

## Response ID ANON-MXFY-U9JF-2

Submitted to Access to information rights in Scotland  
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### Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery

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

Please select from dropdown menu:

No

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

Please select from dropdown menu:

Not applicable

Please provide any detail or context that you can regarding your experience in the box below.:

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

Please select from dropdown menu:

Very doubtful

Please provide any reasons for your answer.:

ERCS believes that the trend to towards outsourcing and subcontracting public services has diluted transparency and accountability, with limited democratic oversight for private companies exercising formerly public duties. It is in the public interest to subject them to the same requirements as public authorities who previously delivered such services.

ERCS has experienced first-hand the shortcomings of existing FOI laws in our attempts to obtain information from public authorities. Authorities frequently fail to respond to FOI requests and follow-up review requests in line with the applicable statutory deadlines (in our experience, SEPA almost always fails to respond in line with the deadlines) and rely on exemptions with little basis for doing so. There are lengthy delays in appeals to the Scottish Information Commissioner. Problems with the law and practice of FOI in Scotland inhibit the efficacy of our work on upholding environmental rights in Scotland.

When the s5 of FOISA was originally debated in the Scottish Parliament, the then Deputy First Minister said "provisions allow providers of services to be added [to FOISA] and I assure Parliament that that power will be exercised." Yet where outsourcing has occurred, the Scottish government has been unwilling or slow to use provisions that would allow outsourced service providers to be designated under the Act. Although the Scottish government points to designation of ALEOs and housing associations, it took more than a decade for such bodies to be designated.

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

Please select from dropdown menu:

Very doubtful

Please provide any reasons for your answer.:

Please refer to our answer to 2a.

### Addressing concerns about agility of the regime and loss of information rights, within the current statutory framework

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

Please select from dropdown menu:

Yes

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

Please give us your views:

To date, the use of Section 5 has proven to be insufficient and not up to task. While in theory it allows for a continuous updating of bodies designated as 'public authorities', the Scottish Government has not kept pace with recent trends towards outsourcing, subcontracting, and privatisation and consequently many service providers have escaped scrutiny. The government has been unwilling or slow to use provisions that would allow outsourced service providers to be designated under FOISA. Although the Scottish government points to designation of ALEOs and housing associations, it took more than a decade for such bodies to be designated. Where it has occurred, the process of designation where it has occurred has been sclerotic and so care must be taken to make this process more nimble and efficient.

4 (a) Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs?:

Please select from dropdown menu:

No

Please give reasons for your answer:

Without reversing the trend towards outsourcing, ERCS believe that weak chains of accountability and complex contractual arrangements will continue to dilute transparency and hinder citizens' right to access information. Improved guidance is not equivalent to a guarantee of enforceable rights, and given the multiple and competing pressures public authorities are subject to, we are sceptical such guidance would alter the status quo in any meaningful way. For this reason, we prefer the approach presented in Katy Clark's Freedom of Information Reform (Scotland) Bill.

4 (b) Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs?

Please select from dropdown menu:

No

Please give reasons for you answer:

See response to 4a.

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

Please select from dropdown menu:

No

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

ERCS believe this is an arbitrary distinction, and a distraction from the ultimate goal of harnessing transparency to improve the functioning of our democracy, strengthen public trust, and ensure public services are responsive to the needs of citizens who rely on them. Information disclosure must become a norm, and new rights to access information must be designed so that they are comprehensible for all citizens of Scotland.

## Assessing the need for primary legislation

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

Please select from dropdown menu:

I support the introduction of a Gateway Clause

Please give us your views:

ERCS support the introduction of a gateway clause, based on whether a body fulfils particular criteria relating to the provision of public services, or if the body is in receipt of public funds. However, a proportionality test should apply – with much greater clarity is required over what counts as 'services of a public nature'. The clause must be designed to incorporate safeguards, to ensure that small charities, free advice services, advocacy and campaigning organisations in receipt of public funds are not subject to vexatious requests or prevented from fulfilling their core duties as a result of new FOI requirements.

Greater thought is needed to ensure proportionality is maintained in the application of FOI requirements, accounting for the scale of funding received by charities and third sector organisations and the nature and length of time the service is to be provided. While a decision may be straightforward if the charity is in receipt of full funding under contract from government or a single local authority to provide a specific service over a specified time, for voluntary and third sector organisations with multiple funders (public bodies, charitable trusts, corporate donors), further clarifications are needed.

