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The right to know: freedom of information in Scotland

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The Freedom of Information (Scotland) Act 2002 gives everyone the right to ask for any information held by a Scottish public authority. This briefing explains the 2002 Act and key features of the freedom of information regime in Scotland. It also considers recent policy and legislative proposals to change the freedom of information regime in Scotland.



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Summary

The Freedom of Information (Scotland) Act 2002 (FOISA) grants individuals the right to access recorded information held by Scottish public authorities. Under FOISA, public authorities must disclose requested information unless specific conditions or exemptions apply.

The Environmental Information (Scotland) Regulations 2004 (EIRs) provide a separate regime for accessing environmental information. Additionally, the INSPIRE (Scotland) Regulations 2009 require public authorities to make spatial datasets publicly available.

The Scottish Information Commissioner is an independent public official responsible for promoting and enforcing Scotland's freedom of information laws. The Commissioner investigates appeals, ensures compliance with Scottish laws on freedom of information, and upholds the public's right to information.

Since FOISA took effect on 1 January 2005, it has provided 20 years of access rights to public information. Over this period, the Scottish Information Commissioner estimates approximately 1.4 million requests have been made under FOISA and the EIRs. Scotland has seen four Scottish Information Commissioners, the passage of one amendment Bill, and the expansion of FOISA to include additional public bodies. The COVID-19 pandemic also temporarily affected the operation of the freedom of information regime.

Since 2017, both the Scottish Parliament and Scottish Government have conducted consultations on potential FOISA reforms, prompted by post-legislative scrutiny from the Session 5 Scottish Parliament Public Audit and Post-legislative Scrutiny Committee. While the Scottish Government has opted not to introduce legislative reforms, Katy Clark MSP has secured the right to propose the Freedom of Information Reform (Scotland) Bill, keeping the prospect of legislative change open.

Freedom of information

Freedom of information, or FOI, typically refers to the rights of individuals to access information held by public authorities, including the government.¹ This principle is enshrined in various laws worldwide, allowing people to request and receive information from public authorities, and is widely considered as fundamental to democratic governance and public sector transparency.¹

Freedom of information is closely linked to the right to freedom of expression, which is protected under several international human rights treaties.¹ For example, Article 19 of the Universal Declaration of Human Rights states:

“ Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

United Nations, 1948²

Similar rights are enshrined in Article 10 of the European Convention on Human Rights and Article 19 of the International Covenant on Civil and Political Rights.^{3 4}

Freedom of information in Scotland

There are several laws governing freedom of information in Scotland. The main law is the [Freedom of Information \(Scotland\) Act 2002](#) (FOISA).⁵ This gives a right of access to recorded information. Under FOISA, a person who requests information from a public authority in Scotland is entitled to be given the information, subject to some conditions and exemptions.⁵

FOISA also enabled Scottish Ministers to make the [Environmental Information \(Scotland\) Regulations 2004](#) (the EIRs) which provide a regime to access environmental information.⁵

The [Scottish Information Commissioner](#), as established by FOISA, is an independent public official responsible for promoting and enforcing freedom of information laws in Scotland.⁵ The Commissioner investigates appeals, promotes the public's right to know, and ensures compliance with Scottish freedom of information laws.⁵ In addition to FOISA and the EIRs, the Scottish Information Commissioner enforces the [INSPIRE \(Scotland\) Regulations 2009](#), which require Scottish public authorities to make spatial datasets available.⁶

UK Government departments and cross-border public authorities operating in Scotland are not covered by FOISA, but are instead covered by the UK [Freedom of Information Act 2000](#).⁷ The [Information Commissioner's Office](#) enforces UK-wide freedom of information legislation.⁷

This briefing explains the [provisions of FOISA and key features of the freedom of](#)

information regime in Scotland, including the *EIRs* . It covers the *20 years that freedom of information has been in law in Scotland* and also considers *recent policy and legislative proposals to change the freedom of information regime in Scotland* .

The Freedom of Information (Scotland) Act 2002

The Freedom of Information (Scotland) Bill was introduced to the Scottish Parliament on 27 September 2001.⁸ It was passed on 24 April 2002 and received Royal Assent on 28 May 2002, becoming the Freedom of Information (Scotland) Act 2002 (FOISA).⁸ The Act came into force on 1 January 2005.⁹

The right to information

Section 1 of FOISA, known as the the general entitlement, grants people the right to access information held by Scottish public authorities.⁵ Specifically, section 1(1) states:

“ A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”

Freedom of Information (Scotland) Act, 2002⁵

The right to information under FOISA applies regardless of residency or citizenship status.ⁱⁱ Children can also exercise their right to information under FOISA.^{iii 5}

FOISA defines information as "information recorded in any form".⁵ This means that applicants may request information from any recorded medium, including audio files, photographs, plans, spreadsheets, and handwritten notes.¹⁰ However, FOISA does not cover unrecorded information, such as verbal conversations between public authority officials that were not documented or included in meeting minutes.¹⁰

While FOISA provides a broad right to access information, this right is not unlimited. Certain information is exempt from disclosure under the Act.¹⁰ The "exemptions" and their application are discussed in the section: [Information exempt from disclosure](#) .

Making an information request

Information requesters, known as 'applicants', do not have to cite FOISA in submitting an information request.⁵ A request is valid, in accordance with section 8 of FOISA, if it:⁵

- is in a recordable format that can be retained for future reference (e.g., letter, email, voice recording)
- includes the applicant's full name
- provides a correspondence address
- clearly describes the information being sought.

ii FOISA refers to information requesters as applicants.

iii Section 69 of FOISA clarifies that children can exercise their information rights under the Act. However, if the child is under 12 years of age, the public authority is entitled to consider whether they understand what they are doing when making a request.

An information request can be made by an agent on behalf of someone else.¹⁰ However, the request must include the true applicant's name to be considered valid.¹⁰

The request must specify the information being requested in a way that allows the public authority to identify and retrieve it.⁵ This is because FOISA entitles applicants to the information itself, rather than documents (even though documents are often provided in response to requests).¹⁰ iv Public authorities, under section 1(3) of FOISA, can ask applicants for further detail on their request in order to identify and locate the information in question.⁵ They also have a duty, under section 15 of FOISA, to provide advice and assistance to applicants both before and after an information request is made.⁵

Scottish public authorities

An information request under FOISA can be made to a "Scottish public authority", as defined in section 3(1) of the Act.⁵ This term refers to any body, officeholder, or other person that meets one of the following criteria:⁵

- is listed in schedule 1 of FOISA
- is designated by order under section 5(1) of FOISA
- is classified as a publicly-owned company, as defined in section 6 of FOISA.

Bodies listed in schedule 1 of FOISA

Most of the types of public authorities covered by FOISA are listed in [schedule 1](#). Generally, if a body is a public authority under the Act, it will be listed in schedule 1 of FOISA.^v This list is structured into seven parts:^{vi}⁵

- Part 1: Ministers, The Parliament (e.g., Scottish Government, Scottish Parliament)
 - Part 2: Non Ministerial Office Holders in the Scottish Administration (e.g., Chief Medical Officer, Keeper of Records of Scotland, Procurator Fiscal)
 - Part 3: Local Government (e.g., local authorities as defined by Local Government etc. (Scotland) Act 1994)
 - Part 4: The National Health Service (e.g., health boards as constituted under the National Health Service (Scotland) Act 1978)
 - Part 5: Educational institutions (e.g., colleges and universities as defined by other Acts)
 - Part 6: Police (e.g., a Chief Constable of the Police Service of Scotland)
-

iv Documents may be available under the public authority's "publication scheme". The publication scheme duty is explained in the section: [Proactive publication and the publication scheme duty](#). The Scottish Information Commissioner has also issued [guidance](#) to public authorities on responding to requests for documents.¹¹

v The Scottish Information Commissioner maintains a [list of public authorities](#) on its website.

vi Examples are illustrative not exhaustive.

- Part 7: Others.

Bodies can be added or removed from schedule 1 in several ways, including through primary legislation and using powers provided for in section 4 of FOISA. These powers are explained in the section: [Amending the schedule 1 list of public authorities](#) .

Bodies designated by order under section 5(1) of FOISA

Scottish Ministers can designate bodies which are not listed in schedule 1, and are not capable of being added to schedule 1, using powers provided for by section 4 of FOISA if the bodies "exercise functions of a public nature".⁵ This power is explained in [Designating a new public authority using the section 5 order making power](#) .

Publicly-owned companies

Publicly-owned companies are defined in section 6 of FOISA.⁵ These companies are not listed in schedule 1 of the Act. A company is a publicly-owned company subject to FOISA if it is "wholly owned" by Scottish Ministers or by one or more other public authorities listed in schedule 1.⁵

A company is considered wholly owned by the Scottish Ministers if all its members are either the Scottish Ministers, companies wholly owned by Scottish Ministers, or persons acting on behalf of the Ministers or those companies.⁵ Similarly, a company is considered wholly owned by any other public authority if all its members are either the public authority itself, companies entirely owned by the public authority, or persons acting on behalf of the public authority or its companies.⁵ Companies which are jointly owned by one or more public authorities (excluding the Scottish Ministers) are also considered wholly owned for the purposes of FOISA.

The section 6 definition does not apply to public authorities listed in schedule 1 which are only subject to FOISA's provisions in relation to certain functions.⁵ The circumstances under which Scottish Ministers may limit the application of FOISA to certain information held by a public authority are discussed in the section: [Limiting the application of the Act to certain public authority functions](#) .

Additionally, the definition does not include jointly owned companies (i.e., companies owned by Scottish Ministers and a public authority listed in schedule 1). This issue was raised during post-legislative scrutiny of FOISA and is discussed in the section: [Post-legislative scrutiny of the Freedom of Information \(Scotland\) Act](#) .

Powers to change the bodies covered by freedom of information legislation

As mentioned in [Scottish public authorities](#), FOISA makes provision for amending the bodies subject to it. This section covers Scottish Ministers' powers to:

- amend the schedule 1 list of public authorities
- designate a new public authority using the section 5 order-making power
- limit the application of FOISA to certain functions of a public authority.

Amending the schedule 1 list of public authorities

Legislation that establishes or abolishes public bodies may amend FOISA to add or remove the public body from schedule 1.¹⁰ However, there may be instances where a public body that should be subject to FOISA is not included in schedule 1.¹⁰ In such cases, Scottish Ministers have a power to add or remove bodies from schedule 1 as needed.¹⁰

Section 4(1) provides that the Scottish Ministers may by order (i.e., using a Scottish Statutory Instrument) amend schedule 1 by adding a body or the holder of any office which is either a part of the Scottish Administration^{vii} or is a Scottish public authority with mixed functions or no reserved functions.^{viii}⁵ An order may also remove a public authority from schedule 1.⁵

Orders adding or removing a body to schedule 1 under section 4(1) of FOISA are subject to the negative procedure (i.e., the Scottish Statutory Instrument implementing the order is laid in the Parliament and will become law unless it is annulled within 40 days of it being laid).⁵

A section 4(1) order may be subject to the affirmative procedure, requiring that the Parliament approves the Scottish Statutory Instrument, if the public authority brought within the scope of the Act is only subject to the Act in relation to specified information.⁵ The circumstances under which Scottish Ministers may limit the application of FOISA to certain information are discussed in the section: [Limiting the application of the Act to certain public authority functions](#).

Designating a new public authority using the section 5 order making power

FOISA allows Scottish Ministers to designate bodies as public authorities if they are not listed in schedule 1 and cannot be added to it using the section 4(1) power.⁵ These bodies must either appear to exercise functions of a public nature or provide services under a contract to a Scottish public authority (where the provision of those services is a function of that public authority).⁵ This designation is done using the order-making power provided by section 5(1) of FOISA and enables private companies to be brought within the scope of the Act should they be involved in significant work of a public nature.⁵

A section 5 order must specify the persons being designated as a public authority under FOISA.⁵ If the order is made because the body in question exercises functions of a public nature, it must specify those functions.⁵ Similarly, if the order is made because the body provides services under contract to a public authority, it must specify the services being

vii The Scottish Administration is defined in section 126(6) of the Scotland Act 1998 and comprises the First Minister and other members of the Scottish Government, junior Scottish Ministers, holders of certain offices (e.g., Keeper of the Registers of Scotland), and the staff of the Scottish Administration.¹²

viii The Explanatory Notes to FOISA indicate that the "references to an authority with mixed functions or no reserved functions are to be read in accordance with Part III of Schedule 5 to the Scotland Act 1998".¹³ A public authority with mixed functions is one whose responsibilities include both reserved matters and devolved matters.¹³ It is not treated as reserved unless the body has been designated as a "cross-border" public authority by an order under section 88 of the Scotland Act 1998.¹³

provided.⁵

Before issuing a section 5 order, section 5(5) of FOISA requires Scottish Ministers consult with every person affected by the order, or their representatives, and any other relevant individuals or groups that they consider appropriate.⁵ A section 5 order is subject to the affirmative procedure and thus requires the approval of the Parliament. The bodies that have been designated as public authorities under FOISA using the section 5 power are discussed in the section: [New public bodies designated under FOISA](#).

Reporting on use of the section 5 power

Section 7A of FOISA requires Scottish Ministers to report to the Parliament every two years on the use of the section 5 power.⁵ Five reports have been laid since the requirement came into force on 31 May 2013.¹⁴ The next report, expected later in 2025, should cover the period 1 November 2023 to 31 October 2025. The section 7A reports must state:⁵

- whether the section 5 power has been exercised during the reporting period
- an explanation of how the power has been exercised and if it has been used, why
- if it has not been used, the reason for the power not being exercised.

The section 7A report may also:⁵

- summarise any response to consultations on extending FOISA coverage using the section 5 power during the reporting period
- indicate any intentions to exercise the power in the future
- include any other information that Scottish Ministers consider appropriate.

Limiting the application of the Act to certain public authority functions

Most public authorities under FOISA are covered by all the provisions of FOISA.¹⁰ However, qualifications can be applied to restrict FOISA's application to specific functions performed by certain bodies.¹⁰ For instance, schedule 1 lists GP practices and other health practices as public authorities under FOISA in the following way:

“ A person providing primary medical services under a general medical services contract (within the meaning of the National Health Service (Scotland) Act 1978) or general dental services, general ophthalmic services or pharmaceutical services under Part II of that Act, but only in respect of information relating to the provision of those services.”

Freedom of Information (Scotland) Act, 2002⁵

The powers of Scottish Ministers to limit the application of FOISA to certain information held by, or functions exercised by, public authorities are provided for in section 7 of the Act. The powers cover when:¹³

- a public authority is added to the Act using a section 4(1) order (i.e., added to the schedule of public authorities at a later date)
- a public authority is already listed in schedule 1
- a public authority is designated using a section 5 order
- the public authority is a publicly-owned company under FOISA.

Proactive publication and the publication scheme duty

FOISA requires Scottish public authorities to publish information proactively under the section 23 "publication scheme duty".⁵ Each public authority is also required to adopt and maintain a "publication scheme" setting out how it intends to publish the different classes of information it holds, and whether there is to be a charge for the information.⁵ Under this duty, all Scottish public authorities must produce a Guide to Information that shows:¹⁵

- the information they already make available or intend to make available
- where to find the information
- whether the published information is available free of charge or for a fee.

When publishing information, section 24(3) of FOISA requires authorities to consider the public interest in allowing public access to a range of information.⁵ This includes information on the services it provides, the cost and standard of those services, the reasons for its decisions and the information which has informed those decisions.⁵

Section 24 of FOISA allows the development of a model publication scheme which can then be adopted by public authorities.⁵ The [Scottish Information Commissioner's Model Publication Scheme](#) (MPS) was approved on 1 November 2018 and a revised MPS was published in March 2021.¹⁶

Public authorities are required to review their schemes periodically.⁵ If a public authority is not using an approved scheme, or is not following good practice, the Scottish Information Commissioner can refuse or revoke approval for a publication scheme, issue practice recommendations, and take enforcement action.⁵

Time for compliance with an information request

Public authorities are required under section 10(1) of FOISA to comply with the information request "promptly" and have a maximum of 20 working days to respond.⁵ ix The twenty working day deadline "resets" back to zero when public authorities ask for reasonable clarification on an unclear request and does not "restart" until the public authority receives

ix Information requests (and other notices under FOISA) sent electronically are presumed received on the day of transmission, while those sent by post are presumed received on the third day after posting. Working days means Monday to Friday under FOISA.⁵

a clear request.¹⁷

Scottish Ministers may make regulations under section 10 of FOISA to extend the time for compliance under FOISA (up to 60 working days).⁵ For example, the [Freedom of Information \(Scotland\) Act 2002 \(Time for Compliance\) Regulations 2016](#) extends the response time for grant-aided schools and independent special schools to account for the impact of school holiday periods.¹⁸

Fees and excessive cost of compliance provisions

Public authorities tend to provide information requested under FOISA free of charge but they are permitted to charge fees for processing information requests.¹⁹ The [Freedom of Information \(Fees for Required Disclosure\) \(Scotland\) Regulations 2004](#) ("the Fees Regulations") set out how and when fees can be applied.¹⁹

If an authority decides to charge a fee, it must issue a fees notice setting out the projected costs of complying with the request within 20 working days of receiving the request.¹⁹

Issuing a fees notice does not change the time for compliance under FOISA.¹⁹ The Scottish Information Commissioner explains in guidance how the time for compliance is affected when a fees notice is issued:

“ Once a fees notice has been issued, the clock stops when it comes to calculating the 20 working days to respond to a request. The clock starts again on the day the fees notice has been paid. So, if a public authority gives a requester a fees notice on day 15, the public authority will only have five more working days to provide the information once the fees notice has been paid. This means it’s good practice for public authorities to issue a fees notice as soon as possible after receiving an information request.”

Scottish Information Commissioner, 2023¹⁹

The information requester then has three months from the date the fees notice is issued to pay.²⁰ If payment is not received, the public authority is not required to process the request.¹⁹ Fees can only reflect the costs incurred by the authority in locating, retrieving, and providing the information.¹⁹ Public authorities cannot charge for:¹⁹

- determining whether they hold the information
- deciding whether to disclose or redact information
- consulting with third parties (e.g., public authority contractors) on disclosure.

However, they can charge for:¹⁹

- staff time spent locating and retrieving information (at a maximum hourly rate of £15 per hour)
- the cost of physically providing the information (e.g., photocopying, postage).

The Fees Regulations set out the following cost limits:²⁰

- if a request costs £100 or less, the public authority must provide the information free of charge
- if a request costs between £100 and £600, the requester may be charged 10% of the costs exceeding £100, up to a maximum of £600
- if a request exceeds £600, the public authority is not required to comply but must notify the applicant that it is not obliged to fulfill the request.

For costs exceeding £600, the public authority also has a duty under section 15 of FOISA to assist applicants in refining their request to bring it under the cost threshold.¹⁹

A public authority can, with the agreement of the requester, respond to an information request that costs more than £600 to comply with.¹⁹ In this case, under the [Freedom of Information \(Fees for Disclosure under Section 13\) \(Scotland\) Regulations 2004](#), a public authority can charge £50 plus the amount by which the projected costs exceeds £600.¹⁹

Appealing to the Scottish Information Commissioner about fees or cost

If a public authority issues a fees notice or refuses a request due to cost, the information requester has the right to challenge the decision (see [Enforcement of the freedom of information regime](#)).⁵ First, they can request a review by the public authority. If they remain dissatisfied with the outcome, they can appeal to the Scottish Information Commissioner.

