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<sup>33</sup> The Ferret At <https://theferret.scot/pesticide-report-suppressed-foi-warning/>

<sup>34</sup> The Ferret At <https://theferret.scot/planned-avoid-freedom-information-law-says-council/>

<sup>35</sup> 'Freedom of Information', pg. 5, September 2019

[https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/SPICe\\_FOIA\\_paper.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/SPICe_FOIA_paper.pdf)

<sup>36</sup> Quoted in in the case of Magyar Helsinki Bizottsag v Hungary, para. 63, European Court of Human Rights at <http://hudoc.echr.coe.int/eng/?i=001-167828>

impact on transparency and accountability. The loopholes must be plugged so that the process matches the purpose, which is to provide a record of who was there, what was discussed, what was agreed and actions to be taken by whom and when. Minutes enable accountability by providing the context to policy, funding and service decisions.”<sup>37</sup>

Under FoISA, there is no duty to make a record. If a record of a meeting is not taken, then there is no information to access. It used to be ‘business as usual’ to routinely produce agendas and take minutes of meetings. Why have we moved away from this practice? Yes, there have been cuts in staffing levels, as evidenced by surveys from UNISON Scotland in 2019, but that can only explain part of the problem. It is fair to conclude that in some bodies FoI, just like so many other public services, is short of the necessary resources to do the job well. Whatever the motivation and the reasons, the impact is clear and FoISA needs to be amended to mitigate the negative impact of omitting to make a record of ‘information’ due to ‘staff shortages’. Rationalising the myriad of duties on ‘recording’ information and making records which currently exist will be challenging, as evidenced by the summary prepared by Heriot Watt University of ‘a few of the Acts which impact on its records management and have influenced its records retention schedules’<sup>38</sup>, but the matter must be addressed.

#### 4. Amendment of schedule 1

**Status: Green but under consideration**

#### 5. Further power to designate Scottish public authorities

**Status: Not fit for purpose as pace of additions unsatisfactory and have the cumulative effect of limiting rights and reducing effectiveness of the law. As a result, information rights have been lost.**

#### Scottish Government Consultation

The Scottish Government has consulted on which organisations should be subject to the next process to add designated bodies under FoISA and we expect a report and a response to this in the Spring of 2020. CFoIS has published its response which recommends that those delivering services of a public nature and those organisations funded to deliver public services should be included as a matter of principle and continuity as FoI rights should follow the spend of public money. In practice this will mean that FoISA will apply only to the portion of their business that is funded by the public purse. The separation of functions has already been aired under the Human Rights Act 1998 in a number of cases that offers both certainty and continuity.<sup>39</sup>

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<sup>37</sup> Pg. 3 of report at <https://www.cfoi.org.uk/wp-content/uploads/2018/01/CFoIS-Minute-Taking-Report.pdf>

<sup>38</sup> ‘Records Management and the Law’ at <https://www.hw.ac.uk/services/information-governance/manage/records-management-law.htm> accessed on 21st January 2020.

<sup>39</sup> See cases involving RSLs at <https://www.housingrights.org.uk/news/legal/peabody-public-body>



It is disappointing to note that the Scottish Council for Voluntary Organisations (SCVO) continues to oppose the designation of Third Sector organisations that are delivering public services or services of a public nature.<sup>40</sup>

### Post Legislative Scrutiny

The Public Audit and Post Legislative Scrutiny Committee has also asked about how Section 5 should be used to extend FoISA's reach to bodies that spend significant amounts of public money or have a significant involvement in the public sphere.

Journalists have proposed:

'Forth Ports and Peel Ports, which are privately held bodies that control or own assets of significant public importance including transport infrastructure, such as the ferry ports used by CalMac, or commercial ports at Leith, Grangemouth, Dundee, Rosyth or elsewhere. Forth Ports has the power to set and enforce bylaws in the Firth of Forth under Part VI of the Forth Ports Authority Order 1969. Other infrastructure companies that operate ports and harbours are likely to have similar legal powers. There may be other private organisations that have the ability to make or enforce rules that have statutory force.

'Alongside COSLA and the Improvement Authority, which we listed in evidence to the committee as bodies which are publicly funded and act for public authorities but are presently excluded from FoISA, we would also add the Scottish Cities Alliance. It is run by seven local authorities and the Scottish government and boasts of a "pitch book" of public asset, infrastructure, commercial and housing investments worth £7.5bn for private or institutional investors to take up.

'Rather than naming individual bodies, or types of private organisation, we recommend the Scottish parliament amends the legislation so the tests for inclusion under FoISA and the EIRs allow the Scottish Information Commissioner to add any body to the list of bodies subject to the legislation where: The body is found to wield statutory powers in Scotland; the body is substantially funded or controlled by other Scottish public bodies, even if there is no single controlling authority.'<sup>41</sup>

As a result of this submission, CFoIS decided to find out how many and what type of bodies wield statutory powers in Scotland and made an FoI request to the Scottish Parliament to obtain a list. Our thinking was that it would have a list for a variety of reasons such as: the bodies may have been set up through legislation passed at the Scottish Parliament since 1999; their performance is/has been scrutinised by the Scottish Parliament; they have given evidence to Scottish Parliament Committees; their budgets have been set by the Scottish Parliament; research undertaken by SPICe, on any matter, yielded a list. Although most of the names would deal with devolved powers, some may have reserved functions too such as the Equalities and Human Rights Commission (EHRC). The reply was that the information 'is not held by the Scottish Parliament. Whilst bodies may be established by legislation passed by the Scottish Parliament the responsibility for those organisations does not lie with

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<sup>40</sup> See Third Sector News, 6<sup>th</sup> January 2019 at <https://www.thirdsector.co.uk/scvo-warns-against-extension-scottish-freedom-information-act/policy-and-politics/article/1669968>

<sup>41</sup> Additional Submission from journalists at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Supplementary\\_evidence\\_from\\_Journalists\\_22\\_October\\_2019.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Supplementary_evidence_from_Journalists_22_October_2019.pdf)

the parliament and therefore there is no requirement for the parliament to hold a list of statutory bodies. Instead you may wish to contact the Scottish Government for this information...’.