To this end, we are mindful of comments made by the Scottish Information Commissioner to SCVO, stressing that FOI requirements should relate to the nature of any public service being delivered, over and above the nature of the organisation or type of funding received. The extension of FOISA should apply only to specific public services provided, rather than the organisation as a whole.

6 (b) If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for small and medium-sized enterprises (SMEs)?

Please select from dropdown menu:

I would oppose a specific exclusion for SMEs

Please provide more information about your views below.:

ERCS support a 'maximalist' approach to FOI encompassing all private companies contracted as service providers. It is in the public interest to be able to access information, and it is the responsibility of SMEs to factor this in if they wish to bid for public contracts. The introduction of exclusions creates additional risks, if larger enterprises seek to then alter their corporate structure, create ancillary companies or subsidiaries for subcontracts, in an effort to circumvent FOI requirements and qualify for exemptions.

6 (c) If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations?

Please select from dropdown menu:

I would oppose a specific exclusion for third-sector organisations

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

ERCS believe that if third sector organisations have been tasked with delivering a public service, then a public right to access information must remain in place. However, precautions must be taken to ensure that small charities, free advice services, advocacy and campaigning organisations in receipt of public funds are not subject to vexatious requests or prevented from fulfilling their core duties as a result of new FOI requirements.

We are mindful of comments made by the Scottish Information Commissioner to SCVO, stressing that FOI requirements should relate to the nature of any public service being delivered, over and above the nature of the organisation or type of funding received. The extension of FOISA should apply only to specific public services provided, rather than the organisation as a whole.

If a distinction is made regarding the size of third sector organisations, we would propose exempting only organisations with less than ten full time employees, to be consistent with the Lobbying (Scotland) Act 2016. ERCS believe 250 is far too high a threshold for exemptions and would be contrary to the aims of a Gateway Clause.

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

Please select from dropdown menu:

I support broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies

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

We view such a move as desirable and necessary, but not sufficient on its own to address the information deficit in Scotland.

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

Please select from dropdown menu:

Not sure/have no view

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

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

Please select from dropdown menu:

Not sure/have no view

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

9 Do you have other thoughts on how the Committee's general concern about the agility of the legislation, in terms of its ability to keep pace with developments in the way public services are delivered, might be addressed?

Please give us your views:

Additional issues concerning agility of FOISA in the context of varied models of public service delivery (1)

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

Please select from dropdown menu:

No, I am not aware of any such instances

Please provide details or any further reflections.:

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

Please select from dropdown menu:

Yes, I would favour making this amendment

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

ERCS support the amendment to prevent authorities from relying on confidentiality clauses to withhold access to information, since these are open to abuse and can be misused to circumvent statutory duties. We would want to see provisions in the Bill that guarantee the ability of third sector organisations to withhold sensitive data and protect equality groups. Nevertheless, we hope this Bill has the potential to hand more power to workers, whistleblowers, and marginalised groups seeking to disclose information in the public interest.

## Additional issues concerning agility of FOISA in the context of varied models of public service delivery (2)

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

Please select from dropdown menu:

No, I am not aware of any such instances

Please provide details or other comments below.:

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

Please select from dropdown menu:

Yes, I would favour making this change

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

This gives greater clarity around the scope of FOISA.

## Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use

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

Please select from dropdown menu:

Yes

Please provide reasons for your answer.:

Updating the Code would provide greater clarity in defining duties around how information is stored and transmitted on unofficial platforms such as WhatsApp.

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

Please provide reasons for your answer.:

See answer above.

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

Please select from dropdown menu:

'any information in written, visual, aural, electronic or any other material form'

Please give us your views:

ERCS believe the definition adopted in the EISRs has advantages over the current interpretation of information under FOISA.

## Improving proactive publication – promoting openness as 'business as usual' in a digital age

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

Please select from dropdown menu:

Yes, I agree there is a need to update the provisions

Please explain the reasons for your answer.:

There is a need for greater proactive disclosure from public authorities and service providers to enhance ease of access concerning the public's rights to information.

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

A statutory duty to publish information, supported by a Code of Practice, would make it easier for citizens and civil society to routinely hold service providers to account. We are mindful that this may be difficult to enforce, nevertheless it is a mechanism to hold duty bearers to account and will in itself, encourage improved recording, reporting and accountability.

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

Please select from dropdown menu:

No

If 'yes', please elaborate.:

## Improving approaches to proactive publication within the existing statutory framework

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

Please select from dropdown menu:

Very dissatisfied

Please provide reasons for your answer.:

ERCS has encountered difficulties accessing information to inform our work strengthening access to justice in Scotland's legal system, specifically around the use of Protective Expenses Orders. Resistance to information disclosure by authorities and service providers limits the efficacy of FOISA in informing citizens, and the process of obtaining information can be lengthy, confusing, and difficult to navigate.

