Standards, Procedures and Public Appointments Committee
Thursday 6 November 2025
20th Meeting, 2025 (Session 6)

Summary of the call for views on the Freedom of Information Reform (Scotland) Bill

The Freedom of Information Reform (Scotland) Bill was introduced by Katy Clark MSP on 2 June 2025. A SPICe briefing on the Bill's provisions is available. The Standards, Procedures and Public Appointments Committee held a call for views on the Bill, which concluded on 22 October 2025. 108 submissions were received and published on the Bill's Citizen Space webpages. This briefing provides a summary of the written evidence received by the Committee ahead of its consideration of the Bill.

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Respondents to the Call for Views

There were 108 respondents to the call for views comprising 62 individuals (57%) and 46 organisations (43%).

Organisations providing responses to the call for views spanned a range of sectors. Public bodies included Registers of Scotland, Public Health Scotland, Scottish Environmental Protection Agency, Bòrd na Gàidhlig, alongside several health boards (Orkney, Forth Valley, Lanarkshire, Ayrshire and Arran) and local authorities (Glasgow City, Angus, Falkirk, Dumfries and Galloway, South Lanarkshire and East Renfrewshire). Media and journalism organisations also featured in the organisational respondents and included BBC Scotland, Newsbrands Scotland, Independent Community News Network, and the National Union of Journalists. Trade unions and professional bodies such as UNISON Scotland, ASLEF, RMT, the Scottish Trades Union Congress, the Archives and Records Association (UK & Ireland) and the Law Society of Scotland submitted views, as did advocacy and civil society groups including Common Weal, For Women Scotland, Age Scotland, the Environmental Rights Centre for Scotland, mySociety and the Campaign for Freedom of Information in Scotland.

The Scottish Information Commissioner, David Hamilton, as the public official with responsibility for promoting and enforcing the freedom of information regime in Scotland, provided a response with their views on the provisions in the Bill.

Improving transparency and strengthening the operation of freedom of information in Scotland

Respondents were first asked an overarching question on to what extent they believe the proposals in the Bill will improve the operation of the freedom of information regime in Scotland. Across sectors, respondents were broadly supportive of the Bill's proposals and affirmatively responded that the Bill would improve transparency and strengthen the operation of the freedom of information regime in Scotland. Respondents routinely indicated that the implementation of freedom of information in Scotland should be regarded as a success due to its high public awareness and widespread use. For example, Kevin Dunion (the first Scottish Information Commissioner and Honorary Professor at the University of Dundee) states:

> "As the first Scottish Information Commissioner and author of Freedom of Information in Scotland in Practice (DUP 2012) I have had a privileged insight into the strengths and weakness of the Freedom of Information (Scotland) Act 2002 [FOISA] in law and practice. FOISA is generally well regarded for transforming access to information. The legislation was quickly carried into effect, compliance by public bodies with the law and the Scottish Information Commissioners' decisions is high; public awareness of FOISA and the right to information is also high. That right is used - in the past 12 months over 100,000 requests for information have been made to Scottish authorities".

Several other respondents also referenced independent polling to argue that freedom of information has a positive impact on public sector transparency. For example, the Campaign for Freedom of Information in Scotland (CFOIS) states:

> "Independent polling in Scotland in 2024 confirmed that 97% of those polled believe it is important for the public to access information held by public bodies, 83% think FoI helps to prevent bad practice in public bodies and only 6% think FoI is a waste of public money. FoI has a high public profile with 88% of respondents in 2024 reporting they had heard of FOI law".

While support for reform was widespread, a recurring theme in responses was frustration at the time taken to implement freedom of information reform. Several respondents described the Bill as "overdue" with some respondents (such as the National Union of Journalists and the Unite Union) expressing frustration that issues remain unresolved even after post-legislative scrutiny by the Scottish Parliament (Session 5) Public Audit and Post-legislative Scrutiny Committee. Other respondents, such as the RMT union, Scottish Trades Union Congress, and Unite Union, linked reform to the wider political context and suggested that reform should be passed ahead of the 2026 Scottish Parliament elections.

Another recurring theme across responses was the changing nature of public service delivery. Many respondents referenced the rise of "outsourcing", arms-length bodies, and third sector provision in public service delivery. There was concern that this change in public service delivery could lead to accountability gaps when considering the pace of that new bodies have been added to the Act's coverage. The Scottish Information Commissioner highlighted that the freedom of information regime in Scotland was designed over 20 years ago and states in its response:

> "After 20 years of implementation, it is my view, as Scottish Information Commissioner that the Freedom of Information (Scotland) Act 2002 (the FOI Act) requires reform to maintain, improve and strengthen transparency in the Scottish public sector. Over the last twenty years, the public's expectations around how they access information have shifted dramatically, while there has also been significant change in the ways in which public services are delivered. While assurances were provided during the passage of the original Bill that the scope of the FOI Act would be regularly reviewed and updated, Parliament has failed to keep pace with these changes".

Dr Ben Worthy, a Reader in Politics and Public Policy at Birkbeck University, similarly stated:

> "In 2020 I concluded that 'The Scottish FOISA has high levels of use, good rates of disclosure and strong public support. It has been undermined by game-playing at senior political levels and there are signs of patchy compliance, especially with Arm's Length Bodies, and less pro-active disclosure than hoped'. This bill will help remedy some of these faults".

Environmental Rights Centre for Scotland referenced "shortcomings" of existing freedom of information laws in its response, stating:

> "Public authorities frequently fail to respond to FOI requests and follow-up review requests in line with the applicable statutory deadlines (in our experience, SEPA almost always fails to respond in line with the deadlines) and rely on exemptions with little basis for doing so. There are lengthy delays in appeals to the Scottish Information Commissioner.
>
> […]
>
> ERCS believe this Bill can reduce delays in accessing information; ensure better compliance by service providers; address concerns about how information is stored and transmitted; and improve proactive publication by public authorities as well as third parties currently outside the scope of the Freedom of Information (Scotland) Act 2002 (FOISA)".

Views on the Bill's provisions

Respondents were then invited to provide views on some of the specific proposals in the Bill. These proposals are:

- The introduction of a presumption in favour of disclosure when exemptions are being considered by public authorities
- Replacing the publication scheme duty with a duty to publish supported by a code of practice
- Pausing, rather than resetting, the 20-working day response clock when seeking clarification
- Requiring Scottish Ministers to consider recommendations from the Scottish Information Commissioner on designating new bodies under the Freedom of Information (Scotland) Act, requiring the Scottish Parliament debate Scottish Ministers' reports on the use of the section 5 power to designate new public authorities, and giving the Scottish Parliament a power to designate organisations delivering public functions or services as public authorities under FOISA
- Requiring all public authorities to designate a Freedom of Information Officer
- Creating an offence where information is destroyed with intent to prevent disclosure, even if no information request has been made
- Removing the First Minister's "veto" power
- Those relating to the Scottish Information Commissioner, including:
    - Introducing an exemption for information provided to the Scottish Information Commissioner during the investigation of appeals
    - Providing the Scottish Information Commissioner with the power to require information from individuals acting on behalf of public authorities

- Allowing the Scottish Information Commissioner to issue enforcement notices where there is non-compliance with FOISA codes of practice
- Allowing the Scottish Information Commissioner to refer cases of failure to comply with the timescales in decision notices to the Court of Session
- Allowing the Scottish Information Commissioner to disclose certain information to Audit Scotland.

Further information on each of the Bill's provisions can be found in the SPICe briefing on the Bill.

Introducing a presumption in favour of information disclosure when considering the application of a qualified exemption

Respondents were asked whether they support the proposal to introduce a presumption in favour of disclosing information when considering the application of a qualified exemption under the Freedom of Information (Scotland) Act.[1] The majority of respondents were supportive of the proposal (see the distribution of responses in Table 1).

Table 1. Responses to whether respondents support the proposal to introduce a presumption in favour of disclosing information when considering applying a qualified exemption. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	91	84%
No	4	4%
Don't know	7	6%
Not answered	6	6%

The Scottish Information Commissioner indicated support for the proposal but explained the presumption in favour of disclosure is already the existing position in legislation and codes of practice. The Scottish Information Commissioner states:

> "Section 1(1) of the FOI Act currently makes clear that the default position is that information should be disclosed. Furthermore, the FOI Act's Section 60 Code of Practice notes a presumption in favour of disclosure across both FOI and EIR legislation, describing it as "in-built" in the regimes themselves. In addition, the Policy Memorandum which accompanied the original Bill stated that "a presumption of openness" underpinned the introduction of FOI legislation in Scotland. This presumption is also embedded within the public

[1] A qualified exemption is one that is 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.

> interest test contained under section 2(1)(b) of the FOI Act.
>
> It is my view that embedding a culture and practice of a presumption in favour of disclosure, supported by a duty to proactively publish information may be preferrable to incorporating this presumption into the legislation – which may have unintended consequences".

Kevin Dunion (former Scottish Information Commissioner) held a similar view to that of the Scottish Information Commissioner but indicated the proposal "should not be controversial" and explained:

> "The general entitlement giving a presumption in favour of disclosure is clear from s1(1): 'A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.' I have described this as a plain yet profound statement of entitlement. The clear intention is to promote a culture of openness, such that authorities should when creating and/or holding information presume it may be put into the public domain on request.
>
> This presumption of disclosure is fundamental to how requests are considered. In the case of many non-absolute exemptions this presumption can only be overturned where significant harm will or will likely occur from disclosure. Even then the public interest in disclosure must be considered.
>
> The Court of Session in Scottish Ministers v Scottish Information Commissioner (William Alexander's Application) 2006 (CSIH 8 at para 11) stated "that the statute creates or at least acknowledges a public interest in the disclosure of requested information by the terms of section 2(1) which requires in the case of non-absolute exemptions the weighing of the public interest in disclosing information against the public interest in maintaining the information."
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> Furthermore, where the public interest arguments are evenly balanced then the wording of section 2(1)(b) creates a presumption in favour of disclosure".

Academics and legal bodies (e.g., Law Society of Scotland) took similar positions of support for the principle that information should be disclosed but queried whether the specific provision in the Bill is necessary. For example, Dr Sean Whittaker (University of Otago) states:

> "[…] The current position in Scotland is that individuals who request information are entitled to be given it (s.1(1) Freedom of Information (Scotland) Act 2002), and that this entitlement is only limited where one of the Act's absolute exemptions applies or, where the authority consider the requested information too sensitive to disclose, where "the public interest in disclosing the information is not outweighed by that in maintaining the exemption" (s.2(1) Freedom of Information (Scotland) Act 2002). There may be a benefit in simplifying this position, as the current formulation is not as clear as the proposed section 1(5A), but this proposed amendment to s.1 of the Freedom of Information (Scotland) Act 2002 does not alter the current state of the law".

Professor Colin Reid (University of Dundee and Adviser to the Scottish Parliament Net Zero, Energy and Transport Committee) also indicated the proposal is unlikely to alter the default position in law. Professor Reid's response states:

> "[…] this proposal appears to add nothing to the current legal position. Indeed there is a risk that it might be seen as downgrading the legal entitlement to a mere presumption. Nevertheless, if it is thought that the position for qualified exemptions as set out in sections 1(1) and 2(1) is not properly understood (disclosure can be refused only where the public interest in disclosure is outweighed by an interest protected by a qualified exemption), a clearer statement that the default position is for the information to be disclosed might be useful".

The Law Society of Scotland also highlighted that section 1(1) of FOISA provides a "general legal presumption of disclosure". The Law Society further states in its response:

> "We believe it is preferable to retain this wording to ensure that the wider public have a better understanding of their rights in terms of a Freedom of Information (FOI) request.
>
> However, we note the views expressed by Lord Marnoch (and endorsed by Lord Hope (at appeal) in the case of Common Services Agency v Scottish Information Commissioner [2008]. These assert that although the whole purpose of the 2002 Act was the release of information and that this should be construed in as liberal a manner as possible, this proposition must not be applied too widely, without regard for other laws. Whilst the Lords observations were made in relation to the application of exemptions under the 2002 Act for third party personal data (an absolute exemption), we consider this a valid point that may apply to class-based qualified exemptions, alongside others including common law legal privilege under section 36 (1) of the 2002 Act.
>
> Therefore, given that the 2002 Act works by importing legal tests and presumptions from other areas of statute and the common law, we do not agree with the proposed new wording. We consider this inserts provisions which appear to create a presumption if favour of disclosure in all circumstances of a particular type of exemption. This may lead to confusion and thus legal uncertainty. We believe that there are circumstances in which class exemptions are needed to protect the integrity of other areas of the law, rather than changing how they apply in respect of public authorities".

Dr Erin Ferguson (University of Aberdeen) indicated that the "proposal is unlikely to make a significant difference to the operation of FOISA" but highlighted that other jurisdictions take this approach of having a presumption in favour of disclosure written into legislation. Dr Ferguson's response states:

> "A presumption of disclosure could help to strengthen transparency by reinforcing the proposition that public authorities are custodians of public information in the public interest. It therefore performs a symbolic function in emphasising that the public have a right to information held in the public

> interest. Furthermore, this would mirror the approach taken in other jurisdictions, such as New Zealand, where the Official Information Act 1982 (OIA) is guided by the principle that information should be made available unless there is a compelling reason to withhold it".

Supportive public authorities and bodies representing public authorities (e.g., NHS Lanarkshire, Dumfries and Galloway Council, NHS Forth Valley, Bòrd na Gàidhlig) frequently admitted that while they already work from the presumption of disclosure, the inclusion of the presumption in legislation could formalise or reinforce the culture of transparency in the organisation. For example, NHS Ayrshire & Arran states:

> "Yes. The Board feels that the proposal to apply a presumption in favour of disclosing for a qualified exemption would only serve to strengthen the Act by explicitly stating that which is already understood from the Act and practised".

A number of public authorities (such as Scottish Environment Protection Agency, NHS Ayrshire & Arran, Dumfries and Galloway Council, South Lanarkshire Council) also mentioned that the provision would bring the Freedom of Information (Scotland) Act into line with the Environmental Information (Scotland) Regulations.[2]

Public authorities who were explicitly unsupportive of the proposal (e.g., University of St Andrews, Falkirk Council and Glasgow City Council) considered it "unnecessary" since, as stated by Falkirk Council:

> "There is an existing "public interest" test which applies to qualified exemptions which is already well understood and we do not consider it requires amendment".

Uncertainty over the necessity of the proposal was also a common theme among public authorities who took a supportive stance. For example, Scottish Higher Education Information Practitioners stated:

> "It is unclear what the intention is behind this proposal or why this is necessary. If the intention is to write the established approach into law, then it doesn't actually change anything. If it is intended to do something new, then the purpose is unclear, and we would welcome more detail on how it is intended to interact with the existing public interest test.

Several public authorities (including NHS Orkney, Dumfries and Galloway Council, and NHS Forth Valley) expressed uncertainty about how the presumption would apply to certain qualified exemptions, and raised concerns about its potential impact on their relationships with private businesses. For example, Dumfries and Galloway indicated there needs to be "further consideration" of the impacts on commercial interests and whether the presumption could provide a "disincentive for businesses to work with the Council". NHS Orkney highlighted the island setting it works in and that "there has to be local decision making to avoid breaching the rights of individuals". NHS Forth Valley queried how the presumption would interact with

[2] Regulation 10(2) of the Environmental Information (Scotland) Regulations 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.

exemptions (e.g., section 38(1) of FOISA) relating to third party personal data that are subject to a public interest test.

Civil society organisations and trade unions commonly supported the proposal to clarify the presumption in favour of information disclosure when considering the application of a qualified exemption. Views expressed in support of the proposal indicated that it could "change culture and practice" (Unite Union). Civil society organisations and individual respondents sometimes indicated that public authorities "hide behind" exemptions or use them as "a first line of defence" to prevent the disclosure of information (e.g., RMT Union, The Lid Files). For example, the RMT Union states:

> "We believe there needs to be a fundamental shift towards disclosure wherever possible. Our experience is that too often organisations hide behind commercial confidentiality or other reasons for not disclosing information. This favours the interests of the organisation rather than the public interest. […]. Furthermore, in our experience when a public interest test is conducted it nearly always comes out in support of not supplying information. Therefore, we would hope that a shift to a presumption of disclosure should lead to a reversal of this in favour of disclosure".

Common Weal, a think tank and advocacy group campaigning for social and economic equality in Scotland, similarly states in its response:

> "We agree but believe that the Bill should be amended to go further than this proposal. We believe that the starting position for public information should be proactive disclosure and that any information that is withheld from proactive disclosure that is later revealed under an FOI or other mechanism should have a position statement appended to it to justify the lack of disclosure until that point. It cannot be considered acceptable that public information is only actually made public if and only if someone, somehow, conceives of an appropriately worded FOI request".

Dr Erin Ferguson (University of Aberdeen) additionally highlighted that the inclusion of the presumption in favour of disclosure could encourage potential information requesters to exercise their rights under FOISA. Dr Ferguson's response states:

> "It could also encourage public requests for information by reinforcing the message that the information is held in the public interest and that the public have a right of access to information. In conducting research on FOI, I have encountered many people who have shared with me that they feel reluctant to make FOI requests because they see the process as too 'legalistic' and they do not want to be seen as a nuisance or a burden for making information requests. Although these reports are largely anecdotal, they do point towards a potential barrier in making information requests that could be reduced by a presumption in favour of disclosure and its symbolic function".

Repealing the publication scheme duty and introducing a duty to proactively publish

Respondents were asked whether they support the proposal to repeal the publication scheme duty and replace it with a duty to proactively publish information.[3] The majority of respondents were supportive of the proposal (see the distribution of responses in Table 2).

Table 2. Responses to whether respondents support the repeal of the publication scheme duty and introducing a duty to proactively publish. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	86	80%
No	2	2%
Don't know	12	11%
Not answered	8	7%

Across respondents there was a broad consensus that the publication scheme duty is "outdated" and does not reflect how members of the public seek information in the contemporary environment. Comments in relation to this proposal frequently indicated that people use search engines now and that the publication scheme duty was implemented before widespread internet access in households and on smartphones. There were also a number of references to the perception that the publication scheme duty is "a box-ticking exercise". A number of respondents indicated publication schemes and guides to information are not used by information requesters or members of the public more generally. For example, Bòrd na Gàidhlig states:

> "The current publication scheme requirements have not kept pace with best practice in accessibility, and require the publication of a scheme that does not reflect how the majority of people now search for and retrieve information in a digital environment. It also has very limited flexibility in terms of publishing information that does not naturally fit within the existing classes of information. This does not prevent publication but does sometimes mean that information that is being published is not represented in the scheme. We would therefore support an update to this part of the legislation".

Registers of Scotland indicated support for the proposal, stating:

> "The move from static publication schemes to a proactive duty is more dynamic and responsive to public interest, and more in line with modern

[3] The publication scheme duty refers to section 23 of FOISA, which requires each public authority 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.

> methods of searching for and accessing information. The code of practice will be important to set expectations and create consistency across authorities".

The Environmental Rights Centre for Scotland referred to the provision to publish information in the Environmental Information (Scotland) Regulations, stating:

> "A proactive publication duty and code of practice would bring greater clarity to transparency requirements and make it easier for citizens and civil society to routinely hold public authorities to account.
>
> The duty to actively disseminate information as set out in Section 4 of the Environmental Information (Scotland) Regulations 2004 already requires public authorities to publish and maintain accessible, up-to-date records of environmental information to ensure compliance with the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)".

The Scottish Information Commissioner response considers how a duty to publish and code of practice could protect the freedom of information regime against technological change. Its response states:

> "With increasing request numbers, we now need a new approach to drive and embed a similar culture change towards the practice of proactive publication – with the objective of creating a sustainable request regime which is underpinned by the proactive publication of key information, enabling it to be readily and easily accessed without the need to make an information request".

The Scottish Information Commissioner also indicated that the Office of the Scottish Information Commissioner would be "best placed to prepare as well as to enforce" the envisaged Code of Practice associated with the duty to publish. The response from the Scottish Information Commissioner includes its views on what a potential code of practice on the duty to publish might include and what public authorities would be required to consider.

Section 15 of the Bill inserts section 60A into FOISA. One of the proposed clauses is that:

> "A Scottish public authority must take reasonable steps to— […] (b) make that information available to the public in an accessible form and manner".

Dr Erin Ferguson (University of Aberdeen) highlighted that some public authorities may require support to make their data suitable for release. Dr Ferguson's response states:

> "A flexible code of practice could ensure that information is provided in ways that are accessible and more intuitive, aligning with how people search for information. Removing the requirement for the publication scheme auditing exercise would provide organisations with more time to devote to this and ensure that the duty to proactively provide information does not become a 'tick box' exercise. Some organisations may require additional support in making information accessible and searchable (for example, by working with librarians

> or other information professionals to ensure information management principles and legal obligations are met)".

Dr Sean Whittaker (University of Otago) also queried this part of the Bill, stating:

> "Does this relate to the how the information is accessed from the authority itself (e.g. how does an individual find the relevant document on their website?), or does it relate to the accessibility of the document itself (e.g. is it comprehensible to the public?). For the latter, requiring that the document itself be "accessible" could impose an additional burden on public authorities, who may need to convert or summarise the document so that it is understandable (and thus accessible) to the public.
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> It should also be noted that how information is created and stored often does not reflect how the public seeks out information. Public authorities create and store information in a sectoral manner, with information on issues such as waste and air being created and stored separately. One reason for this sectoral approach is because it reflects the structure of the legal obligations imposed on Scottish public authorities. However, this approach does not match how users of the right request access to information, which tends to focus on specific locations rather than on sectoral areas".

Several public authorities (including South Lanarkshire Council, Glasgow City Council, and University of St Andrews) while supporting the repeal of the publication scheme duty indicated concern that public authorities will require "additional resources" to undertake their duty to publish. Strathclyde Partnership for Transport indicated that the duty to publish should be "proportionate, cost effective and pragmatic". The Law Society of Scotland also indicated that a duty to publish would need to be properly resourced, stating:

> "[…], the introduction of a proactive publication duty (and the associated code of practice) requires further clarity in terms of what this duty will precisely mean. We note that the Policy Memorandum states the aim is to ensure that public authorities routinely make available certain types of information without a formal request being made. However, we have concerns as to how this will be properly resourced in public authorities (both large and small) given the financial impact this duty is to likely have. We believe that the policy objective underpinning this proposed change could be achieved through greater resources and a culture change, with the latter being addressed through the Code of Practice issued under Part 6 (section 60) of the 2002 Act".

With regard to why a public authority would require additional resource to implement a duty to publish, Glasgow City Council explained in its response:

> "Much of the data we hold is poorly structured for anything other than its original intended purpose, and/or it is held in legacy ICT systems and would therefore require substantial effort to get it into a fit condition for publication. In addition, a lot of Council held information is extremely sensitive and even if anonymised would require to be subject to disclosure control protocols prior to publication to avoid the risk of individuals being indirectly identifiable.

> The Council – in common with all other local authorities - already publish Committee agendas, reports and minutes meaning there is already an extremely high degree of visibility of the key decision-making and performance monitoring functions of the Council. To publish all our data would bring significant practical issues for a very limited improvement in transparency given our existing publication of committee papers".

mySociety (a not-for-profit group developing technologies for civic participation, including the freedom of information site WhatDoTheyKnow) also indicated the issue of "fragmented public data" and the impact this has on supporting effective proactive publication. mySociety states in its response:

> "One problem in public sector data publishing is fragmented public data - where many authorities have part of a dataset, but without a set data standard or central repository, it is hard to combine the data to get the most value out of it. A code of practice can be useful in helping authorities establish good patterns for coordinating and preventing this problem - making it easier for virtuous cycles between data publishers and data users to develop, where publication is more easily justified because of the larger public value".

Professor Colin Reid (University of Dundee) referred to the structure of data in public authorities and the impact this may have on information requesters with reference to the proposed requirements of section 15 of the Bill. Professor Reid states:

> "Two important points should be noted about proactive publication. The first is that for information to be "available to the public in an accessible form and manner" (proposed new s.60A(1) of FOISA) attention must be paid not just to the format for access and display but also to the structure, indexing, cross-referencing and search facilities that will make the information readily useable by members of the public coming to it for the first time, not just experienced users. This leads to the second point which is the importance of appreciating the mismatch that often arises (for good reasons) between how members of the public see an issue and frame requests for information and how authorities create, structure and store the information they hold. An authority's budgetary structures, legal obligations and internal organisation can lead to information about the one location or topic being spread across several datasets in a way that is difficult for outsiders to appreciate, and hence navigate when seeking information".

Many public authorities indicated it was difficult to comment on how well they would be able to comply with a code of practice on the duty to publish and that it would have been helpful to have an "indicative draft Code". Public authorities, including Glasgow City Council, indicated concern for resources given the Policy Memorandum to the Bill states "it is anticipated that the code would be substantial in nature, imposing duties on public bodies". Others, such as NHS Ayrshire & Arran indicated it would welcome "clear guidance". Public authorities and bodies representing them (such as NHS Ayrshire & Arran and Scottish Higher Education Information Practitioners) indicated the public authority is best placed to decide what information should be published under a potential duty. The Scottish Information Commissioner indicated in his response that:

> "an enforceable Code of Practice would specify the minimum required information to be published (reflecting aspects of the current model), while offering public authorities flexibility to determine the best way to meet those requirements".

Health boards (including NHS Ayrshire & Arran and NHS Lanarkshire) indicated they were opposed to making FOI disclosure logs mandatory (i.e., a site where public authorities list information released under FOISA). The reason for this being that it is "resource intensive" and that there is "little evidence of its use".

While there was support for a duty to publish, some respondents (such as Scottish Higher Education Information Practitioners and University of St Andrews) were doubtful that proactive publication would result in fewer freedom of information requests. For example, Dr Sean Whittaker (University of Otago) explains:

> "The assumption is that individuals who find the information that they sought through proactive disclosure channels will be satisfied with that information and then decide not to submit a request asking for the same information. Yet this assumption presumes that individuals will be able to find the desired information where it has been proactively disclosed. This is something which cannot be guaranteed regardless of how accessible the public authority makes the information available through proactive disclosure – noting that different authorities may structure their proactive disclosure channels in different ways to reflect their unique structure and operation. Beyond this, even where the individual finds the desired information this may give rise to additional questions and information being sought after, which may precipitate a request being submitted under the Freedom of Information (Scotland) Act 2002. As such, I do not think that the estimated savings from the Freedom of Information Reform (Scotland) Bill necessarily follows from the proposed reforms".

As with the proposal to introduce a presumption in favour of information disclosure, civil society organisations (such as the National Union of Journalists and Unite Union) were likely to indicate that the proposal represents a "culture shift in favour of openness".

Pause, rather than reset, the 20-working day response clock when seeking clarification

Respondents were asked whether they support the proposal to pause rather than reset the 20-day period for a response when a public authority seeks clarification from an information requester. Most respondents were supportive of the proposal (see the distribution of responses in Table 3).

Table 3. Responses to whether respondents support "pausing" rather than "resetting" the 20-day period to give a response when a public authority seeks clarification from an information requester. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	75	69%
No	19	18%
Don't know	9	8%
Not answered	5	5%

Kevin Dunion (former Scottish Information Commissioner and Honorary Professor at the University of Dundee) indicated that the response deadline reset following clarification in FOISA did have precedent in other jurisdictions. Kevin Dunion states:

> "The provision in FOISA allowing authorities to reset the 20-day period mirrors that in earlier comparable FoI laws in e.g. Ireland and New Zealand. However, such provision is not universally the case. The U.S. FOIA (5 U.S.C. § 552): explicitly allows an agency to pause ('toll') the 20-working-day response period while waiting for reasonably requested information from the requester. Furthermore, the agency is only allowed to do this once in the process of responding to a request.
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> There is merit then in considering this proposal. FOISA requires that Scottish public authority receiving a request 'must comply promptly and in any event by not later than the 20th working day after receipt of request or the receipt by it of further information.' Notwithstanding the stricture to reply comply promptly, many authorities regard the 20-working day window as the period within which they are entitled to respond. The concern is that if a request is only looked at towards the end of the 20 working day, and it is evident that it cannot be responded to before the deadline, then there may be a temptation to request further information to allow the clock to be reset and a further 20 days to lapse before the information is finally provided or a refusal notice is issued.
>
> The extent to which any such delaying tactic is employed is not likely to be known, although I did encounter instances of it in my time as Scottish Information Commissioner".

Scottish Information Commissioner expressed an interest in a pause mechanism in its response but raised concerns that other parts of FOISA could be used to "reset" the response deadline. Specifically, the Commissioner's response referred to provisions of section 8(1) of FOISA on the requirements for a valid information request. The Commissioner indicated that public authorities could use this part of FOISA to "reset" the response rather than section 1(3) which enables an authority to seek clarification. The Commissioner explains:

> "[…], section 8(1) of the FOI Act sets out the requirements for a valid information request. This includes that it must be in a recordable form, it must include a name and address and, under section 8(1)(c), that it must "describe the information requested". Where a request does not fulfil the criteria required by section 8(1)(c) it will not be a 'valid' request, so the 20-working day 'clock' for a response will simply not start (although an organisation should, of course, provide the requester with advice and assistance under section 15 of the FOI Act to support them in making a valid request).
>
> I rarely hear of cases where the validity of a request under section 8(1)(c) is questioned or disputed. This is principally, I suspect, because issues relating to whether or not information has been described appropriately are currently resolved (or not – there is a small, but significant, number of cases where appropriate early clarification would have avoided problems of interpretation emerging further down the line) by means of section 1(3) of FOISA alone. The current consequence of both routes – the resetting of the timescales – is the same, with the result that section 1(3) serves as the most effective route for resolving such issues, and creating, in most cases, no requirement to distinguish between a request which is 'invalid' under section 8(1)(c), and one which is simply 'unclear'.
>
> […] The nuances in the language used here may, in turn, have a negative effect on relations between individuals and organisations".

Professor Colin Reid (University of Dundee) also referred to the perception that clarifications are sought to delay information disclosure. Professor Reid states:

> "This proposal seems sensible to avoid any misuse of clarifications as a means of delaying the release of information. It should be noted that the research into the use of the Environmental Information (Scotland) Regulations 2004 noted above revealed tensions within the clarification process. The need to maintain the "applicant-neutral" basis of the law can lead to authorities not pursuing clarifications that would be helpful to both parties, whilst requesters can be suspicious of authorities' attempts to refine requests, both because of the mismatch noted above between what is thought to be a simple request and the complex and fragmented way in which information may be stored, and because of concern at alerting the authority to an intended line of criticism or challenge".

Public authorities responding to the call for views were either not supportive of the proposal or expressed reservations about the impact on resources for freedom of information within the organisation. The Scottish Environment Protection Agency described the reset mechanisms as "a valuable tool" which ensures "the requester

receives the full value of the time invested in responses to complex requests". NHS Ayrshire & Arran states that "request numbers and their complexity have increased over the last several years" and that this could result in "a further burden on staff already under pressure with core duties" and "tight timelines". Public Health Scotland indicated that pausing rather than resetting "would almost certainly lead to some organisations struggling to provide responses within the statutory deadline". Public authorities (such as the King's and Lord Treasurer's Remembrancer, East Renfrewshire Council, South Lanarkshire Council) were aware that information requesters can perceive the current "reset" arrangements as a "delaying tactic" but assured this is only used to ensure information applicants receive the information they are seeking. Several public authorities indicated that clarifications are being sought as information requests become more complex. The Law Society of Scotland, although not a public authority under FOISA, does not support the proposal and explains in its response:

> "Large public authorities often require input from multiple teams across their organisation and it may only become apparent that a request is unclear once it has been assigned to someone with technical or expert knowledge of the subject matter. The request for clarification may therefore take some time to issue without there being any failure on the part of a public authority to expedite matters, however, this time would be removed from the time the authority has to comply with the request. Alongside this, it is not uncommon for a request to significantly change or be extended in scope following clarification. […] We therefore have concerns that this proposal would effectively reduce the timescales for responding to such requests, in turn, placing additional pressures on certain authorities in terms of compliance".

NHS Forth Valley provided a typical breakdown of its timescales when seeking clarification in its response, and indicated:

> "It is important to recognise that active clarification of requests can build positive relationships with requesters. Where an authority proactively engages with a requester in order to understand the specific information they wish to receive, it is more likely that the requester will be provided with information that is helpful to them, including relevant context and explanation to support their understanding".

The Scottish Environment Protection Agency also indicated concern that a "pause" mechanism would diverge the clarification pathways from what is available under the Environmental Information (Scotland) Regulations. Its response states:

> "The majority of requests for recorded information that SEPA receives are dealt with under the Environmental Information (Scotland) Regulations 2004. Under these regs, when a valid clarification is received from the requester, the clock resets to day 0 and a new acknowledgement and statutory deadline are sent to the requester. For highly complex or voluminous requests, this process can occur more than once, resetting the clock multiple times to ensure that we can fulfil the requester's information rights and needs. Creating a different clarification pathway, and timescales, for the two regimes would create a divergence between the regimes that could cause confusion, creating potential delays where there had previously been none. SEPA

> believes that a culture of presumption of disclosure and proactive publication would have more impact on the public's access to information than reducing the time that authorities get to process complex requests".

Glasgow City Council suggested a "shorter time limit for issuing clarification requests" but retaining the reset mechanism to "avoid applicants being unduly inconvenienced". The Scottish Information Commissioner also referred to a similar proposal in its response, which states:

> "My predecessor suggested a possible alternative to this issue to which I subscribe: an amendment to the FOI Act which allows an authority a defined period in which to seek clarification if a request is unclear, after which any additional days' delay will be deducted from the timescale for a response. For example, under this approach, an authority may, following receipt of a request, be given 5-working days in which to seek clarification within which the clock can be reset. Once this initial 5-working day period has expired, any future request for clarification would result in a 'pausing' rather than a 'resetting' of the clock".

Civil society organisations were very supportive of the proposal, while being aware of why clarification is sought by public authorities, because it could speed up the disclosure of information and improve the experience of information requesters. The National Secular Society states in its response that:

> "We have frequently found the current 'reset' issue has been a barrier to obtaining information in a timely and efficient manner".

Similarly, trade union representatives such as Scottish Trades Union Congress referred to the use of clarification requests as a "delaying tactic". For example, UNISON further states in its response:

> "We are fully cognisant of the fact that an initial FoI request may require clarification. Indeed it is far from unusual for some public bodies to provide advice about a how a request could be better framed. This however is far from universal and we have encountered examples where we feel there has been deliberate 'foot-dragging' on the part of some bodies. The proposal in the Bill that of pausing, rather than resetting the timescale would be a step forward".

Age Scotland provided an example of its experience making freedom of information requests to local authorities in Scotland to illustrate how the clarification and reset process impacts the perceived accessibility of public authorities. Its response states:

> "As an organisation that has submitted FOISAs to public bodies it is frustrating that it can take an indefinite amount of time for a response to be received as a result of requests for clarification. While we understand that there is a duty on public authorities to assist in FOISAs, at times it can be difficult to know whether the duty is being abused to extend or avoid the deadline for a response. An example of this is where we have sought information from all 32 local authorities on social care assessment information. A number of the local authorities requested further clarification, while others understood the request as it was written. […] We found the process both frustrating and difficult to

> access with initial requests sent and responses received around 3-4 months later in the most extreme of cases".

The Environmental Rights Centre for Scotland also indicated how the clarification and reset process can be perceived by information requesters. Its response states:

> "The ability of public bodies to reset the 20-day response time for an FOI request through seeking clarification from the requester is antithetical to the spirit of the original FOISA and could be abused as a delaying tactic to prevent or obstruct the release of information in the public interest, which for advocacy or journalistic purposes is often time sensitive. Lengthy delays can also cause wider disillusionment or disengagement from members of the public seeking to access information. It is therefore appropriate to pause rather than replace the 20-day period for obtaining a response".

Likewise, journalism organisations and trade unions raised the perceived issue of "delaying tactics" to avoid releasing information in relation to time-sensitive requests. The Independent Community News Network referred to the current regime as "adversarial". The National Union of Journalists similarly states:

> "There is significant concern among journalists that the resetting of the 20-day period upon asking for clarification is being used as a delaying tactic, and that this itself encourages public bodies to only ask for clarification close to the 20-day period, rather than earlier. By pausing, rather than resetting the 20-day time period, public bodies are incentivised to seek any necessary clarification sooner rather than later, the release of information would be quicker, and the suspicion of artificial delays being created would be lessened".

Section 5 powers to designate new public authorities

Respondents were asked whether they support the proposals in the Bill regarding section 5 powers to designate new public authorities. Specifically, the proposals to require Scottish Ministers to consider recommendations from the Scottish Information Commissioner on designating new bodies under the Freedom of Information (Scotland) Act, require the debate in Parliament of Scottish Ministers' reports on the use of section 5 powers to designate new public authorities, and give the Scottish Parliament a power to designate organisations delivering public functions or services as public authorities under FOISA.

Respondents were roughly split between supportive of the proposal and uncertainty over the proposal (see the distribution of responses in Table 4).

Table 4. Responses to whether respondents support the proposals regarding section 5 powers in FOISA. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	49	45%
No	7	6%
Don't know	43	40%
Not answered	9	8%

The Scottish Information Commissioner indicates in its response that Parliament's consideration of Scottish Minsters' section 5 reports will likely be the most effective way to incentivise the extension of freedom of information rights to additional bodies. The Scottish Information Commissioner states:

> "It is my view, therefore, that the section 5 mechanism, as it is currently utilised, does not serve as an effective and responsive mechanism through which FOI rights can keep pace with changing patterns in the delivery of public services and regularly falls victim to a lack of political will.
>
> An approach, with an active consideration by the Scottish Parliament and driven by the public interest, would enable momentum to be maintained in an ever-changing public sector environment, while also ensuring that measures to extend FOI can be appropriately considered, implemented, tracked, promoted and enforced. This approach would also help to ensure that the stability, effectiveness and reputation of Scotland's FOI regime can be protected for the future.
>
> Under this approach the Scottish Ministers would, of course, also retain their power to amend Schedule 1 under section 4 and to designate additional organisations under section 5 of the FOI Act, as appropriate.

> It is therefore clear that the current section 5 mechanism requires revision to hold the Scottish Government to account on its lack of timely application of these powers".

Academics indicated uncertainty over whether the proposals would incentivise Ministers to use the section 5 power more often. Kevin Dunion (former Scottish Information Commissioner and Honorary Professor at the University of Dundee) indicated the effectiveness of the proposals is "open to question" and described the time to designate bodies under FOISA using the section 5 powers as "one of the most chronic failings of the assurances given when the legislation was being passed". Dr Erin Ferguson (University of Aberdeen) provided an explanation of why designation of new bodies under FOISA has been slow over the operation of the Act to date, and states:

> "The extent to which the proposed provisions will incentivise Scottish Ministers to use their s 5 powers is difficult to determine. On the one hand, it can be argued that the reporting requirement introduced in 2013 has facilitated the use of s 5 powers as three section 5 orders have been made since then (and none had been made until that point). The reasons for the slow pace of designation are complex, including lack of certainty on what 'public functions' are and the need for robust stakeholder consultation. Additionally, whilst it is important that designation keeps pace with changes in public service delivery so that information rights are not diminished when public services are privatised or outsourced, the speed of designation does not, on its own, improve transparency.
>
> Taking the above into account, the proposals could have some impact on the use of the s 5 power by placing an additional requirement on Scottish Ministers to consider the exercise of the s 5 power during the reporting period. This would complement the existing requirement to explain whether the power has been used and, if not, to explain the reasons why not. The additional requirement has some potential to incentivise regular and robust discussion on the use of the s 5 power, which may help to address the challenge of political will when it comes to the designation of additional bodies as public authorities for FOISA purposes".

Professor Colin Reid (University of Dundee) indicated that the proposal for the Parliament to extend FOISA coverage by parliamentary resolution "further complicates the law-making processes in Scotland". Professor Reid's response further states:

> "An alternative might be to enable the Parliament to make by resolution a formal recommendation/request to Ministers to adjust the list, with Ministers then under an obligation either to introduce the necessary legislation (using the standard procedures) or to explain why they have not, subject to standard processes for ministerial accountability to Parliament".

Dr Sean Whittaker (University of Otago) indicated the proposals in the Bill will not change how the section 5 powers are currently used. Dr Whittaker's response states:

> "The rationale of how entities are designated as public authorities for the purposes of the Freedom of Information (Scotland) Act 2002 is one which is inherently piecemeal in nature: requiring the Scottish Ministers to individually designate such entities. The proposal forwarded by the Freedom of Information Reform (Scotland) Bill do not sufficiently engage with the root causes of this hesitation (or resistance) to the Ministers exercising their "section 5" powers. Equally, it must be noted that the exercise of the "section 5" powers contends with other parliamentary business: the enhance reporting requirements also do not resolve the tight parliamentary schedule that the exercise of this power would have to fit into".

Several respondents such as mySociety, the Scottish Trades Union Congress and ASLEF indicated that parliamentary scrutiny of Scottish Ministers' use of the section 5 power should incentivise greater use of it. For example, mySociety's response states:

> "These create new incentives around the Scottish Ministers S5 power where increased deliberation on the report would have a meaningful value. Rather than reporting "no new designations", the report is more likely to be a reasoned acceptance or decline of a recommendation from the Information Commissioner. Similarly the power of the Parliament to designate directly creates a real incentive to, if rejecting a recommendation, present compelling reasons. A rejection of the report by the Parliament would have the option of being followed-up with a direct resolution.
>
> Direct designations from the Parliament are likely to be rare, but as a backstop it incentivises Scottish Ministers use of S5 powers to be acting as a conduct balancing the specialist expertise of the Commissioner, the general opinion of the chamber, and the administrative questions of the government. An enhanced reporting system is how that conduct is operationalised in practice".

UNISON expressed support for the proposals but indicated it would "prefer a system whereby transparency rights follow the public pound". Other respondents such as Bòrd na Gàidhlig, MurrayBlackburnMackenzie and the Archives and Records Association (UK and Ireland) indicated a preference for using criteria setting out which public functions are subject to FOISA over the designation of organisations.

Professor Colin Reid and Dr Sean Whittaker suggested that FOISA could borrow the approach of the Environmental Information (Scotland) Regulations to designate public authorities for the purposes of the Act. Professor Colin Reid's response states:

> "An alternative would be to adopt the approach in the Environmental Information (Scotland) Regulations 2004 of combining a non-exhaustive list (for clarity) with a broader definition of bodies with public responsibilities, accepting that this will entail some uncertainty but with the Information Commissioner available to provide guidance and determinations without the trouble and expense of recourse to the courts".

Introducing a Freedom of Information Officer in each Scottish public authority

Respondents were asked whether they support the proposals in the Bill to introduce a designated freedom of information officer in each Scottish public authority. Most respondents were supportive of the proposal (see the distribution of responses in Table 5).

Table 5. Responses to whether respondents support the proposal to introduce a designated freedom of information officer in each Scottish public authority. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	82	76%
No	6	6%
Don't know	14	13%
Not answered	6	6%

Respondents were generally supportive of the proposal to designate a freedom of information officer in every Scottish public authority. It was also common for respondents to express that the role "should have teeth" and the officer should have power or authority within the organisation. Many respondents, such as NHS Ayrshire & Arran, NHS Lanarkshire, Unite Union, and Bòrd na Gàidhlig, indicated the proposal would enhance the role and profile of freedom of information in the public authority.

The Scottish Information Commissioner indicated that it supports the view that freedom of information should have "dedicated resource" within a Scottish public authority. The Scottish Information Commissioner's response further states that:

> I think the desired enhancement of the status of FOI Officers can be achieved through other, non-statutory means, such as appropriate revisions to the Section 60 Code of Practice.
>
> […].
>
> It may also be relevant to be mindful of the fact that such roles and responsibilities are likely to be scalable in organisations of different sizes, and it may be appropriate for organisations to take a proportionate approach to the fulfilment of any associated tasks and duties, depending on e.g. the size of the organisation and the number of FOI requests received. A proportion of bodies covered by FOI Act, for example, report receiving few or no requests annually, and responsibilities relating to the fulfilment of any statutory duties should be proportionately scaled in relevant circumstances.
>
> If such a role were to be created, it would also be important to ensure that senior management responsibility and oversight of FOI was nevertheless

> maintained, in order to facilitate and support effective compliance with FOI across each organisation. The current Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOI Act and the EIRs (the Section 60 Code of Practice) highlights the importance of senior level responsibility for FOI within an organisation […].
>
> It will be important that such a requirement is retained or enhanced in any future amendment to FOI law, in order to remove the risk of FOI responsibility being wholly delegated by senior management, or viewed as a responsibility which sits at a more junior level in the organisation, with the statutory FOI Officer alone".

Respondents also suggested that the structure or framework for a freedom of information officer in each public authority under FOISA already exists. The Public Records (Scotland) Act 2011 was often cited in support of this as this Act requires a public authority's record management plan to identify the individual responsible for the management of the public authority's records and, if different, the individual who is responsible for the records management plan. Newsbrands Scotland, Kevin Dunion, Unite Union, and NHS Ayrshire & Arran are among the respondents who cited the Public Records (Scotland) Act 2011 as a potential model for the proposed freedom of information officer role. However, some public authorities raised questions about how the Bill's proposals would interact with the 2011 Act. Additionally, comparisons were made to the UK GDPR, which requires organisations to appoint a Data Protection Officer responsible for overseeing compliance with data protection laws. Dr Sean Whittaker, Dr Erin Ferguson, NHS Ayrshire & Arran, Unite Union, Scottish Trades Union Congress and Bòrd na Gàidhlig are examples of respondents citing the data protection regime as a comparable model to what is proposed in the Bill.

However, there are notable reservations about the feasibility and proportionality of the proposed role. Several respondents, including South Lanarkshire Council, Glasgow City Council, Bòrd na Gàidhlig and NHS Lanarkshire argue that imposing a statutory FOI Officer role might be unnecessary or burdensome for smaller public authorities. Dr. Erin Ferguson additionally queried whether there would be exemptions for smaller organisations. There was also uncertainty over the "broad scope" of the role (Registers of Scotland) and whether "the expectation is for the role to be fulfilled by existing positions" (Dr Erin Ferguson). NHS Forth Valley provided an explanation of the challenges and concerns it perceives with regards to the proposed statutory role of the FOI Officer in the health sector. Its response states:

> "The Bill is currently silent on whether an organisation can designate an external individual to deliver the role of FOI Officer, or whether an individual can act as FOI officer for more than one public authority. Integration Joint Boards (IJBs) are subject to FOISA however employ very few staff in their own right. It is likely that IJBs would look to the role of FOI Officer to be carried out by a member of Local Authority or Council staff but it is not clear whether that would be acceptable. Equally, GP Practices are subject to the legislation however may not employ staff who meet the threshold of FOI expert as described in the Bill. Would it be acceptable for the local NHS Board

to fulfil this responsibility and, if so, would Health Boards be provided with additional funding to fulfil the increased scope of responsibility.

The current wording of the Bill requires the FOI to be an expert, however it is not clear what knowledge and skills would qualify an individual as an FOI officer. While there are practitioner courses in FOISA, there is no formal qualification, so how would organisations be able to identify individuals with the appropriate skills. Equally, the Bill requires FOI officers to maintain their expert knowledge. What would this entail in practice?".

Create an offence where information is destroyed with intent to prevent disclosure, even if no information request has been made

Respondents were asked whether they support the proposal in the Bill to create an offence where information is destroyed with intent to prevent disclosure, even if no information request has been made. Most respondents were supportive of the proposal (see the distribution of responses in Table 6).

Table 6. Responses to whether respondents support the proposal in the Bill to create an offence where information is destroyed with intent to prevent disclosure, even if no information request has been made. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	82	76%
No	7	7%
Don't know	13	12%
Not answered	6	6%

Several responses indicated that means of avoidance of information disclosure may be more readily available in the current communications and digital information environment. This was typically cited alongside indications of support for the proposal and reference to information disclosures at the UK Covid-19 Inquiry which suggested there was deletion of information to avoid disclosure under freedom of information legislation. For example, the Scottish Trades Union Congress and Unite Union indicated there are "clear issues" and "evidenced problems" with deletion of messages to circumvent freedom of information. Kevin Dunion's response provides an exposition of some of the issues with the current information environment, and states:

"[…] the advent of end -to -end encrypted messaging with auto-delete functions has seen e.g. WhatsApp exchanges on private devices which are not readily accessible for recovery in response to FOI requests or have been routinely deleted. The Covid Inquiry has shown the scale of this. […]. Making it an offence to destroy information in anticipation of a request to prevent disclosure would be a novel provision. I am not aware of any similar offence

> provided for in any other FoI law. It would be useful to know more of the specific circumstances which might give rise to prosecution.
>
> I would point out that it is an offence to delete etc information to prevent disclosure once a request has been made. Yet there has not been any prosecution brought in Scotland and only a single successful prosecution in England".

The Scottish Information Commissioner was supportive of the symbolic function that such an offence would have for the freedom of information regime in Scotland. Its response states:

> "While there would undoubtedly be challenges arising from the investigation and enforcement of this provision, it would nevertheless also be the case that the mere existence of the provision – and the consequences that arise from it – would create a significant disincentive for individuals to delete or destroy information in such circumstances. For this reason, I consider that this measure would clearly serve to strengthen and enhance the culture and approach openness, transparency and accountability within Scottish public bodies.
>
> This issue will, of course, also overlap significantly with good records management practices and I envisage this provision having heavy regard to a public authority's Public Records (Scotland) Act 2011 duties and in particular reference to their own Record Management Plans, set within the context of an intention to prevent disclosure".

The Law Society of Scotland provides a detailed discussion of some of the potential implications of the offence. Its response states:

> "Our concern is best explained by the example of when a public authority (or a member of its staff with delegated authority) decides to delete a document. This simple act is done in the full knowledge that this will prevent its disclosure in response to any future FOI request. Whilst the person's "intent" may have been good records management, we believe that it will be difficult to determine if their motivation was to also amount to an "intention to prevent disclosure'". We note that no criteria as to what would constitute a necessary "intent" have been provided in this Bill.
>
> In view of this, we would ask that clarification is provided as to the precise criteria that will be used to establish 'intent', and how this will be defined for the purposes of this Bill. The issue in practice is that intention is typically proved through inference and there is rarely direct evidence of one's intent, for example, through words expressed at the time. Whilst the Courts are used to dealing with intention as a matter of inference, we believe that issues could arise, particularly when deletion is, on the face of it, in line with a records management policy. Therefore, there is unlikely to be any other evidence available pointing to the reasons for the decision to delete. This issue is further complicated by the fact that the criminal burden of proof is "beyond reasonable doubt".

> In view of the foregoing, we believe that prosecutions for this proposed offence are likely to be relatively rare. It will take some time for it to be judicially analysed (typically in an appeal from conviction). We consider that this will cause a period of uncertainty in terms of how the Courts will approach the issue of establishing intent. This may undermine proper record keeping and management, and the objectives of the FOI legislation. However, we believe that in certain situations in which the proposed offence is designed to address, these could well be prosecuted using the common law crime of attempting to pervert the course of justice (which can be prosecuted at any level and can result in anything up to life imprisonment).
>
> […]
>
> We suggest that a positive alternative to the section 18 provision would be to make it clear to public authorities the kind of records that would be good practice to preserve (or be required to preserve)".

A number of respondents (including Dr Erin Ferguson, Dumfries and Galloway Council, Environmental Rights Centre for Scotland, Strathclyde Partnership for Transport, Bòrd na Gàidhlig and South Lanarkshire Council) also expressed concern about how intent to avoid information disclosure would be determined and how such an offence would be evidenced. Additionally, some respondents queried how this offence would interact with or affect public records policy (e.g., the Public Records (Scotland) Act, the section 61 code of practice issued under FOISA), and data protection legislation. A few respondents were also concerned that public authority staff could be vulnerable to an accusation of an offence under FOISA by following established retention policies and that consideration should be given to how to "limit the risk of malicious or speculative allegations being made against individuals" (Scottish Environment Protection Agency).

The Scottish Environment Protection Agency and Scottish Higher Education Information Practitioners suggested that the proposal in the Bill should be considered with reference to the risk of cyberattacks that can cause data to be inaccessible or destroyed or may become an increased risk if public authorities retain data for longer than necessary.

First Minister's "veto" power

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". This power applies only when the Scottish Information Commissioner has issued a decision or enforcement notice to the Scottish Administration relating to certain exemptions that are being applied by the public authority. Respondents were asked whether they support the proposal in the Bill to repeal the section 52 power (see the distribution of responses in Table 7).

Table 7. Responses to whether respondents support the proposal repeal the First Minister's section 52 power. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	82	76%
No	4	4%
Don't know	14	13%
Not answered	8	7%

Most respondents indicating support for the proposal to repeal section 52 of FOISA reasoned that the power is "contrary to the fundamental principles of FOI" or "unnecessary" because it has "never been used" and "serves no real purpose". Dr Erin Ferguson (University of Aberdeen) additionally indicated:

> "Notably, there is no such veto power within the Environmental Information Regulations 2004 (EIR) or the Environmental Information (Scotland) Regulations 2004 (EISRs) because the underlying EU Directive does not provide for a veto. Therefore, removing the s 52 veto power from FOISA would bring the Act in line with the approach to environmental information in Scotland".

The Law Society of Scotland is not supportive of the proposal to repeal the section 52 power. Its response states:

> "We consider that this power provides a necessary check on the SIC and that the existing provision contains a number of inbuilt safeguards in any event. This includes that a decision must be made on reasonable grounds (thereby making the veto subject to judicial review), and that the First Minister must consult with other members of the executive in taking such a decision.
>
> In further support of this view, we note that the veto power has never been exercised previously thereby suggesting it is not a decision that is taken lightly. Alongside this, we point to the fact that this power is not exercisable under any sections of 2002 Act other than information to comply with sections 29, 31(1), 32(1), 34, 36(1) or 41(b). We consider these as being sensitive sections where a discretionary power may be beneficial, particularly as section 52(2)(a) of the 2002 Act states "the information requested is of exceptional sensitivity"".

General functions and enforcement powers of the Scottish Information Commissioner

Respondents were asked whether they support the proposals in the Bill relating to the general functions and enforcement powers of the Scottish Information

Commissioner (see the distribution of responses in Table 8). Specifically, these proposals are:

- Introducing an exemption for information provided to the Scottish Information Commissioner during the investigation of appeals
- Providing the Scottish Information Commissioner with the power to require information from individuals acting on behalf of public authorities
- Allowing the Scottish Information Commissioner to issue enforcement notices where there is non-compliance with FOISA codes of practice
- Allowing the Scottish Information Commissioner to refer cases of failure to comply with the timescales in decision notices to the Court of Session
- Allowing the Scottish Information Commissioner to disclose certain information to Audit Scotland.

Table 8. Responses to whether respondents support the proposals relating to the general functions and enforcement powers of the Scottish Information Commissioner. Percentages are rounded to the nearest whole figure.

Response	Total	Percent
Yes	80	74%
No	3	3%
Don't know	18	17%
Not answered	7	6%

The Scottish Information Commissioner's response contained a detailed rationale for the proposals in the Bill relating to Commissioner's powers and functions. These responses were similar to the Commissioner's previous submissions to the Member's consultation on the then proposed Bill. Further information on the proposals and the Commissioner's views on the proposals can be found in the SPICe briefing on the Bill.

Kevin Dunion, former Scottish Information Commissioner and Honorary Professor at the University of Dundee was also supportive of the proposals relating to the Scottish Information Commissioner. Kevin Dunion's response states:

> "The proposed provisions relating to the Commissioner's powers (e.g. to refer a failure to comply with a decision notice within a specified time period) are a sensible tightening up of the enforcement powers, in the light of experience.
>
> An exemption for information provided to the Commissioner during an investigation is important. Authorities regularly provide to the Commissioner the specific information which has been withheld and is the subject of appeal. They also provide explanations to justify the application of exemptions, which

> contain information which would not otherwise be made public. The assurance that such information is not subject to a s1 request to the Commissioner promotes full access and candid submissions. These not only inform the Commissioners decisions but can also be important in assisting the Commissioner in effecting settlement".

Financial implications of the Bill

Dr Ben Worthy (Birkbeck University) indicated that the Financial Memorandum to the Bill may "overestimate" the costs associated with the proposals in the Bill. Dr Worthy's response states:

> "Yes, if anything the calculations overestimate the costs. As detailed in the savings and in our research, estimating the costs of FOI is very difficult. Many costings tend towards to (i) higher estimates (ii) often pushed by those wishing to weaken FOI laws. While the Scottish government estimated costs to be an average of £189 (a relatively low figure internationally) other local government estimates came to even lower numbers. As the report argues, those with very few requests will find very little, if any, additional costs. Nor are costs static, as UCL work at local government found that requests become easier to deal with over time, as processing become more efficient […]".

However, the Law Society of Scotland indicates that the proposals in the Bill are likely to have "a negative financial impact" on public authorities. Its response states:

> "We believe that the extension of an offence under section 18 of the Bill (and the associated extension of FOI duties for public authorities), along with the wider proactive publication duty, will likely have a negative financial impact on both large and small public authorities. This challenge may be further complicated in smaller organisations in sourcing a FOI officer […]. This stems from likely increased administrative burden of having to keep large volumes of data which could ultimately lead to compliance issues without proper support or funding".

As has been described elsewhere in this summary, several public authorities expressed concern about the resource or financial burden that certain proposals in the Bill could result in. South Lanarkshire Council further states in its response:

> "There is significant concern around the apparent lack of appreciation and understanding about the current cost and resource implications of FOISA and the Council is of the view that further consideration should be given to the operational requirements to meet these obligations and the additional costs of the proposals in the Bill.
>
> In particular, the Financial Memorandum notes that "This Bill will lead to savings for bodies who are currently designated by greater use of proactive publication with streamlined processes." The Council, however, is not clear the basis upon which this has been substantiated, given the additional resources that would be required to comply with the additional requirements as currently set in the Bill, and other associated impacts".

Glasgow City Council also questions the evidence base supporting the Financial Memorandum. Its response states:

> "The starting point for the Financial Memorandum for the current Bill seems to be the Financial Memorandum for the original Freedom of Information (Scotland) Bill from 2001. It is worth noting that the 2001 cost estimates were predicated on estimated numbers of requests, reviews and appeals which with hindsight were significant underestimates. This council's estimate was for 750 requests in the first year (2005) whereas in fact we received around 1,500 requests, double the anticipated number (and numbers have increased ever since, currently sitting at around 4,000 requests per annum). We also understand that the then-Sottish Information Commissioner Kevin Dunion commissioned academic research to estimate the number of appeals his office would have to deal with, and that this estimate was similarly out by around 100%. Cost estimates for the current Bill based on the 2001 estimates would therefore appear to be repeating the significant errors of those 2001 estimates and cannot be considered to be reliable.
>
> We take particular issue with the statements in the Financial Memorandum at paragraph 5 where it is stated, without any evidence, that "This Bill will lead to savings for bodies who are currently designated by greater use of proactive publication with streamlined processes," and expanded on in paragraph 10 which states "In terms of local authorities if there is a cost attached to proactive publication, this is due to the FOI Act not currently being followed." This could be seen as an attempt to conceal the fact that there is a significant potential cost for local authorities which is being disguised under the mantle of an alleged failure to comply with existing legislative requirements".

Registers of Scotland did not express immediate concern about the costs associated with the proposals in the Bill but did suggest a cost-benefit analysis could help to "meaningfully assess any financial impact".

Courtney Aitken, SPICe Research

Date: 31/10/2025