The process of making the FoI request has therefore been very useful. FoISA reform depends on official information being available and in a format that enables people to come to an informed view. Despite the functions of the Scottish Parliament, including holding the Executive to account, the information on bodies wielding statutory powers in Scotland is not available and that now needs to be remedied. Obliging organisations to gather and publish information that assists decision making is a matter ‘beyond’ FoISA and needs to be taken up separately.

### Commentary - What the Public Thinks

The use of the Section 5 power has been repeatedly and deliberately slow over the last 15 years despite the appetite from the public for increased designations. The Scottish Information Commissioner’s polling over the decade has evidenced anecdotal understanding. For example, polling from 2017, to which people were responding to questions put to them rather than initiating ideas, reveals that:

- 94% agreed it is important for the public to be able to access information
- 77% would be more likely to trust an authority that publishes a lot of information about its work
- Strong public agreement on the type of information that should be made available by public authorities: how public authorities spend their money (94%), reasons for the decisions public authorities make (90%), how public authorities deliver their services and functions (94%)
- contracts with other organisations (84%)
- data and statistics about their performance (93%)<sup>42</sup>

Further insights were gained by Scottish Information Commissioner polling in 2019. Respondents generally agreed that it was "extremely" or "very" important for public bodies to publish information about:

- how they spent their money (85%)
- the reasons for the decisions they make (80%)
- information on the contracts they have with other organisations (74%)
- information on how they deliver their functions and services (79%).
- 80% of survey respondents agreed that **private** sector companies who work on contracts for public bodies should be subject to the same FOI laws as public bodies.<sup>43</sup>

### Commentary - arms-length external organisations (ALEOs)

A report published in 2018 by Audit Scotland, the local authority spending watchdog, looked at how councils are using the **estimated** 130 ALEOs in Scotland, which have

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<sup>42</sup> Available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

<sup>43</sup> Available at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx>

an annual spend of more than £1.3 billion, and the impact they are making.<sup>44</sup> All ALEOs should be documented so there is clarity about how many are operating within as well as outwith FoISA.

### Commentary – Pace of Designation

The pace and detail of the exercise of this power has been excessively slow which is a significant contributor to reducing the effectiveness of FoISA:

- a failure to designate under FoISA new collective cross-authority bodies that deliver public services/services of a public nature.
- handing over the management or delivery of public functions so the changing nature of how public services delivered led to loss of rights.
- absence of full disclosure of information due to contractual terms eg under PFI.

Despite reforms introduced by The Freedom of Information (Amendment) (Scotland) Act 2013, which require Scottish Ministers to lay before the Parliament reports about the exercise of the section 5 power every two years,<sup>45</sup> further problems are emerging. For example, the designation of RSL ‘subsidiaries’ under FoISA will cause problems that will only be addressed through appeal to the Scottish Information Commissioner and that depends on a requestor being unhappy enough to pursue an internal review and then a full appeal to the Commissioner. The Scottish Parliament should provide clarity on the matter ie which of the 160 subsidiaries are designated and in respect of what services they deliver.<sup>46</sup> Legal precision on rights and duties should not be achieved through the appeal process.

### Commentary – impact of the Human Rights Act 1998 and the Scotland Act 1998

The Equalities and Human Rights Committee of the Scottish Parliament is alert to the relevance to Scotland of domestic, European and international human rights law and there is a growing number of cases which illustrate how access to information is a human right and a gateway to all of our rights<sup>47</sup>. The Human Rights Act 1998 covers public authorities and those delivering services of a public nature, but there appears to be a lack of reflective learning from case decisions which define what a ‘public body’ is and what functions can be considered ‘public’. These matters are very important to how FoISA is reformed. For example, cases that set out which parts of an RSL’s business was public and that which remained private<sup>48</sup>.

The UN Human Rights Committee’s General Comment 34, adopted in 2011, on how Article 19 of the ICCPR should be delivered states:

- Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the

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<sup>44</sup> See <https://www.audit-scotland.gov.uk/news/aleos-can-bring-benefits-but-need-careful-consideration>

<sup>45</sup> Act is available at <http://www.legislation.gov.uk/asp/2013/2/section/1>

<sup>46</sup> Figure provided in response to an FoI request from CFoIS in March 2019.

<sup>47</sup> CFoIS has consistently argued this point see for example the January 2015 publication ‘30:10 Reflecting and Protecting Freedom of Information Rights’ at <https://www.cfoi.org.uk/2015/01/3010-reflecting-and-protecting-freedom-of-information-rights/>

<sup>48</sup> See resources for RSLs produced by the EHRC at <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-social-housing-providers>

promotion and protection of human rights. (Para 3)

- The obligation to respect freedom of opinion and expression is binding on all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local ... and may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.<sup>49</sup> The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression ...' (para 7)
- A right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. (Para 18)
- To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. ... Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests. (Para 19).<sup>50</sup>

## **Insert new Section 6A**

### **6A. Publicly funded bodies**

Information held by persons providing services for Scottish public authorities, whether under a contract or otherwise, shall be subject to Section 1 in so far as they perform public functions or receive substantial public funding.

### Commentary on remedy and rights

The slow pace of designation under FoISA is hampering its effectiveness in delivering transparency and accountability. The pace of change in how public services and publicly funded services continues with no evidence of a slowdown. To future proof FoISA and remove the discretion which selective addition under Section 5 provides, it is now appropriate to introduce a new category of body for explicit designation.

It is useful to note that in 2017, the ECtHRs stated:

'...from the materials available to the Court on the legislation of member States of the Council of Europe that all of the thirty-one member States surveyed, save for Luxembourg, recognise the right of access to information and/or official documents held by public bodies. It would also appear that in most member States the right of access to information and/or documents appears not to be limited to the executive branch of power but extends to information and/or documents held by the legislative

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<sup>49</sup> See communication No. 61/1979, Hertzberg et al. v. Finland, Views adopted on 2 April 1982

<sup>50</sup> See UN Human Rights Committee website at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en)

or judicial branches of power and even to State-owned companies and private bodies which perform public functions or receive substantial public funding.<sup>51</sup>

Therefore, Scotland will become one of the majority in the Council of Europe states to legislate on the matter of private bodies which perform public functions or receive substantial public funding. Given how public services are delivered in Scotland, the definition will capture Third Sector organisations too. The issue to be clarified is what is 'substantial public funding' and should there be lower thresholds eg when the public funding relates to key public services such as support for children, adults with learning disabilities and the care of elderly and vulnerable people. A conversation is needed to develop these proposed criteria under FoISA.

To corroborate this extension in designation, reference can be made to the submission of Audit Scotland to the post legislative scrutiny of FoISA as it points out:

'Since FOISA came into effect the way that public services are delivered has become significantly more diverse and complex. This means that significant areas of service delivery and public expenditure are not covered by FOISA.'<sup>52</sup>

#### Commentary – Records

The proposed amendment is consistent with the terms of the Public Records (Scotland) Act 2011 which sets out the meaning of public records:

- (1) *In this Act, "public records", in relation to an authority, means—*
- (a) *records created by or on behalf of the authority in carrying out its functions,*
  - (b) *records created by or on behalf of a contractor in carrying out the authority's functions,*
  - (c) *records created by any other person that have come into the possession of the authority or a contractor in carrying out the authority's functions.*
- (2) *In subsection (1) "contractor", in relation to an authority, means a person to whom functions of the authority are delegated (whether under a contract or otherwise) by the authority.*<sup>53</sup>

Already the creation of a 'public record' can be undertaken by a body which is not a public authority but who is acting for them in the delivery of their functions. FoISA should 'tidy up' designations to comply with the reality of the delivery of publicly funded services.

#### 6. Publicly-owned companies

**Status: Not fit for purpose as issues with interpretation of 'publicly owned company which negatively impacts on the effective delivery of the right.**

#### Commentary – practice and effect

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<sup>51</sup> Quoted in judgement in the case of Magyar Helsinki Bizottsag v Hungary, para. 64, European Court of Human Rights at <http://hudoc.echr.coe.int/eng?i=001-167828>

<sup>52</sup> Pg. 3 at

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

<sup>53</sup> Section 3 at <http://www.legislation.gov.uk/asp/2011/12/section/3>

Under Section 6 of FoISA, publicly owned companies are automatically designated. The Scottish Information Commissioner's Office has extracted the names of 148 publicly owned companies from its database of publication scheme approvals. According to the Commissioner's Office:

'This list is not an accurate representation of how many publicly owned bodies under section 6 of FOISA are in existence. Such a list would be constantly evolving as new companies come on and old companies drop off. The list is also only as good as the co-operation this office receives from the bodies involved. Our office does not hold what we can confirm to be a fully accurate list of Scottish publicly owned companies under section 6 of FOISA. The list attached is as close as we can come to providing you with what we believe you are interested in.'<sup>54</sup>

Part of the problem is the onus is on the company or the designated body that sets it up declaring its existence and adopting the Model Publication Scheme (MPS) as according to the Commissioner's office:

'Our Guidance on the MPS sets out that, under Class 1, organisations should publish: "Subsidiary companies (wholly and part owned) and other significant financial interests". In general, the onus is on organisations to ensure they are compliant with FOI law when any new companies are set up. If the Scottish Information Commissioner's Office is made aware of a company being set up, or if it's brought to our attention that a company has been set up and we haven't received an MPS notification form, we will contact the company and take steps to ensure compliance.'<sup>55</sup>

After 15 years of FoISA there is still is no complete list available which makes a Section 1 request challenging unless the requester knows the publicly owned company's name and the contact details to direct a recordable request. This is important as a requestor may have an interest in a particular subject area but is entirely unaware that a publicly owned company operates in that 'space'.

### Commentary - interpretation

There is disagreement on the interpretation of publicly-owned companies under section 6(1) of FoISA as the Scottish Government's submission on post legislative scrutiny states there is a 'loophole in that a company that is wholly-owned by a combination of authorities does not fall within the definition, and so is not subject to FoISA'<sup>56</sup>. However the 'Explanatory Notes' that accompany FoISA state that 'for the purposes of section 3(1)(b), a company is a "publicly-owned company" if it is wholly owned by the Scottish Ministers or by any other Scottish public authority or authorities listed in schedule 1...'<sup>57</sup>. Therefore, a publicly owned company by several bodies is covered.

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<sup>54</sup> Answer to an FoI request in a letter dated 17<sup>th</sup> January 2020.

<sup>55</sup> Ibid, and more information about the Commissioner's processes regarding publication schemes at <http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemeHome.aspx>.

<sup>56</sup> Pg. 6 of the submission at Public Audit and Post Legislative Scrutiny Committee website at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/11\\_Scottish\\_Government.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/11_Scottish_Government.pdf)

<sup>57</sup> Para 32 at [http://www.legislation.gov.uk/asp/2002/13/pdfs/aspn\\_20020013\\_en.pdf](http://www.legislation.gov.uk/asp/2002/13/pdfs/aspn_20020013_en.pdf)

The matter is related to compliance with the Model Publication Scheme Guidance produced by the Commissioner, in November 2018. It is stated under Class 1 and 'about the authority' that there should be information listed on 'Subsidiary companies (wholly and part owned) and other significant financial interests' as well as 'Strategic agreements with other bodies'.