Public authorities frequently fail to respond to FOI requests and follow-up review requests in line with the applicable statutory deadlines (in our experience, SEPA almost always fails to respond in line with the deadlines) and rely on exemptions with little basis for doing so. There are lengthy delays in appeals to the Scottish Information Commissioner.

A simplified process, and proactive publication online, could help remedy the situation.

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

Please give us your views:

20(c) How would you prefer to access information about government and public services in Scotland?

Please give us your views:

Centralised online database.

## Technical and other changes – ensuring the Act remains fit for purpose

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

Please select from dropdown menu:

No, I would not support changes of this nature

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

It is not evident that a change is required, since any formal updating over time would still have to be achieved through Regulations, whether phrased in terms of total cost or hourly rate.

Amending FOISA to allow requests to be transferred between Scottish public authorities (similar to the way in which EIRs requests can be transferred).

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

Please select from dropdown menu:

No

Please elaborate.:

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

ERCS believe this provision would benefit both public authorities (who have an easy way to respond to requests for information they do not hold, but which another authority does) and the public (whose requests are automatically transferred to the relevant authority without them having to take additional effort to resend the request). This amendment would also bring FOISA in greater alignment with the EISRs.

Amending the provisions of FOISA with respect to time for compliance so that requests for clarification merely pause - and do not reset - the 'clock' for compliance within the statutory timescale.

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

Please select from dropdown menu:

Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested

Please provide comment/reasons for your answers.:

We strongly support proposals to pause rather than reset the clock for FOI compliance, to ensure requests are processed in a timely manner and responses are issued within a time period in which they will remain relevant.

ERCS has experienced first-hand the shortcomings of FOISA, in one case waiting for more than one year to receive a response to our original FOI request, which was initially refused and subsequently only granted after an appeal. This lengthy delay inhibited our advocacy work around environmental rights and access to justice.

Public authorities frequently fail to respond to FOI requests and follow-up review requests in line with the applicable statutory deadlines (in our experience, SEPA almost always fails to respond in line with the deadlines) and rely on exemptions with little basis for doing so. There are also lengthy delays in appeals to the Scottish Information Commissioner.

Removal of (section 48) prohibitions against appeals being made to the Commissioner against: the Commissioner himself; procurators fiscal; the Lord Advocate in his capacity as head of the systems for criminal prosecution and the investigation of deaths

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

Please select from dropdown menu:

No, I would not be in favour of such a change

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

Even if additions safeguards are in place, there is too great a risk of bias and pre-existing relationships are liable to prejudice outcomes.

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

ERCS agree with the Commissioner's arguments suggest that the exception has been drawn more widely than is necessary to fulfil the legitimate objective of protecting the independence of the prosecution system. The adjustments proposed should be adopted.

### Removal of First Ministerial 'veto' power (section 52)

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

Please select from dropdown menu:

I consider that the power should be removed

Please provide reasons for your answer.:

This veto power compromises judicial independence and allows the Executive to override democratic procedures with no accountability. It is anti-democratic, and should be removed.

Add provision to FOISA, similar to 10(2)(b) of the EIRs, 'that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure'.

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

ERCS strongly support the presumption in favour of disclosure, to build a culture of transparency and ensure the onus is on authorities to justify any exemptions.

### Amend section 53(1)(a) to make it clear that failure to comply with a decision on time can also be referred to the Court of Session

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

ERCS believe this would strengthen compliance by public authorities, and improve the enforceability of decision notices issued by the Scottish Information Commissioner.

### Amend definition of "information" to exclude environmental information as defined in the EIRs

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

Please select from dropdown menu:

I don't know/have no view

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

### Provide an exemption for information provided to the Commissioner under or for the purposes of FOISA

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

Please select from dropdown menu:

Yes, I would be in favour of such a change

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

Such an exemption would not undermine or restrict the transparency objectives of FOISA, and would allow public authorities to openly discuss their position with the Scottish Information Commissioner without a fear of the information subsequently being disclosed. This exemption does not impact on

the disclosure of the same information when requested directly from the authority itself.

## About you

What is your name?

Name:  
Benjamin Brown

What is your email address?

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:  
Environmental Rights Centre for Scotland

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

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

Yes

I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent

## Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Neither satisfied nor dissatisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Slightly satisfied

Please enter comments here.: