

FREEDOM OF INFORMATION REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany Freedom of Information Reform (Scotland) Bill, introduced in the Scottish Parliament on 2 June 2025.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 72–EN);
 - a Financial Memorandum (SP Bill 72–FM);
 - a Delegated Powers Memorandum (SP Bill 72–DPM);
 - statements on legislative competence made by the Presiding Officer and the Member in Charge of the Bill (SP Bill 72–LC).
3. This Policy Memorandum has been prepared by the office of Katy Clark MSP. It is intended to set out the member's policy intentions, the rationale for introducing the Bill and what the member hopes the Bill will achieve.

POLICY OBJECTIVES

4. The main aim of the Bill is to improve transparency in Scotland by strengthening existing measures in the Freedom of Information (Scotland) Act 2002 ("FoI Act"). The Bill strengthens the public's right to information by explicitly stating the right to receive the information unless it is subject to an absolute exemption, introduces a new mechanism by which additional bodies may be designated under the FoI Act and requires pro-active publication of information through a new duty to publish. The Bill improves compliance with the FoI Act by requiring an FOI officer to be designated in each public authority and strengthens the enforcement powers of the independent, Scottish Information Commissioner ("the Commissioner").
5. The FoI Act came into force 20 years ago on 1 January 2005, and so the time is right to update and improve its provisions.
6. Methods of information processing and public service delivery have radically changed over the last two decades. This Bill ensures that the original policy objective of the FoI Act takes account of those changes and continues to be met.

7. The Bill addresses shortcomings in the current legislation identified by campaigners, journalists and members of the public. Many agreed that, given 75% requests for information result in full or partial disclosure¹, measures in the Bill which require public authorities to proactively disclose information, without the need for a request for information, should be strengthened.

8. This Bill is intended to address the outstanding recommendations in the May 2020 Public Audit and Post Legislative Scrutiny (PAPLS) Committee report which concluded that “... there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication.”²

BACKGROUND

Current freedom of information legislation

9. The FoI Act gives a general right to information held by Scottish public authorities. It operates within a wider legislative landscape on access to information which includes the Environmental Information Regulations (Scotland) 2004 (the EIRS), and regulation of access to and disclosure of personal information under the [UK General Data Protection Regulation \(UK GDPR\)](#) and the [Data Protection Act 2018](#) (DPA).

10. Public bodies including the Scottish Government, the Scottish Parliament, local authorities, NHS services, universities and colleges, Police Scotland, the Scottish Fire and Rescue Service, individual GP practices and publicly owned companies are covered by the FoI Act. The Scottish Government has the power to designate further organisations as public bodies under the FoI Act with approval of the Scottish Parliament. This has led to organisations including housing associations (RSLs), privately run prisons, sports and cultural trusts created by public authorities and grant aided and special schools falling under the scope of the FoI Act.

11. Public authorities are required to respond to requests “promptly” and within 20 working days. However, they are also required to publish information proactively under the “publication scheme duty”, which can render requests unnecessary.

12. All Scottish public authorities must produce a publication scheme, outlining the information it already publishes, where it can be found, and the costs (if any) it charges to provide it.

13. Requests can be refused if:

- the authority does not hold the information requested;
- the information is already available;
- not enough detail has been provided by the requester to enable the authority to respond to the request, which may result in the authority asking for “reasonable”

¹ <https://www.foi.scot/celebrating-20-years-foi-20-numbers>

² Post-legislative Scrutiny: Freedom of Information (Scotland) Act 2002, at para 5: <https://bprcdn.parliament.scot/published/PAPLS/2020/5/19/Post-legislative-scrutiny--Freedom-of-Information--Scotland--Act-2002/PAPLS052020R2.pdf>

clarification, with the effect that the FoI ‘clock’ is reset once clarification has been provided;

- it would cost the authority more than £600 to provide the information (based on a capped rate of £15 per hour of time incurred in doing so);
- the request is recorded as “vexatious” because it disrupts the authority’s work in an unreasonable way³;
- the requester has asked for information in a format the authority cannot reasonably provide;
- the information requested falls under a category of information that is exempted from disclosure by the FoI Act.

14. Requesters are entitled to request an internal review if they are dissatisfied with the response they have received from the public authority. If the requester is unhappy with the authority’s handling of the review, they may appeal, for free, directly to the Commissioner.

15. The Commissioner is impartial and independent of the Scottish Government, the Scottish Parliament, and other Scottish public authorities. The Commissioner makes final decisions based on the evidence and arguments from both the requester and the authority, as well as the substantial body of case law. The Commissioner’s duties include informing the public about their right to know, ensuring public bodies follow the FoI Act and the EIRS, monitoring public bodies’ procedures and adherence to the publication scheme duty, and carrying out interventions, investigations and enforcement action where necessary.

16. A requester may appeal to the Court of Session if they believe that a decision of the Commissioner is based on an incorrect understanding of a point of law. The First Minister may also overturn a decision notice issued by the Commissioner by issuing a “ministerial certificate”.

17. There are two codes of practices that Scottish Ministers are required to produce and maintain under the FoI Act and which public authorities must follow: the Code of Practice on the Discharge of Functions by Scottish Public Authorities⁴, which sets out good practice for complying with the FoI Act and EIRS, and the Code of Practice on Records Management by Scottish Public Authorities⁵, which sets out good practice for records management.

Consultation and public engagement

18. On 1 November 2022, Katy Clark MSP lodged a draft proposal⁶ for a Member’s Bill which aimed to “reform Freedom of Information legislation in Scotland, including to:

- extend coverage to all bodies delivering public services, services of a public nature and publicly funded services

³ [The FoI Act Guidance - Vexatious or repeated request, Frivolous or vexatious applications](#) - Published by the Scottish Information Commissioner's Office 2023

⁴ [Code of Practice on the Discharge of Functions by Scottish Public Authorities](#)

⁵ [Code of Practice on Records Management by Scottish Public Authorities](#)

⁶ [Proposed Freedom of Information Reform \(Scotland\) Bill - Draft Proposal](#)

- create a role of Freedom of Information officer
- increase the proactive publication of information
- improve enforcement where necessary
- and improve compliance with human rights law.”

19. The Member carried out extensive consultation on the vision and principles of the Bill which ran between 2022 and 2023.⁷

20. In total, 74.5% of respondents were in favour of the general principles of the Bill. Most agreed that reforming the FoI Act was overdue and would increase the pro-active publication of information; would ensure the right to information would apply where public services are outsourced; and would increase transparency and accountability in public bodies in Scotland. Organisations including the Scottish Information Commissioner, the National Union of Journalists, the Scottish Public Services Ombudsman, Educational Institute of Scotland, the Environmental Rights Centre Scotland were all in favour of some form of proportional legislative reform.

21. 63% of those who answered the question on the creation of a new statutory FoI officer within designated authorities were supportive of the proposal, with 11% opposed.

22. 73.6% of the respondents who answered were supportive of a statutory duty to publish information, and 8.3% were opposed.

