Standards, Procedures and Public Appointments Committee
Thursday 20 November 2025
22nd Meeting, 2025 (Session 6)

Freedom of Information Reform (Scotland) Bill

Introduction

1. The Freedom of Information Reform (Scotland) Bill was introduced on 2 June 2025 by Katy Clark MSP. On 10 June 2025 the Parliamentary Bureau agreed to refer the Bill to the Committee as lead committee for the Bill.

2. The Scottish Parliament Information Centre has published a briefing on the Bill.

Contents of the Bill

3. The Policy Memorandum sets out that the main aim of the Bill is:

   "to improve transparency in Scotland by strengthening existing measures in the Freedom of Information (Scotland) Act 2002 ("FoI Act"). The Bill strengthens the public's right to information by explicitly stating the right to receive the information unless it is subject to an absolute exemption, introduces a new mechanism by which additional bodies may be designated under the FoI Act and requires pro-active publication of information through a new duty to publish. The Bill improves compliance with the FoI Act by requiring an FOI officer to be designated in each public authority and strengthens the enforcement powers of the independent, Scottish Information Commissioner ("the Commissioner")."

4. The Bill would amend the Freedom of Information (Scotland) Act 2002 ("FOISA"). A range of provisions are made in the Bill relating to various aspects of the FOISA regime. The provisions of the Bill include:

   Access to information held by Scottish public authorities

   - Introduce a presumption in favour of disclosure when exemptions are being considered by public authorities.

   - Require Scottish Ministers to consider recommendations from the Scottish Information Commissioner on designating new bodies under FOISA and give the Scottish Parliament power to designate organisations delivering public functions or services by resolution.

   - Extend FOISA to publicly owned companies that are jointly owned by the Scottish Ministers and another public authority.

   - Make changes to the requirements for reports on Scottish Ministers' 'section 5 powers' to designate new public authorities under FOISA and require the Scottish Parliament to debate any section 5 report.

- Clarify that FOI requests can include an electronic address for correspondence.
- Pause, rather than reset, the 20-working day response clock when seeking clarification.
- Repeal the publication scheme duty.

Exempt information

- Create a new exemption for information provided to the Scottish Information Commissioner for the purpose of investigating appeals.

The Scottish Information Commissioner

- Provide the Scottish Information Commissioner with the power to require information from individuals acting on behalf of public authorities.
- Enable the Scottish Information Commissioner to investigate appeals on its handling of information requests made to the Office of the Scottish Information Commissioner.
- Allow the Commissioner to issue enforcement notices where there is non-compliance with FOISA's codes of practice.
- Remove the First Minister's "veto" power.
- Allow the Commissioner to refer cases of failure to comply with the timescales in decision notices to the Court of Session.

Codes of practice

- Introduce a proactive publication duty supported by a code of practice.
- Require all public authorities under FOISA to designate a Freedom of Information Officer.

Miscellaneous and supplemental

- Allow the Commissioner to disclose certain information to Audit Scotland.
- Create an offence where information is destroyed with intent to prevent disclosure, even if no information request has been made.
- Extend the time limit for prosecuting the offence of deliberately destroying or concealing records.

Scrutiny of the Bill at Stage 1

5. The Committee ran a call for views on the Bill from 19 September to 22 October 2025. All the responses are published on the Scottish Parliament's webpage.

6. The Committee took evidence from academics and advocacy groups on 6 November and from stakeholder organisations and legal bodies on 13 November. This week, the Committee will take evidence from the Scottish Information Commissioner and then from the Minister for Parliamentary Business and Veterans. The Scottish Government has provided a memorandum to the Committee setting out its position on the Bill. The memorandum is included in the annexe to this note.

7. The Committee will complete its evidence gathering by hearing from Katy Clark MSP on 27 November 2025.

8. The Committee will conclude its scrutiny of the Bill at Stage 1 by submitting a report to the Parliament.

Clerks to the Committee
November 2025

ANNEXE: MEMORANDUM FROM THE SCOTTISH GOVERNMENT TO THE STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

FREEDOM OF INFORMATION REFORM (SCOTLAND) BILL

Introduction

1. This memorandum has been prepared by the Scottish Government to assist the Standards, Procedures and Public Appointments Committee in its consideration of the Freedom of Information Reform (Scotland) Bill, introduced by Katy Clark MSP on 2 June.