7. Public authorities to which Act has limited application

**Status: Green but under consideration**

7A. Reports on section 5 power

**Status: Amber as generally unhappy with the delivery of designations under Section 5.**

#### Commentary

The reports have proven to be late and not very ambitious. The purpose was to drive forward the use of the Section 5 power and this has not happened thus far. The Scottish Parliament should use the opportunity of the bi-annual reports to probe FoISA operation and scope and hold the Executive to account for the slow pace of expanding coverage.

8. Requesting information

9. Fees

10. Time for compliance

**Status: Amber due to operational issues**

#### Commentary

FoISA obliges public authorities to respond "promptly" but 'the statistics indicate that authorities often respond only near the end of or past the 20-day time limit. Users of the right are often unhappy about this, contributing to the negative perception of Scottish public authorities.'<sup>58</sup>

In evidence from journalists it was pointed out that some designated bodies are not in compliance with the 20-day working timeframe and that has a consequential impact on cost:

'...The Scottish Information Commissioner intervened with East Lothian Council in October 2018. It had failed to meet the 20-day deadline in 65% of FoISA requests and 79% of EIRs. Special measures had to be put in place. That report confirms too its own failings increased its costs: "The increase in requests for review can mainly

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<sup>58</sup> Evidence from academics at Dundee University at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/03\\_Prof\\_Reid\\_Academics\\_Dundee\\_University.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/03_Prof_Reid_Academics_Dundee_University.pdf)

be attributed to the deterioration in the Council's compliance with statutory timescales."<sup>59</sup>

11. Means of providing information

**Status: Amber given the importance of inclusive communication but it may be that practice needs to change rather than the legislation. See commentary below on Section 23 of FoISA.**

12. Excessive cost of compliance

**Amber: Solely because the cost ceiling has not been raised since 2005.**

Commentary

Regulations are made by Scottish Ministers under Section 12(1). Currently, if the cost to the authority is likely to exceed £600, which is capped at £15 per hour of staff time amounting to 40 hours' work. The logic of the way to calculate the cost remains acceptable. However, the effect of the cost ceiling failing to keep up with inflation means that more information requests are refused. The staff hourly rate can also be increased commensurate with any relevant staff pay increases in the public sector since 2005.

13. Fees for disclosure in certain circumstances

**Status: Green as accept that fee structure is necessary. Note that many public bodies do not usually charge for requests and applaud this approach.**

14. Vexatious or repeated requests

**Status: Green as the section applies to the request. Note that designated bodies are reluctant to use the power and suggest some of the criticism of FoISA could be addressed if they chose to use the power and test the definition of the restraint which it offers, in having to answer certain requests.**

15. Duty to provide advice and assistance

**Status: Amber but this is due more to practice issues including the designated body offering advice and assistance and greater consideration as to the importance of providing the service at a level that meets people's needs.**

16. Refusal of request

**Status: Red as the exemptions, which can be cited to refuse disclosure, are too broad. See commentary on Section 25 - 41 below.**

17. Notice that information is not held

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<sup>59</sup> Supplementary Evidence dated 10<sup>th</sup> October at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Supplementary\\_evidence\\_from\\_Journalists\\_22\\_October\\_2019.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Supplementary_evidence_from_Journalists_22_October_2019.pdf)



**Status: Green but under consideration**

18. Further provision as respects responses to request

**Status: Green but under consideration**

19. Content of certain notices

**Status: Green but under further guidance consideration due to the importance of making the system less legalistic and more communication friendly.**

20. Requirement for review of refusal etc.

**Status: Green but under consideration**

21. Review by Scottish public authority

**Status: Green but under consideration**

22. Special provisions relating to records transferred to Keeper

**Status: Green but under consideration**

23. Publication schemes

**Status Red: not fit for purpose as there is no systematic monitoring within and across authorities of the pro-active publication of information of the type and in a format the public wants. Need greater emphasis on inclusive communication.**

Commentary

There is a duty under the EISRs for public authorities to proactively disclose environmental information in an active and systemic manner. This contrasts with the more general duty to adopt and maintain a publication scheme under FoISA, which imposes less of an obligation on Scottish public authorities.

Currently FoISA seems to be robust as a Scottish public authority ‘must’:

- (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner.
- (b) publish information in accordance with that scheme.

However, in practice that is simply not happening as there are no enforcement consequences for failing to maintain the model publication scheme (MPS) and publish information in accordance with the scheme.

There are also issues about the accessibility of information. Under Section 23 (2)A the publication scheme must specify—

- (a) classes of information which the authority publishes or intends to publish;
- (b) the manner in which information of each class is, or is intended to be, published; and
- (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.

The 'manner' and method of publication have to comply with the Equality Act 2010 and the principles of inclusive communication. The issues come up several times in relation to FoISA, eg the duty on designated bodies under section 23 (4) 'The authority must publish its publication scheme but may do so in such manner as it thinks fit.' Consideration is needed about how the duties comply with the law as well as good practice to avoid a postcode lottery on accessibility. Therefore, this is a national conversation as well as within individual bodies. Consultation should be undertaken eg with Third Sector organisations such as deafscotland, SPIF and the Inclusive Communication Hub<sup>60</sup>.

During evidence, it has been repeatedly stated that the MPS cannot be enforced. However, if the MPS is being ignored by a designated authority it is possible to argue that they have failed to 'maintain' the MPS under Sections 23(a) and in effect the designated authority is without a functioning publication scheme. If sufficient evidence is gathered to prove this, the Commissioner should be able to revoke approval of the publication scheme under 23(5)(b) and set out his reasons under Section 23(6)(b). It would be interesting to observe, if this were to happen, whether the designated body sought judicial review. We raise this point to encourage discussion. A simpler approach is to amend FoISA.