23. Respondents also raised the perceived lack of transparency in the third and private sector delivering public services around issues such as executive pay, and the pay and conditions of the workforce. Other issues raised included the lack of access to information about procurement chains and links of some private organisations receiving public contracts, licenses and awards, the increase in the use of various organisational models and arm’s length organisations being used to evade FoI Act compliance⁸, and the perceived poor performance of public bodies and the Scottish Government, which has been in special measures over its level of FOI compliance since 2017 when the Commissioner undertook an intervention.⁹

24. Almost three quarters of respondents were supportive of the proposal to designate private sector bodies under the FoI Act if they are publicly funded or of a public nature, and 9.1% of the respondents who answered this question were opposed. 11 respondents were neutral and two unsure.

⁷ Summary of Consultation Responses available at <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/final-version--foi-consultation-summary.pdf>

⁸ As of 2018, councils were using an estimated 130 ALEOs (arms-length external organisations) in Scotland, which had an annual spend of more than £1.3 billion, Publication: [Councils' use of arm's-length organisations - Audit Scotland](#)

⁹ [Scottish Government Intervention - Practice and Performance](#)

25. 70% of the respondents, who answered the question about extending the FoI Act to third sector organisations, were supportive and 22.7% were opposed. 4 respondents were neutral and one unsure.

26. Some respondents raised concerns about sections of the proposed legislation. These included possible disproportionate increases in the administrative burden of responding to requests for information under the proposed Bill, particularly in the case of charities who may fall under its increased scope.

Further engagement

27. The Scottish Information Commissioner ran a poll in 2024, which found:

- 93% of respondents agreed that it was important for public bodies to publish as much information as possible about their work;
- 90% of respondents considered they would be more likely to trust an organisation that publishes a lot of information about its work;
- 68% of respondents reported that their preferred route to access information was on a public body's website. In contrast, only 12% reported that sending a request to the organisation would be their first choice.¹⁰

28. The 'OECD Survey on Drivers of Trust in Public Institutions', published in 2024, explores people's perceptions "of different public institutions in their country and the degree to which they trust their government"¹¹. These perceptions range from day-to-day interactions with public institutions to decision making on complex policy issues." The Trust Survey was carried out in 30 OECD countries including the UK, with results representative of their respective adult populations. People in the UK find it more likely than the OECD average, that information on administrative procedures is easy to find.

29. In the Scottish Household Survey (SHS) trust in public institutions survey of 2023:

- the institutions that adults in Scotland were most likely to express trust in were the Health System (78%) and the Police (73%). Compared to 2022 findings, this represents a very slight decline in trust in the Health System (79% in 2022) and a slightly larger decline in trust in the Police (78% in 2022).
- People were most likely to express distrust in the Scottish Government (45%) and Local Government (35%). Compared to 2022 figures, this represents a slight increase in distrust of Local Government (32% in 2022) and a larger increase in distrust in Scottish Government (38% in 2022).
- The institutions people were least likely to express distrust in were the Education system (15%), the Police (16%), the Civil Service (17%) and the Health system (18%).

¹⁰ [2024 Public Awareness Research Report: Freedom of information and public awareness](#)

¹¹ [OECD Survey on Drivers of Trust in Public Institutions 2024 Results - Country Notes: United Kingdom](#)

30. However, care is needed in interpreting these results as the percentage of adults who said they didn't know or were not sure whether they trusted an institution varied considerably. For example, 27% of people said they didn't know whether they trusted the Civil Service compared with 4% for the Health System.¹²

DETAILS OF THE BILL

Section 1: General entitlement

Bill provision

31. Section 1 requires public bodies, when considering the use of exemptions under Part 2 of the FoI Act, to apply a presumption in favour of disclosure unless the exemption is absolute, which means that the exemption is not subject to the public interest test.

Policy objectives

32. This provision is intended to change culture and practice to ensure transparency by design. The Member believes that an explicit legal requirement introducing a presumption in favour of disclosure strengthens the provisions in the current Bill, and provides clear direction to designated bodies and staff on how to exercise their duties.

Section 2: Further powers to designate Scottish public authorities

Bill provision

33. Section 2 sets out a new requirement for Scottish Ministers to consider any proposal made by the Commissioner when deciding whether to designate a Scottish public authority.

34. It also confers a new power on the Scottish Parliament to add, by resolution, to the list of Scottish public authorities in schedule 1 of the FoI Act. The Parliament may only specify persons who can already be specified by the Scottish Ministers using their existing powers under sections 4 and 5 of the FoI Act. The Parliament must take certain procedural steps before exercising this power.

Policy objectives

35. As Scottish Ministers have failed to regularly use their powers to designate, many organisations, despite delivering public functions, are not subject to the FoI Act with all the democratic engagement, transparency and accountability benefits that it brings. The Member has accepted the Commissioner's challenge in their 2015 report¹³ that FOI coverage must be increased in a considered and thoughtful way.

36. Over 10,000 organisations are covered by the FoI Act. However, the Member believes a confused and inconsistent approach on further designations has developed since the Act came into force. For example, from commencement individual GP practices were covered by the FoI Act in

¹² [Scottish Household Survey 2023 key findings: trust in institutions, pgs. 4-5](#)

¹³ [Scottish Information Commissioner, FOI 10 years on: Are the right organisations covered?](#)

relation to their NHS work despite being mostly run as private, independent businesses providing services for NHS boards. By contrast, private care homes are not covered by the FoI Act.

37. In the 2015 report *FOI Ten Years On: Are the Right Organisations Covered*¹⁴ the Commissioner recommended that the Scottish Parliament take immediate steps to protect FoI rights from the damage caused by the outsourcing of important public services. The Commissioner argued the provision to extend FOI to non-public sector organisations delivering public functions had been "woefully underused" in the ten years since FOI law came into effect, with the consequence that some public functions were no longer open to full public scrutiny. The Member believes that a key element of addressing these concerns would be to address the loss of rights as a result of changes in delivery of public functions and services and creating access to information rights for the first time, where it is in the public interest to do so.

38. Over the last 23 years there have been huge changes in how publicly funded services are delivered with the creation of new organisations and an increasing reliance on third and private sector providers of public services. In 2018, an Audit Scotland report found that councils were using an "estimated" 130 arms-length external organisations (ALEOs), which had an annual spend of more than £1.3 billion.¹⁵ ALEOs can be created by public authorities as a joint venture to deliver services and functions under contract. These are everyday service providers but are not covered by the provisions of the FoI Act. Local authority leisure and culture trusts are ALEOs which are specifically designated under the FoI Act. The problem was also raised by Audit Scotland in its written submission to the PAPLS inquiry.¹⁶

39. The Member's policy intention is to introduce a power for the Parliament to designate a Scottish public authority under section 5 of the FoI Act. The Member's view is that the provision in section 2 provides a proportionate approach to designation.

40. The new procedure creates an opportunity for Parliament to take the initiative on the pace and detail of designation but still enables Parliament and Scottish Ministers to ensure each designation is measured, understandable and enforceable.

41. This section also capitalises on the periodic reports from the Commissioner, set out in section 43(4) of the FoI Act, to make proposals from time to time to Scottish Ministers on the exercise of their functions under sections 4 and 5 of the FoI Act. The Member considers Ministers should have a duty to "consider" those evidenced and informed proposals as they draw on case law, enforcement action and experience of all staff in the Commissioner's office.

42. The process of designation will be evidence led. Therefore, the Committee's consultation process reflects the existing methodology of Committees to hear evidence from a range of views before arriving at a conclusion and adopts a Human Rights Based Approach (HRBA). The Scottish Human Rights Commission believes the PANEL principles are one way of breaking down what a human rights-based approach means in practice.¹⁷

¹⁴ [Scottish Information Commissioner, FOI 10 years on: Are the right organisations covered?](#)

¹⁵ [Councils' use of arms-length organisations - Audit Scotland, 17 May 2018](#)

¹⁶ POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002 - Submission by Audit Scotland

¹⁷ [Scottish Human Rights Commission, Human Rights Based Approach | The PANEL principles](#)

43. Section 2 also has the policy objective of enabling delivery of the recommendations of the PAPLS report of 2020 which concluded: “The overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation.”¹⁸

44. This view is consistent with the UN Human Rights Committee’s General Comment 34 which defines ‘public bodies’ and states: “The designation of such bodies may also include other entities when such entities are carrying out public functions.”¹⁹

45. The Member also observes inconsistencies between designated bodies under the FoI Act and those covered by section 6 of the Human Rights Act 1998²⁰. For the sake of consistency and to provide a single route of complaint to the Commissioner, bodies should be covered if they are delivering public services or services of a public nature. Whilst the problem can be addressed using the FoI Act’s section 5 power, this has not been sufficiently used by the Scottish Government in the Member’s view.

46. A policy objective of the Bill is to enable informed discussion about the impact of designation and counter some of the opposition expressed. The Member is aware of the potential perception that new designation automatically leads to capacity issues in the short term, but it is useful to note the findings of the report *Registered Social Landlords and FOI: One Year On*.²¹ The report found 97% of responding organisations were confident in their ability to respond effectively to FOI requests, 84% of requests for information held by organisations resulted in some or all of the information being disclosed and 81% were now publishing more information.

Section 3: Publicly-owned companies

Bill provision

47. Section 3 amends section 6 of the FoI Act to address a problem inadvertently created by the drafting of section 6(1). Currently a company which is jointly owned by two or more public authorities will fall within the scope of the FoI Act, unless one of those public authorities is the Scottish Ministers. Section 3 enables a company to be subject the FoI Act if it is wholly owned by the Scottish Ministers and by any other Scottish public authority.

Policy objectives

48. The policy objective is to address a problem by ensuring consistency in the designation of companies wholly owned by the Scottish Ministers and by any other Scottish public authority. Research by CFoIS has suggested there is a gap in the recorded number of publicly owned companies and those known to the Commissioner.²²

¹⁸ Recommendation 7 at <https://bprcdn.parliament.scot/published/PAPLS/2020/5/19/Post-legislative-scrutiny--Freedom-of-Information--Scotland--Act-2002/PAPLS052020R2.pdf>

¹⁹ ‘Article 19: Freedoms of Opinion and Expression’, para 7 and 18 at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

²⁰ [Human Rights Act 1998, section 6](#)

²¹ [Registered Social Landlords 'responding well' to FOI](#)

²² [Names of Publicly-Owned Companies Remain Confidential – CFoIS Briefing](#)

Section 4: Public authorities to which Act has limited application

49. Section 4 is a technical amendment to separate information held by a public authority for the delivery of its public functions from the ‘private’ information held. Section 4 ensures that any public authority designated by Parliament under the FoI Act, is only liable in relation to information of a specified description and not any other information held by the authority.

50. The policy intention is consistency in designation by the Parliament and Scottish Ministers to avoid inadvertently enabling information about the private business of the body designated being subject to the FoI Act. For private and third sector providers of public services designated in the future, the information requested will only apply to the public functions and not the rest of their business portfolio.

Section 5: Reports on section 5 power

Bill provision

51. Section 7A of the FoI Act places a duty on Scottish Ministers to report on delivery of the section 5 duty every two years. However, the system, introduced in 2013, has failed to speed up the process of designation.²³ Therefore a new provision is inserted by section 5 on how the power is used and its impact. Section 5 strengthens the duty to report to Parliament as Scottish Ministers “must consider the exercise of the section 5 power during the reporting period”. Section 5 also provides for the Parliament to debate the report within twenty sitting days of the report being laid and by resolution determine whether to approve the report.

Policy objective

52. Currently the report is a factual account of whether there has been a consultation and if there have been any designations. This has led to reports, including the last two in 2021 and 2023, stating that no new designations have been undertaken.²⁴

53. A policy objective is that the scrutiny role of Parliament is enhanced as the Scottish Minister’s report must be debated by Parliament, within one month of the report being laid, and MSPs will vote on whether to approve the report.

54. The Member anticipates that individually and collectively, these provisions will incentivise Scottish Ministers to regularly use their section 5 powers and at a pace which enables the system of independent regulation to operate effectively.

²³ Section 7A of the FoI Act and duty commenced on 31st October 2015.

²⁴ [Report on the use made by the Scottish Ministers of their powers under section 5 of the Freedom of Information \(Scotland\) Act 2002 to extend coverage of the FOI legislation between November 2021 and October 2023](#)

Published 27th October 2023.

Section 6: Requesting information

Bill provision

55. Section 6 provides that an information request can include an electronic address for correspondence.

Policy objective

56. Section 6 is a technical amendment to enable an electronic address to be used for correspondence when an information request is submitted.

57. Currently the system is outdated as a postal address is required despite the content of the request being made by email or in another form which has “some permanency”. Therefore, a policy objective is to ensure the law reflects current practice.

58. A policy objective is to improve accessibility for requestors and designated bodies who prefer a digital first approach.

Section 7: Time for compliance

Bill provision

59. Section 7 amends section 10 of the FoI Act so that the deadline for a Scottish public authority to provide information under the FoI Act does not restart in circumstances where the authority requests more information from the requester to comply with their request. Instead, the provision pauses the 20 working day response time and excludes the time between the authority requesting more information from the requester and receiving that information.

60. Section 7 repeals the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016, which extended the statutory time limit for responding to information requests to up to 60 working days for grant-aided and independent special schools.

Policy objective

61. Currently, under section 10 of the FoI Act when a public authority receives an FOI request, it should respond “promptly” and no later than in 20 working days. However, if it seeks “reasonable” clarification from the requester, this timescale is reset to zero and a new 20 working day deadline applies.

62. The Member regards this as an unnecessary rule, which was raised by a number of people she met or heard from during the consultation process. Respondents frequently raised that they perceived that some public authorities were seeking clarification that they considered unreasonable and was a delaying tactic.

63. To ensure good practice, the Member proposes a simple amendment: the clock will be paused rather than reset, speeding up responses, instilling good practice and removing any perceived advantage in requesting clarification which does not meet the test of “reasonableness”.

64. The Member notes the concern of the Commissioner that a move to ‘pause’ rather than ‘reset’ timescales under section 1(3) may lead to more authorities looking towards section 8(1)(c)²⁵ when a poorly described request is received. By adopting this approach it would enable authorities to retain the option of ‘resetting’ FOI timescales by requesters being told that a request is ‘not valid’, rather than simply ‘unclear’.²⁶ However the Member notes that under section 15(1) of the FOI Act, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Therefore, the Member expects this identified concern to be mitigated by the provision of advice and assistance. The extensive statistics portal on the Commissioner’s website, provides an opportunity to identify any trends on the use of section 8(1)(c) and deal with them promptly²⁷.

65. The Member’s view is that not all amendments to the FoI Act made in recent years have been progressive. The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016²⁸ effectively introduced a new special provision which allowed grant-aided schools and independent special schools to take up to 60 working days to respond to FOI requests. The regulation was opposed by the Children and Young People’s Commissioner Scotland.²⁹ The Member believes the Regulations creates inequalities in rights and duties and should be repealed.

Section 8: Publication schemes

Bill provision

66. Section 8 repeals the requirement on Scottish public authorities to make publication schemes, and repeals the power of the Scottish Information Commissioner to make model publication schemes.

67. The FoI Act requires authorities to publish information as well as respond to requests. This is called the "publication scheme" duty. They must make information available to the public so that it can be accessed without having to ask for it. Currently a standard Model Publication Scheme is produced by the Commissioner which is adopted by all public authorities.

Policy objective

68. The Member is persuaded that the current publication scheme is outdated and does not work. The Member proposes that the duty to proactively publish information be refreshed, replacing the current poorly understood and commonly misinterpreted ‘publication scheme’ duty with a modern, flexible Code of Practice enabling the vitally important duty to publish to keep pace with both technological changes and public expectations.

69. The Member is persuaded by the evidence from the Commissioner who pointed out that:

²⁵ A valid information request must “describe the information requested”.

²⁶ [Freedom of Information \(Reform\) Scotland Bill Proposal Consultation response from the Scottish Information Commissioner](#) pg. 26

²⁷ [FOI and EIRs statistics](#)

²⁸ The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 - SSI Regulation 2

²⁹ Response to Consultation on the Freedom of Information (Scotland) Act 2002 (Time for Compliance Regulations 2016) - Published May 2016

“the Model Publication Scheme monitoring exercises conducted by my office in 2015-2018, suggested that the current model is seen as way of ‘ticking a box’ that shows that the authority is complying with the FoI Act, rather than an opportunity to use the framework to promote and enable the dissemination of information. This research also concluded that practice was poor in relation to making specific classes of information available. Even where there is a supplementary statutory duty to publish certain information (e.g. expenditure over £25,000), performance was poorer than expected (resulting in my office taking intervention and/or enforcement action). The research also concluded that many authorities were not regularly reviewing their Guide to Information - i.e. they were not updating and reviewing the information they made available under the publication scheme duty”.³⁰

70. Provision in section 8 seeks to address the conclusions in the PAPLS report. The Committee found that “the publication scheme model is outdated and does not reflect the way in which Members of the public search for or access information” and proposed a “statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency”.³¹

Section 9: Information provided to the Commissioner

Bill provision

71. Section 9 introduces a new exemption if the information is provided to the Commissioner when a requestor appeals against failure to disclose all or part of the requested information, under section 47(1) of the FoI Act.”

Policy objective

72. Section 45 of the FoI Act provides that the Commissioner and their staff must not disclose any information which has been obtained by them under or for the purposes of the FoI Act if the information is not already in the public domain, unless the disclosure is made with lawful authority. This might include submissions or information the authority has withheld because it believes the information to be subject to an exemption from disclosure. Section 45 also provides that to knowingly or recklessly disclose such information is a criminal offence. It is clearly the intent of section 45 to prevent the disclosure of such information. However, there is no statutory prohibition against disclosure of this information.

73. Section 26 of the FoI Act says that information is exempt if its disclosure by a Scottish public authority otherwise than under this Act is prohibited by or under an enactment, so does not allow a prohibition within the FoI Act to be treated as an exemption. In the event of receiving a request for such information, the Commissioner has to rely on other exemptions, e.g. section 30(c) which relates to prejudice to the effective conduct of public affairs. Given the provisions of section 45, it would clearly not be within the expectations of public authorities providing information and submissions to the Commissioner that these would be released into the public domain, and there

³⁰ [Freedom of Information \(Reform\) Scotland Bill Proposal Consultation response from the Scottish Information Commissioner](#) pg. 16

³¹ [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002](#), paragraph 20.

is a very real likelihood that, if authorities expected that the Commissioner might disclose information, they would not provide it in the first place.

74. The Commissioner's investigation function is dependent on gathering evidence and submissions, so the impact would be to prejudice substantially the very function and purpose of determining appeals under the FoI Act. The absence of a statutory prohibition on disclosure, which would allow the Commissioner to rely on section 26 of the FoI Act, is understood to have been due to a drafting omission. The (UK) Information Commissioner can rely on section 44(1)(a) of FOIA (the FOIA equivalent of section 26) to withhold such information because, although it is drafted in similar terms to section 26 (i.e. it also only applies to prohibitions on disclosure "otherwise than under this Act"), the prohibition itself is actually contained in another Act – [the Data Protection Act 2018 (DPA).]

75. Given the terms of section 45 of the FoI Act, the Member agrees with the Commissioner that it was clearly "the intention of Parliament that such information should be prohibited from disclosure, and an exemption, which specifically relates to information which has been obtained by the Commissioner under or for the purposes of the FoI Act, should be created to remedy this oversight."³²

Section 10: General functions of Commissioner

Bill provision

76. Section 10 enables the Commissioner to require any person employed, contracted to or appointed to the authority, to provide information to enable the discharge of the Commissioner's functions under sections 44, 49, 50 and 51. The power to compel evidence from a range of persons will assist the Commissioner with investigations and enforcement.

Policy objectives

77. The Member is persuaded that this amendment is required to enable the Commissioner to perform their functions. The policy intent is to ensure that the Commissioner has access to all the information held by an organisation and to directly ask all relevant persons questions pertinent to the fulfilment of the regulatory and enforcement functions.

78. By enabling the Commissioner to "require" engagement, a clear message is sent about the importance of co-operation with the Commissioner and their staff.

Section 11: When application excluded

Bill provision

79. Section 11 removes the prohibitions contained in section 48(a) of the FoI Act against appeals being submitted to the Commissioner if a requestor is dissatisfied with the response of the Commissioner to their FoI request.

³² [Freedom of Information \(Reform\) Scotland Bill Proposal Consultation response from the Scottish Information Commissioner](#) pgs. 36-38.

Policy objective

80. The Member considers the prohibition to be unnecessary, as it restricts the public's right to know, the right to an effective remedy through the free appeals process and removes the right to appeal the Commissioner's decisions to the Court of Session on a point of law. At the present time, if requesters are dissatisfied at the end of the review process, they can only resort to judicial review proceedings which in practice is not a realistic, effective and affordable remedy³³.

81. The Member is persuaded that such a move is in the interest of those requesting information. Although the provision was intended to avoid any appearance of a conflict of interest arising from the Commissioner's office considering appeals about decisions issued, there are existing internal measures in place which protect the independence and impartiality of decisions and investigations.

82. The policy objective is to align the Commissioner with other regulators who can and do regulate their own compliance with legislation. The removal of this provision brings the office of the Commissioner more in step with its own duties and obligations under FoI legislation as a public body. The Member notes that the Commissioner is fully supportive of the removal of this provision.

Section 12: Enforcement notices

Bill provision

83. Section 12 extends the enforcement powers of the Commissioner to require compliance with a code of practice made under section 60A, which is the proactive publication duty, section 60B, which is on publication, and section 61 which is about the keeping, management and destruction of records.

84. For consistency, the Commissioner must consult with the Keeper of the Records of Scotland before giving an Enforcement Notice to a Scottish public authority (other than the Keeper) in relation to conformity with the code of practice issued under section 61.

Policy objective

85. All Enforcement Notices issued to date have been complied with. The Member recognises that it is a powerful tool to address compliance and practice issues. The policy objective is to remove any perception that there is discretion in complying with the Codes of Practice.

86. In practice, the expectation is that designated bodies will seek to address a failure to comply with a provision of the Code of Practice and seek to resolve the matter without the need to issue an Enforcement Notice. However, having the power to issue one as a 'last resort', can serve to ensure a collaborative, informal route to compliance.

³³ Article 13 of the European Convention on Human Rights is the right to an effective remedy.

Section 13: Exception from duty to comply with certain notices

Bill provision

87. Section 13 repeals the power of the First Minister to override the Commissioner's decision notice or enforcement notice to the Scottish Administration. Under Section 52 of the FoI Act, the power is only given to the First Minister and not any of the other designated bodies. The First Minister can exercise the power when the Commissioner has issued a notice of a "perceived failure" by the Scottish Administration to comply with the FoI Act. The First Minister must have concluded that there was no such failure, and the information requested is of exceptional sensitivity.

Policy objective

88. Under section 13 there is an exception from the duty to comply with certain notices. As it stands, Scottish Ministers have a veto over directives to abide by decision notices or enforcement notices under section 52 of the FoI Act. The Member sees no rational argument for why this should be permitted as it undermines the entire principle of the FoI Act by enabling certain provisions to be circumvented. The Member notes that the power has never been used.

89. The Member's Bill proposes removing the veto. The lack of use of the veto provides clear evidence that there is no need for it. Should the public interest require that information be withheld then there are exemptions within the legislation which are available for Scottish Ministers to apply and, where Ministers disagree with the Commissioner's conclusions on any case, an appeal can be made, as in all other circumstances, to the Court of Session on a point of law. Removing the veto strengthens FoI law in Scotland, and applies FoI law equally to all Scottish public authorities.

Section 14: Failure to comply with a notice

Bill provision

90. Section 14 covers a failure to comply with a notice issued by the Commissioner under section 53. The purpose is to amend section 53(1)(a) to make it clear that failure to comply with a decision in time can also be referred to the Court of Session.

Policy objective

91. Section 53 sets out that if an authority fails to comply with notices issued by the Commissioner, the Commissioner can certify in writing to the Court of Session that the authority has failed to comply. The Court may deal with the authority as if it were in contempt of court.

92. All notices issued by the Commissioner (Decision Notices, Information Notices and Enforcement Notices) must specify the timeframe within which the public authority is to comply with them (sections 49(6)(c), 50(2)(b)(iii) and 51(1) respectively). However, whereas Information Notices and Enforcement Notices can be referred to the Court of Session if any aspect of the notice is not complied with (including the timescale for compliance as specified in the notice), Decision Notices can only be referred for failure to comply with the steps the Commissioner has required the authority to take. Decision Notices cannot be referred for failure to comply with the timescales for compliance.

93. In practice, this can result (and has in the past resulted) in the Commissioner spending public money on legal fees to commence the certification procedure, only for the authority to comply late, at which point the Commissioner can no longer pursue the matter. To avoid this happening in the future, the Commissioner should be able to certify to the court failures to comply with the timescales set in Decision Notices.

Section 15: Proactive publication duty and publication code

Bill provision

94. Section 15 introduces a duty of proactive publication in a new section 60A. The duty requires designated bodies to organise and keep up to date the information, relevant to its functions, and make that information available to the public in an accessible form and manner. It also introduces a new section 60B Code of Practice on Publication, which will be drafted by the Commissioner, setting out how a Scottish public authority is to comply with the proactive publication duty. It will set out certain mandatory requirements to ensure key principles apply to improve consistency across the public sector, while offering public authorities flexibility to determine the best way to meet those requirements.

Policy objective

95. The Member takes the view that a legal duty is needed to drive forward the pace and detail of disclosure. Public services should be transparent by design and the policy objective is to reduce the need for recordable FoI requests because the information is already available and accessible. The proactive publication duty should enable and ensure that public authorities have a committed, focussed and ongoing regard to the publication of information they hold, where it is in the public interest to do so.

96. The provision addresses an identified problem. In 2017, the Scottish Information Commissioner published the report *Proactive Publication, time for a rethink?*³⁴ The report considered “how fit for purpose are the publication and dissemination duties set out in” the FoI Act, concluding that “it is time for a re-think to bring access to information law and practice more into line with how we actually use and approach information as a society”. The Commissioner also found that when it came to the “range of practices” used for “making specific classes of information available”, the “majority of it [was] poor”, and that “even where there is a statutory duty to publish certain information... performance was poorer than expected”.

97. The provision provides the Commissioner with enforcement powers to take action in the event of a breach of mandatory elements of the Code, which will enable greater control and influence over the standard of proactive publication, and improvements in the quality, consistency and accessibility of information across the public sector.

98. A statutory Code of Practice enables future updates without the need for a change to the primary legislation. It therefore offers a flexible and future-proofed option to ensure the continuing maintenance of high standards of proactive publication by Scottish public authorities. Given the pace of technological change, this is an important consideration.

³⁴ [Proactive Publication: time for a rethink? - 2017](#)

99. The Code, as with current FoI Act Codes, are subject to parliamentary approval, under the affirmative procedure.

Section 16: Freedom of Information Officer

Bill provision

100. Section 16 makes provision for the new role of a Freedom of Information Officer. The Member proposes the new role is assigned within all bodies designated under the FoI Act. The Bill sets out the functions of the role.

Policy objective

101. The policy objective is to embed a professional culture, underpinned by sufficient resource and authority, within organisations when it comes to handling requests and publishing information.

102. FoI staff's abilities and attitudes affect the success of the FoI Act's implementation. Those who answer requests and respond to complaints are the key players in the implementation process. Along with FOI officers, records managers play a large role in ensuring that that implementation goes smoothly.

103. In 2022, a key finding of a survey of FOI practitioners by the Scottish Information Commissioner was that practitioners would like their profile, and the profile of FOI, elevated within organisations.³⁵

104. The Member believes there is clear and evidenced modelling behind this proposal. Under section 1(2) of the Public Records (Scotland) Act³⁶, an authority's records management plan must "identify the individual who is responsible for management of the authority's public records, and if different, the individual who is responsible for ensuring compliance with the plan".

105. Selecting a bespoke officer is also the approach taken in data protection law. The EU's General Data Protection Regulation (GDPR)³⁷, retained in UK law as the UK GDPR, requires the appointment of a data protection officer in public authorities or bodies if they carry out certain types of processing activities. The DPA gives these provisions further effect and clarifies the role of a data "controller". The Member believes this line of accountability and independent scrutiny should be followed as a model for consistent compliance under the FoI Act.

106. The new officer role is therefore proposed with similar powers to those of Data Protection Officers, as set out under sections 69-71 of the DPA. By codifying this requirement, the need to manage risk in terms of legal compliance and public reputation are fully impressed upon designated bodies.³⁸

³⁵ FOI Practitioner Survey 2022

³⁶ Public Records (Scotland) Act 2011

³⁷ Regulation (EU) 2016/679 of The European Parliament and of The Council - 2016

³⁸ The UK Data Protection and Digital Information Bill is noted but currently sits at the Committee Stage in the House of Lords: <https://bills.parliament.uk/bills/3430>

Section 17: Disclosure of information to Scottish Public Services Ombudsman, Information Commissioner or to Audit Scotland

Bill provision

107. Section 17 adds Audit Scotland to the list of public bodies to which the Scottish Information Commissioner may disclose any information obtained by, or furnished to, the Commissioner under or for the purposes of this Act if it appears to the Commissioner that the information relates to a matter which is, or could be, the subject of an investigation.

Policy objective

108. The Member's motivation for amending section 63 of the FoI Act is to ensure the annual audit of Scotland's largest public sector organisations is joined up across regulators.

109. Audit Scotland has a remit to give "independent assurance to the people of Scotland that public money is spent properly, efficiently and effectively"³⁹.

110. Audit Scotland has said: "Public audit plays a key role in providing assurance that public money is well managed and in providing independent and objective evidence on the performance of public bodies. That assurance is important for the public and decision-makers and will become even more important as Scotland assumes greater fiscal autonomy within the UK. We want the public interest, trust and confidence to be at the heart of Audit Scotland's work."⁴⁰ Given this, the Member believes Audit Scotland has a role in maintaining a culture and practice of compliance with the FoI Act.

111. The section is worded in a way which attempts to reflect the statutory responsibilities of Audit Scotland as already set out in the Public Finance and Accountability (Scotland) Act 2000.⁴¹

Section 18: Offence of altering etc. records with intent to prevent disclosure

Bill provision

112. Section 18 extends the scope of an existing offence to circumstances where information is destroyed before any request for that information has been made, where that destruction is done with the intention of preventing the disclosure of that information.

Policy objective

113. The Member's policy objective is to tighten the FoI Act and close legal loopholes given what has been learned from practice.

114. It is already a criminal offence under section 65 of the FoI Act to "alter, deface, block, erase, destroy or conceal" information with intent to "prevent disclosure" following an information request being made. However, the Member believes recent high-profile cases shows the need to

³⁹ Audit Scotland | Audit Scotland (audit-scotland.gov.uk)

⁴⁰ Audit quality | Audit Scotland (audit-scotland.gov.uk)

⁴¹ [Public Finance and Accountability \(Scotland\) Act 2000](#)

strengthen enforcement in this area, including providing greater clarity on who such an offence applies to.⁴²

115. The Scottish Government has been in special measures over its FOI performance over its practice and performance since 2017.⁴³

116. The involvement of special advisors in the handling of FOI requests has been established⁴⁴, with parliamentarians also flagging concerns about whether instructions to special advisors to delete email trails are in contravention of the FoI Act.⁴⁵

117. The Commissioner has raised concerns in light of the findings of the Covid-19 inquiry, which found that Ministers had on many occasions deleted messages that referred to government business. This resulted in a second intervention, launched in 2024, to specifically support improvements in the Scottish Government's communications and records.⁴⁶

118. Whilst, as noted by the Scottish Parliament Information Centre⁴⁷, information “does not need to be provided if a request is made pertaining to information that is due to be deleted (or amended) in the time between request and response”, section 1(5) of the FoI Act is clear that deletion of information should not be used to circumvent the release of information.

119. This section therefore explicitly lays out that attempts to delete or evade publication of information, which requestors have an unequivocal right to access, is a prosecutable offence, and this offence applies to both the public body and the staff member under its instruction. The Member believes there is a legitimate public interest in pursuing such a provision in light of recent high-profile examples.

Section 19: Time limit for proceedings

Bill provision

120. Section 19 removes the existing three-year time limit on the bringing of proceedings in respect of an offence under section 65, so it does not begin until the commencement of a criminal investigation.

Policy objective

121. Section 65 in its current form creates an offence where, having received an information request, an individual alters, defaces, blocks, erases, destroys or conceals a record held by the authority with the intention of preventing the information being disclosed. Official information held on private devices constitutes information which is held by an authority, and a deliberate

⁴² The Scottish Ministers (raised 4 February 2024) - [Intervention to support improvements in the Scottish Government's Communications and Records](#)

⁴³ Scottish Government Intervention - Practice and Performance - SIC

⁴⁴ FOI Release - May 2018

⁴⁵ [Question reference: S5W-15345](#)

⁴⁶ Probe launched over Scottish government's informal messages – 4 February 2024, BBC

⁴⁷ [Digital footprints to deleted trails: what is the status of deleted information and non-corporate messaging tools in the Freedom of Information \(Scotland\) Act 2002?](#) - SPICe

attempt to conceal, etc. such information to prevent disclosure would constitute an offence under section 65 in its current form. The purpose of this provision is to reflect the severity of the alleged behaviour by replacing “commission of the offence” with “offence becomes the subject of a criminal investigation”.

122. The Bill abolishes the provision which prohibits proceedings commencing after more than 3 years. The reasoning is that the last date on which the offence was committed may not be detected for a considerable time. Also, in the case of a continuous contravention, the complaint must specify the entire period during which the offence was committed and that is practically an impediment to the effective use of the provision.

Section 22: Commencement

Bill provision

123. The Member proposes a phased introduction of rights and duties to ensure that the timescale and process of delivery is measured, understandable and enforceable.

Policy objective

124. The phased introduction will also enable sufficient preparation for Commissioner to support new bodies designated, and existing staff in public authorities who have increased functions and responsibilities.

ALTERNATIVE APPROACHES

125. The Member has taken great care to fully consider whether a Member’s Bill was the right approach for tackling the issues raised. From research and practice, it is clear that legislative measures are the only route to ensure an effective reform of existing rights and duties. As the Scottish Government has declined to legislate, the Member has no option but to introduce a Bill.

126. It is five years since the recommendations were agreed by the PAPLS Committee. Its report, following a robust inquiry, was agreed in March 2020, but publication was delayed until 19th May 2020 due to COVID. The report’s recommendations have not been actioned, so this Bill is an opportunity to do so.

127. The overarching recommendation of that report was that public sector bodies delivering public services should be subject to the FoI Act. The non legislative route adopted by the Scottish Government to increase designations is slow and, given the evidence, is not expected to result in action soon.

128. As set out under *Relevant Reports and Reform Proposals*, the number of reports, consultations or inquiries published on FOI reform over the past decade have been extensive. Despite the raft of recommendations made, the Scottish Government has failed to act decisively, merely pledging designation of further sectors.

129. The Member has shown a willingness to engage with the Scottish Government on a number of occasions regarding the issue of FOI reform, including meeting with the Minister for Parliamentary Business in January 2025. The Member also engaged with the Scottish Government's own FOI consultation in good faith and publicly encouraged via Twitter (now X)⁴⁸ and Facebook⁴⁹ followers to participate in the consultation in November 2022.

130. Given the number of recommendations made in the PAPLS report, the Member was not convinced there were any credible alternative approaches to legislation to achieve her aims, particularly in light of the Scottish Government's refusal to progress legislation at this stage which was announced in November 2023.