The Scottish Information Commissioner may require the public authority to comply with the request if it fails to justify its cost estimate.¹⁹ However, if the Scottish Information Commissioner agrees that compliance would exceed £600, it cannot require the authority to disclose the requested information.¹⁹

Format of response to information request

Under section 11 of FOISA, information requesters can specify their preferred format for receiving information.⁵ For example, someone may request a printed copy of a digital document.¹⁰ Public authorities must accommodate these preferences where reasonably practicable.⁵ If they do accommodate the information requester's preferences, they can take account of any associated costs when considering fees and charging under FOISA.¹⁹ However, public authorities cannot charge for providing information in a preferred format if it is required to make reasonable adjustments for disabled people under the Equality Act 2010.¹⁹

Responses to information requests

When responding to an information request, a public authority may offer different types of responses depending on the circumstances. These responses include:

- providing all the information held by the public authority as requested by the applicant
- refusing the request, either in full or in part. Reasons for refusal include:
 - the requested information, or part of it, is not held by the public authority
 - the information, or part of it, is exempt from disclosure under FOISA
 - the cost of providing the information exceeds £600
 - the request is deemed vexatious or repeated.

Information held by public authorities

When information is to be disclosed under FOISA, section 1(4) of the Act specifies that:

“ the information to be given by the authority is that held by it at the time the request is received.”

Freedom of Information (Scotland) Act, 2002⁵

However, information does not need to be physically held by a public authority in order to be "held" for the purposes of FOISA.²¹ For example, information which is held on a public authority official's personal device, or on informal communication tools (e.g., WhatsApp), will be held for the purposes of FOISA where the information relates to the official business of the public authority.²²

Section 3(2) of FOISA

Section 3(2) of FOISA defines when, for the purposes of the Act, information is considered to be held by an authority.¹³ The Scottish Information Commissioner states in guidance on the matter that:

“ Good records management is required in order to be sure what information is held within an authority.”

Scottish Information Commissioner, 2021²¹

For example, information which a public authority has in its possession is not "held" by it for the purposes of FOISA if it is held on behalf of another person.⁵ This is the case for certain information held about the work of MSPs^x and Councillors by the Parliament and Councils, respectively.²¹ The Scottish Information Commissioner states in guidance:

“ [...] councillors and MSPs are not public authorities in their own right, and do not hold information for the purposes of FOISA. However, information about their activities is often created and stored by the Council or Parliament. Where this relates to constituency and party political activities, the information is held on behalf of the elected member. Where the information relates to activities which the elected member has undertaken on behalf of the authority in connection with its corporate functions, or where the information is intended to represent the authority's views and interests, it is held by the authority in its own right.”

Scottish Information Commissioner, 2021²¹

x SPICe published [20 February 2018] an [FAQs blog post](#) on MSPs and FOISA on SPICe Spotlight.

However, information that another person holds on behalf of a public authority is "held" by that public authority.⁵ For example, information held by a commercial storage company on behalf of a public authority would be held by that authority for the purposes of FOISA. Finally, information is not "held" by a public authority if it is held in confidence and was supplied by a Minister of the Crown or a department of the UK Government.⁵

The status of deleted information

Deleted information may also be considered as "held" for the purposes of FOISA if it can be re-accessed or restored (e.g., via a "recycling bin" or "recently deleted folder").²¹ However, section 1(4) allows the public authority to make changes or deletions to the information if it would have done so anyway, regardless of the receipt of the request.⁵ This provision is to support records management in the public authority.¹³

That being said, FOISA is clear that deletion of information should not be used to circumvent the release of information.²³ Section 1(5) of FOISA sets out the information:

“ Is not, [...], to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).”

Freedom of Information (Scotland) Act, 2002⁵

Section 65 of FOISA also makes it a criminal offence to alter, deface, block, erase, destroy or conceal information with intent to prevent disclosure following an information request being made.⁵

Information transferred to the Keeper of the Records of Scotland

Information contained in records deposited in the National Records of Scotland, including those closed to public access, can be accessed under FOISA.¹⁰ Again, the right to information is not unlimited and [exemptions](#) may be applied to information contained in records.

Section 22 of FOISA applies to the situation when the Keeper of the Records of Scotland (head of the National Records of Scotland) receives a request for information which has been transferred to the Keeper by a Scottish public authority and which has not been designated by that authority as "open" information (i.e., information open to public access).⁵

When the Keeper receives a request for information which to any extent relates to information contained in a record transferred by another public authority, the Keeper must transfer that request to the remitting public authority "as soon as practicable".⁵ The public authority then decides whether any information is exempt from disclosure and is expected to communicate its decision to the Keeper "within such time as will make it practicable" for the Keeper to respond to the applicant within 30 working days.^{xi} Scottish Ministers are the remitting authority in the case of an information request pertaining to information transferred to the Keeper by the Secretary of State for Scotland before 1 July 1999.⁵

The same procedure applies when the Keeper receives a "requirement to review" a

xi Under section 10(2) of FOISA, the Keeper is entitled to respond to information requests relating to transferred records within 30 working days (as opposed to 20 working days).

response to an information request which relates to information in a record transferred from a public authority (for further information on the requirement to review see the section [Public authority review](#)).⁵ The Keeper notifies the remitting public authority of the requirement to review, and the public authority reviews its decision.⁵ The Keeper (under section 21(2) of FOISA) must respond with the public authority's review within 30 working days and provide any information or statements from the public authority in relation to the review.⁵

Information held by the Keeper of the Records of Scotland

As set out in [Information held by public authorities](#) , there are some circumstances where information is not held for the purposes of FOISA.⁵

Section 3(4) of FOISA provides that information is not held by the Keeper of the Records of Scotland if a UK public authority listed under schedule 1 of the UK Freedom of Information Act 2000 transfers a record to the Keeper of Records.⁵ However, under section 3(4)(b), information is "held" if the UK public authority has designated the information as "open".⁵ This provision means an information requester does not need to make a second request for information to a UK public authority because the information can already be made publicly available.¹⁰ Similarly, under section 3(5), if the information was transferred by the Secretary of State for Scotland before 1 July 1999 and it has been designated as open information by Scottish Ministers, then it is "held" by the Keeper of Records for the purposes of FOISA.⁵

Refusal of information request

As discussed in the section on [Responses to information requests](#) , public authorities may refuse an information request (or part of it) for several reasons, including:

- the information, or part of it, is not held by the public authority
- the cost of providing the information exceeds £600
- the information, or part of it, is exempt from disclosure
- the request is deemed vexatious or repeated.

If the public authority refuses a request on any of these grounds, a refusal notice must be issued to the applicant within 20 working days of the request being received or sufficiently clarified.⁵ The refusal notice must also specify the details of the complaints procedure operated by the authority, the right to an internal review (under section 20(1) of FOISA), and the right of appeal to the Scottish Information Commissioner (under section 47(1) of FOISA).⁵

For information on review and enforcement mechanisms, please refer to the section on [Enforcement of the freedom of information regime](#) .

Information exempt from disclosure

The right of access to recorded information may be restricted if an "exemption" applies. [Part 2 \(sections 25 to 41\) of FOISA](#) provides for the exemptions.⁵ When an exemption is applied to an information request, the refusal notice must:⁵

- inform the applicant that the requested information is held by the authority
- confirm that the authority is claiming that all or part of the information requested is exempt
- specify which exemption(s) under [Part 2 of FOISA](#) is being applied
- provide reasons for applying the exemption(s).

An exemption can be "absolute" or "qualified".⁵

- [Absolute exemptions](#) apply to classes of information specified in section 2(2) of FOISA.⁵
- [Qualified exemptions](#) apply to all other classes of information provided for in Part 2 of FOISA.⁵ Qualified exemptions are subject to the public interest test, which requires that information covered by the exemption is disclosed unless the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Section 66 of FOISA states:

“ Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.”

Freedom of Information (Scotland) Act, 2002⁵

This means that FOISA does not prevent public authorities from disclosing requested information if they choose to do so.¹⁰ However, the public authority could be in breach of other legislation (e.g., data protection legislation) if it does not apply a relevant exemption.¹⁰

Absolute exemptions

The absolute exemptions are specified in section 2(2) of FOISA and include:⁵

- [Section 25: Information otherwise accessible](#)
- [Section 26: Prohibitions on disclosure](#)
- [Section 36\(2\): Confidentiality, actionable breach of confidence](#)
- [Section 37: Court records](#)
- [Section 38: Personal information.](#)

Section 25: Information otherwise accessible

Section 25 of FOISA exempts information from disclosure if it is already reasonably accessible without the need to make an information request.⁵ For example, this exemption would apply to information that is published on a public authority's website, is available through the public authority's publication scheme, or is required to be communicated to the public by other legislation.²⁴ The rationale of the exemption is to direct the applicant to where the information can be readily found.¹⁰ As such, public authorities are expected to guide applicants on how to access such information when applying this exemption.²⁴

Section 26: Prohibitions on disclosure

Section 26 of FOISA exempts information from disclosure if releasing it is:⁵

- prohibited by other legislation
- incompatible with an Assimilated Law obligation (i.e., an obligation arising from the body of law originating from the UK's previous membership of the European Union)²⁵
- would constitute, or be punishable as, contempt of court.

The exemptions in section 26 can be applied regardless of how long the information has been held.²⁶

Section 64 power to amend or repeal enactments prohibiting disclosure of information

The Scottish Ministers have a regulation-making power to repeal or amend legislation that prohibits the disclosure of information, and therefore, has the effect of making information exempt from disclosure under section 26 of FOISA.⁵ This power is provided for by section 64 of FOISA.⁵ The Scottish Ministers exercised this power to make the [Freedom of Information \(Relaxation of Statutory Prohibitions on Disclosure of Information\) \(Scotland\) Order 2008](#), which amended five enactments containing provisions prohibiting the disclosure of information. The order amended the following legislation:²⁷

- Factories Act 1961
- Offices, Shops and Railway Premises Act 1963
- Medicines Act 1968
- Health and Safety at Work etc. Act 1974
- Diseases of Fish Act 1983.

Section 36(2): Confidentiality

Section 36 of FOISA provides for two distinct exemptions.⁵ Only the exemption provided for by section 36(2) of FOISA is absolute.⁵

Section 36(2) provides for information to be withheld if disclosure would result in an actionable breach of confidence.⁵ The public authority has to fulfil two tests before information can be withheld under section 36(2).²⁸ The public authority must determine:
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- whether the information was obtained from another (legal) person;
- whether disclosure of this information would result in an actionable breach of confidence.

To constitute an actionable breach of confidence:²⁸

- the information must have the quality of confidence (i.e., it should not be common knowledge and it should require substantial effort to obtain);
- the information must have been received in circumstances which impose an obligation on the public authority to maintain confidence (e.g., in a contract with the public authority);
- unauthorised disclosure must be to the detriment of the person who communicated the information (e.g., to the financial detriment).

Section 37: Court records

Section 37 of FOISA exempts from disclosure information contained in documents that are:⁵

- lodged with a court for the purposes of court proceedings
- served on, or by, a public authority for the purposes of court proceedings
- created by a court for the purposes of court proceedings
- lodged with or created by a person conducting an inquiry or arbitration for the purposes of that inquiry or arbitration.

These exemptions apply only if a public authority holds the information solely because it is contained in such documents.²⁹

Section 38: Personal information

Section 38 of FOISA deals with exemptions related to personal information.⁵ This section is designed to protect individuals' privacy and ensure compliance with data protection laws, such as the UK General Data Protection Regulation (GDPR) and the Data Protection

Act (DPA) 2018.³⁰

There are four exemptions in section 38.⁵

- Section 38(1)(a) applies to personal data requested by the data subject themselves. Such requests are handled under data protection legislation rather than FOISA.
- Section 38(1)(b) applies to third-party personal data. Disclosure is exempt if it would breach any of the data protection principles, such as fairness, lawfulness, and transparency.
- Section 38(1)(c) applies to personal census information.
- Section 38(1)(d) applies to personal data contained in records held by the Keeper of the Records of Scotland.

The exemptions in section 38(1)(a) and (b) can be applied regardless of how old the information is.³⁰ However, the Scottish Information Commissioner indicates that in practice, this will be limited because the exemptions can only be applied if the information relates to living individuals.³⁰

Section 38 and the public interest test

The exemption under section 38(1)(b) is subject to the public interest test in two specific situations.³⁰ These are:³⁰

- when disclosing the personal data would contravene Article 21 of the UK GDPR (right to object to processing)
- when the data subject would not be entitled to receive the personal data under a subject access request (Article 15(1) of the UK GDPR or section 45(1)(b) of the DPA 2018).

In these cases, even if the exemption applies, the personal data must be disclosed unless the public interest in withholding it outweighs the public interest in disclosure.³⁰

Additionally, under section 18 of FOISA, where any of the exemptions in section 38 apply, a public authority can refuse to confirm or deny whether it holds the information—provided that doing so would be contrary to the public interest.⁵

The public interest test is explained in the section: [The public interest test](#).

Qualified exemptions

Exemptions subject to the public interest test are known as qualified exemptions.³¹ The following exemptions are subject to the public interest test:⁵

- [Section 27: Information intended for future publication](#)

- [Section 28: Relations within the United Kingdom](#)
- [Section 29: Formulation of Scottish Administration policy](#)
- [Section 30: Prejudice to effective conduct of public affairs](#)
- [Section 31: National security and defence](#)
- [Section 32: International relations](#)
- [Section 33: Commercial interests and the economy](#)
- [Section 34: Investigations by Scottish public authorities](#)
- [Section 35: Law enforcement](#)
- [Section 36: Confidentiality \(only section 36\(1\) is subject to the public interest test\)](#)
- [Section 39: Health, safety and the environment](#)
- [Section 40: Audit functions](#)
- [Section 41: Communications with His Majesty etc. and honours.](#)

If an exemption is subject to the public interest test this means that, even if an exemption applies, the information must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it. ³¹

The public interest test

The reference to the public interest test can be found under section 2(1) of FOISA. ⁵ The Scottish Information Commissioner has published a [briefing](#) on the public interest test. ³¹ Paragraphs 11 and 12 of the briefing state:

“ FOISA does not define the public interest. It has been described elsewhere as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been described as “something that is “in the interest of the public”, not merely “of interest to the public.” In other words, it serves the interests of the public. When applying the test, the public authority is deciding whether, on balance, it serves the interests of the public better to withhold or disclose information. The “public” in this context does not necessarily mean the entire population. It might relate to a relatively localised public (e.g. a small community or interest group) or to the wider public at large.”

Scottish Information Commissioner, 2023³¹

How the public interest test is applied

The Scottish Information Commissioner provides guidance on the public interest tests in its public interest test briefing. ³¹ The briefing states:

“ This guidance tells public authorities how to address the public interest test. It gives examples of the factors they should take into account when deciding where the public interest lies. Requesters may also find the guidance helpful when a public authority refuses to disclose information because it is subject to a qualified exemption.”

Scottish Information Commissioner, 2023³¹

The Scottish Information Commissioner guidance on the public interest test indicates that there is a two-step process in considering whether a qualified exemption can be applied.

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1. The first step is to determine whether the exemption applies. The information is regarded as exempt information if the relevant test or tests in FOISA associated with the exemption are met.
2. The second step is to apply the public interest test to determine whether the public interest in maintaining the exemption outweighs the public interest in the disclosure of the exemption.

The following factors that should be taken into account when applying the public interest test are summarised from the Scottish Information Commissioner guidance. ³¹

- The general public interest that information is accessible to enhance scrutiny of decision-making processes.
- Whether disclosure would contribute to the administration of justice, law enforcement, crime prevention, or the prosecution of offenders.
- The role of disclosure in the effective oversight of public funds.
- The role of disclosure in informing the public about threats to health, safety, or the environment.
- The potential negative impact on national security or international relations due to disclosure.
- The role of disclosure in ensuring that regulatory bodies are performing their duties effectively.
- Whether releasing information could expose malpractice, correct misinformation, or ensure fairness in applications or complaints.
- The contribution of the information to public debate on significant issues.
- The protection of an individual’s right to privacy.

The Scottish Information Commissioner guidance on the public interest test also states:

“ The need to consider the public interest “in all the circumstances of the case” means that the factors weighing in favour of disclosure or maintaining an exemption, or their relative weight in the balancing exercise, is likely to change over time. It is important that the balancing exercise takes into account the circumstances at the time of the information request (or, where relevant, at the review stage). Just as the application of an exemption may change with the passage of time, the balance of the public interest will also shift with the passage of time, usually in favour of disclosing the information.”

Scottish Information Commissioner, 2023³¹

Section 27: Information intended for future publication

Section 27 contains two exemptions related to information intended for future publication.³²

The first exemption, under section 27(1) of FOISA, allows public authorities to withhold information if they plan to publish it within 12 weeks of the request date.³² This applies only if the public authority had a genuine intention to publish the information at the time of the request and if delaying disclosure until the planned publication date is reasonable.³²

The second exemption, under section 27(2) of FOISA, applies to research information (e.g., in universities and research institutions).³² It allows public authorities to withhold information obtained or derived from a research programme if there is an intention to publish a report of the research and if early disclosure would be likely to cause substantial prejudice to the research or its outcomes.³² The Scottish Information Commissioner guidance on the exemption states:

“ There is no definition of substantial prejudice in FOISA, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.”

Scottish Information Commissioner, 2023³²

Section 28: Relations within the United Kingdom

Section 28 exempts information from disclosure if its release would, or would be likely to, substantially prejudice relations between administrations within the United Kingdom.³³ This includes relations between the Scottish Government and other UK administrations, such as the UK Government, the Welsh Government, and the Northern Ireland Executive.³³

Under section 18 of FOISA, when the section 28 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 29: Formulation of Scottish Administration policy

Section 29 exempts information from disclosure if it relates to:³⁴

- the formulation or development of Scottish Government policy
- Ministerial communications (including Cabinet discussions and correspondence among Ministers or their private secretaries)
- advice provided by the Law Officers or requests for such advice
- the operation of any Ministerial private office.

The section 29 exemptions are "class-based" which means the exemption applies if the information falls within a specific class (i.e., category), without needing to demonstrate harm from disclosure.³⁴

Under section 18 of FOISA, when the section 29 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 30: Prejudice to effective conduct of public affairs

Section 30 exempts information from disclosure if its release would, or would be likely to, substantially prejudice the effective conduct of public affairs.³⁵ The exemption covers three main categories.³⁵

- Section 30(a) applies to information that if disclosed would prejudice the maintenance of the convention of collective responsibility of Scottish Ministers.^{xii}
- Section 30(b) applies to information that if disclosed would inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
- Section 30(c) applies to information that if disclosed would prejudice the effective conduct of public affairs.

Under section 18 of FOISA, when the section 30 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 31: National security and defence

Section 31 contains three separate exemptions.³⁷ The Scottish Information Commissioner summarises these exemptions in guidance and states:

xii The Scottish Ministerial Code establishes the principle of collective responsibility, a convention whereby decisions "reached by the Scottish Ministers, individually or collectively, are binding on all members of the Government".³⁶

“ Information is exempt information if:”

- (i) exemption from disclosure is required for the purpose of safeguarding national security (section 31(1))”
- (ii) disclosure would, or would be likely to, prejudice substantially the defence of the British Islands or of any colony (section 31(4)(a))”
- (iii) disclosure would, or would be likely to, prejudice substantially the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them (section 31(4)(b))”

Scottish Information Commissioner, 2023³⁷

Under section 18 of FOISA, when the section 31 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest. ⁵

Section 32: International relations

Section 32 exempts information from disclosure if its release would, or would be likely to, substantially prejudice international relations. ³⁸ The Scottish Information Commissioner guidance on the exemption states:

“ Under section 32(1)(a) of FOISA, information is exempt from disclosure if disclosure would, or would be likely to, prejudice substantially:

- relations between the UK and any other State;”
- relations between the UK and any international organisation or international court;”
- the interests of the UK abroad; or”
- the promotion or protection by the UK of its interests abroad.”