#### 24. Model publication schemes

**Status Red: Not fit for purpose as it can be ignored, not kept up to date and the terms cannot be enforced by the Commissioner even though the designated body has adopted it.**

#### Commentary

The legal emphasis on the adoption of a publication scheme is problematic and legal balance is required to ensure there is adoption **and** compliance with the terms. It is necessary to introduce a procedural requirement, eg a declaration from the FoI Officer on behalf of the designated authority, that they are aware of and have incorporated any updates from the Commissioner on the MPS. This is constituted as 'maintaining' the MPS.

'Bespoke' schemes are permitted under the regime and it is useful to reflect they have not evolved or been developed.

#### Part 2 Exempt Information

**Status: Not fit for purpose as there are too many exemptions and all should be subject to the public interest test.**

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<sup>60</sup> At <http://inclusivecommunication.scot/>

### Commentary

Under FoISA the authority needs to apply the public interest test only when applying certain exemptions, whereas under the EISRs the authority needs to apply the test whenever it exempts information from disclosure. Under the EISRs the term used is 'exception' rather than exemption which conveys a better understanding and purpose of the law.

25. Information otherwise accessible

**Status: Green but there may be practice issues about accessibility including that people do not have access to a computer.**

Under FoISA the exemptions that can be cited to stop the publication of information and which need to be reviewed are:

26. Prohibitions on disclosure

27. Information intended for future publication

28. Relations within the United Kingdom

29. Formulation of Scottish Administration policy etc.

30. Prejudice to effective conduct of public affairs

31. National security and defence

32. International relations

33. Commercial interests and the economy

**Status: Red as no longer fit for purpose.**

### Commentary

Journalists have provided information on comparative practice to illustrate that Scotland is far from progressive on what is pro-actively published and released on contracts delivered for the public and funded through public resources:

'The US government has a number of publicly accessible and searchable databases giving details of procurement contracts. Those include: the Federal Procurement Data System, which allows searches of government contracts at [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) and USA Spending at <https://www.usaspending.gov/#/> which is a searchable database which is very broad in scope and scale. These databases are very contemporary, are searchable via a large number of identifiers, and cover domestic and foreign contracts, including by place name, purchasing department, country and so on. The Scottish government has an extremely brief and non-searchable list which offers only very basic headline information on a spreadsheet, which is also nine months out of date and only covers

contracts with a value above £25,000: <https://www.gov.scot/collections/government-spend-over-gbp25000-monthly-reports/><sup>61</sup>

There is too much use of commercial interests' exemptions and the Commissioner has rightly overruled on some decision to withhold information.

34. Investigations by Scottish public authorities and proceedings arising out of such investigations

**Status: Green but under consideration**

35. Law enforcement

**Status: Green but under consideration**

36. Confidentiality

**Status: Not fit for purpose**

#### Commentary

The Section 60 Code of Practice provides some guidance on the use of confidentiality clauses: paragraph 8.4.4 makes it clear that authorities should not “implicitly” accept confidentiality terms in contracts. The confidentiality exemption in section 36(2) of FoISA establishes as a pre-requisite for reliance on the exemption that the authority must have obtained the information from a third party. If the information was created internally, the authority cannot rely on the exemption.

Contractual information has consistently proven to be an area of public interest whether it is about seeking costs on PFI hospitals or contracts for cleaning services. Reflective learning would prompt the pro-active publication of all such contracts as a matter of routine.<sup>62</sup> There is too much use of confidentiality exemptions and the Commissioner has rightly overruled on some decision to withhold information.

#### Commentary - Reform

The confidentiality exemption in section 35 of the Irish Freedom of Information Act 2014 places a prohibition on relying on confidentiality clauses between authorities and contractors providing services on their behalf. FoISA should be amended to introduce a similar prohibition on relying on confidentiality clauses between authorities and contractors providing services on their behalf. It would remove this particular barrier to accessing information about those services.<sup>63</sup>

37. Court records, etc.

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<sup>61</sup> From additional submission from journalists. October 2019 at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Supplementary\\_evidence\\_from\\_Journalists\\_22\\_October\\_2019.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Supplementary_evidence_from_Journalists_22_October_2019.pdf)

<sup>62</sup> For example see Decision 190/2007 granting a copy of a PFI Contract from Lothian NHS Board at <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200501839.aspx>

<sup>63</sup> Inspired by the supplementary evidence from the Scottish Information Commissioner dated 10<sup>th</sup> December and following on from oral evidence session of 5<sup>th</sup> December at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/SIC\\_Follow\\_up\\_note\\_for\\_PAP\\_LS\\_Committee\).pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/SIC_Follow_up_note_for_PAP_LS_Committee).pdf)

**Status: Green but under consideration**

38. Personal information

**Status: Green but under consideration**

39. Health, safety and the environment

**Status: Green but under consideration**

40. Audit functions

**Status: Green as we are currently re-assured by the judgement of Audit Scotland on the value and impact of this exemption.**

Commentary

The submission of Audit Scotland to the post legislative scrutiny of FoISA points out that Section 40 of FOISA, the 'audit functions exemption is vital to the effective conduct of public audit. We remain strongly supportive of this exemption. In practice we apply this exemption very sparingly and only after careful consideration. We have applied the exemption only six times since 2013.'<sup>64</sup>

41. Communications with Her Majesty etc. and honours

**Status: Green as we are unaware of issues of concern.**

Commentary

This section was updated in the Freedom of Information Amendment (Scotland) Act 2013 after detailed discussion and debate.

42. The Scottish Information Commissioner

**Status: Green but under consideration but only in so far as funding and organisational matters.**

43. General functions of Commissioner

**Status: Not fit for purpose**

Commentary

The Commissioner needs to have more powers to enforce obligations – see also section 51 of FoISA – so that there are consequences for a designated bodies failure to comply. A consultation on extending the nature of the Commissioner's powers and what kinds of action can be taken to rectify failings, would be useful. This is not an attempt to delay but simply to inform.

