

ERCS consultation response Freedom of Information Reform (Scotland) Bill



14 March 2023

The Environmental Rights Centre for Scotland (ERCS) was established in January 2020. We assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment; and carry out advocacy in policy and law reform to improve environmental rights, including access to justice on the environment and full compliance with the Aarhus Convention.

This is ERCS's response to Katy Clarke MSP's consultation on Freedom of Information reform (questions 5-15).

Aim and approach

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

- Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

ERCS welcome the reforms proposed in this Bill. We believe that the modernisation of Scotland's FOI laws is long overdue, and it is in the overwhelming public interest to extend transparency requirements to the plethora of new service providers including ALEOs, private companies, and third sector organisations that have grown in prominence since FOISA came into force. The right to information is a cornerstone of our democracy. Freely accessible information is fundamental to democratic oversight and scrutiny, and can improve the overall functioning and responsiveness of service providers to serve the public good.

Since FOISA was passed in 2002, many public services have been privatised, or outsourced to the private and third sectors. This has created an 'uneven playing field', where citizens can be kept in the dark about public services they rely on. There is thus a need to keep pace with a rapidly shifting governance landscape and strengthen enforceable rights to access information.

ERCS has experienced first-hand the shortcomings of existing FOI laws. 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. Problems with the law and practice of FOI in Scotland inhibit the efficacy of our work on upholding environmental rights in Scotland. We are therefore particularly supportive of provisions to speed up the process and prevent delay tactics from authorities seeking to withhold information.

ERCS believe this Bill offers the possibility of comprehensive reform, in contrast to the minor amendments to FOI law proposed by the Scottish Government in its own consultation. It has the potential to reduce delays in accessing information; ensure better compliance; address concerns about how information is stored and transmitted; and improve proactive publication by public authorities as well as third parties currently outside the scope of FOISA.

We believe this Bill is complementary to other reforms underway, including the incorporation of ICESCR and the right to a healthy environment into Scots Law, in strengthening accountability between rights holders and duty bearers in Scotland's public sphere. It will also help FOISA to align more closely with Environmental Information (Scotland) Regulations 2004 (EISRs).

Details 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**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

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.

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.

We believe private companies whose activities have demonstrable adverse effect on the environment should also be required to divulge environmental information. This Bill would complement and strengthen the procedural elements of the human right to a healthy environment, which is due to be incorporated in Scots law as part of the Human Rights (Scotland) Bill. It would also contribute to meeting the access to information requirements of the Aarhus Convention. The designation of service providers under the new Bill would have a beneficial impact in extending the right to information established under the EISRs, with more environmental information being made available from private bodies such as highway maintenance and harbour authorities.

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
- Partially supportive**
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

ERCS is broadly supportive, given the increasing role of third sector/charitable/voluntary organisations in delivering public services, and the importance of openness and transparency to build public trust. We also recognise that a number of public bodies have transferred state assets and functions to arms-length bodies, specifically established by them to take advantage of charitable status. Where a third sector/voluntary organisation is publicly funded to provide a public service then in principle it is appropriate for FOISA to be applicable, specifically in relation to the performance of that service. But a proportionality test should apply – with much greater clarity is required over what counts as ‘services of a public nature’. The law 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 etc.), 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. This should help to address concerns raised by third sector organisations whilst strengthening public trust in the capabilities of service providers to carry out their duties.

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?

- Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

ERCS believe that the creation of a statutory officer within designated authorities would uphold standards, ensuring that service providers issue timely responses and do not neglect their public duties. Many countries (e.g. Brazil, Croatia) already have such a provision in their FOI laws to establish officer roles, who oversee compliance, monitor performance, provide expert internal advice, and engage with the FOI Commissioner. Other legislation, including the Ethical Standards in Public Life (Scotland) Act 2000, and Public Records (Scotland) Act 2011, already include similar provisions and mandate the appointment of officers who assume responsibilities to uphold standards and ensure compliance.

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

- Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

A statutory duty to publish information 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.

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

- Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

ERCS agree that there are too many exemptions. However, where exemptions apply they should nearly always be subject to the harm and public interest test. It is important to note that there are no absolute exceptions under the EISRs, so there can be a disparity where a request includes environmental and non- environmental information.

We share concerns about undue influence of the Crown on public policy, given previous interventions made by the Queen and now the King to influence legislation. We agree with Katy Clark that removing the exemptions for the monarchy would be a necessary step forward as part of the Scottish Parliament's commitment to be 'open, accessible, and accountable', especially considering the provisions to manage regulated lobbying under the Lobbying (Scotland) Act 2016.

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**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

We support provisions to limit the use of confidentiality clauses and Non-Disclosure Agreements to prevent access to information, since these are open to abuse and can be adopted to circumvent statutory duties relating to the right to access information. We would want to see provisions in the Bill that guarantee the ability of organisations to withhold sensitive data and protect equality groups. Nevertheless, we hope this Bill has the potential to hand more power to workers, whistleblowers, and marginalised groups seeking to disclose

information in the public interest.

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**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

We agree that reforms proposed in the Bill relating to procurement would complement EISRs through increasing access to information on social and economic wellbeing and ensure a fairer process when private companies or third parties are bidding for contracts against public bodies.

Financial implications

13. 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**
- No
- Not Sure

Greater transparency and democratic scrutiny is in the public interest, and can enhance the effectiveness, responsiveness, and overall functioning of institutions subject to the law's requirements. Any financial impact must be considered against the added value of informing the public, building trust and legitimacy, and stimulating higher standards in public life. That said, there should be a dedicated budget to fund training and support for charities to respond to new duties. We are mindful that charities and voluntary groups are already subject to stringent compliance requirements, and new FOI laws should therefore be designed to avoid a duplication of their existing workload.

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?

Many third-sector organisations provide vital services to some of the most marginalised and vulnerable groups in our society. It is essential that any reforms do not have a disproportionate impact on services working to defend human rights, or compromise the ability of third sector organisations who regularly challenge the government to speak out in defence of minority groups.

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?

Strengthened FOI laws could have a beneficial impact, allowing citizens and civil society to gain information on adverse impacts of private companies delivering public services, and stimulating improvements in such areas. We agree that it is a progressive step to comply with the Sustainable Development Goal 16, with the caveats outlined in our response to Q7 with regard to the need for a proportionality test.

In the view of ERCS, private companies whose activities may have adverse effects on the environment must be required to disclose information about their activities. This would improve environmental democracy by complementing and strengthening EISRs, and the procedural elements of the human right to a healthy environment, which is due to be incorporated in Scots law as part of the Human Rights (Scotland) Bill. It would also contribute to meeting the access to information requirements of the Aarhus Convention.

For more information contact

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