Under section 32(1)(b), information is exempt from disclosure if it is confidential information obtained from a State other than the UK or from an international organisation or international court.”

Scottish Information Commissioner, 2023³⁸

Under section 18 of FOISA, when the section 32 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest. ⁵

Section 33: Commercial interests and the economy

Section 33 contains exemptions related to commercial interests and the economy. Scottish Information Commissioner guidance on the exemption states that information may be withheld if:

“

- it is a trade secret (section 33(1)(a));”
- disclosure would (or would be likely to) prejudice substantially the commercial interests of any person or organisation (section 33(1)(b));”
- disclosure would (or would be likely to) prejudice substantially the economic interests of the whole or part of the UK (section 33(2)(a)); or”
- disclosure would (or would be likely to) prejudice substantially the financial interests of an administration in the UK (section 33(2)(b)).”

Scottish Information Commissioner, 2023³⁹

Under section 18 of FOISA, when a section 33 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest. ⁵

Section 34: Investigations by Scottish public authorities

Section 34 contains a range of exemptions related to investigations carried out by public authorities. ⁴⁰ Scottish Information Commissioner guidance on the section 34 exemptions states that information will be exempt from disclosure if:

“

- at any time, it has been held for the purposes of an investigation which the authority has a duty to conduct in order to ascertain whether a person should be prosecuted for an offence or whether a person prosecuted for an offence is guilty (section 34(1)(a));”
- at any time, it has been held for the purposes of an investigation, conducted by the authority, which may lead to the authority deciding to make a report to the procurator fiscal (PF) to decide whether criminal proceedings should be instituted (section 34(1)(b));”
- at any time, it has been held for the purposes of criminal proceedings instituted in consequence of a report made by the authority to the PF (section 34(1)(c));”
- it is held by a Scottish public authority for a Fatal Accident Inquiry (FAI) which has not yet concluded (section 34(2)(a));”
- at any time, it has been held by a Scottish public authority for the purposes of making a report to the PF as respects the cause of death of a person (section 34(2)(b));”
- it was obtained or recorded by an authority for the purpose of an investigation and the information relates to the obtaining of information from confidential sources (section 34(3));”
- or it was obtained or recorded for civil proceedings brought by or on behalf of the authority, provided the proceedings arise out of an investigation mentioned in section 34(1) or (3) (section 34(4)).”

Scottish Information Commissioner, 2023⁴⁰

The section 34 exemptions are "class-based" which means the exemption applies if the information falls within a specific class (i.e., category), without needing to demonstrate harm from disclosure.⁴⁰

Under section 18 of FOISA, when a section 34 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 35: Law enforcement

Section 35(1) contains a range of exemptions related to law enforcement. Information is exempt from disclosure if disclosure would, or would be likely to, substantially prejudice:⁴¹

- the prevention or detection of crime;
- the apprehension or prosecution of offenders;
- the administration of justice;
- the assessment or collection of any tax or duty (or of any imposition of a similar nature);
- the operation of immigration controls;
- the maintenance of security and good order in prisons (or in other institutions where persons are lawfully detained);
- the exercise by any public authority of its functions for any of the purposes listed in section 35(2);
- any civil proceedings that have been brought by or on behalf of a UK or Scottish public authority, have arisen out of an investigation authorised by or under statute or by virtue of His Majesty's prerogative, and have arisen out of an investigation carried out for one or more of the purposes listed in section 35(2).

The section 35(2) "purposes" are:⁴¹

- to ascertain whether a person has failed to comply with the law;
- to ascertain whether a person is responsible for conduct which is improper;
- to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- To ascertain a person's fitness or competence in managing a body corporate, or in relation to any profession or activity for which they are, or seek to become, authorised.
- to ascertain the cause of an accident;
- to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- to protect the property of a charity from loss or mismanagement;

- to recover the property of a charity;
- to secure the health, safety and welfare of persons at work; and
- to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

Under section 18 of FOISA, when a section 35 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 36(1): Confidentiality

Section 36 of FOISA provides for two distinct exemptions.⁵ Only section 36(1) is subject to the public interest test.⁵

Section 36(1) provides for information to be withheld if a claim to confidentiality of communications could be maintained in legal proceedings.²⁸ This requires that the public authority assesses whether the information is subject to legal professional privilege (i.e., legal advice privilege and litigation privilege).²⁸

Section 39: Health, safety and the environment

Section 39 of FOISA contains two distinct exemptions related to health, safety, and the environment.⁴²

Section 39(1) applies to information where disclosure would, or would be likely to, endanger the physical or mental health or safety of an individual.⁵ Under section 18 of FOISA, when the section 39(1) exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest.⁵

Section 39(2) exempts environmental information (that public authorities are required to make available under the EIRs) from disclosure under FOISA.⁴² This exemption under FOISA and its relation to the EIRs is explained in the section: [The Environmental Information \(Scotland\) Regulations 2004](#) .

Section 40: Audit functions

Section 40 exempts information from disclosure if it would, or would be likely to, substantially prejudice the exercise of a Scottish public authority's public audit functions.⁵ Section 40(1) exempts information relating to the auditing of financial accounts while section 40(2) covers non-financial audits relating to the efficiency and effectiveness of public authorities discharging their functions.⁴³ The Scottish Information Commissioner guidance on the exemption states:

“ This exemption covers information relating to audits, particularly those carried out by bodies such as Audit Scotland. It may also include audits carried out by other inspectorate bodies, such as HM Chief Inspector of Prisons for Scotland or HM Inspectors of Constabulary.”

Scottish Information Commissioner, 2023⁴³

Section 41: Communications with His Majesty etc. and honours

Section 41 contains two exemptions related to communications with the Sovereign, other members of the Royal Family, and the conferring of honours. ⁴⁴ Section 41(a) exempts information related to communications with the Sovereign, other members of the Royal Family, or the Royal Household from disclosure under FOISA. ⁵ Section 41(b) exempts information relating to the conferring of honours, such as knighthoods, from disclosure under FOISA. ⁵

The section 41 exemptions are "class-based" which means the exemption applies if the information falls within a specific class (i.e., category), without needing to demonstrate harm from disclosure. ⁴⁴

Under section 18 of FOISA, when the section 41 exemption applies, a public authority can refuse to confirm or deny whether it holds the information, provided that revealing whether the information exists or is held would be contrary to the public interest. ⁵

Historical records

As outlined in [Information transferred to the Keeper of the Records of Scotland](#) , information contained in records can be accessed under FOISA. Additionally, not all exemptions are permanent.

Part 5 of FOISA (sections 57 to 59) defines "historical record" for the purposes of FOISA, sets time limits on exemptions that can be applied to information in historical records, and grants Scottish Ministers an order-making power to modify the definition of historical record or to vary the time periods during which exemptions can apply. ⁵

Meaning of historical record

As enacted, FOISA defined the meaning of historical record for the purposes of the Act as a record that is 30 years old. ⁴⁵ Section 58 of FOISA disapplies most exemptions in the event the information is contained in a historical record. This meant that most exemptions could be applied to information in historical records for up to 30 years after the record was created. ⁴⁵ Section 59 of FOISA as enacted provided for an order-making power allowing Scottish Ministers to reduce the period after which a record becomes a historical record for the purposes of FOISA. Any order made under this power would affect all types of records uniformly. ⁴⁵

The [Freedom of Information \(Amendment\) \(Scotland\) Act 2013](#) replaced the order-making power with a new section 59 power. This power allows Scottish Ministers to define the meaning of historical record differently for different types of records and to change the

length of time that different exemptions can be applied for.⁴⁶

The [Freedom of Information \(Scotland\) Act 2002 \(Historical Periods\) Order 2013](#) subsequently amended section 57 of FOISA (the general definition of when a record becomes a historical record for the purposes of the Act) from 30 to 15 years.⁴⁷ In accordance with section 58 of FOISA, which provides for the falling away of exemptions with time, most exemptions under the Act can only be applied for up to 15 years after information was created.⁴⁷

Additionally, the 2013 order specified that records containing information exempt from disclosure under section 36 of FOISA (the confidentiality exemption) become historical records 30 years after the 1st January following the year they were created.⁴⁷ For records containing information exempt under section 41(a) (communications with the Royal Family), the record becomes a historical record at the later of:⁴⁷

- 20 years after the date the record was created,
- 5 years after the death of the relevant Royal Family member in relation to communications with His Majesty or the Royal Family, or
- 5 years after the death of the reigning Sovereign at the time the record was created.

Time-limited exemptions

The time-limited exemptions are set out in section 58 of FOISA.⁵ The following exemptions are time-limited to 15 years:

- [Section 28: Relations within the United Kingdom](#)
- [Section 29: Formulation of Scottish Administration policy](#)
- [Section 30: Prejudice to effective conduct of public affairs](#)
- [Section 33\(1\)\(a\): Trade secrets](#)
- [Section 33\(1\)\(b\): Commercial interests of any person or organisation](#)
- [Section 36: Confidentiality](#)
- [Section 37: Court records](#)
- [Section 40: Audit functions](#)
- [Section 41\(a\): Communications with the King, with other members of the Royal Family or with the Royal Household.](#)

The following exemptions are time-limited to 60 years:

- [Section 41\(b\): Awarding of honours by the King.](#)

The following exemptions are time-limited to 100 years:

- [Section 34\(2\)\(b\): Information held for the purposes of an investigation into the cause of death of someone](#)
- [Section 35: Law enforcement](#)
- [Section 38\(1\)\(d\): Personal census information](#)
- [Section 38\(1\)\(d\): Personal information from a deceased person's health record.](#)

Vexatious or repeated requests

Section 14(1) of FOISA provides that public authorities do not have to respond to vexatious requests.⁵ The Scottish Information Commissioner provides guidance on determining whether a request is vexatious:

“ There is no definition of “vexatious” in FOISA. The Scottish Parliament considered that the term “vexatious” was well-established in law and chose to give the Commissioner latitude to interpret the term in that context, so that the interpretation might evolve over time in light of experience and precedent. [...] The following factors will be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious if: (i) it would impose a significant burden on the public authority. (ii) it does not have a serious purpose or value. (iii) it is designed to cause disruption or annoyance to the public authority. (iv) it has the effect of harassing the public authority. (v) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.”

Scottish Information Commissioner, 2023⁴⁸

Similarly, section 14(2) of FOISA provides that public authorities do not have to comply with repeated requests for the same or substantially similar information unless a reasonable period has passed.⁵ The Scottish Information Commissioner guidance states:

“ It should be relatively straightforward to establish whether a request is identical or substantially similar to a previous request, but it is a judgment call whether a reasonable period of time has elapsed between requests. There is no attempt to define a “reasonable period of time” in the legislation, because it will depend on the circumstances. Considering the following two questions will help public authorities to assess whether a reasonable period of time has elapsed: (i) Has the information changed? (ii) Have the circumstances changed? [...] If a public authority is receiving repeated requests for particular information, it should consider pro-actively publishing the information through its publication scheme. [...] Section 14(2) is discretionary, not mandatory. Even if a request is repeat, it might still be good practice to comply with the request; for instance, where the requester has lost or failed to retain the information, but then realised they still need it.”

Scottish Information Commissioner, 2023⁴⁸

When a public authority determines that a request is vexatious or repeated, it must notify the information requester of its decision in writing.⁵ However, this is not required if a notice has already been given in relation to a "previous identical or substantially similar request" and it would be unreasonable to expect the public authority to issue another notice in all

the circumstances of the case.⁵

The notice must include details of the applicant's right to ask the public authority to review its decision and right to appeal to the Scottish Information Commissioner if they remain dissatisfied.⁵

Enforcement of the freedom of information regime

The role of the Scottish Information Commissioner

The Scottish Information Commissioner is an independent public official responsible for enforcing and promoting FOISA.⁵ The Scottish Information Commissioner's powers and duties are set out in Parts 3 and 4 of FOISA, which include responsibilities to:⁵

- enforce FOISA and the EIRs
- enforce the Codes of Practice issued under FOISA and the EIRs
- provide guidance on FOISA and the EIRs to the public
- promote good practice among Scottish public authorities
- give advice to any person on these matters.

The Scottish Information Commissioner's statutory functions under FOISA also include:⁵

- approving Scottish public authorities' publication schemes
- investigating and deciding appeals, as well as enforcing decisions related to authorities' handling of freedom of information requests
- assessing, promoting, and monitoring compliance with FOISA
- providing advice and assistance on access to information.

The Scottish Information Commissioner is required to publish a strategic plan every four years.⁵ The current strategic plan (2024–2028), published in March 2024, focuses on "supporting, sustaining, and improving" freedom of information.⁴⁹

Additionally, the Scottish Information Commissioner must publish an annual report on its functions.⁵ The Scottish Information Commissioner can also publish special reports "from time to time" on its duties under FOISA, as was done during the COVID-19 pandemic (see [Twenty years of freedom of information in Scotland](#)).⁵

Governance of the Office of the Scottish Information Commissioner

The Scottish Information Commissioner is an independent officeholder of the Scottish Parliamentary Corporate Body.⁵⁰ The Scottish Information Commissioner is nominated by the Scottish Parliament and formally appointed by His Majesty.⁵ Under FOISA, the Scottish Information Commissioner can serve a single term of up to eight years.⁵ The Scottish Parliamentary Corporate Body determines the specific length of the term within this limit.

The governance of, and eligibility for, the Office of the Scottish Information Commissioner is regulated by section 42 and schedule 2 of FOISA, as amended by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010.⁵ The Scottish Parliamentary Corporate Body primarily supports the Scottish Information Commissioner by setting the terms and conditions of their appointment and annual budget.⁵⁰

For more details on past and present Scottish Information Commissioners, see [Twenty years of freedom of information in Scotland](#).

Public authority review

FOISA establishes a three-stage appeal and enforcement process.⁵¹ The first stage of which is the "requirement for review" where information requesters can ask the public authority to review its handling of an information request or lack thereof.⁵²

Applicant requirement for review

Under section 20 of FOISA, any individual who is unhappy with how their information request has been handled can ask the public authority to review its actions regarding any part of the request.⁵ The request for review must be submitted in writing (or in a format that can be referred to later).⁵ It should include the information requester's name and contact details, specifics of the original request, and the reasons for seeking a review.⁵

The requirement for review must be submitted within 40 working days of either:^{xiii 5}

- the expiry of the 20 working day period set for responding to the original information request
- the public authority's response to the original information request outside of the 20 working day period.

Public authorities have the discretion to accept a requirement for review received after the expiry of these time limits.⁵

xiii This also applies to requests for information held in [historical records](#) made to the Keeper of the Records of Scotland. In such cases, the requirement for review can be submitted within 40 days of either the end of the 30 working day period or the response to the original request that was made outside of the 30 working day period.⁵

Public authority review procedure

Section 21 of FOISA outlines the procedure that a public authority must follow when dealing with an applicant's requirement for review under section 20.⁵ The public authority must respond to the requirement for review within 20 working days of receiving it.^{xiv 5} The response can confirm the initial decision, arrive at a different decision, or provide a decision if one was not reached initially.¹³ Public authorities are required by section 21(5) of FOISA to provide the applicant with information on applying to the Scottish Information Commissioner for a decision (in the event they are unhappy with the review outcome) and appealing to the Court of Session thereafter, alongside the response to the requirement for review.⁵

A public authority is not required to carry out a requirement for review if it believes the requirement for review is “vexatious” or if the request to which the requirement for review relates is “repeated”.⁵ If the public authority decides not to conduct a review, it must respond to the applicant within 20 working days and indicate that the requirement for review is considered vexatious or repeated.^{xv 13} The response must include the procedures for applying to the Scottish Information Commissioner and appealing to the Court of Session.¹³

Applicants can withdraw their requirement for review at any time by providing written notice.¹³

Scottish Ministers' section 20 and 21 powers

Scottish Ministers have powers under section 20 and section 21 of FOISA to vary the timescales within which an applicant must require a review and within which a public authority must respond, respectively.

Appealing to the Scottish Information Commissioner

Individuals who are dissatisfied with how a public authority has handled their information request cannot pursue legal action against the authority in the courts.¹⁰ Section 55 of FOISA clarifies that the Act does not grant a right of civil action against a public authority for failing to comply with FOISA.¹⁰ Instead, information requesters can appeal to the Scottish Information Commissioner if they receive no response to their request for review or are unhappy with the outcome of the review.⁵¹ This is the second stage of FOISA's three-stage appeal and enforcement process.⁵¹ The information requester must have awaited a review response from the public authority before approaching the Scottish Information Commissioner. Appeals to the Scottish Information Commissioner should be made within six months of when the public authority should have replied to the review

xiv A response to the applicant is due within 30 days in the case of a requirement for review made to the Keeper of the Records of Scotland in relation to information contained in a [historical record](#).⁵

xv A response indicating the public authority has decided not to conduct a review is required within 30 working days in the case of a requirement for review [made to the Keeper of the Records of Scotland](#).⁵

request or within six months of receiving a review response from the public authority.⁵

The Scottish Information Commissioner will investigate valid appeals.⁵³ A valid appeal requires that the requester has undergone the public authority's review process, provided the necessary information for the investigation, and clearly stated what they are unhappy with.⁵⁴ Appeals should be made in writing (or in some other form that can be referred to later) and should state the name of the applicant and a correspondence address.⁵

The Scottish Information Commissioner does not have to investigate "frivolous" or "vexatious" appeals, and those appeals which are subsequently withdrawn by the requester.⁵³ In these cases, section 49(2) of FOISA requires that the applicant is told of this and the reasons why within one month of receipt of the application or within "such other period as is reasonable in the circumstances".⁵

Section 48 of FOISA provides that the Scottish Information Commissioner is not able to investigate appeals about the handling of information requests by the Scottish Information Commissioner, a Procurator Fiscal, or the Lord Advocate (in the Lord Advocate's capacity as head of the criminal prosecution and investigation of deaths in Scotland).⁵ This means that the requirement for review is the last line of appeal under FOISA in these cases. However, the Scottish Information Commissioner may use [other enforcement powers](#) outside of the appeal process to compel good practice from these public authorities.⁵⁴

The Scottish Information Commissioner operates a "four-strand" investigations process for all other appeals, the procedures of which are set out in full in its Investigations Handbook.⁵³ The four-strand process is summarised as follows:

“

1. Validation: we must ensure an appeal is valid in law before we can investigate it”
2. Resolution: where possible we will resolve appeals without the need for a decision”
3. Investigation: we conduct a full investigation of appeals before reaching a decision”
4. Decision: the Commissioner issues a formal decision on the appeal.”

Scottish Information Commissioner, 2024⁵³

The Scottish Information Commissioner on validation of an appeal gives notice to the public authority of the appeal, and invites the public authority to give its submissions on the appeal.¹⁰ The public authority may give information to the Scottish Information Commissioner in support of its position which is confidential and cannot be given to the applicant as part of this submission process.^{xvi 10}

The Scottish Information Commissioner must reach a decision within four months (or such other period as is reasonable in the circumstances) of receiving the application.⁵ The

xvi Section 45 of FOISA governs the disclosure of information held by the Scottish Information Commissioner.⁵ It mandates confidentiality for information obtained by or furnished to the Scottish Information Commissioner and prohibits disclosure unless disclosure meets certain lawful conditions.⁵ Unauthorised disclosure under section 45 of FOISA is an offence.⁵

Scottish Information Commissioner, under section 49(4) of FOISA, can also mediate a mutually-agreed settlement between the applicant and public authority within that time.¹⁰ This is considered an informal resolution of an appeal to the Scottish Information Commissioner.¹⁰ The Scottish Information Commissioner Investigations Handbook states:

“ Section 49(3)(b) of FOISA requires SIC [Scottish Information Commissioner] to issue decision notices where settlement has not been effected. This suggests that Parliament expects SIC to take reasonable steps to resolve cases informally. Resolution may be initiated by either party or by the IO [Investigating Officer] (subject to the considerations set out below) at any point during the investigation.”

Scottish Information Commissioner, 2024⁵³

The same decision notice should be given to the applicant and public authority.⁵ Under section 49(6) of FOISA, where the Scottish Information Commissioner finds that a public authority has not dealt with an information request in accordance with [Part 1 of FOISA](#), the decision notice must contain details of the failure, the remedy, and the time within which such action must be taken.⁵ The decision notice must also inform the applicant and public authority that they can appeal the Scottish Information Commissioner's decision to the Court of Session on a point of law.⁵ The timescales set in the decision notice are not allowed to expire before the end of the period within which an appeal can be made to the Court of Session under section 56 of FOISA.⁵ At present, this is within 42 days of the decision notice being intimated.⁵⁵

The Scottish Information Commissioner publishes its [decisions](#) on its website.

Codes of Practice

Two Codes of Practice are issued under FOISA (by Scottish Ministers) to provide guidance to public authorities on responding to requests for information and associated matters (section 60 Code of Practice) and on records management (section 61 Code of Practice).⁵

The section 60 and 61 Codes of Practice can be revised from "time to time".⁵ The Scottish Information Commissioner must be consulted before the new Codes of Practice are issued.⁵ Scottish Ministers committed to updating the section 60 and section 61 Codes of Practice as part of the Scottish Government's freedom of information policy objectives for 2024 to 2026 (see [The future of freedom of information in Scotland](#)).⁵⁶

The Scottish Information Commissioner can issue a practice recommendation under section 44 of FOISA if a public authority is not conforming with the Codes of Practice.⁵ The [practice recommendations issued](#) by the Scottish Information Commissioner are published.

Section 60 Code of Practice: Good freedom of information practice

The [section 60 Code of Practice](#) on the discharge of functions by Scottish public authorities was first issued by Scottish Ministers on 6 September 2004 and the most recent was issued on 1 December 2016.⁵⁷ It sets out guidance that public authorities should follow in the discharge of their duties under FOISA.⁵⁷ Section 60(2) specifies that

the following matters must be considered in the Code of Practice:⁵

- the advice and assistance that should be given to applicants
- the transferring of requests (under the EIRs)
- making third parties (e.g., contractors) aware of the public authority's duties under FOISA
- the disclosure of information relating to contracts or procurement processes
- procedures for dealing with complaints
- procedures for collection and recording of statistics by public authorities
- locating and retrieving information, including record keeping.

The section 60 Code of Practice is also issued under [Regulation 18 of the EIRs](#), and incorporates guidance on public authorities' duties to publish and make environmental information available.⁵⁷

Section 61 Code of Practice: Records management and freedom of information

Given the complexity that may sometimes be involved in determining whether information is held by a public authority and the various mediums and platforms that information may be held on, public authorities should adopt good records management practice to support the release of information under FOISA.²³ There is provision in FOISA and the [Public Records \(Scotland\) Act 2011](#) to support this.

Scottish Ministers issue the section 61 Code of Practice under FOISA to provide guidance to public authorities on the keeping, management, and disposal of records.⁵ The first Code of Practice was issued on 10 November 2003 and the most recent was issued on 16 December 2011.⁵⁸ The section 61 Code of Practice states:

“ Freedom of information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative. Good records and information management benefits those requesting information because it provides some assurance that the information provided will be complete and reliable. It benefits those holding the requested information because it enables them to locate and retrieve it easily within the statutory timescales or to explain why it is not held.”

Scottish Government, 2011⁵⁸

The Public Records (Scotland) Act 2011 sets out the requirements on certain public authorities in relation to records management.⁵⁹ Public authorities are under a duty through the 2011 Act to produce and submit a records management plan for agreement by the Keeper of the Records of Scotland.⁵⁹ The records management plan should set out:

- the individual responsible for managing the public authority's records

- the procedures for managing and maintaining the security of the public authority's records
- how records will be archived, disposed of, or destroyed by the public authority.

Official records management plans may also be supplemented with the public authority's own policies for managing information that is not minuted and captured as the official record.²³

The Scottish Information Commissioner and Keeper of the Records of Scotland have responsibilities under section 44 of FOISA to support good practice in records management.²³ These responsibilities are supported by a Memorandum of Understanding between the Scottish Information Commissioner and Keeper of the Records of Scotland, signed in May 2014, which sets out the offices' mutual understanding on the operation of the section 61 Code of Practice and cooperation between the offices on practice assessments and recommendations.⁶⁰

The Scottish Information Commissioner must periodically consult the Keeper on the adherence of Scottish public authorities to the section 61 Code of Practice.⁵ In cases where it appears to the Scottish Information Commissioner that a public authority's practices deviate from the Code of Practice, the Scottish Information Commissioner may issue a "practice recommendation".⁵ This written recommendation specifies the areas where the public authority is not conforming with good practice and outlines the necessary steps to be taken in order to conform.⁵ The Scottish Information Commissioner must consult with the Keeper of the Records of Scotland before issuing such recommendations.⁵

There is substantial overlap between the section 61 Code of Practice and the Public Records (Scotland) Act 2011.²³ The Scottish Government previously wrote in evidence to the Parliament's Session 5 Public Audit and Post-legislative Scrutiny Committee that:

" Given the existence of bespoke modern records management legislation, which was informed by the experience of operating FOISA, we suggest that the section 61 Code may now be otiose. We think that it is sensible to remove unnecessary duplication, and that it would be desirable for records management guidance to be issued by the Keeper of the Records rather than the Scottish Ministers, and so propose the repeal of the section 61 duty."

The Scottish Parliament, 2019⁶¹

Scottish Ministers have not taken steps to repeal the section 61 duty and compliance with the section 61 Code of Practice continues to be assessed by the Scottish Information Commissioner (e.g., in relation to information held on third party messaging platforms).

Information notices

The Scottish Information Commissioner can issue an "information notice" under section 50 of FOISA if information is required from a public authority to deal with an appeal to the Scottish Information Commissioner, or where the Scottish Information Commissioner "reasonably requires information" to determine whether a public authority is complying with

FOISA or the Codes of Practice.⁵

The information notice to the public authority details what information must be provided, the timeframe within which it is to be provided, and the right of appeal to the Court of Session on a point of law.⁵ The deadline for compliance cannot expire before the period within which the public authority can appeal to the Court of Session ends.⁵ The information notice can request recorded and unrecorded information.⁵ However, public authorities do not have to share legally privileged communications—that is, confidential discussions between a lawyer and their client about FOISA compliance or legal proceedings.⁵

Interventions and enforcement notices

The Scottish Information Commissioner can initiate "interventions" with public authorities to support good practice and compliance with FOISA.⁶² Good practice encompasses how requests are responded to, the giving of advice and assistance by authorities, proactive publication, and records management.⁶³ The circumstances which may result in an intervention can range from a self-referral by a public authority to one initiated by the Scottish Information Commissioner in line with the [Scottish Information Commissioner Enforcement Policy](#).⁶² Interventions are graded as follows:⁶²

- Non-compliance notification: minor failure to follow good practice
- Level 1: failure to follow good practice
- Level 2: practice failure
- Level 3: serious systemic practice failure
- Level 4: consistent, ongoing failure to comply with freedom of information law and guidance.

The Scottish Information Commissioner can also issue a "practice recommendation" if a public authority appears not to be conforming to the good practice described by the Scottish Ministers' Codes of Practice under sections 60 and 61 of FOISA.⁵ The Scottish Information Commissioner publishes information on [practice recommendations issued](#).

If the Scottish Information Commissioner determines that a public authority has failed to comply with FOISA, they have the power to issue an "enforcement notice" under section 51 of FOISA.⁵ This notice instructs the authority to take specific actions within a set time frame to correct the failure and comply with the law.⁵ The enforcement notice must clearly state which provision of FOISA has been breached and explain how the authority has failed to meet its obligations.⁵ It must also inform the authority of its right to appeal to the Court of Session on a point of law under section 56 of the FOISA.⁵ The deadline for compliance cannot expire before the period within which the public authority can appeal to the Court of Session ends.⁵ The Scottish Information Commissioner also has the discretion to cancel an enforcement notice at any time by notifying the public authority in writing.⁵

The Scottish Information Commissioner publishes information on [enforcement notices issued](#) under section 51 of FOISA.

The First Ministerial "veto" of Scottish Information Commissioner decisions

Section 52 of FOISA gives the First Minister the power to "veto" certain decisions made by the Scottish Information Commissioner in cases where the requested information is deemed of "exceptional sensitivity".⁵ This power applies only when the Scottish Information Commissioner has issued a decision or enforcement notice to the Scottish Administration.^{xvii 5}

For this power to be used, the decision or enforcement notice must relate to information exempt from disclosure under:⁵

1. [Section 29: Formulation of Scottish Administration policy](#)
2. [Section 31\(1\): National security and defence](#)
3. [Section 32\(1\)\(b\): International relations](#)
4. [Section 34: Investigations by Scottish public authorities and proceedings arising out of such investigations](#)
5. [Section 36\(1\): Confidentiality](#)
6. [Section 41\(b\): Communications with His Majesty etc.](#)

The First Minister, after consulting other members of the Scottish Government, can issue a certificate within 30 working days of the relevant notice or, in the event of an appeal to the Court of Session, within 30 working days of the cause being determined.⁵ Once the certificate is issued, the decision or enforcement notice ceases to have effect.⁵ A copy of the certificate must be laid in Parliament within 10 working days of the certificate being issued.⁵ Additionally, if the certificate relates to a decision notice, the First Minister must inform the applicant who originally requested the information of the reasons for the decision unless doing so would disclose exempt information.⁵

This power has, at the time of writing, never been used.

Scottish Information Commissioner powers of entry and inspection

The Scottish Information Commissioner has powers of entry and inspection.⁵ These

xvii The Scottish Administration is defined in section 126(6) of the Scotland Act 1998 and comprises the First Minister and other members of the Scottish Government, junior Scottish Ministers, holders of certain offices (e.g., Keeper of the Registers of Scotland), and the staff of the Scottish Administration.¹²

powers are given effect by section 54 of FOISA and are set out in schedule 3.⁵ The Scottish Information Commissioner may seek a warrant for entry and inspection where there are reasonable grounds for suspecting that a public authority has failed (or is failing) to comply with:⁵

- any of the provisions of Part 1 of FOISA (which governs the right of access to information held by public authorities)
- the steps required of a public authority within a decision notice issued under section 49 of FOISA
- an information or enforcement notice issued under FOISA.

The Scottish Information Commissioner may also seek a warrant where there are reasonable grounds for suspecting that an offence under section 65 of FOISA has been or is being committed.^{xviii 5}

These powers of entry and inspection have not been used (to date of publication) since FOISA came into force.

xviii Section 65 makes it a criminal offence under FOISA to alter, deface, block, erase, destroy or conceal information with intent to prevent disclosure following an information request being made.⁵

The Environmental Information (Scotland) Regulations 2004: Access to information about the environment

Members of the public in the UK had certain rights to access environmental information before general information rights were introduced in the UK and Scotland under the Freedom of Information Act 2000 and FOISA, respectively. These rights were established by the Environmental Information Regulations, which were first introduced in 1992 and later amended in 1998, granting the public the right to request information related to the environment from a "relevant person" (e.g., public authorities with environmental responsibilities).^{64 65}

The [Environmental Information \(Scotland\) Regulations 2004](#) ("the EIRs") are the most recent regulations governing access to environmental information held by Scottish public authorities.⁶⁶ Section 62 of FOISA enabled Scottish Ministers to make the EIRs.⁵ These regulations mandate that all Scottish public authorities must publish environmental information and provide it upon request.⁶⁶ The EIRs came into force on 1 January 2005, concurrently with FOISA.⁶⁶ The Scottish Information Commissioner enforces the EIRs in Scotland.⁶⁶

Unlike FOISA, the EIRs are derived from an international treaty, the [UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters](#) (also known as the Aarhus Convention), and EU-derived legislation.⁶⁷ The Aarhus Convention, signed by the UK in 1998, grants rights to access environmental information, participate in environmental decision-making, and access justice in environmental issues.⁶⁸ Scotland, via the UK, is obliged to respect and implement the Aarhus Convention. The EU adopted the [Access to Environmental Information Directive \(2003/4/EC\)](#) to require that its member states (as the UK was at the time) comply with the first pillar of the Aarhus Convention (which establishes rights to access information on the environment held by public authorities and requires the active dissemination of environmental information by those public authorities).⁶⁹ The EIRs were made to implement the obligations arising from the Directive in Scotland and remain in effect as domestic law following the UK's departure from the EU.⁶⁷

Definition of environmental information

Environmental information has a wide scope under the EIRs.⁷⁰ Regulation 2(1) of the EIRs defines environmental information as having the same meaning as in Article 2(1) of the EU Environmental Information (2003/4/EC) Directive, which in turn defines environmental information as *any* information in written, visual, aural, electronic or any other material form on:

“

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;”
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);”
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;”
- (d) reports on the implementation of environmental legislation;”
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and”
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

The broad scope of the definition means that environmental information can encompass topics and documents not explicitly related to the environment.¹⁰ For example, contracts and press releases can all be considered environmental information. There are also no geographical restrictions on environmental information under the EIRs.⁷⁰ As long as the information is held by a public authority, information about locations outside of Scotland may fall within the EIRs' definition of environmental information.⁷⁰

Public authorities covered by the EIRs

Regulation 2(1) also defines a Scottish public authority. All public authorities subject to FOISA are also subject to the EIRs. The EIRs state:

““Scottish public authority” means—”

- (a) any body which, any other person who, or the holder of any office which is—
 - (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule), or”
 - (ii) designated by order under section 5(1) of [FOISA];”
- (b) a publicly-owned company as defined by section 6 of [FOISA].”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

The definition of a public authority under the EIRs is wider than that under FOISA as the EIRs also apply to:

“

- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and”
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body [subject to FOISA or the EIRs] and–”
 - (i) has public responsibilities relating to the environment;”
 - (ii) exercises functions of a public nature relating to the environment; or”
 - (iii) provides public services relating to the environment.”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

Definition (c) refers to public authorities with mixed functions or no reserved functions (i.e., they are fully devolved or carry out functions assigned by both the Scottish and UK Parliaments).⁷¹ The Scottish Information Commissioner has previously decided on whether a body qualifies as a public authority under the EIRs, in Decision 097/2020, where the Lochaber District Salmon Fishery Board was deemed to meet the criteria.⁷² The Lochaber District Salmon Fishery Board is a district salmon fishery board established in accordance with the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. District salmon fishery boards are bodies with statutory powers and duties to protect and improve salmon fisheries within designated salmon fishery districts.⁷³ The Scottish Information Commissioner states in Decision 097/2020:

“ The Board, operating wholly within a defined area of Scotland and operating entirely under an Act of the Scottish Parliament, would appear to be a body with no reserved functions. [...] Given the nature of the statutory scheme under which it is established, the Board would appear to be a distinct form of legal person. Given that statutory scheme, its functions relating to the protection or improvement of fisheries (with particular reference to salmon) appear to be intended as functions to be exercised in the public interest, rather than simply for the benefit of the represented proprietors. Although not essential for this part of the definition to apply, the functions would appear to be environmental in nature.”

Scottish Information Commissioner, 2020⁷²

Definition (d) in the EIRs allows for any body controlled by a Scottish public authority, which has environmental responsibilities, to be considered a public authority under the EIRs.⁷¹ This could include private contractors and other entities with environmental functions, like waste disposal, if they are under the control of a Scottish public authority.⁷¹

The Scottish Information Commissioner has issued several decisions concluding that a body is a public authority for the purposes of the EIRs in accordance with definition (d). In Decision 085/2011, the Scottish Information Commissioner concluded that the (now dissolved) Solway Shellfish Management Association, a company with responsibilities for the maintenance and regulation of a shellfish fishery on the Scottish Solway Firth by virtue of the Solway Firth Regulated Fishing (Scotland) Order 2006, was a public authority and held environmental information under the EIRs.⁷⁴ This is because even though it was not

wholly publicly owned as is required under FOISA, it was considered to have environmental responsibilities and to be under the control of Scottish Ministers.¹⁰ This determination was made on the basis that the order regulating its activities required the Association to operate with the consent of, and subject to directions from, Scottish Ministers.¹⁰ The initial information request referred to the Scottish Information Commissioner was for financial information on the company's funding and expenditure.⁷⁴ The Commissioner stated that this would be considered environmental information under the EIRs, explaining:

“ The Commissioner takes the view that because the SSMA's [Solway Shellfish Management Association] sole purpose is the regulation of a particular environment, it is likely that information relating to the SSMA's activities will be environmental information because these activities affect or are likely to affect the state of the elements of the environment concerned, such as “coastal and marine areas” and “biological diversity”, both referred to in part (a) of the definition of environmental information in regulation 2(1) of the EIRs. In his view, information relating to expenditure on these activities will be information relating to these activities.”

Scottish Information Commissioner, 2011⁷⁴

Housing associations represent another example of bodies qualifying as a public authority for the purposes of the EIRs in accordance with definition (d). This was determined in Decision 099/2015 where it was found that Dunbritton Housing Association was under the control of the Scottish Housing Regulator, which is itself a public authority under the EIRs.⁷⁵ More recently, Abellio Scotrail Ltd was found to be subject to the EIRs on the basis that it was under the control of Scottish Ministers for the purposes of delivering the ScotRail franchise.⁷⁶ The Scottish Information Commissioner states in Decision 044/2021:

“

- Clearly, the delivery of a passenger rail service in Scotland is the provision of a public service. The franchise agreement in place between the Scottish Ministers and ASL [Abellio Scotrail Ltd] sets out a number of obligations it is required to meet, when delivering this service, in relation to the environment. These include a requirement to allocate funding to support research and development into innovative solutions relating to carbon and energy use reduction to address environmental issues in the railway environment. The agreement requires all proposed research and development projects to be assessed by a panel, including representatives from the Scottish Ministers. ASL is also required to carry out an energy audit in an effort to agree baselines from which energy use per passenger kilometre shall be reduced over the franchise term. The methodology for the audit is to be submitted to the Scottish Ministers.”
- The Commissioner also recognises that a passenger rail service is of particular importance as part of the overall public transport infrastructure in Scotland and plays a significant role in the drive to divert travellers to more sustainable modes of transport, in an effort to meet emission targets. For these reasons, the Commissioner concludes that ASL is providing a public service relating to the environment. In all the circumstances, therefore, the Commissioner finds that ASL is properly considered to be a Scottish public authority within the meaning of paragraph (d) of the definition in regulation 2(1) of the EIRs.”

Scottish Information Commissioner, 2021⁷⁶

Both Registered Social Landlords and ScotRail were subsequently brought within the scope of FOISA. Registered Social Landlords were designated a public authority by a section 5 order in 2019,⁷⁷ while ScotRail was included by becoming a wholly publicly owned company in 2022.⁷⁸

Obligations under the EIRs

The EIRs require public authorities to fulfil several obligations, which are summarised in the [table](#) reproduced from Scottish Information Commissioner guidance.

