

Freedom of Information (Scotland) Bill Response to the Consultation Issued by Katy Clark MSP

The Jimmy Reid Foundation is a think tank which brings together different voices from across Scotland to make the case for economic, environmental, political and social equity and justice in Scotland and further afield. For more information go to <https://reidfoundation.scot> The Jimmy Reid Foundation is a Scottish Charitable Incorporated Organisation Number SC051331.

Overview

The Jimmy Reid Foundation (JRF) welcomes the proposal for a bill to reform the Freedom of Information (Scotland) Act 2002 (FoISA). FoISA is a powerful tool to hold government and public authorities to account as:

- Requestors can make a request for information which must be answered “promptly” and no later than 20 working days.
- If dissatisfied with the response or if they get no response, requestors can seek an internal review of the decision.
- If still dissatisfied, they can appeal to the independent Scottish Information Commissioner.

Therefore, FoISA provides a right to access information and is a key tool in delivering community empowerment and democratic participation.

FoISA replaced the ‘Code of Practice on Scottish Executive Information’ with enforceable rights, as the voluntary regime was inadequate.¹ FoISA created an architecture of enforcement delivered by the Commissioner. The free enforcement of the right and duties ensured culture and practice changed to deliver legal compliance. However, FoISA has been allowed to weaken by: failing to close legal loopholes, failing to apply to the diverse bodies that now deliver public services, failing to strengthen enforcement powers to fix practice failures and failing to address longstanding issues such as increasing pro-active publication to boost trust and accountability.

The JRF is disappointed that the Scottish Government’s consultation on ‘Fol Rights’, which was published on 29th November 2022² reflects its 16 year old commitment to operate “within the Freedom of Information (Scotland) Act 2002 rather than proposing significant changes to it, but adjusts the regime where it is necessary and sensible to do so.”³ FoISA needs to be reformed, merely adjusting the regime is an entirely inadequate approach.

¹ ‘An Open Scotland’ pub by Scottish Executive, November 1999 Page 9

² [Supporting documents - Access to information rights in Scotland: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/supporting-documents-access-to-information-rights-in-scotland-consultation)

³ Scottish Government’s Six Fol principles published in 2007 [Guide to information published by the Scottish Government – gov.scot \(www.gov.scot\)](https://www.gov.scot/guide-to-information-published-by-the-scottish-government)

The JRF notes that Scotland is a member of the Open Government Partnership (OGP) and membership is dependent on meeting the 'Core Eligibility' criteria which is determined by evaluations of countries' performance in four critical areas of open government including 'Access to Information'.⁴ Whilst welcome, OGP is a voluntary vehicle for making information available and cannot replace enforceable rights.

Evidence for Reform

The JRF acknowledges the Public Audit and Post Legislative Scrutiny Committee's (PAPLS) FoISA Inquiry Report of May 2020 which concluded:

"There is a broad consensus that FoISA has brought significant benefits by establishing a statutory right of access to information held by Scottish public authorities that fall within the scope of the legislation. However, witnesses have identified a number of areas for improvement, both in terms of the legislation itself and in its implementation. The Committee recommends that the Scottish Government consults on the legislative changes proposed in this report and works with the SIC⁵ and public authorities across Scotland, as appropriate, to address the areas where implementation of the Act could be strengthened⁶.

The PAPLS Committee was cross party and produced a report following serious consideration of the issues. The JRF agrees with the Committee that effective implementation of the Act requires reform of FoISA. It is a non-partisan issue. Therefore, the JRF is disappointed that the pace of legislative reform is so slow and the apparent reluctance of the Scottish Government to accept the problems. The JRF supports reform of FoISA to ensure rights are robust and enforcement is effective.

Issues of Concern

The JRF proactively engaged in the consultation and hosted an online meeting on 6th March to discuss 'Scrutiny of Private Sector Delivery of Public Services - Reforming FoI law to deliver equal transparency in Scotland'. We also drew on issues raised by articles in the Scottish Left Review including:

- **Failure to Extend FoISA** - The creation of a National Care Service will extend the provision of social care by more private and third sector providers but not require them to be individually designated under FoISA. This is unacceptable. FoISA rights should follow the service not the provider. Such an approach creates institutional inequality in FoISA rights and duties. [Not so much of a care service and more of a complete omnishambles – RADICAL SCOTTISH POLITICAL WRITING \(scottishleftreview.scot\)](#)
- **Importance of FoISA in accessing information promptly** - research and analysis is enabled by accessing information such as on the nationalisation of the Ferguson Marine shipyard, the delays in delivering ferries for island communities and consideration of alternative vessels to the ferries currently being built [The Manichaeism reality of Scottish ferries policy – RADICAL SCOTTISH POLITICAL WRITING \(scottishleftreview.scot\)](#)
- **Empowering communities and increasing democratic participation –**

⁴ [Eligibility Criteria & OGP Values Check Assessment \(opengovpartnership.org\)](#)

⁵ Scottish Information Commissioner

⁶ [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 | Scottish Parliament](#) Para 244.