131. The Member is aware of consultation 'fatigue' on amending the FoI Act and is persuaded by campaigners and trade unions, particularly those highly engaged with the issue such as CFOIS and the STUC, that legislative reform is required to address the range of problems with the FoI Act identified by their members and the wider public. Furthermore, the Member was convinced by survey data from the Commissioner, interventions into the Scottish Government's performance, and a number of high-profile reported cases⁵⁰, that measures of enforcement need to be strengthened via legislation.

132. The Member found overwhelming support for the proposals laid out during the consultation process as 74.5% declared they were in favour of the general purpose of the Bill. However, the Member did make amendments to the final proposal wording based on the submissions.

133. A key issue to emerge was the backlog of designations. There was concern that the architecture of FoI rights, compliance and enforcement would be overwhelmed if too many bodies were designated at the one time. Therefore, the focus was on creating a mechanism which would address the backlog and try to ensure the bi-annual reports from Scottish Ministers to MSPs presented realistic options for a phased designation of public authorities under section 5 of the FoI Act. Consultation, to enable evidence-led decisions, is built into the process.

134. A number of proposals were not progressed after receipt of the responses to the consultation's questions because although desirable, operationalising them was challenging. For example, despite criticism that there are too many exemptions to disclosure under the FoI Act and they should be reduced, it was established that they are permitted by models of best practice as part of democratic processes, e.g. as set out in Article 3 of the Tromso Convention⁵¹.

135. It is hoped that outstanding issues will be addressed through guidance. They include preventing the use of confidentiality clauses where inappropriate between public authorities and

⁴⁸ The Scottish Government has finally published its FOI consultation. As expected, it's toothless and watered down, with no strong position taken in favour of reform. I encourage people to participate, as well as my own consultation. We must ensure FOI follows the public pound. - X, 29 November 2022

⁴⁹ The Scottish Government has finally published its FOI consultation. As expected, it's toothless and watered down, with no strong position taken in favour of reform. I encourage people to participate, as well as my own consultation. We must ensure FOI follows the public pound. - Facebook, 29 November 2022.

⁵⁰ For example, BBC report 27th October 2023 at <https://www.bbc.co.uk/news/uk-scotland-67230071>

⁵¹ Article 3 – Possible limitations to access to official documents at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205>

contractors providing public service and ensuring aspects of procurement policy set by the Scottish Government are covered.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, CHILDREN'S RIGHTS, SUSTAINABLE DEVELOPMENT, LOCAL AUTHORITIES, ISLAND COMMUNITIES AND DATA PROTECTION

Equal opportunities

136. An Equality Impact Assessment (EQIA) has been carried out and a summary of its findings is provided below. Following the Bill's introduction, the Member in charge of the Bill will send a copy of the EQIA to the lead committee to assist its scrutiny of the Bill at Stage 1.

137. The purpose of an EQIA is to examine the extent to which a policy or Bill may impact on any specific group of people and/or promote equality of opportunity, or create any new inequality. The Member believes that her Bill will have a positive equalities impact.

138. The Bill introduces an enforceable, pro-active publication duty which requires a Scottish public authority to take reasonable steps to organise and keep up to date the information which it holds and make that information available to the public in an accessible form and manner. The Code will also require public authorities to have due regard to how members of the public would be likely to access the information that the authority holds. The Member believes the requirement, to be drafted by the Commissioner and subject to consultation, is an opportunity to renew attention on adopting an inclusive communication approach to pro-active publication. Inclusive communication recognises that human beings use many ways of understanding and expressing themselves. For example, if people find it easiest to understand information in photographs or video then a service would provide information about how to access services in that way.⁵²

139. The Code on Proactive Publication will amplify the existing section 11 of the FoI Act, which enables a requestor to express a preference in how they receive the information in line with section 29 of the Equality Act 2010 (provision of services etc). This is the duty to make adjustments to practices, policies, procedures or physical features so that use of services by disabled persons is facilitated or made possible.

140. The Member believes that the appointment of an FoI officer in each designated body will actively and progressively facilitate compliance with equal opportunities in the design and delivery of the FoI function. She notes that the FoI Act was introduced to ensure equality of opportunity in exercising the right so the designated body should treat each information request without regard to the identity of the requestor and section 69 provides for the exercise of rights by children. Under section 15 of the FoI Act, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it and she views this function as crucial to fulfilling equal opportunities requirements.

⁵² [Inclusive communication: Supporting disabled children, young people and their families: guidance](#)

Human rights

141. It is the Member's view that all the Bill's provisions are fully compatible with the European Convention on Human Rights (ECHR). The Member assessed human rights impacts as part of a Sustainable Development Impact Assessment (SDIA). Following the Bill's introduction, the Member in charge of the Bill will send a copy of the SDIA to the lead committee to assist its scrutiny of the Bill at Stage 1.

142. As noted earlier in the document, a key aim of the Bill is to improve compliance with human rights law. The UN Human Rights Committee defines "public bodies" and states that "the designation of such bodies may also include other entities when such entities are carrying out public functions"⁵³. This already happens under the EIRS.

143. To this end, the Bill aims to ensure organisations providing public services or services of a public nature on behalf of the public sector should be covered by the FoI Act, aligning with the aims of human rights law.

144. Article 10 of the ECHR, Article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁵⁴, Article 21 of the Convention on the Rights of Persons with Disabilities⁵⁵ and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁶ set out the right to form an opinion by receiving and imparting information and ideas. Existing FOI law provides the legal mechanism to enforce this human right, but the Member believes it must be reformed to ensure compliance with human rights case law and be fit for purpose in a modern democracy.

145. Article 25 of the ICCPR gives everyone the equal right and opportunity, without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives. Article 19 is interconnected with Article 25 of the ICCPR because forming and expressing opinions in the conduct of public affairs are human rights.

146. It is noted that protecting civic space, enhancing participation, funding and encouraging activity by civil society is an ongoing priority for the UN, which acknowledges the core role of accessing information:

"Civic space is the environment that enables civil society to play a role in the political, economic and social life of our societies. In particular, civic space allows individuals and groups to contribute to policy-making that affects their lives, including by accessing information, engaging in dialogue, expressing dissent or disagreement, and joining together to express their views."⁵⁷

⁵³ [UN Human Rights Committee's General Comment 34](#)

⁵⁴ International Covenant on Civil and Political Rights – UN - Adopted 1966

⁵⁵ Convention on the Rights of Persons with Disabilities – UN - Adopted 2006

⁵⁶ International Convention on the Elimination of All Forms of Racial Discrimination - UN - 1965

⁵⁷ OHCHR - Protecting and expanding civic space

147. The Member believes reforming the FoI Act will positively impact on Scotland's delivery of the UN's 31 'Guiding Principles on Business and Human Rights'⁵⁸, which set out the state's duty to protect human rights and the corporate responsibility to respect human rights. Remedies must also be available to prevent and address human rights abuses. Transparency and accountability are key to the delivery of the UNGPs such as numbers 8, 15(b) and 31(e).

Statement of compatibility under section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

148. Under section 23 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, any member introducing a Bill into the Scottish Parliament is required to make a written statement about the extent to which "the provisions of the Bill would be compatible with the UNCRC requirements". The provisions of this Bill do engage the UNCRC.

