



Scottish Information
Commissioner

Our Ref: VC 240149

Your Ref:

Martin Whitfield MSP
Convener
Standards, Procedures and Public
Appointments Committee
Scottish Parliament

Sent by email to the Committee Clerk

26 November 2025

Dear Convener

FOI Reform Bill Evidence Session – Follow Up Correspondence

My thanks to the Committee for the recent opportunity to provide evidence on the Bill to reform Scotland's 20-year-old FOI law. As will have been clear from the evidence I presented, it is my view that the reform of the Freedom of Information (Scotland) Act 2002 (FOISA) is long overdue, and the FOI Reform Bill would update and modernise key elements of FOISA, while also correcting some oversights and deficits which have been found in the original legislation. While it is also the case that there are some elements of the Bill which would benefit from further fine-tuning, it is my view that this could be effectively achieved through consideration of the Bill by the Parliament at Stage 2.

During my evidence session, I committed to provide some additional information in relation to the need for an amendment to FOISA to give the Commissioner the power to require witnesses to give evidence, in circumstances where it is necessary for the exercise of my functions. I have provided some further comment and information on this below.

I have also taken this opportunity to provide some brief additional information to the Committee, including comment on one or two provisions which we did not have the opportunity to discuss in detail during my own evidence session, along with some reflections on matters raised during the Minister's subsequent evidence.

I hope this additional information will be helpful to the Committee as it considers the next steps for the FOI Reform Bill. I would, of course, be very happy to provide any further information relating to the submissions below, where necessary.

FOI Reform Bill Section 10 – General Functions of the Commissioner

Section 10 of the FOI Reform Bill would give the Commissioner the power to require individuals' representing public bodies to provide information in circumstances where this is necessary for the exercise of the Commissioner's functions. This would, for example, include giving me the

power to require individuals to participate in interviews, where it is necessary for the fulfilment of my functions.

If enacted, I do not anticipate that such a power would be used widely. However, it is undoubtedly the case that there have been circumstances in the past where the carrying out of such interviews has played a key role in the work of my office to ensure the effective running of Scotland's FOI regime. Most notably, this occurred in the early stages of my intervention to improve FOI performance in the Scottish Government, where interviews with key figures – including officials, special advisers and Ministers themselves – were vital in diagnosing the problems at the heart of that intervention and working - alongside Scottish Government officials - to develop and implement a practical and effective solution.

It should be noted that, in this case, Scottish Government Ministers and officials complied willingly with my office's requests for interview, so an inability to require compliance was not a matter of concern in this case.

Evidence from other areas of my work, however, show that circumstances will undoubtedly arise where authorities are less willing to comply with my requests for information and engagement, and powers to compel the provision of information are, in those circumstances, fundamental to the effective delivery of my functions.

Section 50(1)(a) of FOISA gives me the power to issue Information Notices to public authorities. These notices compel an authority to provide me with information required for the fulfilment of my role. Both my predecessors and I have tended to use this power as a last resort – largely operating as a 'backstop' to be used in circumstances where an authority has failed to comply with a prior, non-statutory, request for information.

Such failures to comply do arise. Indeed, just this week I have been forced to issue an Information Notice to an NHS Board following its repeated failure to comply with requests for the information required to enable my staff to begin the investigation of an FOI appeal. Without this important power, my investigation would have ground to a halt, unable to proceed without the required information. In this way, Information Notices operate as a 'stick' which can be used when our initial 'carrot' has failed to work.

I have, however, no equivalent 'backstop' available in relation to circumstances where witness interviews would be a vital element to support my work. The ability to do so currently, therefore, operates wholly under the good grace and willing compliance of the individuals and authorities concerned. As is clear from other circumstances, such good grace and willing compliance, while usually forthcoming, can never be guaranteed.

Interventions to improve overall public authority performance are a key element of my work and bring undoubted benefits for the public. By intervening to improve practice we serve to improve the FOI experience for service-users as a whole; not just those who have taken the time to bring an appeal to my office. It is my intention to further develop and expand my office's intervention work during the remainder of my term as Commissioner, and the amendment proposed in Section 10 would create the statutory 'backstop' required to support the effective implementation of this vital work.

I therefore fully support the proposed amendment set out in Section 10 of the FOI Reform Bill.

Section 2 – Further power to designate Scottish public authorities

There has been much discussion during the evidence sessions of the proposals contained in this provision and, in particular, the proposal which would give the Parliament the power to designate organisations under FOI law, by means of a parliamentary resolution.

I would anticipate that, if enacted, such a power would principally be used in circumstances where Ministers had failed to act in relation to a matter which the Parliament views to be of significant public interest. This might include, for example, circumstances where rights had been significantly lost through the outsourcing of public functions and services, or where an urgent public interest concern had highlighted the need for greater transparency and scrutiny of third-party providers of public services.

As noted during my evidence session, we are now more than five years on from the lessons learned during the Covid-19 pandemic and are still awaiting the launch of the Scottish Government's consultation on the extension of FOISA to providers of care home and care-at-home services.

It is anticipated that power provided by Section 2 would be a further circumstance where the existence of a 'backstop' – here a parliamentary power to designate – would incentivise timely and appropriate action to be taken by Ministers much earlier in the process.

Therefore, I once again fully support the proposed amendment.