Accessing information helps movements built upon the interests of local causes and communities. See ‘Community campaigns – the power to change from the bottom up in SLR’, Issue 129 [slr-129-may-june-202228463.pdf \(scottishleftreview.scot\)](#) pg. 9.

Diversification in the delivery of public services has effectively removed FoI rights from requestors. The decision by bodies designated under FoISA to transfer delivery of current services by contracting with the private and third sectors makes the disclosure process opaque: the new delivery body is not subject to enforcement action by the Commissioner; it is not required to pro-actively publish information; it does not need to adopt the Model Publication Scheme which dictates which sort of information should be “held” and published; it is not required to provide quarterly statistics to the Scottish Information Commissioner to evidence performance.

Instead, requestors need to secure disclosure by going through the funding body, already designated under FoISA, and that may be complicated if there are several funders of a service. Each designated body will have to approach the delivery organisation to ask for the information. That delivery body may have subcontracted services to many different companies diluting knowledge of what information is gathered, managed and stored as well as variations between the different companies. It is unhelpful and unacceptable that diversifying providers of public services complicates scrutiny at a time when the public is increasingly curious about how services are funded, delivered and evaluated for impact.

Conclusion

The JRF is persuaded that the aged legislation needs reformed to strengthen rights and enforce duties to boost transparency and accountability in Scotland. JRF supports Katy Clark MSP’s route map of comprehensive reform of FoISA as evidenced in the consultation document. The following responses to the questions are offered to assist Katy Clark MSP’s deliberations.

For further Information contact: Dave Watson – contact@reidfoundation.scot

March 2023.

SECTION 1 - ABOUT YOU

1. Are you responding as:

on behalf of an organisation? – *in which case go to Q2B*

2B. Please select the category which best describes your organisation:

Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

I am content for this response to be attributed to me or my organisation

Name/organisation: Dave Watson, Director, The Jimmy Reid Foundation (JRF)

4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

Contact details: contact@reidfoundation.scot

Aim and approach

5. Which of the following best expresses your view of the proposed Bill?

Fully supportive

Explanation

FoISA is 21 years old and reform is delayed and overdue. The evidence is persuasive: FoISA needs to be updated, legal loopholes closed, rights strengthened, designation of bodies delivering public services consistently applied and the powers of the Scottish Information Commissioner enhanced to ensure effective enforcement of duties.

Detail of the proposal

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

Fully supportive

Explanation

FoISA rights should follow the service not who provides the service.

The transparency deficit created by private providers of public services needs to be addressed. Those companies delivering public services also sub-contract delivery creating a labyrinth of complexity that makes establishing who “holds” the information challenging and answering information requests “promptly” or within 20 working days. Also, by involving the private sector, they may be more tempted to seek to withhold the information for commercial and confidential reasons which undermines the purpose of FoISA which is to boost transparency and trust. Whatever complex arrangements for delivery are set up, exercising rights and fulfilling obligations under FoISA must remain a simple process.

The Commissioner’s report published eight years ago ‘Fol 10 years on: Are the right organisations covered?’⁷ warned that immediate steps must be taken to protect Fol rights from the damage caused by the outsourcing of important public services.

The public supports this change. Polling by the Commissioner in 2019 reported 80% of survey respondents agreed that private sector companies that work on contracts for public bodies should be subject to the same Fol laws as public bodies.⁸

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

Fully supportive

Explanation

Fol rights should follow the service not who provides the service. Whatever complex arrangements for delivery are set up using the third sector, exercising rights and fulfilling obligations under FoISA must remain a simple process.

Third sector organisations have expressed their commitment to transparency and accountability and in their accountability to OSCR. Therefore being covered by FoISA is part of their existing compliance agenda and is a tool to build trust. Designation under FoISA should not be onerous as section 25 provides an exemption if information is otherwise accessible.

Designation under FoISA applies only to the contract, not the whole business of the Third sector organisation.

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

⁷ [Special Reports \(itspublicknowledge.info\)](https://www.itspublicknowledge.info)

⁸ <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2019.aspx>

Fully supportive

Explanation

The JRF agrees with the proposal that the new role will have similar powers and duties to Data Protection Officers under Sections 69-71 of the Data Protection Act.⁹ Strengthening the role is a recognition of the professionalism and expertise needed.

The Commissioner's survey of Scotland's FoI practitioners provides the views and experience of staff with day-to-day responsibility for delivering FoI within Scotland's public authorities. In 2022, 195 practitioners from across Scotland's FoI community responded to the survey and the key findings include:

- **Practitioners have confidence in their skills** 95% of respondents expressed confidence in their skills and knowledge to be an effective FoI practitioner. 80% also agreed that their FoI advice was valued in their organisation (with only 4% disagreeing).
- **Practitioners would like to seek the profile of FoI and FoI practitioners elevated within organisations** Suggestions included the creation of a dedicated FoI Officer role and the development of a nationally accredited qualification.¹⁰

9. Which of the following best expresses your view on creating a statutory duty to publish information?

Fully supportive

Explanation

The Commissioner's survey of Scotland's FoI practitioners reported they would like to see changes made to the FoI 'publication scheme' duty.

Proactively publishing much more information (of the type which the public wants to see) is crucial to enable people to make informed opinions, debunk fake news and grow participation in democratic institutions. FoISA has not been successful in increasing pro-active publication despite the Model Publication Scheme (MPS) so targeted and enforceable action is needed.

The further categories of information which should be published include an accessible list of all private companies owned and operated by the designated body(ies), those jointly owned as well as ALEOs and services through specially created organisations such as hubCos.¹¹

10. Which of the following best expresses your view on reducing exemptions under FoISA?

⁹ [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁰ [Remote Desktop Redirected Printer Doc \(itspublicknowledge.info\)](https://itspublicknowledge.info)

¹¹ [The National Hub Programme - hub North Scotland](#)

Fully supportive

Explanation

Section 2 of FoISA permits information to be withheld if one of the numerous exemptions to disclosure apply, some of which are subject to a public interest test and some which are “absolute” – which means the public benefit in disclosure cannot even be considered. The only current exemption which is still ‘fit for purpose’ is section 25 which applies if the information requested is already “reasonably” accessible to the requestor.

In Part 2 of FoISA, 17 other exemptions are listed in sections 26-41 and that number needs to be reduced, drawing on practice in other jurisdictions. Also, changing the cultural and legal approach to exemptions which should be to regard them as exceptional/rare.

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

Fully supportive

Explanation

Sections 33 and 36 of FoISA relate to “confidentiality”. Section 33 needs to be reviewed given the recommendation from the PAPLS Committee as it “considers that the Scottish Government should consult on amending FoISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.

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

Fully supportive

Explanation

The impacts of public sector procurement spend on Scottish output, GDP and FTE employment represents around 4% of the total Scottish economy. This public purchasing is funded through taxpayers’ money and, therefore, public rules apply to ensure its efficiency and transparency. Therefore, all aspects of procurement should be subject to FoISA.

Financial implications

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

x Yes

Explanation

Delivering on FoI rights had to be absorbed within the 'business as usual' agenda in 2002. Therefore, delivering openness and accountability was understood to be core for public bodies.¹²

The report 'Registered Social Landlords and FoI: One Year On', published in March 2021 by the Commissioner, confirmed RSLs have not been overwhelmed by FoI, with 57% reporting a 'small' impact on staff workload, and 95% reporting 24 requests or fewer during 2020. Most organisations used existing staffing to deal with FoISA.

Organisations which already believe they are sufficiently transparent and are newly designated under FoISA may wish to seek additional funding in their contract to deliver the public service. This is sensible as it is a cost saving to the designated body.

Equalities

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

Explanation

A transparency deficit has emerged in Scotland as certain groups of people such as children, women and disabled people disproportionately receive public services through private and third sector providers so their ability to assert rights under FoISA is curtailed. The reform of FoISA, as set out in this consultation, will have a positive impact on different individuals in society by requiring consistent designation of bodies delivering public services and equalizing access to FoI rights about those services.

Sustainability

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

Explanation

Yes, the proposals will help Scotland deliver on the Sustainable Development Goals (SDGs). SDG 16 is designed to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Specifically SDG 16.10 states "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements". Therefore

¹² Para 210 at [b36s1en.pdf \(parliament.scot\)](#)

reforming FoISA so that all providers of public services are covered and increasing regulation of duties helps deliver SDG 16.

General

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

The JRF urges Katy Clark to promptly bring forward a Bill to reform the Freedom of Information (Scotland) Act 2002. The public supports reform. Opinion polling in 2022 by the Commissioner found that over 80% of those surveyed said it's either 'very' or 'extremely' important that privately-run but publicly funded health and social care services are subject to FoI law.¹³

ENDs.

¹³ [2022-Public-Awareness-Research-summary-of-results.pdf \(itspublicknowledge.info\)](#)