2. The Scottish Government is committed to protecting and strengthening Freedom of Information rights in Scotland. Following the Scottish Government's own consultation on Access to Information Rights in 2022-23, the Scottish Government decided not to pursue new primary legislation to amend FOI law in Scotland within the current Parliament for the reasons set out below.[1]

3. The Scottish Government took the view that the law – originally brought fully into force in 2005 following the passage of the Freedom of Information (Scotland) Act 2002 (FOISA) and subsequently amended by the Freedom of Information (Amendment) Scotland Act 2013 – remained fundamentally robust.

4. The Scottish Government undertook to address concerns about the operation of the rights provided by FOISA by committing to various actions within the scope of Scottish Ministers' powers under the existing law. This included commitments to:

- Consider further extension of FOISA to organisations not already covered, including the Scottish Government's planned consultation on extension to private and third sector care home and 'care at home' providers.

- Revise and update the statutory codes of practice issued by Scottish Ministers under sections 60 and 61 of FOISA.

- Review the list of Scottish public authorities listed in schedule 1 of FOISA, to ensure all bodies which should be understood to be Scottish public authorities are listed.

5. Work is being taken forward in relation to each of these commitments. The Scottish Government's commitment to consult on extension of FOISA of private and third sector care home and 'care at home' providers is of particular significance. If this extension is taken forward, this would represent the most significant expansion of FOI rights in Scotland since FOISA came into force. The extension would make around 2000 care services, delivered by around 1000 distinct providers, subject to the law.[2] The consultation is expected to launch later this year.

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[1] see Conclusion - Access to information rights consultation: response - 28 November 2023

[2] Estimate derived from Care Inspectorate Datastore (as at 31 January 2025)

6. Whilst the Scottish Government decided not to pursue new primary legislation in relation to freedom of information within the current session, the Scottish Government does recognise that there may be some scope to improve the primary legislation in the future.

7. This memorandum sets out how the Scottish Government views the various proposals in the Bill.

Financial Impact

8. The Financial Memorandum accompanying the Freedom of Information Reform (Scotland) Bill provides the Member's view of indicative cost ranges but does not present definitive Year 1 cost estimates. Based on available data and internal analysis, the Scottish Government estimates that Year 1 costs could range from £1.2 million to £3.6 million (this excludes any calculation for financial impact on existing public bodies). This financial range is due to the variability in the number and size of bodies affected. The Bill introduces new statutory obligations, including proactive publication and the designation of FOI Officers, which will have financial implications across the Scottish public sector.

9. The Financial Memorandum estimates:

- Scottish Government annual costs of between £0 and £1,000.
- Scottish Courts and Tribunal Service annual costs of £1,912 for court costs (but they would also have costs falling under the "existing public bodies" heading below).
- Local Authorities' annual costs of between £0 and £32,000.
- Scottish Information Commissioner (the Commissioner) annual costs of £305,280.
- Newly designated bodies annual cost between £500,000 and £2 million *(across all bodies)*.
- Existing public bodies other than the Scottish Government or Local Authorities: Additional annual costs between £0 and £79,171 (*for each body*).
- Up to 99 new section 3 bodies: Costs between £41,840 and £128,171 per body.

10. While the Financial Memorandum suggests that up to 99 companies could be brought into scope under section 3, the Scottish Government considers this to be a high-end estimate and proposes a more realistic assumption of around 10 bodies for forecasting purposes. On that basis, Year 1 costs for new section 3 bodies alone could range from £0.4 million to £1.3 million. Costs will be significantly higher if the costs falling upon existing public bodies for meeting new duties are included. Year 1 costs are expected to fall across the Scottish Government, the Commissioner, local authorities, and newly designated bodies.