44. Recommendations as to good practice

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<sup>64</sup> Pg. 4 at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/50\\_Audit\\_Scotland.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/50_Audit_Scotland.pdf)

**Status: Green but there is scope for developing this work which has been clearly of use to all parties to the process.**

Commentary

Raises issues about funding and staff resources to reflect on the need for guidance on practice, test the model and put into the public domain. Good practice could also apply to requestors.

45. Confidentiality of information obtained by or furnished to Commissioner

**Status: Green as it seems an essential component of the process.**

46. Laying and publication of reports

**Status: Green but under consideration**

46A. Strategic plans

**Status: Green but under consideration**

47. Application for decision by Commissioner

**Status: Red as not fit for purpose as currently most requestors are at a disadvantage in terms of knowledge of the law and case law on, for example, the appropriate use of exemptions.**

Commentary

A duty for the Scottish Information Commissioner to advise and assist applicants should be introduced to equalise access to justice. Currently the process is profoundly uneven: the understanding and expertise of the designated body and the Commissioner contrasts with the requestor who will not have the same knowledge of the law, case decisions and practice issues. It was this logic that promoted the duty to advise and assist at the initial stage of a section 1 request under FoISA, so it is a matter of consistency.

48. When application excluded

**Status: Red as not fit for purpose**

Commentary on Sections 47 and 48

Repeal section 48 in its entirety to bring FoISA into line with the UK Act.<sup>65</sup> The more accessible UK FoI Act process has resulted in more appeals and from an access to justice perspective that is to be welcomed. Also, the UK legislation has been subject to a much greater level of judicial scrutiny because of the more accessible appeals process, so the meaning of the law is being authoritatively determined. Currently the

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<sup>65</sup> See reasoning set out in submission from Inksters Solicitors at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/01\\_Alistair\\_Sloan\\_Inksters\\_Solicitors.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/01_Alistair_Sloan_Inksters_Solicitors.pdf)

Commissioner must reach conclusions about the interpretation of the law, which are not binding, and with limited guidance from the courts.

Enforcement and appeal provisions under Section 17 of the EISRs connect with Section 48 of FoISA and thus enables the Aarhus Convention to be engaged. Reform in Scotland should be informed by the principles and procedures set out in the Aarhus Convention in respect of access to justice. A distinctive Scottish appeal process needs to be agreed which is accessible and not cumbersome.

49. Commissioner's decision

**Status: Green but under consideration**

50. Information notices

**Status: Green but under consideration**

51. Enforcement notices

**Status: Red as power needs to be expanded**

#### Commentary

The Commissioner should be able to serve enforce notices on a range of failings by designated bodies such as a failure to maintain the MPS. An enforcement notice does not mean that the Commissioner needs to take direct action with the designated body, just be satisfied that it has complied with the terms of the enforcement notice. IN practice the two are closely linked as there needs to be a body of evidence to prove that practice has improved. Squaring the circle needs to be the subject of further consideration.

52. Exception from duty to comply with certain notices

**Status: Green but under consideration**

53. Failure to comply with notice

**Status: Green but under consideration**

54. Powers of entry and inspection

**Status: Green but under consideration**

55. No civil right of action against Scottish public authority

**Status: Green but under consideration**

56. Appeal against notices under Part 4

**Status: Need to be reformed**

### Commentary – Providing Information

When the Scottish Information Commissioner decides a designated body has failed to respond to a requirement for review within the timescale set out in FoISA, he can order it to carry out a review and is required, by law, and to give the body at least six weeks to comply. Given that the original review should be completed within 20 working days, it is extraordinary that the Commissioner ‘must’ give an additional 6 weeks as, apparently, that is the amount of time a party has before deciding if it will make an appeal. FoISA should be amended so that the information is provided as soon as possible and no more than a further 20 working days.

### Commentary - Process

The designated public authority or the requestor can appeal against the decision. However, a successful appeal does not guarantee that the information will ultimately be released as the court can only change the Commissioner’s decision and remit it to the Commissioner to retake. This section highlights the procedural nature of much of FoISA.

**Status Red: the appeals system is not fit for purpose and must be amended.**

### Commentary

Appeals may be made, on a point of law, to the Court of Session and are heard by a division of the Inner House. Therefore, appeals are made directly to Scotland’s highest civil court which is an extremely expensive process and therefore inaccessible to the vast majority of people. Under the UK FoI Act the system of appeals is different and has resulted in much more litigation.

Views are sought on the best approach to reforming the appeals process. In its submission to the post legislative scrutiny of FoISA Inksters solicitors suggested:

‘Appeals to the Upper Tribunal for Scotland; thereafter a right of appeal from the Upper Tribunal to the Court of Session (with the permission of the Upper Tribunal; which failing, the Court of Session); where the proposed appeal would raise some important point of principle or practice, or there is some other compelling reason, the Court of Session should hear the appeal; a right of appeal to the Supreme Court in terms of section 40 of the Court of Session Act 1988, as amended.’<sup>66</sup>

57. The expression “historical record”

**Status: Green but under consideration**

58. Falling away of exemptions with time

**Status: Green but under consideration**

59. Power to vary periods mentioned in sections 57 and 58

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<sup>66</sup> Submission from Inksters Solicitors at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/01\\_Alistair\\_Sloan\\_Inksters\\_Solicitors.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/01_Alistair_Sloan_Inksters_Solicitors.pdf)



### **Status: Green but under consideration**

60. Code of practice as to functions under this Act

### **Status: Amber due to effect and impact of current system**

#### Commentary - Enforcement

The Code is the responsibility of Scottish Ministers and is in danger of being watered down over a period. The codes of practice are not enforceable, and in the event of a breach of the code, the most the Commissioner could do is to make a practice recommendation and there are no penalties for failing to comply. This anomaly needs to be remedied such as making the Code of Practice enforceable.

#### Commentary - Confidentiality

The Section 60 Code of Practice provides some guidance on the use of confidentiality clauses (paragraph 8.4.4 makes it clear that authorities should not “implicitly” accept confidentiality terms in contracts). Their existence, and compliance with them, is essential for requestors as well as designated bodies.