149. UNCRC Article 13 (1) states that: "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." Under Section 66 of the FoI Act, provision is already made for children to make an FoI request.

150. Article 28 (1) of the UNCRC states: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity." Therefore, the current 'Time for Compliance Regulations' negatively impact on people, including children, accessing information held by those designated as independent and special schools as they have up to 60 working days to respond rather than the standard 20 working days.

151. The preamble of the UNCRC further notes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection". The Member considers that the Time for Compliance (Scotland) Regulations may delay the flow of information to requestors from two categories of education providers, which undermines the human rights of children, their families and carers, as well as journalists and civil society organisations who are seeking information in the public interest. Given independent schools often educate vulnerable and disabled children, the Member believes this imbalance is unjustifiable, undermining universal rights of disabled children and families. Therefore, this Bill makes a positive impact by abolishing those regulations and equalising response timescales.

152. Katy Clark MSP has made a statement that, in her view, the provisions of the Bill have a positive impact on compatibility with the UNCRC requirements.

Sustainable development

153. Adoption of well-structured, comprehensible and high-quality legislation on access to public information was an essential step towards the development of transparent and accountable government, countering corruption and ensuring progress towards achieving the Sustainable

⁵⁸ Guiding Principles on Business and Human Rights - UNHR

Development Goals (SDGs). The SDGs are given effect through Scotland's NPF which impacts on all aspects of our lives and presupposes delivery of some services through the private and third sectors.

154. The Member believes this Bill helps meet three targets set out in SDG 16⁵⁹:

- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements. (16A)
- Develop effective, accountable and transparent institutions at all levels. (16.6)
- Ensure responsive, inclusive, participatory and representative decision-making at all levels. (16.7)

155. The Sustainable Development Goals Report 2023: Special Edition provides a powerful call to action, presenting a candid assessment of the SDGs based on the latest data and estimates. While highlighting the existing gaps and urging the world to redouble its efforts, the report also emphasizes the immense potential for success through strong political will and the utilization of available technologies, resources, and knowledge. Together, the global community can reignite progress towards achieving the SDGs and create a brighter future for all. In respect of SDG 16, it identified "structural injustices, inequalities and emerging human rights challenges are putting peaceful and inclusive societies further out of reach. To meet Goal 16 by 2030, action is needed to restore trust and to strengthen the capacity of institutions to secure justice for all and facilitate peaceful transitions to sustainable development."⁶⁰

156. By updating and strengthening the FoI Act duty bearers will be more accountable for the delivery of rights and the fulfilment of duties. The impact of the Bill, especially through the enforceable pro-active publication duty will ensure transparency by design which improves inclusive, participatory and representative decision-making at all levels.

157. The SDG principles include human rights and wellbeing, equalities and equity, and participation and accountability. In considering these and the other principles of sustainable development, the Member is satisfied the Bill can be delivered sustainably.

158. As part of the SDIA, the Member assessed the environmental impact of the Bill as well as the implications of the present legislative framework. As noted above, the enforceable right to access Environmental Information is already provided for through EIRs⁶¹.

159. By amending the FoI Act, the Member believes more information may be proactively published or disclosed on procedural matters which may be outside the scope of EISRs. By harmonising certain provisions between the FoI Act and the EISRs, more information about the local environment may be more readily accessible to the public, informing better policy choices at all levels and ensuring all bodies are abiding by their environmental obligations.

⁵⁹ [UN Sustainable Development Goal 16](#)

⁶⁰ [The Sustainable Development Goals Report 2023, pg.44](#)

⁶¹ [The Environmental Information \(Scotland\) Regulations 2004](#)

160. The Member also assessed the extent to which the Bill would help to improve the connections between people, e.g. goodwill, friendship, trust, support, networks, etc. The Member believes the proposals respond to public concerns about lack of access to some information (see the aforementioned points on polling). Accessing information can debunk fake news and build public awareness of how public money is spent and the impact it makes.

Island communities

161. The Member is satisfied that the Bill has no differential effect upon island or rural communities. The provisions in the Bill are intended to benefit all communities across Scotland, regardless of location. While there are specific considerations for island communities in relation to some of the provisions, such as local digital connectivity issues, these are likely to be able to be addressed at a local level. Currently being able to make a recordable information request online to a publicly owned company, seek a review online and appeal to the Commissioner online enables people to exercise their FoI rights regardless of geographical location. No markedly different or unique impacts were identified for island communities.

Local government

162. The Bill does have an impact on local government in Scotland along with other public sector providers such as health boards, colleges and universities. It is anticipated that the Bill's impact will be equal amongst designated bodies and local authorities will not be disadvantaged.

163. From 1st April 2024 – 31st March 2025, the local authority sector across Scotland received 43,616 FoI requests and undertook 722 internal reviews when a requestor was dissatisfied with the response they received or did not receive.⁶² Therefore it will be impacted by a Bill which strengthens rights and duties under the FoI Act. There are wide variations in the sector, such as Angus Licensing Board and Tayside Valuation Joint Board which received zero requests, while Glasgow City Council received 3,623 requests with 74 reviews, and Aberdeenshire Council and Licensing Board received 1,634 and 25 reviews.

164. The Member understands that the FOI function is part of the business as usual approach in most public authorities. The Member expects each public authority to have existing mechanisms in place for legal compliance on rights and duties and invest in continuous professional development for staff to accommodate FoI reform. The Member believes that the integration of measures to improve transparency, accountability and scrutiny fits well with the local government aim to provide effective community leadership, strong local governance and deliver high quality, efficient local services.⁶³

Data protection

165. The Member has also carried out a Data Protection Impact Assessment (DPIA). No issues have been identified which may undermine or threaten data subject rights and interfere with the effective delivery of duties by public authorities. Following the Bill's introduction, the Member in

⁶² [FOI and EIRs statistics](#)

⁶³ [The Improvement Service | About us](#)

charge of the Bill will send a copy of the DPIA to the lead committee to assist its scrutiny of the Bill at Stage 1.

166. The Member is satisfied that section 38 the FoI Act will not be undermined by the provisions of the Bill. Section 38 contains four exemptions to the release of information, all relating to personal information. Information is exempt from disclosure if it is:

- (i) the personal data of the person requesting the information (section 38(1)(a));
- (ii) the personal data of a third party – but only if other conditions apply (section 38(1)(b));
- (iii) personal census information (section 38(1)(c)); or
- (iv) a deceased person’s health record (section 38(1)(d)).

167. The exemptions in sections 38(1)(a) and (b) regulate the relationship between the FoI Act, the United Kingdom General Data Protection Regulation (UK GDPR) and the DPA 8).

168. The Member is persuaded that the Guidance issued by the Commissioner ‘Section 38: Personal Information: Exemption Briefing’ is sufficiently robust to ensure that designated bodies comply with data protection duties and with the FoI Act.⁶⁴

⁶⁴ [FOISA Guidance | Section 38: Personal Information](#)

This document relates to the Freedom of Information Reform (Scotland) Bill (SP Bill 72) as introduced in the Scottish Parliament on 2 June 2025

FREEDOM OF INFORMATION REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

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