Section 9 – Information provided to the Commissioner

Section 9 of the FOI Reform Bill creates a new exemption covering information supplied to the Commissioner for the purpose of investigating appeals. As highlighted by the Scottish Government in its written submission to the Committee, the provision as currently drafted would enable other bodies beyond the Commissioner to rely on this exemption, creating a situation where any information supplied to the Commissioner – including non-sensitive information - might be exempted from disclosure in response to other, unrelated, requests.

In this regard, I support with the Minister's view that this provision should be amended at Stage 2 to clarify that this exemption will only be available for use by the Commissioner. This would support the effective operation of the Commissioner's investigative function while also avoiding any negative consequences that may arise from the current drafting.

Section 13 – Exception from the duty to comply with certain notices

Section 13 of the FOI Reform Bill proposes the removal of the First Minister's power to veto decisions of the Commissioner in some circumstances. This provision was not discussed in detail during my own evidence session, but I followed the subsequent discussion during the Minister's evidence session with interest, and in particular the Minister's view that this provision should be retained, albeit with the range of exemptions to which it can be applied perhaps being restricted.

In response to points raised during the Minister's evidence, I would like to offer the following additional observations to the Committee.

Firstly, I would note that the First Minister's power of veto, contained under section 52(1) of the FOI Act, can only be used in circumstances where the Commissioner has ordered the disclosure

of information which falls within the scope of certain exemptions. Each of the exemptions to which this provision can be applied is subject to the FOI Act's 'public interest test'. Fundamentally, this will mean that any use of veto power will be in circumstances where the Commissioner has typically found that:

- The information in question falls within the scope of one of the listed FOI Act exemptions; but
- Consideration of the balance of the public interest nevertheless favours disclosure of that information.

The use by the First Minister of such a power would therefore invariably be in circumstances where, in my considered view, the public interest in relation to the information lies in favour of disclosure.

In this way, any use by the First Minister of the power provided under section 52(1) is likely to be contrary to the public interest.

Without this veto power, Ministers would retain the ability to have any relevant decisions appealed to – and considered by – the Court of Session. I would suggest that this route would, in all circumstances, be the most appropriate outcome – not only in terms of serving the public interest, but also in terms of protecting the reputation of the First Minister themselves. Any use of the veto would, by its nature, be viewed as contrary to the public interest, and would serve only to damage both the reputation of the First Minister and the international reputation of Scotland's FOI regime.

Secondly, I also note that the point was made during the Minister's evidence session that any use by the First Minister of the section 52(1) veto power could itself be challenged through the Courts. In response, however, I would note that any associated challenge to the use of the veto would be likely to push the burden of challenge onto the requester (requiring them to judicially review the First Minister's decision to use the veto) rather than the Scottish Ministers (who could appeal my decision to the Court of Session). Such a situation would also, in my view, fail to effectively serve the public interest.

I therefore continue to strongly maintain my view that public interest in Scotland is best served through the removal of the outdated and unused power that the First Minister holds to veto my decisions.

Ministerial Submission on the Financial Impact of the FOI Reform Bill

I would like to make one final point in response to the Scottish Government's written submission to the Committee of 20 November and, in particular, in relation to its assessment of the financial impact of the Bill.

Paragraph 11 of the Scottish Government's submission suggests that the Financial Memorandum to the Bill **underestimates** the cost of the Bill's provisions. While I am not in a position to comment on all elements of the Financial Memorandum (and particularly those that fall outside my own area of responsibility), I would, however, note that certain elements of the Scottish Government's own submission may appear, in my view, to **overestimate** the cost of the Bill's provisions.

For example, the Scottish Government submission notes, at paragraph 11b, that any training costs for the bill are significantly underestimated, with the Scottish Government's own analysis suggesting that training costs would, in reality, be in the range of £7,000 per organisation. I found this cost estimate a little surprising, not least because I would anticipate that relevant training updates could largely be managed through existing and established training responsibilities.

Under section 1.3 of the Scottish Ministers' Section 60 Code of Practice on the effective implementation of FOI law, Scottish public authorities are currently required to:

- Provide training to ensure that all staff have sufficient knowledge of the [FOI] regimes
- Establish procedures to ensure that training is refreshed on a regular basis
- Ensure arrangements are flexible, allowing ad-hoc training to be conducted when necessary.

Where authorities are appropriately meeting this Code of Practice requirement, I would anticipate that much of the additional training arising from the Bill could be delivered under the terms of that requirement. I would not, therefore, anticipate a significant additional cost.

The Scottish Government also states at paragraph 11e of its 20 November submission that "The assumption that newly designate bodies will absorb costs within existing structures is not realistic, especially in earlier years." On this point, I would note that each round of FOI designation to date – including the initial 2003 designation of an estimated 10,000 bodies, and the subsequent designations of social landlords, arms-length trusts, independent special schools, etc – has successfully required costs to be absorbed within existing structures. I see no reason why any future designation could not, and should not, follow a similar model.

I hope the additional information provided above will be useful to the Committee as it continues its deliberations. As ever, I would be more than happy to provide any further information or clarification to the Committee as required.

With best wishes,

A handwritten signature in black ink, appearing to read 'David Hamilton', with a stylized flourish at the end.

David Hamilton
Scottish Information Commissioner