61. Code of practice as to the keeping, management and destruction of records

### **Status: Amber due to effect and impact in practice**

#### Commentary

There is a code of practice on record keeping, made by the Scottish Ministers, under section 61 of FoISA. This code of practice is merely aspirational, and the Commissioner has very limited powers in respect of that code – his powers being limited to the issuing a practice recommendation (having consulted the Keeper of the Records of Scotland). These are not enforceable by the Commissioner and could, quite lawfully, be ignored by a Scottish public authority (as the section 61 Code of Practice can also be given its aspirational nature)

62. Power to make provision relating to environmental information

### **Status: Green but under consideration as to whether to merge regimes**

#### Commentary

In evidence to the Post Legislative Scrutiny Committee, academics from Dundee University suggested that consideration should be given to merging the parallel FoISA and EISRs regimes in Scotland:

‘By merging the two information laws into a unified regime, the issues that arise from the different procedural rights enshrined in FOISA and EISRs would be eliminated. Further, Scottish public authorities would not have to determine whether a request falls under FOISA or EISRs.’<sup>67</sup>

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<sup>67</sup> Available at

[https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/03\\_Prof\\_Reid\\_Academics\\_Dundee\\_University.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/03_Prof_Reid_Academics_Dundee_University.pdf)

CFoIS considers this to be a matter for future consideration including what we can learn from the Aarhus Convention.

63. Disclosure of information to Scottish Public Services Ombudsman or to Information Commissioner

**Status: Green but under consideration**

64. Power to amend or repeal enactments prohibiting disclosure of information

**Status: Green but under consideration**

65. Offence of altering etc. records with intent to prevent disclosure

**Status: Green but under consideration**

#### Commentary

There have been news stories and concerns by a range of people, especially journalists, about the shadow world where information is exchanged, views are expressed, and decisions taken. The matter has also been raised by Professor Kevin Dunion, in written evidence to the post legislative scrutiny of FOISA, and he acknowledges the issue of concern:

‘... that information within the scope of FOISA may be exchanged other than through records management systems and official email accounts, e.g. by text, personal email accounts, and social media apps. Such a practice makes it difficult for officials to conduct adequate searches for relevant information. If this is being done deliberately to avoid freedom of information, and in particular information is not disclosed when a request is received, greater consideration should be given to using the provisions of section 65 which makes it an offence to block, destroy or conceal a record held by the authority.’<sup>68</sup> CFoIS agrees with this opinion.

65A. Time limit for proceedings

**Status: Green but under consideration**

66. Saving for existing powers of disclosure

**Status: Green but under consideration**

67. Protection from actions for defamation

**Status: Green but under consideration**

68. Scottish Parliament and Scottish Administration

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<sup>68</sup> Available at pg. 4

[https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/08\\_Prof\\_Kevin\\_Dunion\\_Dundee\\_Law\\_School.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/08_Prof_Kevin_Dunion_Dundee_Law_School.pdf)

**Status: Green but under consideration**

69. Exercise of rights by children

**Status: Green Fit for Purpose**

Commentary

An example of how Scot's law is already giving effect to the UN Convention on the Rights of the Child, which is going to be incorporated into Scot's law.<sup>69</sup> Article 13 (1) states 'The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.'

**Insert new 69 A**

Text to be drafted that places a duty on Scottish Ministers, public authorities and the Scottish Information Commissioner to engage with new technologies and how they interact with information and communication systems so that the right to information under Section 1 of FoISA is kept up to date, is relevant to how business is conducted and adapts to the use of new technologies that may not have even been invented yet.

Commentary

Technology, the internet, email, WhatsApp, Instagram and other online methods have become very significant means by which individuals seek proactively disclosed information and expect to submit requests for information. Not only has technology influenced how users engage with the right, but it has also driven the expectation that users will be able to access the sought-after information immediately. By requiring systems to keep up to date, expectations of users are more likely to be realised.<sup>70</sup>

70. Amendment of Public Records (Scotland) Act 1937

**Status: Green but under consideration**

71. Amendment of Scottish Public Services Ombudsman Act 2002

**Status: Green but under consideration**

72. Orders and regulations

**Status: Green but under consideration**

73. Interpretation

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<sup>69</sup> Statement from Scottish Government on 20<sup>th</sup> November 2019 at <https://www.gov.scot/news/strengthening-childrens-rights/>

<sup>70</sup> View of Dundee academics in its submission at [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/03\\_Prof\\_Reid\\_Academics\\_Dundee\\_University.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/03_Prof_Reid_Academics_Dundee_University.pdf)

**Status: Amber as need to insert new definition of ‘Information’**

Commentary

The EISRs offer a specific as well as general definition: “environmental information” has the same meaning as in Article 2(1) of the directive, namely any information in written, visual, aural, electronic or any other material form. Therefore, this should be adopted for FoISA too.

74. Giving of notice etc.

**Status: Amber due to changes in how the routine practice of communication has changed, for environmental and cost reasons.**

Commentary

Section 74 provides that the Commissioner can only give a notice, including a decision notice, by delivering it or posting it. FoISA does not permit such notices to be transmitted electronically. FoISA should be amended to allow notices, including decision notices, to be given by electronic means where the application for a decision was itself received by electronic means or where the requester had provided consent to have the decision notice given to them by electronic means.

