FOI Reform in Scotland

mySociety/WhatDoTheyKnow’s response to the consultation on the proposed Freedom of Information Reform (Scotland) Bill

February 2023
Summary

- We are supportive of new support and structure for proactive publication, and closing potential abuses around time limits.
- We additionally recommend consideration of:
  - Reconciling the cost limit under the environmental regulations with that of FOISA - ensuring it is not more difficult to access environmental information than other kinds of information.
  - Better conversations between official and civil society actors in Scotland and UK FOI circles. Around reform of the appeal process in particular, there is a lot of mutual learning from general dissatisfaction with the (very different) appeal processes in both regimes.
- We approve of the approach of keeping FOI regimes up to date and closing loopholes over time. In many cases we do not have strong opinions on the exact implementation proposed, but welcome the process and hope to learn from other submissions.

About mySociety

mySociety is the charity behind UK civic services like TheyWorkForYou, WriteToThem, and WhatDoTheyKnow. We build open, digital solutions to help repower democracy, in the UK and around the world.

mySociety runs WhatDoTheyKnow.com in the UK, and maintains the Alaveteli software and network which powers Freedom of Information sites around the world. This software allows users to make public requests through a website that are sent to authorities via email. WhatDoTheyKnow.com handles access to information requests to both UK and Scottish public authorities, under all four information laws (FOI/EIR/FOISA/EISR).

mySociety produces research into civic tech and systems of access to information, and has published analysis (and proposals for reform) of Freedom of Information in the UK and across Europe.

About WhatDoTheyKnow

WhatDoTheyKnow.com is a website where people can make Freedom of Information requests online using a form. These requests are sent via email to the appropriate public authorities.

The requests and responses are also displayed in public, meaning that information is available to all users of the site, rather than just the original requesters. WhatDoTheyKnow makes Freedom of Information more efficient, because information requested once is accessible to a wider range of people and discoverable through search engines. This reduces the need for different people to
request the same information, and means that information may be found and used by people who would never make a request themselves.

The maintenance of this public archive is managed by a small team of dedicated volunteers with the support of mySociety's staff and board.

Answers to the consultation’s questions

About us

A1 Are you responding as
We are responding as an organisation.

A2A Which of the following best describes you? (If you are a professional or academic whose experience or expertise is not relevant to the proposal, please choose “Member of the public”)
Professional with experience in a relevant subject

A2B. Please select the category which best describes your organisation
Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

A3 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
We are content for this response to be attributed to us or our organisation:

WhatDoTheyKnow/mySociety
Aim and approach

A5 Which of the following best expresses your view of the proposed Bill?

Partially supportive

We are supportive of continued improvement of Freedom of Information legislation over time and the adaptation to changing times. We do not have expertise to fully endorse all recommendations, but are supportive of this process of consultation.

The prospect of this proceeding as a Member’s Bill helps navigate some of the complexity of Freedom of Information reform. Freedom of Information is a citizens' right created by the UK’s Parliaments, but both UK and Scottish governments have had adversarial approaches to at different times.

We are strongly supportive of reforms to address abuse of time limits (as in proposed reform of clarification clock reset) and the importance of the Information Commissioner in upholding a wider system of Freedom of Information, which requires appropriate funding.

Detail of the proposal

A6 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?

Partially supportive

We are supportive of the principle, but the exact details of the implementation are important. We will be interested in proposals that are made as part of this consultation to help form our own view of the appropriate way to deliver this principle.

A7 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?

Partially supportive

We are supportive of the principle, but the exact details of the implementation are important. We will be interested in proposals that are made as part of this consultation to help form our own view of the appropriate way to deliver this principle.
A8 Which of the following best expresses your view on the creation of a new statutory officer within designated authorities – a Freedom of Information Officer?

Neutral (neither support nor oppose)

We are supportive of those working on Freedom of Information within public authorities being given support and development to better advocate for these rights and to be able to deliver access to information effectively.

We are happy to defer to those working within public authorities on the question of whether creating a new statutory officer would achieve this goal.

A9 Which of the following best expresses your view on creating a statutory duty to publish information?

Fully supportive

We believe that proactive publication of information is an approach that improves its discoverability and reduces the friction of needing to ask for information. Publication schemes are poorly understood, and do not reflect the current information environment. A new code of practice better adapted to the current information environment (and changeable for future circumstances) would be a step forward.

A10 Which of the following best expresses your view on reducing exemptions under FoISA?

Fully supportive

We agree that all exemptions should be subject to a public interest test.

A11 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?

No response as part of this submission.
A12 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?

No response as part of this submission.

Financial implications

A13 Any new law can have a financial impact which would affect individuals businesses, the public sector, or others. Do you think any cost is outweighed by the public interest benefit?

Yes.

As we argue in our research on improving Oversight of Freedom of Information regimes across Europe, better access to information regimes play an important role both in anti-corruption and improved design of projects because of the prospect of future disclosure.

The rewards of better results from the public sector are much larger than the cost of compliance with the current access to information regime. This same principle applies to proposed expansions into new providers. Appropriate consideration of thresholds for compliance is important, but FOISA is currently successfully managed by small authorities and rollout to registered landlords has worked well.

Equalities

A14 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?

The proposed option of anonymous information requests could help requesters to make better use of Freedom of Information law, where some users may currently fear discrimination on the basis of protected characteristics that could be disclosed by their name.
Sustainability

A15 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?

As discussed in answer to question 16, using this opportunity to reconcile aspects of Environmental Regulations where FOISA is more permissive (e.g. fees regime) would help enhance access to environmental information and work to protect the environment.

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)?

mySociety’s 2020 research into improving FOI regimes across the UK was mostly focused on how existing innovations in Scottish FOI law and practice could be imported into the UK-wide regime (and mapping potential options for the Welsh Senedd).

We did however have a clear recommendation for Scottish law around environmental information. Environmental Information Regulations allow charging for fees below the equivalent “appropriate limit” in FOI legislation. While generally fees are not charged, in some cases they are (East Lothian Council is a notable example). This means that it can be harder to get environmental information than non-environmental information – which is against the spirit of the relevant legislation.

We recommend aligning the fee limit for EIR with the appropriate limit for FOI, and providing clarity that environmental information should be easier, not harder, to access than other kinds of information held by public authorities.

When considering changes to how OSIC decisions can be appealed, it is worth bringing together discussion of reform in both FOISA and the UK’s FOIA.

From a UK-wide perspective, as noted in the consultation document, the ICO has argued that a move to a Scottish style appeal system would make the ICO’s word more final and prevent a situation where the release of information can be delayed by entirely new arguments being made by public authorities in the tribunal process. More levels of appeals introduce delays, and extra costs to participate. This is generally to the advantage of public authorities who do not want to disclose information, who have the legal funds to justify new arguments at each stage, while not all
requesters will be in the position of being able to afford or argue their case in progressively higher courts.

But reducing levels of appeal and thereby making the decisions of the ICO more final is controversial in the UK-wide discussion. An open letter by journalists and campaigners raised concerns about the idea of removing the first tier tribunal. Decisions of the ICO can and have been overturned at this point, resulting in information being released.

There is a real balance to be struck between an appeal system that can speedily and cheaply bring about the release of information, and there being a real prospect of review of the decisions of the Information Commissioner. People in both systems see positive features in the other, which reflects that possible middle routes may be desirable. More generally that there is a lot to be gained by clearer understanding of how different regimes in the UK are operating, so that problems can be better understood, and good approaches shared.