What do the EIRs require Scottish public authorities to do?

| Requirement | Reference |
|---|------------------------------------|
| Actively disseminate information, particularly by electronic means | regulation 4(1) |
| Make environmental information available to any person who requests it within 20 working days (40 working days if the request is voluminous and complex) | regulations 5(1) and 7(1) |
| Publish a schedule of charges and information on when a fee may be charged, waived or required to be paid in advance | regulation 8(8) |
| Provide reasonable advice and assistance to someone who has made, or wants to make, a request for environmental information | regulation 9 |
| Refuse requests only in line with the exceptions available, giving reasons and details of how to seek a review and appeal | regulations 10, 11, 13, 16, and 17 |
| Transfer requests for environmental information if the authority doesn't hold the information, but another does or supply the name and address of the authority which does hold the information | regulation 14 |
| If asked to do so, carry out a review of a decision not to make environmental information available | regulation 16 |

Scottish Information Commissioner, 2021⁷⁹

Further information on public authorities' obligations under the EIRs is provided in the following sections:

- [Active dissemination of environmental information](#)
- [Provision of environmental information.](#)

Active dissemination of environmental information

Regulation 4(1) requires Scottish public authorities take reasonable measures to organise and regularly update environmental information, as a means of ensuring environmental information is actively and systematically shared with the public.⁶⁶ The regulation also requires public authorities make environmental information "progressively available" to the public through electronic means.^{xix} The Scottish Information Commissioner's guidance on public authorities' responsibilities under the EIRs indicates that the use of the term "progressively available" allows the regulations to take account of technological changes to the way information is created, stored, and shared.⁷⁹

Regulation 4(2) specifies the main types of information that should be made available in this manner as:

xix The EIRs do not require information collected before 14 February 2003 to be made available electronically.

“

- (a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;”
- (b) policies, plans and programmes relating to the environment;”
- (c) progress reports on the implementation of the items referred to in sub paragraphs (a) and (b) when prepared or held by a Scottish public authority in electronic form;”
- (d) reports on the state of the environment;”
- (e) data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment;”
- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;”
- (g) environmental impact studies and risk assessments concerning those elements of the environment referred to in paragraph (a) of the definition of “environmental information” in regulation 2(1); and”
- (h) facts and analyses of facts which the authority considers relevant and important in framing major environmental policy proposals.”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

As public authorities subject to FOISA are required by section 23 of that Act to adopt and maintain a publication scheme, the Scottish Information Commissioner advises (in its guidance) that public authorities subject to both FOISA and the EIRs can *partially* meet their obligation to actively share information under the EIRs through the maintenance of their FOISA publication scheme.⁷⁹

Provision of environmental information on request

The EIRs require public authorities to respond to requests for environmental information. Under Regulation 5, public authorities holding environmental information must provide it as soon as possible and within 20 days of receiving the request.⁶⁶ Regulation 7 allows public authorities to extend this period to within 40 days if the information covered by the request is both voluminous and complex.⁶⁶ In such cases, the applicant must be notified in writing, given reasons for why the authority considers the information voluminous and complex, and provided with information on the [review and enforcement provisions available under the EIRs](#).⁶⁶

The EIRs stipulate how information should be provided and what additional information should be provided in certain matters. For instance, public authorities are required by Regulation 5(4) to ensure "as far as practicable" that information provided in response to a request for environmental information is "up to date, accurate and comparable".⁶⁶ Similarly, under Regulation 5(5), public authorities must supply information on sampling and analysis methods if the information requested is made available and pertains to matters that affect or are likely to affect elements of the environment (i.e., matters defined

in Regulation 2(1) paragraph (b)).⁶⁶ Additionally, Regulation 6 obliges public authorities to provide information in the form or format requested by the applicant, unless it is unreasonable to do so or the information is already publicly available in another form or format.⁶⁶

Duty to provide assistance and information on fees

There is also a requirement in Regulation 9 which obliges public authorities to provide assistance to individuals making or planning to make requests for environmental information.⁶⁶ Additionally, under Regulation 9, if a request for environmental information is too vague, then the public authority must ask the applicant for more detail no later than 20 working days after receiving the request, and help the applicant provide those details.⁶⁶

Regulation 8 allows public authorities to charge reasonable fees for providing environmental information.⁶⁶ Public authorities are required by this regulation to publish a schedule of charges and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.⁶⁶ If the public authority has not published a schedule of fees, it cannot charge for providing information under the EIRs.⁷⁹ Public authorities are also not allowed to charge for information held in publicly accessible registers of environmental information.⁶⁶ Similarly, public authorities are not permitted to charge individuals to examine the information requested in a place they provide for that purpose.⁶⁶

Refusal of environmental information requests

Public authorities can refuse requests for environmental information if an exception applies. Exceptions under the EIRs are similar to exemptions under FOISA (see [Exceptions under the EIRs](#) for further information).

Regulation 16 provides for the circumstances under which an information applicant can request a review of the refusal to provide environmental information or make representations to the public authority that they have not complied with the EIRs.⁶⁶ Requests for review should be made in writing to the public authority within 40 days of receiving the decision or within 40 days of the date by which the public authority should have complied with the regulation.⁶⁶ The authority should conduct its review and notify the applicant of its decision within 20 working days after the date of receipt of representations.⁶⁶ Regulation 16 requires the public authority to take immediate steps to remedy the non-compliance where it finds on review that it has not complied with its duties under the EIRs.⁶⁶

Transfer of environmental information requests

Regulation 14 allows public authorities to transfer a request for environmental information to another public authority if they do not hold the information but believe another authority does.⁶⁶ This is different to FOISA, where public authorities cannot transfer a request and

it is up to the information applicant to make a separate request to the public authority.⁷⁹

The EIRs also include provisions for releasing environmental information in historical records held by the Keeper of the Records of Scotland. Regulation 15 outlines the Keeper's duties regarding environmental information in records that have been transferred and are not already publicly accessible.⁶⁶ If a request for such information is made, the Keeper must forward the request to the public authority that originally provided the record.⁶⁶ The original public authority then decides whether to release the information or apply any exceptions, and inform the Keeper of its decision within a time frame that allows the Keeper to comply with the request.⁶⁶ If there are any requests for review, the Keeper sends these to the original public authority, which then reviews the decision and informs the Keeper of the outcome.⁶⁶ The Scottish Ministers assume the role of original public authority for records transferred to the Keeper before 1 July 1999 by the Secretary of State for Scotland.⁶⁶

Making a request for information under FOISA and the EIRs

All requests for environmental information will technically be covered by FOISA since information is defined in the Act as "information recorded in any form".⁵ However, as the EIRs require public authorities to respond to requests for environmental information, it is the responsibility of public authorities to recognise when a request for information is environmental.⁶⁶ Unlike FOISA, the EIRs do not specify how a valid request should be made.⁸⁰ As such, verbal requests for information will normally be valid under the EIRs.⁸⁰ Again, it is the responsibility of the public authority to identify when a request for environmental information has been made.⁸⁰

Section 39(2) of FOISA provides for a technical exemption to allow public authorities to exempt environmental information from disclosure under FOISA so that it can be considered solely in terms of the EIRs.⁴² If public authorities do not claim the section 39(2) exemption for a request for environmental information, they must evaluate the request under both FOISA and the EIRs.⁴² This means they need to consider how the exemptions under FOISA and the exceptions under the EIRs might apply.⁴² Scottish Information Commissioner guidance on the exemption suggests that public authorities need only do this if they are unsure of whether or not information is environmental in nature.⁴² Therefore, where a request is for environmental information, the section 39(2) exemption should normally apply.

The exemption is subject to the public interest test (see [The public interest test](#)).⁴² This means that the information must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it. The Scottish Information Commissioner states in its guidance on the section 39(2) exemption:

“ Given the separate statutory right to access environmental information under the EIRs, the public interest in maintaining the section 39(2) exemption in FOISA will generally outweigh the public interest in disclosing environmental information under FOISA.”

Scottish Information Commissioner, 2023⁴²

Exceptions under the EIRs

There are instances when the disclosure of environmental information requests may be refused under the EIRs. Such cases are known as exceptions. When an exception is applied and information is withheld from disclosure, Regulation 13 requires that public authorities provide written reasons for their decision and inform the applicant of review procedures no later than 20 working days after the date of receipt of the request.⁶⁶

Overview of the exceptions in Regulation 10

Regulation 10 of the EIRs provides for the exceptions to disclosing environmental information under the EIRs.⁶⁶ All exceptions under the EIRs, which are set out in Regulation 10(4) and 10(5), are subject to the public interest test (see [The public interest test](#)).^{xx 82} This means that even if an exception applies, the information must be disclosed unless the public interest in making the information available is outweighed by that in maintaining the exception.⁸² Regulation 10(2) also clarifies that in considering the application of an exception, the public authority should interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.⁶⁶ Regulation 10(3) sets out that environmental information that is also personal data can only be made available in accordance with Regulation 11, which in turn describes the circumstances under which such data can be made available.^{xxi 66}

There are two types of exception in the EIRs set out in Regulation 10(4) and Regulation 10(5), respectively: class exceptions and substantial prejudice exceptions.⁸² Regulation 10(4) provides for the class exceptions, which relate to the type of information held or the nature of the request.⁸² The regulation states:

“ A Scottish public authority may refuse to make environmental information available to the extent that—”

- (a) it does not hold that information when an applicant’s request is received;”
- (b) the request for information is manifestly unreasonable;”
- (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;”
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or”
- (e) the request involves making available internal communications.”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

Regulation 10(5) provides for exceptions which can only be applied if disclosure of the information would, or would be likely to cause substantial prejudice.⁸² The regulation

xx The Scottish Information Commissioner issued guidance to public authorities on the public interest test in the EIRs on 6 July 2023.⁸¹

xxi Regulation 11, which deals with personal data, is a "quasi-exception" and only parts of the regulation are subject to a public interest test.

states:

“ A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially—”

- (a) international relations, defence, national security or public safety;”
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;”
- (c) intellectual property rights;”
- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;”
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;”
- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;”
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and”
 - (iii) has not consented to its disclosure; or”
- (g) the protection of the environment to which the information relates.”

The Environmental Information (Scotland) Regulations, 2004⁶⁶

Information relating to emissions is given a special status under the EIRs.⁸² Some of the exceptions under the EIRs cannot be applied when the information in question relates to emissions.⁸² Regulation 10(6) provides that a public authority cannot rely on the following exceptions in relation to an information request about emissions:

- Regulation 10(5)(d) – the confidentiality of proceedings
- Regulation 10(5)(e) – the confidentiality of commercial or industrial information
- Regulation 10(5)(f) – the interests of the person who provided the information
- Regulation 10(5)(g) – the protection of the environment.⁶⁶

Differences between EIRs and FOISA

There are key differences in how exceptions under the EIRs and exemptions under FOISA are applied. For example, in contrast to FOISA, the EIRs require the public interest test to be applied to all exceptions and grant a special status to information on emissions.⁸⁰ A further difference between the two regimes is how they interact with other laws.⁸⁰ For instance, section 26(a) of FOISA states that information cannot be disclosed if it is

prohibited by other legislation.⁵ Regulation 5(3) of the EIRs on the other hand specifies that any law preventing the disclosure of environmental information under the EIRs does not apply.⁶⁶ However, the information in question may still be subject to an exception.⁸² The EIRs also make provision in Regulation 12 for certificates to be issued by Scottish Ministers where they consider that making environmental information available would, or would be likely to, prejudice substantially national security.⁶⁶

Enforcement of the EIRs

The EIRs include provisions for enforcing the regime, which link to FOISA. Regulation 17 of the EIRs sets out that the enforcement provisions of Part 4 of FOISA, including the powers of entry and inspection set out in Schedule 3, apply to the EIRs with certain modifications. These modifications allow the relevant parts of FOISA to be interpreted as references to the EIRs.⁶⁶ Regulation 18(5) makes provision for functions of the Scottish Information Commissioner under FOISA to apply in relation to the EIRs.⁶⁶ Taking Regulation 17 and 18 together, this means that if a public authority has not provided a response to a request for environmental information or the applicant remains unhappy with the response(s) received following a review, the applicant can appeal to the Scottish Information Commissioner for a decision.⁶⁶⁵ Applicants and public authorities can also appeal to the Court of Session if they are unhappy with the Commissioner's decision under the EIRs, but only if it is on a point of law.⁵

Regulation 18 also makes provision for Scottish Ministers to issue a Code of Practice on how public authorities should carry out their duties under the EIRs, including how they should manage their records.⁶⁶ The Code of Practice issued under section 60 of FOISA is also issued under Regulation 18 of the EIRs (see [Codes of Practice](#) for further discussion).

Regulation 19 mirrors section 65 of FOISA to make any attempt to alter information or records (e.g., through deletion) with the intent of preventing disclosure an offence under the EIRs.⁶⁶

Summary of differences between FOISA and the EIRs

The EIRs and FOISA are similar freedom of information regimes but there are differences. These differences are summarised in the [table](#) reproduced from Scottish Information Commissioner guidance.

Differences between FOISA and the EIRs

| | EIRs | FOISA |
|---------------------------------------|---|---|
| Active dissemination | <p>Authorities must:</p> <ul style="list-style-type: none"> organise and keep environmental information up to date disseminate that information actively and systematically. | Authorities must adopt and maintain a publication scheme. |
| Charging | <p>Authorities can make a reasonable charge for making the information available (but not for inspecting information). Authorities must publish a schedule of charges.</p> | Authorities can charge for locating, retrieving and providing the information under the Fees Regulations. |
| Copies of documents | The duty to make environmental information available includes the duty to provide copies of documents. | FOISA gives people the right to access information, not documents. (In many cases, the easiest way to respond to a request is to give a copy of a document). |
| Cost limit | The EIRs don't have an upper or lower cost limit. This means a request can't be refused just because it would cost too much. (However, requests might be manifestly unreasonable.) With no lower cost threshold, an authority can charge for providing any information under the EIRs, providing the charge is reasonable. | An authority is not obliged to respond to a request if complying would exceed £600. An authority cannot charge for the first £100 of costs. |
| Late requests for review | Authorities can't accept late requests for review under the EIRs. If they do – and the requester appeals to the Commissioner – the appeal will be invalid. | An authority can comply with a late request for review if it considers it appropriate to do so. |
| Emissions | Information on emissions has a special status: some of the exceptions in the EIRs can't be used to withhold information on emissions. | No equivalent under FOISA. |
| Extending the response time | The 20 working day period for responding to a request can be extended by up to 20 working days if the volume and complexity of the information requested makes it impractical for the authority to deal with the request more quickly. | The authority must respond in 20 working days. |
| Format of request | Requests can be made in any format: verbal requests for environmental information are valid under the EIRs. | Requests must be in writing or any other format capable of having some permanency. |
| Historical records | The exceptions can be applied regardless of how old the information is. | Some exemptions can't be applied to "historical records". In many cases, this means information which is more than 15 years old. |
| Neither confirm nor deny | <p>An authority can refuse to confirm or deny whether it holds:</p> <ul style="list-style-type: none"> information if the exception in regulation 10(5)(a) applies and revealing whether the information exists would not be in the public interest personal data if disclosure would be contrary to regulation 11 | An authority can refuse to confirm or deny whether it holds information if one of the exemptions in sections 28 to 35, 38, 39(1) or 41 applies and revealing whether the information exists would be contrary to the public interest. |
| Prohibitions on disclosure | The EIRs trump other laws: any law which would prevent an authority making environmental information available does not apply. | Other laws trump FOISA: information is exempt if its disclosure is prohibited by other laws. |
| Public and restrictive interpretation | <p>All of the EIRs exceptions:</p> <ul style="list-style-type: none"> are subject to the public interest test must be read in a restrictive way a presumption in favour of disclosure should be applied. <p>(Regulation 11, which deals with personal data, is a quasi-exception. The public interest test applies only to parts of the regulation.)</p> | The public interest test applies to only some of the exemptions in FOISA. |

| | EIRs | FOISA |
|---------------------------|---|--|
| Scottish public authority | The definition of a Scottish public authority is wider under the EIRs than FOISA. | FOISA covers: <ul style="list-style-type: none"> • bodies listed in Schedule 1 • bodies designated under section 5 of FOISA • publicly-owned companies. |
| Transfer of request | The EIRs allow authorities to transfer a request to another body. | FOISA does not allow authorities to transfer requests to another authority. |

Scottish Information Commissioner, 2020⁸⁰

Twenty years of freedom of information in Scotland

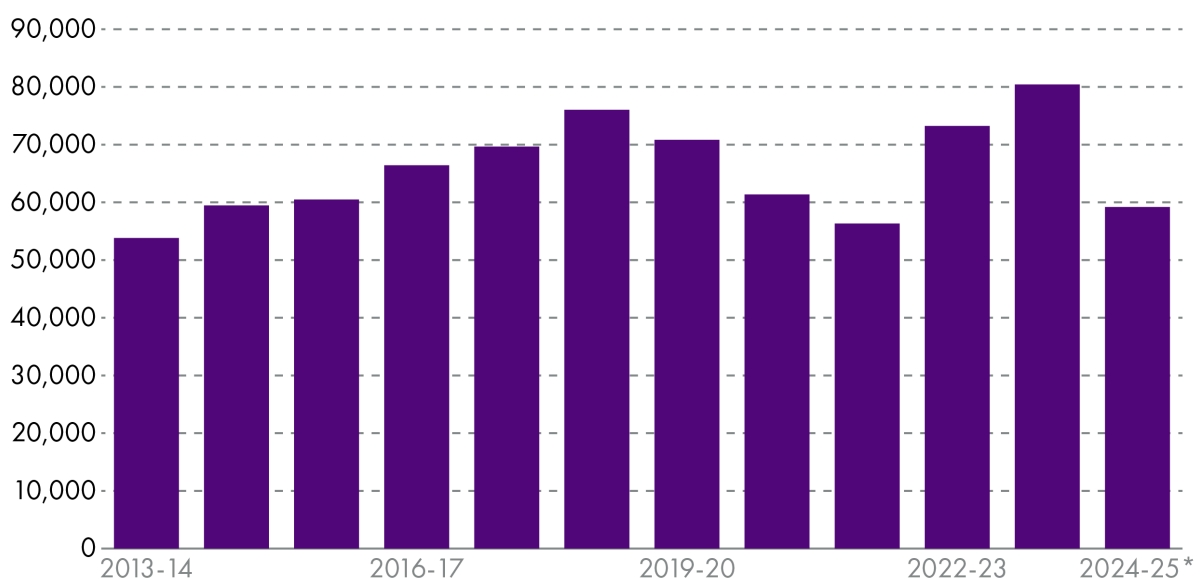
FOISA came into force on 1 January 2005. This legislation has now provided 20 years of rights to information from public authorities in Scotland. In that time, an estimated 1.4 million information requests have been made to public authorities under FOISA and the EIRs, four Scottish Information Commissioners have been appointed, one amendment Bill has been passed, new public bodies have been designated as public authorities under FOISA, and coronavirus legislation has impacted the operation of the freedom of information regime. This section covers the evolution of FOISA over the past two decades.

The impact of freedom of information in Scotland

The Scottish Information Commissioner estimates that 1.4 million information requests have been made to public authorities under FOISA and the EIRs since they came into force on 1 January 2005.⁸³ Public authorities are expected, under the Section 60 Code of Practice, to record and report data on their freedom of information performance.⁸⁴ In 2013, the Scottish Information Commissioner began collating this data from public authorities, which is now published on the [Scottish Information Commissioner Statistics Portal](#). The data shows a steady increase in the number of FOISA and EIR requests until the COVID-19 pandemic, after which the number of requests began to recover and significantly increase with requests peaking in 2023-24. Although the data for 2024-25 is not yet complete at time of writing, the three quarters submitted so far suggest that information requests may increase again this year.

Freedom of information requests made to Scottish public authorities between 2013 and 2025

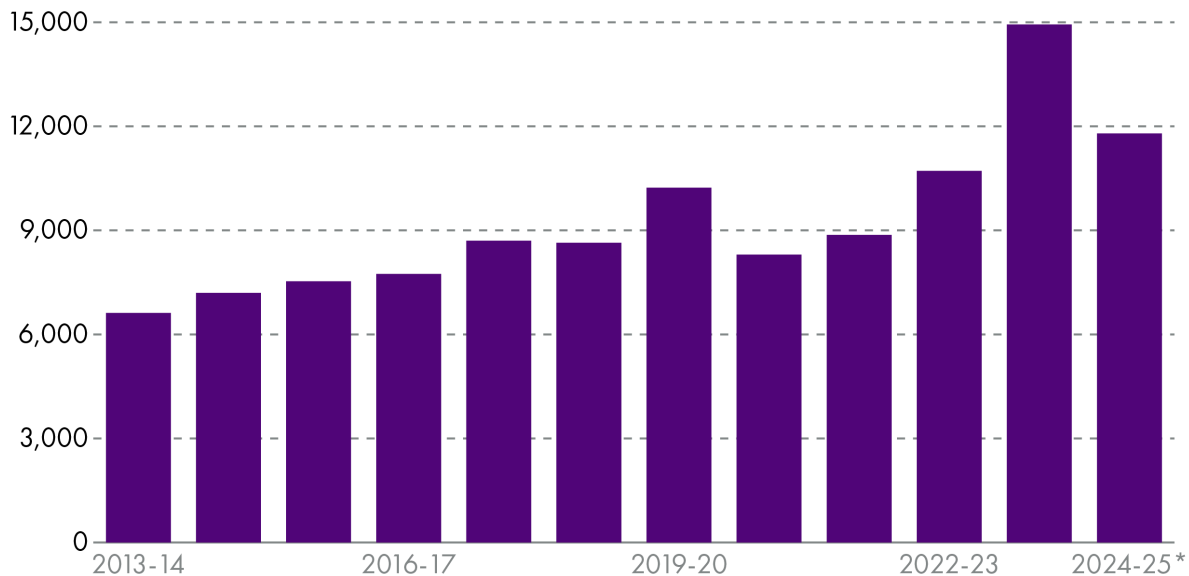
* Data for 2024-25 is for quarters 1 to 3.



SPICe, from Scottish Information Commissioner data

Requests for environmental information made to Scottish public authorities between 2013 and 2025

* Data for 2024-25 is for quarters 1 to 3.



SPICe, from Scottish Information Commissioner data

Four Scottish Information Commissioners

Four Scottish Information Commissioners have been appointed under FOISA so far.⁸³

Kevin Dunion was the first Scottish Information Commissioner, nominated by the Parliament on 10 December 2002 and taking up post on 24 February 2003.⁸⁵ Kevin Dunion was subsequently nominated by the Parliament for reappointment on 24 January 2008 and held the appointment until 23 February 2012.⁸⁶

Scottish Parliamentary Commissions and Commissioners etc. Act 2010

Kevin Dunion is the only individual to serve two terms as the Scottish Information Commissioner. During Kevin Dunion's second term, FOISA was amended by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 to make individuals who have previously held the role of Scottish Information Commissioner ineligible for reappointment.⁸⁷ The Scottish Parliamentary Commissions and Commissioners etc. Act 2010 also amended FOISA to change the term of office for the Scottish Information Commissioner.⁸⁷ The term was extended from a maximum of five years to a maximum of eight years, with the length of the term determined by the Scottish Parliamentary Corporate Body at the time of appointment.⁸⁷

Rosemary Agnew was nominated by the Parliament for appointment as the second Scottish Information Commissioner on 30 January 2012 and held the appointment between 1 May 2012 and 30 April 2017.⁸⁸

Daren Fitzhenry was nominated by the Parliament for appointment as the third Scottish Information Commissioner on 27 June 2017 and held the appointment from 25 October 2017 and 15 October 2023.⁸⁹

David Hamilton is the current Scottish Information Commissioner and was nominated by the Parliament for appointment as the fourth Scottish Information Commissioner on 28 June 2023. David Hamilton began the appointment on 16 October 2023.⁹⁰

Collectively, at the time of writing, these Commissioners have issued 4208 decisions since FOISA came into force.^{xxii}

Freedom of Information (Amendment) (Scotland) Act 2013

The Freedom of Information (Amendment) (Scotland) Bill was passed on 16 January 2013 and became an Act on 19 February 2013.⁹¹ It remains the only bespoke primary legislation to amend or reform FOISA to date.

The passage of the Freedom of Information (Amendment) (Scotland) Bill

The introduction of the Freedom of Information (Amendment) (Scotland) Bill followed amendments to the UK Freedom of Information Act 2000 by the UK Parliament and a Scottish Government consultation on amendments to FOISA. The policy memorandum to the Bill indicated that the proposed modifications to the Act were "limited" and "intended to add strength and clarity and improve its operation".⁹² A [SPICe briefing on the Bill](#) (as introduced) was published on 30 August 2012. The [SPICe Bill Summary](#) setting out the parliamentary consideration of the Bill is published on the Scottish Parliament Archive website.

Section 41 of FOISA allows public authorities to refuse to disclose information if it relates to communications with the King, the Royal Family, or the Royal Household, or if it relates to the award of honours by the King.⁹³ The exemption is subject to the public interest test.⁹³ The Bill, as introduced, included an amendment to bring the section 41 exemption in line with that provided for by the UK Freedom of Information Act 2000 by creating an absolute exemption for communications with Her (His) Majesty, the heir and the second in line to the throne.⁹² However, at Stage 2, in response to the Stage 1 Committee report and to the Stage 1 debate, a Scottish Government amendment to remove the provisions for an absolute exemption was lodged and agreed to.⁹⁴ This means that information held by a public authority under FOISA may be disclosed under FOISA provided it is in the public interest to do so, but the same information held by a UK public authority may be absolutely exempt from disclosure.⁹³

The Act amended the following sections of FOISA.⁴⁶

xxii Margaret Keyse was Acting Scottish Information Commissioner for two brief periods between the appointments of Kevin Dunion and Rosemary Agnew, and Rosemary Agnew and Daren Fitzhenry, respectively.

- The section 5 order making power to require the Scottish Ministers to consult relevant persons before making an order to designate a public authority under FOISA and to require Scottish Ministers to report to the Scottish Parliament on their exercise of the power.
- Section 18 of FOISA to allow authorities to issue, in reply to a request for information concerning personal information, a neither confirm nor deny response.
- Section 25 of FOISA, which exempts information otherwise accessible, to clarify that information which is provided in a public authority's publication scheme does not also have to be provided in response to an information request.
- Section 59 of FOISA to give Scottish Ministers an order making power to reduce the lifespan of historical records, so there could be varying lengths of time for different public bodies or for different kinds of records. The only subsequent Order made using this power, the Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 2013, reduced the time period after which a record becomes a historical record for FOI purposes from 30 years to 15 years, with some exceptions.⁴⁷
- Section 65 of FOISA to allow prosecution for the offence of altering, defacing, blocking, erasing, destroying, or concealing information subject to an information request to be made up to six months after sufficient evidence has been amassed, rather than six months after commission of the offence.

New public bodies designated under FOISA

New public bodies created or amended by other legislation have been added to schedule 1 of FOISA since the Act came into force. However, the section 5 order making power to extend coverage of FOISA had not been used prior to the enactment of the Freedom of Information (Amendment) (Scotland) Act, despite assurances during the passage of the Bill that the power would be used and several Scottish Government consultations on the matter.⁹⁵ The provisions of section 5 of FOISA are explained in the section: [Designating a new public authority using the section 5 order making power](#).

Consideration of how FOISA should be extended began shortly after the Act came into force during 2005 when the (then) Scottish Executive initiated a limited review of FOISA that included a consultation to develop "gateway criteria" for the application of section 5 powers.⁹⁶ However, this process, which concluded in 2007, did not yield a consensus on the criteria for determining when a public body should fall within the scope of FOISA.⁹⁶ Subsequently, between November 2008 and December 2009, a series of stakeholder discussion papers on extending FOISA were published, culminating in a formal consultation on expanding FOISA coverage in July 2010.⁹⁶ The Scottish Government consulted on including the following bodies in schedule 1 of FOISA:⁹⁶

- contractors who run privately managed prisons and provide prisoner escort services
- leisure, sport and cultural trusts and bodies used by local authorities
- the Glasgow Housing Association

- the Association of Chief Police Officers in Scotland
- contractors who build and maintain schools
- contractors who build and maintain hospitals
- contractors who build, manage and maintain trunk roads under private finance contracts.

Since the enactment of the Freedom of Information (Amendment) (Scotland) Act 2013, the Scottish Ministers have made section 5 orders in 2013, 2016 and 2019.

- [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2013](#) brought leisure, sports and cultural trusts created by local authorities under the scope of FOISA.⁹⁷
- [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2016](#) brought privately-run prisons, secure accommodation providers, grant-aided and independent special schools, and Scottish Health and Innovations Limited under the scope of FOISA.⁹⁸
- [The Freedom of Information \(Scotland\) Act 2002 \(Designation of Persons as Scottish Public Authorities\) Order 2019](#) registered social landlords (housing associations) and many of their subsidiaries under the scope of FOISA, in relation to functions and services intended for the prevention and alleviation of homelessness, the management of social housing accommodation, and the provision and management of sites for gypsies and travellers.⁷⁷

The most recent consultation on extending FOISA coverage was held in August 2019.⁹⁹ The Scottish Government sought views on whether the scope of FOISA should be further extended to include “organisations providing services on behalf of the public sector” that are not already subject to the Act.⁹⁹ However, the formal response to this consultation was delayed to allow for a broader consultation on FOISA reforms, as recommended by the Session 5 Scottish Parliament Public Audit and Post-legislative Scrutiny Committee (see the section on the [future of freedom of information in Scotland](#) for further information).⁹⁹

The Scottish Government has committed to outlining how the section 5 power will be used as part of its policy objectives for freedom of information from 2024 to 2026.⁵⁶ These objectives also include a commitment to consulting on the extension of FOISA to private and third sector care home providers by early 2025.⁵⁶ However, at the time of writing, no such consultation has been launched. This commitment was first reported in November 2023, with the consultation expected to take place once the National Care Service (Scotland) Bill, now known as the Care Reform (Scotland) Bill, is passed.¹⁰⁰ The anticipated consultation has not yet taken place and the Care Reform (Scotland) Bill is at Stage 3 at time of writing.¹⁰¹ The terms of reference for a proposed advisory group for consulting on extending freedom of information to the care sector was published on 30 April 2025 (for more information, see the section: [What's next for freedom of information](#)).¹⁰²

Freedom of information during the COVID-19 Pandemic

The COVID-19 pandemic impacted freedom of information in Scotland. This section discusses the temporary amendments to FOISA during the COVID-19 pandemic and the special reports and statements published by the Scottish Information Commissioner.

Coronavirus legislation

Coronavirus (Scotland) Act 2020

The Coronavirus (Scotland) Act 2020 was the first coronavirus-related legislation to temporarily affect the freedom of information regime in Scotland.¹⁰³ Under this legislation, the time limit for public authorities to respond to freedom of information requests was extended from 20 to 60 working days.¹⁰³ The Scottish Information Commissioner and public authorities were also permitted to issue formal notices under FOISA electronically.¹⁰³

The Coronavirus (Scotland) Act 2020 also allowed the Scottish Information Commissioner to take the impact of coronavirus on a public authority into account when it failed to comply with the timescales set out in FOISA.¹⁰³ If the Scottish Information Commissioner deemed that a failure was due to coronavirus-related disruption, and that it was reasonable for the public authority not to comply with the timescales, the Scottish Information Commissioner was able to find that the public authority had not failed to comply with [Part 1 of FOISA](#), which provides for the general right of access to information held by public authorities.¹⁰³

Coronavirus (Scotland) (No. 2) Act 2020

The Coronavirus (Scotland) (No.2) Bill as introduced did not contain provisions relating to freedom of information.¹⁰⁴ However, amendments relating to freedom of information were considered at Stage 2.¹⁰⁴ As a result, the Coronavirus (Scotland) (No. 2) Act 2020 ("No. 2 Act") removed the extension to freedom of information deadlines provided for by the Coronavirus (Scotland) Act 2020.¹⁰⁵ The No. 2 Act also provided that Scottish Ministers report on the freedom of information performance of the Scottish Government for as long as the temporary amendments to FOISA were in place.¹⁰⁵

Coronavirus (Extension and Expiry) (Scotland) Act 2021

The Coronavirus (Extension and Expiry) (Scotland) Act 2021 expired the provision in the Coronavirus (Scotland) Act 2020 allowing the Scottish Information Commissioner to decide that a public authority had complied with Part 1 of FOISA in instances where a delay occurred if certain conditions were met.¹⁰⁶ The Scottish Information Commissioner is, however, still able to take the effects of the coronavirus pandemic into account in instances where an application reaches the Commissioner for a decision under section 47(1) of FOISA in respect of a request for information made before 30 September 2021.¹⁰⁶

However, it is unlikely that any relevant applications of this nature would now be received or taken forward given that appeals must be made to the Scottish Information Commissioner within six months.

Coronavirus (Recovery and Reform) Scotland Act 2022

The requirement on the Scottish Government to report on its freedom of information performance during the COVID-19 pandemic ended on 30 September 2022.¹⁰⁷ The remaining temporary provision allowing formal notices under FOISA to be issued electronically was superseded by an equivalent permanent provision in the Coronavirus (Recovery and Reform) Scotland Act 2022 on 1 October 2022.¹⁰⁸

Scottish Information Commissioner Special Reports on COVID-19 and freedom of information

Daren Fitzhenry was the Scottish Information Commissioner during the COVID-19 pandemic and published two special reports on COVID-19 and freedom of information in Scotland.¹⁰⁹ The first report, Impact of Covid-19 on Freedom of Information in Scotland, was published during December 2020.¹¹⁰ In this first report, the Scottish Information Commissioner set out its response to the pandemic and highlighted key actions taken to support and promote freedom of information during the COVID-19 emergency period.¹¹⁰ The report also summarised research into the impact of freedom of information changes on public authorities during the emergency period of the pandemic.¹¹⁰ The key issues, as reported by the Scottish Information Commissioner, that public authorities faced included:¹¹⁰

- reallocation of resources
- closure of premises
- limited access to necessary systems
- staff shortages
- absence of key staff.

Public authorities reported that these issues caused responses to freedom of information requests to take longer but did not lead to an over-reliance on the use of the 60-day time limit or a suggestion that using extended time limits was becoming the norm.¹¹⁰ Where freedom of information delays (either from late responses or using the extended timescales) were caused by the pandemic, it was most often attributed to the reallocation of freedom of information resources within public authorities.¹¹⁰

The report also indicated that the pandemic did not create an influx of requests. Instead, public authorities experienced a decrease in freedom of information request numbers.¹¹⁰ The Scottish Information Commissioner indicated in the report that this may have been a result of a shift to more proactive publishing.¹¹⁰ The report states:

“ This highlights the importance of communicating clearly about change, and the role that a modernised proactive publication duty (which focuses on the public interest in information being proactively published and ensures its swift accessibility to the public) should have in the future.”

Scottish Information Commissioner, 2020¹¹⁰

The report indicated that the return to the 20-day maximum timescale for a response caused further disruption to public authorities.¹¹⁰ This was particularly an issue for public authorities which redeployed staff or which had reduced access to premises and necessary systems during emergency periods.¹¹⁰

Daren Fitzhenry, the then Scottish Information Commissioner, gave an indication of the longer-term impacts of COVID-19 on freedom of information that he was interested in assessing as part of future engagement work with Scottish Ministers. Daren Fitzhenry stated in the first special report on COVID-19:

“ It remains to be seen what impact the good practice in proactive publication seen in April and May will have going forward. In particular, I will be examining what, if any, difference it will make to perceptions and lessons about how to present such information, and would like to see use of existing powers by the Scottish Ministers under section 60 of FOISA to enable modernisation of the statutory proactive publication duty. I have engaged with the Scottish Ministers on that point, through contact with their FOI Unit, and -will continue to do so. I will continue to monitor statistics over the coming quarters to inform next steps, and will report further on those findings.”

Scottish Information Commissioner, 2020¹¹⁰

The second special report, Freedom of Information during and after the Covid-19 pandemic, was published during January 2022.¹¹¹ It analyses the key impacts and reflects on lessons from the experience of freedom of information during the pandemic.¹¹¹ After remarking on the resilience of freedom of information in Scotland during the pandemic, the Scottish Information Commissioner made several observations and recommendations for future freedom of information practice.¹¹¹ The observation and recommendations stated in the report are:

“

- FOI is a core function, and authorities should ensure it is afforded the resources and senior-level attention that it requires. ”
- Authorities must consider the ways in which they create, store and manage records, particularly when using new technologies.”
- Authorities should take a positive, responsive approach to publishing information, learning from the experience of the pandemic. ”
- Information should be provided in context to help people understand it and reduce the risk of misinterpretation. ”
- Public authorities must have regard to their FOI obligations when implementing new systems or processes, including business continuity arrangements. ”
- Steps should be taken to address disparities in access to information between equivalent public services based on how they are owned or managed (e.g., private care homes providing services to a local authority versus care homes run directly by a local authority).”

Scottish Information Commissioner, 2022¹¹¹

The UK COVID-19 Inquiry and freedom of information practice

On 31 October 2023, the Deputy First Minister and Cabinet Secretary for Finance Shona Robison MSP made a statement to the Parliament on the Scottish Government's provision of information to the UK COVID-19 Inquiry.¹¹² In the statement, Shona Robison MSP indicated that the UK COVID-19 Inquiry had requested the Scottish Government release messages exchanged by members of the Government and officials via non-corporate messaging tools, such as WhatsApp, during the emergency period of the pandemic.¹¹² It was in relation to the request that actual messages be released, that the Scottish Government asked for the necessary legal basis for providing the information.¹¹² In response to this, the UK COVID-19 Inquiry issued a formal section 21 order under the Inquiries Act 2005, which required the Scottish Government to produce the relevant documents.¹¹² Shona Robison MSP conveyed in her statement that the Scottish Government received the order on 30 October 2023 and that it would comply with the request by 6 November 2023.¹¹²

The Scottish Information Commissioner, David Hamilton, subsequently made a statement on the status of non-corporate messaging tools under FOISA on 2 November 2023.^{xxiii} The statement read:

xxiii SPICe published a blog on the status of non-corporate messaging tools under FOISA on 25 January 2024.²³

“ There is a significant amount of public discussion currently around the use of WhatsApp and other messaging tools by public authorities. In particular, the ongoing inquiries into the response to the Covid-19 pandemic have seen a specific focus on public authority use of tools such as WhatsApp during the management of the pandemic, and whether relevant information has been appropriately recorded, retained and, where relevant, searched when responding to requests under FOI law. Where tools such as WhatsApp are used by public authority staff to carry out official business, the information generated will, in most cases, fall under the scope of Scotland’s FOI laws. The Freedom of Information (Scotland) Act 2002 defines “information” as “information recorded in any form”. The Commissioner therefore expects public authorities to identify and consider all appropriate recorded information when responding to FOI and EIR requests, including, where relevant, information recorded in exchanges made through WhatsApp, Microsoft Teams, or other messaging tools.”

Scottish Information Commissioner, 2023²²

The UK Covid-19 Inquiry released evidence from Scottish Government WhatsApp messages on 22 January 2024. This evidence included extracts of WhatsApp messages between officials appointed by the Scottish Government. ¹¹³ The evidence led to public concern that deletion of messages from these channels may have been occurring in a manner that is not compliant with FOISA and Scottish Government record retention policies. ¹¹⁴

The Scottish Information Commissioner announced a [performance intervention](#) into the Scottish Government’s communications and record keeping practice under FOISA on 4 February 2024. ¹¹⁴ In a news release on the performance intervention, David Hamilton is quoted as stating:

“ The evidence disclosed during Module 2A of the UK Covid -19 Inquiry raises significant practice concerns which warrant further investigation by my office. It is critical that public officials retain information which allows the public to understand how decisions are reached, for both record keeping requirements and to maintain public confidence. Understanding how decisions are reached is how public trust in decisions are secured and lessons learned for the future. It is also evident that the use of informal communication channels present risks to transparency and accountability within government. My intervention will review current practices as well as identifying actions to be taken to ensure improvements are made in relation to how officials and Ministers use and retain informal communications in future.”

Scottish Information Commissioner, 2024¹¹⁴

On 22 March 2024, the then First Minister Humza Yousaf MSP announced an external review led by Emma Martins (former Channel Islands Data Commissioner) to investigate the use of mobile messaging applications and non-corporate communication apps in the Scottish Government. ¹¹⁵ The review was published on 17 December 2024, and coincided with the publication of a revised Ministerial Code which set out that Ministers should use Government communication systems for all Government business.^{xxiv}

The Scottish Information Commissioner performance intervention, at the time of writing, is ongoing. ¹¹⁴ David Hamilton, the Scottish Information Commissioner, following the Emma

xxiv SPICe published a blog on the new Scottish Ministerial Code on 21 January 2025. ¹¹⁶

Martins review stated:

“ I welcome Emma Martins' report, and congratulate her on a wide-ranging review which puts behaviours and culture at its heart. Her review complements much of my own office's thinking and approach to our ongoing intervention. I note, however, that the Scottish Government's plans to remove WhatsApp from corporate devices won't be enforceable on personal devices. I would remind everyone that any public authority information, wherever it is held, will be subject to Scotland's FOI laws.”

Scottish Information Commissioner, 2024¹¹⁷

The future of freedom of information in Scotland and potential for reform

The future of freedom of information in Scotland, along with potential reforms to FOISA, has been the subject of consultations by both the Scottish Parliament and Scottish Government since 2017. These consultations were prompted by a post-legislative scrutiny inquiry conducted by the Session 5 Public Audit and Post-legislative Scrutiny Committee between 2017 and 2020.¹¹⁸

Post-legislative scrutiny of the Freedom of Information (Scotland) Act

The Public Audit and Post-legislative Scrutiny (PAPLS) Committee undertook post-legislative scrutiny of FOISA during Session 5.¹¹⁸ This scrutiny began in 2017 when FOISA was shortlisted by the PAPLS Committee for post-legislative review and concluded on 19 May 2020 with the publication of a [report](#).¹¹⁹ The report concluded that while FOISA had significantly improved the transparency and accountability of public authorities, it needed updates to address the evolving nature of public service delivery and communication methods.¹¹⁹ The PAPLS Committee made an overarching recommendation that the Scottish Government conduct a public consultation before bringing forward legislation. The Scottish Government responded positively to the Committee's report and agreed to a public consultation to gather wider views on potential legislative changes.¹²⁰

The PAPLS Committee's specific recommendations were structured around several key themes: who is covered by the Act, what is covered by the Act, proactive publication, resourcing and fees, requests for information, and reviews and appeals.¹¹⁹ This section summarises the scrutiny and recommendations laid out in the report.

Who is covered

The PAPLS Committee noted that a key theme in evidence was who is covered by FOISA and how the legislation should be amended to accommodate the changing nature of public service delivery in Scotland.¹¹⁹ There was a “general view” that FOISA had failed to keep pace with the changing nature of public service delivery in Scotland, meaning that several types of organisation that deliver public services or receive significant public funds do not fall within its scope.¹¹⁹ As such, the Committee agreed that:

“ in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.”

The Scottish Parliament Session 5 Public Audit and Post-legislative Scrutiny Committee, 2020¹¹⁹

At the time of the PAPLS Committee's inquiry, the Scottish Government was inviting views on extension of coverage to organisations that provide public services under section 5 of FOISA.⁹⁹ The subsequent consultation analysis indicated that there was support for an extension of FOISA coverage with 47% of respondents in favour.⁹⁹ Only 22% of

respondents did not support an extension and 31% were either not sure or did not address the question.⁹⁹ The consultation analysis states:

“ The Campaign for Freedom of Information in Scotland and UNISON Scotland, together with most of the individual respondents expressed consistent enthusiasm for an ambitious approach to extension. This was supported to a significant extent by the detailed response from the Scottish Information Commissioner who also advocated for substantial extension, albeit qualified by an emphasis on certain areas identified as particular priorities. By contrast a number of stakeholders, predominantly representing the third sector and many with an interest in the delivery of health and social care services, expressed significant concerns about the impact of extending FOISA coverage in terms of administrative burden and the willingness of third or private sector organisations to enter into contracts with public authorities. These stakeholders tended either to oppose further extension of FOISA outright or to urge a more cautious approach.”

Scottish Government, 2020⁹⁹

The PAPLS Committee suggested several remedial options in consideration of the slow pace at which organisations have been designated as public authorities under section 5 of FOISA and concern that the legislation is not sufficiently agile for the public sector landscape.¹¹⁹ These included a “factors” approach to extending FOISA based on functional tests of the extent to which an organisation is delivering public services and a “gateway clause” which would bring bodies carrying out public functions and in receipt of public funds within the scope of FOISA.¹¹⁹ The PAPLS Committee state in its report:

“ The Committee recognises that any solution needs to be proportionate. It therefore supports, in principle, the idea of a “factors” approach to the extension of FOISA, which is based on functional tests, such as the extent to which an organisation is delivering a public function; the degree of public interest in relation to the function/ service being delivered and the cost to the public purse in delivering the function or service. The Committee is also attracted to the idea of the legislation being amended to introduce a “gateway clause” which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. As such, the Committee recommends that the Scottish Government consults on amending FOISA to introduce a mechanism by which relevant elements of non-public sector bodies would automatically fall within the scope of FOISA if they fulfilled certain criteria relating to the provision of public services or functions and/or receipt of significant public funds.”

The Scottish Parliament Session 5 Public Audit and Post-legislative Scrutiny Committee, 2020¹¹⁹

The Scottish Information Commissioner, in evidence to the PAPLS Committee, also highlighted a loophole in the current legislation which exempts jointly owned bodies (i.e., bodies owned by the Scottish Ministers and one or more public authorities) from FOISA .

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“ I would first like to clarify that a company which is jointly owned by two or more public authorities **will** currently fall within the scope of FOISA, **unless** one of those public authorities is the Scottish Ministers. This situation appears to have arisen inadvertently as a result of the drafting of section 6(1), whereby the current drafting makes a company subject to FOISA if it is wholly owned: a) by the Scottish Ministers; **or** (my emphasis) b) by any other Scottish public authority. While section 6(1)(b) of FOISA refers to a singular ‘public authority’, this provision should be read in conjunction with the Interpretation Acts, which set out that, unless a contrary intention is indicated, words in the singular which are contained in legislation will include the plural (and vice versa). Companies which are wholly-owned by one or more Scottish public authorities will, therefore, be covered by virtue of 6(1)(b), while companies which are wholly owned by the Scottish Ministers and one or more public authorities will fall out of scope. An amendment to 6(1) to clarify that the latter is also covered (along with relevant consequential amendments to section 6(2)) would address this oversight. At the same time, it may be prudent, for clarity, to make it clear that any reference to “any other Scottish public authority” in section 6 includes “one or more Scottish public authorities.”

Scottish Information Commissioner, 2022¹²¹

The PAPLS Committee subsequently recommended that this anomaly is addressed in future amendments to FOISA (alongside a list of other [technical amendments relating to reviews and appeals supplied by the Scottish Information Commissioner in written evidence](#)).¹¹⁹

What is covered

The PAPLS Committee reported that whilst there was an increase in the level of information routinely recorded by public authorities, evidence indicated concerns about the use of unofficial channels of communication (e.g., WhatsApp) and the extent to which such information generated on these channels is being recorded.¹¹⁹ The PAPLS Committee asserted in its report:

“ The freedom of information regime is underpinned by effective record keeping and management. The Committee emphasises the importance of documenting and recording relevant information. It is clear that there should be no deliberate attempt to evade FOISA by failing to do so. The Committee considers that much greater emphasis needs to be given by the public sector as a whole to adequately creating information trails, such as relevant drafts, memos, emails, correspondence and minutes of meetings, which show how key decisions have been reached and how public funds have been spent.”

The Scottish Parliament Session 5 Public Audit and Post-legislative Scrutiny Committee, 2020¹¹⁹

The PAPLS Committee also considered the possibility of amending in legislation what is meant by information and the extension of guidance that would set requirements for certain information to be recorded and accessible under FOISA.¹¹⁹ The Scottish Information Commissioner also proposed a technical amendment which would have the effect of excluding environmental information as defined by the EIRs from FOISA.¹²²

Proactive publication and resourcing of freedom of information

The PAPLS Committee noted there was a consensus that the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information.¹¹⁹ The SIC recommended that the requirement for public authorities to adopt a publication scheme should be removed and replaced with a statutory duty to publish information, supported by a new legally enforceable “Code of Practice on Publication” to ensure consistency.¹¹⁹ The PAPLS Committee recommended that the Scottish Government consult on this amendment to FOISA.¹¹⁹

The PAPLS Committee also advocated for a cultural shift in the way public authorities approach proactive publication and the resourcing of FOI functions.¹¹⁹ The PAPLS Committee specifically stated that:

“ [...] authorities need to think carefully about how the public wishes to access the information that they hold - whether by topic, sector or geographical area - and reflect this in the way in which they create, store and publish information. The Committee recognises that, in the short term, the development of a coherent system of proactive publication may require an initial increase in resources, but notes the significant benefits in the longer-term, including increasing public trust in public authorities, but also in reducing the number of requests.”

The Scottish Parliament Session 5 Public Audit and Post-legislative Scrutiny Committee, 2020¹¹⁹

Requests for information

Evidence submitted to the PAPLS inquiry highlighted the varying procedures for making freedom of information requests across public authorities.¹¹⁹ The PAPLS Committee acknowledged the frustrations experienced by some requesters due to this. However, the Committee also noted that establishing a specific format or template for requests could hinder the right to information.¹¹⁹ Instead, it recommended that the Scottish Government consult on amending FOISA to allow for the transfer of information requests between public authorities, similar to the provisions under the EIRs.¹¹⁹

Witnesses to the inquiry raised concerns about the current arrangement, where the deadline for public authorities to respond is reset to a new 20-day period if they seek clarification from information requesters.¹¹⁹ Alasdair Clark, an individual journalist responding to the Call for Views, suggested that officials sometimes delay asking for clarification until the end of the 20-day limit, causing unnecessary delays.¹²³ The Scottish Information Commissioner expressed a preference for a “pause-the-clock” mechanism instead of one that “resets the clock”, but noted that public authorities do not commonly use response delaying tactics such as asking for clarification at the end of the 20-day period.¹¹⁹ This approach was also supported by the then Minister for Parliamentary Business, George Adam MSP.¹¹⁹ The PAPLS Committee subsequently recommended that the Scottish Government consider a “pause-the-clock” mechanism in its consultation on legislative changes.¹¹⁹

The nature of information requests was another key area of consideration during the inquiry. The PAPLS Committee acknowledged and referenced a previous performance

intervention by the Scottish Information Commissioner regarding how the Scottish Government handled requests from journalists and MSPs.¹¹⁹ Additionally, public authorities expressed concerns that requests made for commercial or research purposes might not align with the spirit of FOISA.¹¹⁹ However, the PAPLS Committee emphasised the principle of being applicant blind, meaning that all information requests should be treated equally, regardless of the requester's identity.¹¹⁹ On a similar matter, albeit related to exemptions applied to information requested, the PAPLS Committee recommended that the Scottish Government consult on amending confidentiality exemptions in FOISA to address concerns about freedom of information requests on public sector contracts.¹¹⁹ The Scottish Information Commissioner also proposed a technical amendment which would have the effect of adding a requirement that exemptions are read in a restrictive way, to complement the default position that information should be disclosed under FOISA.¹²²

Other concerns raised related to information requests deemed to be vexatious.¹¹⁹ Respondents and witnesses in evidence to the PAPLS Committee raised concerns about the meaning of "vexatious use" and how to objectively assess whether a request is vexatious.¹¹⁹ The PAPLS Committee therefore recommended that the use of the section 14 exemption should be revisited and suggested that concerns over vexatious use of FOISA could be dealt with through implementation of additional guidance from the Scottish Information Commissioner.¹¹⁹

Resourcing, reviews, and appeals

Evidence submitted to the PAPLS Committee's inquiry highlighted the resource burden of responding to FOI requests when faced with an increasing demand for information.¹¹⁹ Given the impact on resources, some submissions called for a review of the fees that could be charged for responding to requests through the [Freedom of Information \(Fees for Required Disclosure\) \(Scotland\) Regulations 2004](#).¹¹⁹ Both the Scottish Government and the Scottish Information Commissioner proposed estimating the staff time required to handle the request, rather than the cost of compliance.¹¹⁹ The PAPLS Committee recommended that the Scottish Government include this option in a broader consultation on other legislative changes.¹¹⁹

The Scottish Information Commissioner in its written submission to the PAPLS Committee suggested removing section 48 prohibitions against appeals being made against the Crown Office and Procurator Fiscal Service and the Scottish Information Commissioner.¹²² The Commissioner noted that only a small number of appeals have been excluded by section 48 and that there is no comparable provision in the UK Freedom of Information Act 2000.¹²² Similarly, the Scottish Information Commissioner recommended the section 52 power of veto given to the First Minister is removed from FOISA.¹²² The section 52 power applies to a decision or enforcement notice related to the Scottish Government's failure to provide information.⁵ The Scottish Information Commissioner indicated that this power does not serve the purposes or objectives of FOISA.¹²² The PAPLS Committee recommended that both revisions are consulted on by the Scottish Government.¹¹⁹

As mentioned previously, the Scottish Information Commissioner provided a list of technical amendments in its submission to the PAPLS Committee. Three of the amendments proposed by the Scottish Information Commissioner related to reviews and appeals. The relevant proposed amendments are set out below.¹²²

1. Amend section 53(1)(a) of FOISA to make it clear that failure to comply with a decision in time can also be referred to the Court of Session.
2. Amend section 74 of FOISA to clarify that decision notices can be given by email.^{xxv}
3. Introduce an exemption for information provided to the Scottish Information Commissioner under or for the purposes of FOISA.

The PAPLS Committee recommended that the Scottish Government include the proposed amendments in a consultation on legislative changes to FOISA.¹¹⁹

Responses to the Committee report

The Scottish Information Commissioner's initial response to the PAPLS Committee report was set out in the [Scottish Information Commissioner Annual Report for 2021 to 2022](#). The annual report indicates that following the report, the Scottish Information Commissioner:¹²⁴

- conducted research on current practices and potential future approaches to proactive publication
- started sharing insights from decisions, including those related to managing new forms of information and communication
- initiated efforts to improve guidance provided to public authorities and the public on various aspects of freedom of information law and rights.

The PAPLS Committee Session 5 Legacy Paper summarised its consideration of FOISA and set out its recommendation for the Session 6 Parliament.¹²⁵ The Legacy Paper states:

“ The Committee’s report on Freedom of Information laws demonstrated that there are clear weaknesses with the current legislative framework. The Committee is strongly of the view that a significant shift is required in public bodies to move to proactive publication, with a focus on making accessible the information that members of public want to see (without having to request it). Public services are now delivered through a wide variety of entities, some of which still remain outside the scope of FOI legislation. This needs to change. The Committee recommends that the next Parliament robustly pursues the Committee’s recommendations to ensure that the Scottish Government makes the necessary changes.”

The Scottish Parliament Session 5 Public Audit and Post-legislative Scrutiny Committee, 2021¹²⁵

xxv As discussed in [Coronavirus legislation](#), electronic notices under FOISA were first permitted on a temporary basis by the Coronavirus (Scotland) Act 2020. The Coronavirus (Recovery and Reform) Scotland Act 2022 made these provisions permanent.

Consultations on freedom of information reform

The Scottish Government committed to consulting on reforms to FOISA in response to the PAPLS Committee report.¹²⁰ This consultation was launched in November 2022.¹²⁶ Shortly before this, Katy Clark MSP proposed a Member's Bill to reform FOISA and initiated a separate consultation on the proposal.¹²⁷ This section discusses the content and responses from both consultations.

The proposed Freedom of Information Reform Bill

In January 2022, the Campaign for Freedom of Information in Scotland published a draft Bill along with explanatory notes aimed at reforming FOISA.¹²⁸ This draft Bill was later converted into a draft consultation for an MSP to adopt.¹²⁸

Katy Clark MSP lodged the draft proposal for a Freedom of Information Reform (Scotland) Bill (a Member's Bill) on 1 November 2022.¹²⁷ A consultation on the proposal closed on 14 March 2023 and Katy Clark MSP has since secured the right to introduce the proposed Bill.¹²⁷ The Campaign for Freedom of Information in Scotland is cited as assisting in the drafting of the proposed Bill.¹²⁹ Katy Clark MSP states in the consultation document:

“ I am consulting on a draft proposal for a bill to improve existing freedom of information legislation including to:”

- Deliver on the recommendations of the PAPLS Committee”
- Update the law and ensure compliance with human rights law”
- Strengthen the enforceable right of access to information”
- Extend FOISA to those bodies delivering public services, services of a public nature and publicly funded services”
- Introduce a new statutory role of Freedom of Information Officer (FIO)”
- Provide agility and clarity in defining duties however information is stored and transmitted such as using temporary WhatsApp message groups”
- Provide a legal duty for proactive publication”
- Improve enforcement.”

The Scottish Parliament, 2022¹²⁹

Katy Clark MSP, in the consultation document, proposed a number of reforms to FOISA, which are set out in the following list.¹²⁹

1. Introduction of a purpose statement to FOISA, similar to the statement in Article 1 of the Aarhus Convention, to clarify the intended outcomes of the legislation.
2. Amendments to section 1 of FOISA (also known as the General Entitlement) to pause the clock, rather than reset it, when a public authority requests clarification on an information request.

3. Review of the definition of information in FOISA to ensure it can accommodate new methods of public service delivery (e.g., extraction of information from algorithms)
4. Reforming the definition of public authorities to ensure it covers bodies (namely, jointly owned public bodies, private sector bodies, and third sector bodies) delivering public services, services of a public nature, and publicly funded services.
5. Amendments to sections 4 to 6 of FOISA to improve the pace at which bodies are designated as public authorities under FOISA (e.g., by ensuring publicly owned companies owned by public authorities and public bodies with mixed or no reserved functions are automatically covered).
6. Introduction of a statutory role for a Freedom of Information Officer in each public authority to ensure compliance with the legislation and elevate the profile of freedom of information within the organisation.
7. Establishing a legal duty for public authorities to proactively publish information.
8. Reforms to FOISA to support good records management and strengthen the impact of existing records management legislation.
9. Applying the public interest test to all exemptions in FOISA and considering a reduction in the number of exemptions.
10. Extending the scope of enforcement notices to include failures to comply with the Codes of Practice issued under FOISA.
11. Removal of section 48 of FOISA which excludes appeals to the Scottish Information Commissioner against the Procurator Fiscal or the Lord Advocate where there is a dispute about the extent to which the information requested concerns criminal prosecution and investigations of deaths in Scotland.
12. Removal of section 52 of FOISA which allows the First Minister to overrule a Scottish Information Commissioner decision against the Scottish Ministers where the First Minister considers the information in question to be of exceptional sensitivity.