75. Commencement

Status: Not applicable

76. Short title

Status: Not applicable

SCHEDULE 1 - Scottish Public Authorities

**Status: Amber, given what has been said above about the need to extend designations under FoISA and there are a variety of ways that can be done.**

SCHEDULE 2 - The Scottish Information Commissioner

**Status: Green but under consideration**

SCHEDULE 3 - Powers of Entry and Inspection

**Status: Green but under consideration**

SCHEDULE 4 - Consequential Amendments to Scottish Public Services Ombudsman Act 2002

**Status: Green but under consideration**

#### 4 Making FoI rights robust – over to you

MSPs can reform FoISA and we hope this report convinces you to act and promptly. This report is published with a range of ‘Next Steps’ which can engage civil society and the public too. Protecting civic space, enhancing participation, funding and encouraging activity by civil society is an ongoing priority for the UN<sup>71</sup> which acknowledges the core role of accessing information:

‘Civic space is the environment that enables civil society to play a role in the political, economic and social life of our societies. In particular, civic space allows individuals and groups to contribute to policy-making that affects their lives, including by accessing information, engaging in dialogue, expressing dissent or disagreement, and joining together to express their views.’<sup>72</sup>

Resources are required to develop further, specific reforms and that can be undertaken in a number of ways such as:

- Domestically invite comments to inform a new Bill to update FoISA
- Enable and support discussion at SPIF. The domestic network, enabled through SPIF, has been invaluable in sharing experiences and knowledge on best practice as well as issues on the equal exercise of rights across Scotland.
- Using the international FoI advocates community to source ideas on best practice eg consult activists, academics and professionals pushing to get greater transparency in law, culture and practice. The international network has been invaluable to activists in Scotland as we have immediate access to a vast pool of knowledge and expertise unified in the purpose of securing, extending and being ambitious about laws which enforce the public’s right to know about how they are governed and how public money is spent.<sup>73</sup>
- Reaching out internationally to a wider range of views via the ‘Global Dev Hub’ which is an online community of international development practitioners and professionals. ‘Since 2012, the United Nations’ Development Programme (UNDP) Knowledge Management team has hosted and supported open online consultations to help connect organizations and governments to connect directly with global experts and people to inform decision making processes, resonating with the first line of the UN Charter ‘We the peoples...’.<sup>74</sup>

The law and practice of the right to information and accessing information is a matter of global concern and it is right for Scotland to look beyond its borders when considering the detail of reforming of FoISA. The role of non-governmental organisations (NGOs) in informing the detail and drawing on what works and what does not is vital to that process. Recently the role and funding for NGOs in Scotland has been the subject of scrutiny by the Equalities and Human Rights Committee of

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<sup>71</sup> For example see the online consultation which runs from 13th to 24<sup>th</sup> January 2020 at <https://www.globaldevhub.org/civicspace>

<sup>72</sup> See Office of the UN High Commissioner on Human Rights website at <https://www.ohchr.org/EN/Issues/CivicSpace/Pages/ProtectingCivicSpace.aspx>

<sup>73</sup> For more information on the FoI Advocates Network go to [https://foiadvocates.net/?page\\_id=69](https://foiadvocates.net/?page_id=69)

<sup>74</sup> Go to <https://www.globaldevhub.org/about>

21st January 2020

the Scottish Parliament.<sup>75</sup> It is a general matter, not specific to FoI, that NGOs have a range of functions not just to deliver services on behalf of a public authority including Government. How and why NGOs are funded is still a matter under review across Scotland and is part of the dialogue on freedom of expression.

This publication is a 'living document', and we hope inspires you to contribute to the reform of FoISA. The enormity of the challenge means this document is a work in progress as we do not believe we have thought of all the reforms necessary.

CFoIS recognises that the current post legislative scrutiny of FoISA is an opportunity to deliver stronger enforceable rights, increase accountability through transparency and extend the range of organisations covered by the law to align with other modern democracies. We hope the process results in brave and radical proposals for reform.

CFoIS hopes that by 28th September 2020, International Day for Universal Access to Information<sup>76</sup>, there should be a clear roadmap on how and when FoISA will be reformed.

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<sup>75</sup> Go to the Committee's website for the terms of the Inquiry into the 'Draft Budget Scrutiny 2020 - 21', evidence submitted, the Committee's report and the Scottish Government's response <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111972.aspx>

<sup>76</sup> UN General Assembly adopted a Resolution in October 2019

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- Freedom of Information in Scotland in Practice by Kevin Dunion pub by Dundee University Press 2011
- The Impact of the Freedom of Information Act on Central Government in the UK – Does Fol Work? By Robert Hazell, Ben Worthy and Mark Glover pub by Palgrave McMillan 2010
- Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information at <http://www.legislation.gov.uk/ssi/2004/520/made> (accessed 19th December 2019)
- The Public's Right to Know – Principles of Freedom of Information by Toby Mendel and published by Article 19, June 1999  
<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

## **Reports from the Scottish Information Commissioners**

- April 2017 [Commissioner's Special Report - Proactive Publication: time for a rethink?](#);
- January 2015 [Commissioner's Special Report: FOI 10 Years On - are the right organisations covered?](#);
- August 2014 [Commissioner's Special Report - Failure to Respond to FOI Requests: extent, impact and remedy;](#)
- January 2012 [Kevin Dunion's Special Report to the Scottish Parliament, on leaving office](#)

## **SPICe**

'Freedom of Information (Scotland) Acts 28<sup>th</sup> February 2019

[https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/FOISA\\_SPICe\\_February\\_2019.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/FOISA_SPICe_February_2019.pdf)

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## **CFoIS - articles**

Making Fol Right – Journal of the Law Society of Scotland November 2019

<https://www.lawscot.org.uk/members/journal/issues/vol-64-issue-11/making-foi-right/>

'A price can't be put on our Fol rights' - Third Force News 16<sup>th</sup> August 2019

<https://thirdforcenews.org.uk/blogs/a-price-cant-be-put-on-our-foi-rights>

'Making Freedom of Information Fit the Job' Scottish Left Review November 2019

<http://www.scottishleftreview.scot/making-freedom-of-information-fit-for-the-job/>

## **CFoIS Publications**

Available at <https://www.cfoi.org.uk/scotland/> and on our new website at

[https://www.cfois.scot/?page\\_id=60](https://www.cfois.scot/?page_id=60)