Response to the consultation

The summary of consultation responses was published on 7 December 2023.¹³⁰ Katy Clark MSP, in the commentary on the summary of consultation responses, states:

“ The consultation process has shed light on many important issues:”

- The need for legislative reform given the failure to address operational problems and legislative inadequacies”
- The extent of migration of publicly funded services from publicly owned bodies”
- The delay in designating bodies under FOISA”
- The administrative burden on the Office of the Scottish Information Commissioner created by designating many more bodies under FOISA at the one time”
- The need to extend FOISA in a manageable and proportionate way, with appropriate training, guidance and advice provided to each sector (and, importantly, service-users and the wider public) in advance of commencement date(s)”
- The need for a proactive duty to provide information and the significant imbalance between the public sector and others providing public services in relation to the provision of information”
- The need for legislation to be drafted in such a way to create general powers which address new circumstances”
- The need for legislative changes which are proportionate and reasonable given the support for them indicated in this consultation and previous consultations.”

The Scottish Parliament, 2023¹³⁰

General aim of the proposed Member's Bill

There were 98 respondents to the consultation. The summary of consultation responses indicates 74.5% of respondents were in favour of the proposed Bill and 20.9% of respondents opposed it. ¹³⁰ Additionally, all the regulators which responded, including the Office of the Scottish Charity Regulator (OSCR), the Scottish Public Services Ombudsman, and the Scottish Information Commissioner, were "partially supportive" of the proposed Bill.

The summary of consultation responses indicates the primary reasons given by respondents supporting the proposed Bill are that reform to FOISA in the broad ways suggested could help to improve:

- the pace at which the legislation keeps up with changes in public service delivery
- the proactive publication of information
- access to information held by private and third sector organisations. ¹³⁰

Those opposing the proposed Bill indicated that the broad reforms to FOISA suggested in the consultation document could cause a significant administrative and regulatory burden to third sector organisations funded by public money, such as sports organisations. ¹³⁰

Specific aims of the proposed Member's Bill

At time of writing, the specific proposals for FOISA reform have not yet been published and the proposed Bill has not been introduced to the Parliament. However, the consultation did seek views in seven broad areas.¹³⁰

1. Designation of private sector organisations under FOISA

- 74% of respondents supported the proposal to designate private sector entities under FOISA if they are publicly funded and provide public services. The summary document highlights respondents' concerns about the differing provisions between FOISA and EIRs for obtaining information on private operators delivering public services. The summary document states there was a clear majority for designation of private social care providers and public authorities under FOISA, but does not provide data on the extent of support.
- 9.1% opposed the proposal, expressing concerns about potential burdens on service providers, competitive disadvantages for Scottish companies, and the need for further consultation with those affected.

2. Designation of third sector organisations under FOISA

- 70.7% of respondents supported the proposal to designate third sector entities under FOISA if they are publicly funded and provide public services. The summary document indicates this support was cross sector and highlights responses from public bodies in Scotland, local authorities, community councils, charities, and NHS boards.
- 22.7% opposed the proposal, with responses highlighted the consultation document citing concerns about a one-size-fits-all approach, the sustainability of the third sector, and potential negative impacts on specific sectors, like sports.

3. Creation of a statutory Freedom of Information Officer (in each public authority under FOISA)

- 63% of respondents supported the proposal, with responses highlighted in the consultation document suggesting such a role could improve compliance and elevate the role of freedom of information in the public authority.
- 11% opposed the proposal, with responses highlighted in the consultation document citing concerns that such a role is unnecessary and may create undue resource burdens on charities potentially designated as a public authority under FOISA.

4. A new statutory duty to publish information

- 73.6% of respondents supported the proposal, with responses highlighted in the consultation document indicating that the current publication scheme model is outdated.
- 8.3% opposed the proposal, with responses highlighted in the consultation document citing concerns about additional work, resource implications, and the lack of clarity on what is being proposed.

5. Reduction to the number of exemptions provided for by FOISA

- 47.1% supported the proposal, with some respondents highlighted indicating a view that all exemptions should be subject to the public interest test, as is the case under the EIRs.
- 12.6% opposed the proposal, with respondents highlighted indicating the current system works well, and citing concerns about a "blanket" reduction in exemptions.

6. Preventing the use of confidentiality clauses between public authorities and contractors providing public services

- 65.7% of respondents supported the proposal. Supporters emphasized the importance of public safety, good practice, and preventing the abuse of confidentiality clauses.
- 9% opposed the proposal, with respondents highlighted indicating the need for clarification on the problem and citing concerns about the risk of litigation.

7. Updates to FOISA to accommodate updates in Scottish Government procurement policy

- 56.25% supported the proposal with the respondents highlighted in the consultation document indicating support for the principle that all relevant information about procurement contracts should be disclosed.
- 6.25% opposed the proposal, with respondents citing concerns about commercial sensitivities and the lack of clarity on what is being proposed.

Scottish Government consultation on freedom of information

The Scottish Government consultation on "Access to information rights in Scotland" ran between 29 November 2022 and 14 March 2023.¹³¹ The consultation addressed several areas of FOISA, including:¹³¹

- inclusion of public service contractors under FOISA
- Scottish Ministers' powers under section 5 of FOISA to extend access to information rights to other public bodies in Scotland
- the PAPLS Committee recommendation for a "gateway clause" (i.e., a clause which would which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA)
- developments in technology and the definition of information under FOISA
- improving proactive publication of information by public bodies
- general issues related to making sure FOISA remains fit for purpose (e.g., fees regulation, compliance times when there is a request for clarification, transferring requests between public bodies, and amendments to exemptions and prohibitions)

under FOISA).

Consultation analysis

The Scottish Government published its consultation analysis on 30 June 2023.¹³² The analysis notes that 83 written consultation responses from 70 organisations and 13 individuals were received.¹³² The consultation analysis also notes that half of the organisations responding were themselves public authorities under FOISA.¹³² The remaining organisations were from a variety of third sector, civil society and other organisations in Scotland.¹³²

The Scottish Government summarised the responses to the consultation over four sections, covering the following areas.¹³²

1. Agility of the FOISA regime in the context of varied models of service delivery.
2. Developments in information technology and the impact on access to information.
3. Improving proactive publication.
4. Technical updates to FOISA.

Agility of the FOISA regime

The section on the agility of the FOISA regime assessed views on including private and third sector contractors delivering public services under FOISA, the powers of Scottish Ministers under section 5 of FOISA to extend access to information rights to other public bodies, and the PAPLS Committee's recommendation for a "gateway clause".¹³²

The Scottish Government consultation analysis indicated there was a "clear divergence" in views between public authority respondents and civil society (including third sector) respondents.¹³² The consultation summarises this as public authorities generally providing responses suggesting the existing law is sufficient to ensure access to information, including about services delivered by private and third sector providers.¹³² In contrast, civil society and third sector respondents, along with the Scottish Information Commissioner, were described as "more sceptical".¹³² The Scottish Information Commissioner's response to the consultation is quoted in the analysis and states:

“ The fundamental issue in relation to access to information held by the majority of ‘outsourced’ services that deliver public functions and services is that those services are not, generally, directly covered by FOI law. [...] Where an organisation is not directly covered by FOI law there will, of course, also be no direct right of appeal to the Commissioner. [...] It should also be noted that, when a request is made to a public authority which relates to information held by a third-party contractor, in many cases a requester may simply receive an ‘information not held’ response under section 17 of FOISA from the public authority; the authority only being required by FOI law to consider the information that it holds in relation to the request. In such cases an authority may exercise caution when considering whether to direct a requester on to a third-party that is not covered by FOISA, given that the third-party organisation will normally face no statutory duties and responsibilities when responding to requests.”

Scottish Information Commissioner, 2023¹³³

Additionally, there was mixed support for clearer guidance on the status of information held by contractors delivering public services (i.e., those provided directly to members of the public, for which the public authority itself has responsibility) and ancillary services (i.e., internal services provided to a public authority which it has contracted to an external provider).¹³² Some respondents to the Scottish Government consultation, such as Caledonian Maritime Assets Ltd, South of Scotland Enterprise, and Highlands and Islands Enterprise, are referred to as indicating such a distinction can already be drawn from the Public Records (Scotland) Act 2011.¹³² Caledonian Maritime Assets Ltd is quoted in the consultation analysis, as stating:

“ The distinction can already be made in practice and in guidance within the existing statutory framework. The distinction is important because it avoids disproportionate oversight of non-public records held by service providers providing ancillary services.”

Scottish Government, 2023¹³²

Highlands and Islands Enterprise is quoted as referring to the Model Records Management Plan required by the Public Records (Scotland) Act 2011, which itself states:

“ An authority’s plan must include reference as to what public records are being created and held by a third party carrying out a function of the authority and how these are being managed to the satisfaction of the authority.”

National Records of Scotland, 2019¹³⁴

The Scottish Government consultation summarises those opposing a distinction between public and ancillary services in FOISA as holding the view that:

“ the method of delivering a public service should not have an impact upon transparency and access to information under FOISA.”

Scottish Government, 2023¹³²

There was a consensus view that more assurance about Scottish Ministers' future use of its power under section 5 of FOISA to extend the legislation to further entities would be welcome. The majority of respondents also indicated support for using the section 5 power to extend FOISA to a wider range of bodies. There was similar support for amendments to clarify the operation of section 6 of FOISA to ensure that companies wholly owned by a combination of Scottish Ministers and other public authorities are subject to FOISA.

There was limited support for the gateway clause proposal with only 18 of 65 respondents indicating support. The Scottish Information Commissioner was opposed to the proposal and instead offered an alternative approach. The consultation response states:

“ My principal concerns around the introduction of a ‘gateway’ clause relate to the lack of certainty, the lack of manageability and lack of control that such a clause would bring. [...] An appropriate Bill could be introduced to enable the Scottish Parliament to make revisions to Schedule 1 to FOISA. The combination of this and section 5 would enable both Ministers and the Scottish Parliament to play a key role in this important area. Such a Bill could also consider introducing a requirement for a review of the legislation allowing the Scottish Parliament to consider further updates to Schedule 1 on a periodic basis – e.g. every five years. Such a measure would enable the Parliament not only to ensure that FOISA is ‘fit-for-purpose’ for today’s society, but also that it can be ‘future-proofed’ to meet the challenges of tomorrow.”

Scottish Information Commissioner, 2023¹³³

Developments in information technology

The section on developments in information technology covered views on updates to the section 60 Code of Practice, the use of unofficial platforms (e.g., WhatsApp) for public authority business, and the definition of information in FOISA.¹³² The consultation analysis indicates that respondents typically acknowledged the compliance risks associated with the use of unofficial platforms for conducting business within Scottish public authorities.¹³² While there were various suggestions on how to mitigate these risks, most respondents indicated that further guidance to support better organisational practice would be more appropriate remedy than a change in the law.¹³²

There were mixed views on whether a more detailed definition of information should be introduced into the legislation.¹³² However, most respondents agreed that if such a definition were to be included, it should align with the definition provided in the EIRs, which encompasses any information in written, visual, aural, electronic, or any other material form.¹³²

Improving proactive publication

The consultation sought views on the duty to maintain a publication scheme and the Scottish Information Commissioner's proposal to replace the duty to maintain a publication scheme with a duty to publish information.¹³²

Most respondents (45 out of 60) were in favour of updating sections 23 and 24 of FOISA (which provide for the model publication scheme and the duty for public authorities to maintain a publication scheme).¹³² The consultation analysis provides some further context on respondents' views on the publication scheme duty:

“ Most of those explaining why they agreed that the provisions of sections 23 and 24 required to be updated referred to the changed ways in which people seek to access information about the work of public authorities. There was a widely held view that people rarely use the scheme itself as a tool for identifying and finding available information. Rather, people tend to rely on search engines, A-Z guides on authorities' websites etc. There was also a view among some of these respondents that the requirement to maintain a publication scheme is seen as a 'tick box' exercise by authorities and adds little real value to their overall approach to making information available about their work.”

Scottish Government, 2023¹³²

Most respondents (44 out of 60) were also open to the Scottish Information Commissioner's proposal to replace the current statutory requirement for maintaining a publication scheme with a statutory duty to proactively publish information, supported by a Code of Practice.¹³² The Scottish Information Commissioner's response to the consultation provides further detail on how this proposal could operate:

“ Although the FOISA ‘publication scheme’ duty has made significant inroads towards the objective of supporting proactive publication, the current model in sections 23-24 of FOISA is outdated. [...] I recommend the removal of the requirement for public authorities to adopt a publication scheme, and replace this with a simple statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication, with both mandatory and guidance sections. A new Code of Practice on Publication would offer flexibility to ensure that the duty can remain up-to-date with fast-paced technological advances and the increasing expectation that information will be quickly and easily accessible, without having to make a request.”

Scottish Information Commissioner, 2023¹³³

The consultation analysis also highlights the various types of information that public authorities indicated they would like to see proactively published, with financial and budgetary information being the most frequently mentioned.¹³² Other areas of interest included data, information about services, information underpinning decisions and policies, performance information, information about contracts, information about people involved in services and their interests, diversity data, demographic data, and information on major projects.¹³²

Technical updates to FOISA

The consultation also sought views on a number of technical updates to FOISA, the majority of which were raised during the PAPLS Committee post-legislative scrutiny of the Act.¹³² The consultation analysis indicates the following key outcomes from consultation questions seeking views on technical updates to FOISA.¹³²

1. **Cost of compliance:** 42 out of 63 respondents indicated they would support a change to FOISA and the fees regulation to permit public authorities to estimate excessive cost of compliance in terms of staff time, rather than financial cost.
2. **Transfer of requests between public authorities:** Views were split on the proposal for a provision in FOISA that permits the transfer of information requests to other public authorities in a similar way to that provided for by Regulation 14 of the EIRs. 22 of 59 respondents indicated they would favour the proposal, 22 respondents indicated they would not favour the proposal, and 15 indicated they had no view.
3. **Clarification provisions:** 17 of 63 respondents indicated a preference for a "pause the clock" mechanism when a clarification on an information request is needed, while 7 favoured a defined period for seeking clarification, 29 favoured no change to the current "reset the clock" approach, and 10 indicated no preference.
4. **Section 48 prohibitions:** 29 of 56 respondents indicated they are in favour of removing section 48 prohibitions on the Scottish Information Commissioner. Only 6 respondents opposed this proposal. At present, the Scottish Information Commissioner is not able to investigate appeals about the handling of information requests by the Scottish Information Commissioner, a Procurator Fiscal, or the Lord Advocate (in the Lord Advocate's capacity as head of the criminal prosecution and investigation of deaths in Scotland).
5. **First Ministerial veto:** There was majority support among respondents for removing

the section 52 provision allowing the First Minister to issue a certificate to overrule a Scottish Information Commissioner decision in respect of the handling of any request by the Scottish Ministers where the information in question is deemed to be of exceptional sensitivity.

6. **Presumption in favour of disclosure:** 25 of 57 respondents indicated they were opposed to the proposal that a provision, similar to the EIRs, should be added to FOISA requiring exemptions be interpreted in a restrictive way and that there should be a presumption in favour of disclosure. 22 respondents were in favour of the proposal and 10 did not hold any view.
7. **Failure to comply with a decision on time:** 30 of 57 respondents supported empowering the Scottish Information Commissioner to refer failures to comply with decisions to the Court of Session. Only 8 opposed the proposal and 19 did not have a view.
8. **Environmental information and FOISA:** 30 of 57 respondents supported amending the definition of information in FOISA to specifically exclude environmental information within the definition of Regulation 2(1) of the EIRs. 16 respondents opposed the change and 11 respondents indicated they had no view.
9. **New exemption:** 35 of 59 respondents were in favour of the proposal to create an exemption applicable to information received by the Scottish Information Commissioner under, or for the purposes of, fulfilling statutory duties under FOISA (e.g., information received in connection with appeals being considered by the Scottish Information Commissioner). Only 6 opposed the proposal and 18 indicated they did not have a view.

Response to the consultation

The Scottish Government published its response to the consultation on 28 November 2023.¹³⁵ Its position on amending FOISA was stated in the response to the consultation:

“ The Scottish Government considers that post-legislative scrutiny of FOISA, and the subsequent Scottish Government consultation has been a useful exercise to examine the operation of access to information rights in Scotland – changes to FOISA having last been made by the Freedom of Information (Amendment) (Scotland) Act 2013. The Scottish Government recognises that there are areas where further amendments to primary legislation could be of some value, to make incremental improvements to the regime. We therefore do not rule out a further FOISA Amendment Bill in the future. However, the Scottish Government believes that the fundamentals of the access to information rights regime, provided by FOISA and Environmental Information (Scotland) Regulations 2004 (EIRs), remain fit for purpose, so we do not propose to introduce new primary legislation to amend FOISA within the current session of the Scottish Parliament. Rather, the Scottish Government proposes to address issues which have been raised in the post-legislative scrutiny process within the framework provided by the existing primary legislation – including through the use of existing secondary legislation making powers.”

Scottish Government, 2023¹³⁵

What's next for freedom of information reform?

Scottish Parliament

While the Scottish Government has decided to not legislate to reform FOISA, Katy Clark MSP has secured the right to introduce the Freedom of Information Reform (Scotland) Bill.¹²⁷ In accordance with Rule 9.14.15 of the Standing Orders of the Scottish Parliament, the Bill must be introduced by 3 June 2025, or in exceptional cases, by 30 September 2025, to be considered by the Parliament during Session 6.¹³⁶

Scottish Government

The Scottish Government published its freedom of information policy objectives for 2024 to 2026 on 22 June 2024.⁵⁶ The approach is stated as non-legislative and consists of three workstreams.⁵⁶

Workstream 1: Consideration of and use of Scottish Ministers' powers to extend coverage of FOISA

The Scottish Government has reiterated its commitment to undertake a public consultation on the extension of FOISA to care homes and care from home services. It is not clear when this consultation will take place given the delays and pauses to the National Care Service (Scotland) Bill, now Care Reform (Scotland) Bill. The policy objectives state that the consultation was to be launched in late 2024 or early 2025, but no such consultation has been published yet. The Scottish Government have, however, published a [terms of reference](#) and [membership](#) for a proposed advisory group for the consultation on extending FOISA to care homes.¹⁰² This terms of reference, published on 30 April 2025, states the aim of the proposed advisory group as:

“ To input into the development of the Scottish Government’s approach to consultation on extension of FOISA to private and third sector providers of care home and ‘care at home’ services, in order to ensure the approach to consultation is robust.”

Scottish Government, 2025¹⁰²

The Scottish Government has also indicated that it plans to develop and set out an approach to the wider use of the section 5 extension power. Stakeholder engagement was expected to begin in late 2024, with an approach agreed by summer 2026, and an ongoing programme of further extension to be developed in late 2026.

Workstream 2: Updating statutory guidance for public authorities

The Scottish Government has indicated it will consult with the Scottish Information Commissioner and the Keeper of the Records of Scotland on revisions to the section 60 and 61 Codes of Practice. The Scottish Information Commissioner indicated this consultation was underway in its annual report for 2023-24 and at the Standards, Procedures and Public Appointments Committee meeting with the Commissioner on 30 January 2025.^{137 138}

Workstream 3: Maintaining full freedom of information coverage of the public sector

in Scotland

The Scottish Government has committed to undertaking a comprehensive review of Schedule 1 of FOISA (i.e., the list of public authorities subject to the Act), using the section 4 power to make any required updates to the Schedule. The policy objectives indicate this review will include consideration of the status of any publicly owned companies which are currently not subject to FOISA or the status of which is uncertain. The objectives indicate that the Scottish Government plans to conduct the review and stakeholder engagement in 2025, with a section 4 order laid before the Parliament in 2026.

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