11. The Scottish Government believes that the above cost range **underestimates the cost** of the Bill's provisions. This is due to several factors:

a. Staff costs within the Scottish Government and across public bodies are not fully modelled.
b. Training costs are significantly underestimated; **internal analysis** suggests a minimum of £7,000 per organisation, compared to the £0–£1,000 range assumed.
c. The Financial Memorandum does not account for digital infrastructure upgrades required to support proactive publication and FOI tracking.
d. Legal compliance, communications, and appeals handling costs are not fully captured.
e. The assumption that newly designated bodies will absorb costs within existing structures is not realistic, especially in earlier years.

12. While the Financial Memorandum states that costs will be absorbed within existing budgets, internal analysis suggests that several provisions will result in new unfunded pressures on the Scottish Consolidated Fund. These include:

a. £305,000 for additional staffing and support at the Commissioner's office (as outlined in the Financial Memo).
b. £231,000 for training across 32 local authorities and Scottish Government (based on Scottish Government conservative estimated costs of £7,000 per organisation, rather than the estimate provided in the Financial Memo of between £0 and £1,000 per organisation).
c. £55,000 based on an average cost of an Information Officer as outlined in Table 3 of the Financial Memo for one additional FOI Officer within the Scottish Government but noting that that a £nil estimate was provided in the Financial Memo.
d. A number of the "other public authorities" (costed in the Financial Memo at between £0 and £79,171 per body) are bodies which form part of the Scottish Administration and whose costs are met from the Scottish Consolidated Fund (such as the Scottish Fiscal Commission).

13. Although the Financial Memorandum states that the Commissioner's costs will be met by the Scottish Parliamentary Corporate Body (SPCB), it is important to note that the SPCB is funded from the Scottish Consolidated Fund (SCF). Accordingly, while the SPCB may be the immediate budget holder, the expenditure (estimated at £305,000) should ultimately be regarded as payable out of the SCF.

14. The Financial Memorandum assumes that the Scottish Parliament will absorb the costs associated with section 2 within existing budgets; however, this overlooks the potential resource impact of conducting consultations, preparing designation reports, and supporting legislative resolutions. If designation activity is frequent or complex, existing committee and staff capacity may be insufficient, potentially requiring additional support. Without clarity on the volume and timing of designations, there remains uncertainty around the true cost to the Parliament.

15. The Financial Memorandum assumes training costs for Scottish Government and local authorities will be absorbed within existing budgets and will cost in the region of between £0 and £1,000 in each organisation. However, given the scale and geographical spread of these organisations, as noted above, our **internal analysis** suggests estimated costs of at least £7,000 per organisation, which would ultimately be funded from SCF. At the very least, the following minimum activities are likely to be incurred:

- E-learning platform subscriptions
- In-person workshops and specialist training
- Printed materials and handbooks
- Staff time and refresher modules

16. The Financial Memorandum does not account for the potential need for additional staff in the Scottish Government to support implementation. A conservative estimate of £55,000 (assumed average cost as outlined in Table 3 of the Financial memo) for one FOI Officer is included in our analysis to reflect new duties introduced by the Bill (but noting that this average is lower than the cost assumed by the Financial Memo for even a medium-sized organisation).

17. The Bill introduces new enforcement and appeal mechanisms. While the Financial Memorandum assumes low volumes, contingency costs of £60,000 (as outlined in the Financial Memo in paragraph 92 and included in the total Commissioner costs of £305,000) are included, based on recent judicial review costs and the potential for court referrals.

18. The Financial Memorandum assumes that newly designated bodies will absorb any associated costs within their existing structures. However, Table 3 of the Memorandum outlines estimated costs for employing a Freedom of Information Officer, ranging from £39,840 for smaller organisations to £78,171 for larger ones, with an average cost of £55,350. These costs are likely to be ultimately funded through the Scottish Consolidated Fund, via contracting authorities during negotiations with the Scottish Government. It is also important to note that smaller and less well-resourced organisations may face a disproportionately higher financial burden, which could potentially impact the delivery of frontline services.

19. The Bill anticipates long-term savings through reduced FOI requests and improved transparency. However, these savings are speculative and not expected to materialise in Year 1. The assumption that efficiencies will offset costs is therefore not substantiated in the short term. In addition, the estimate in the Financial Memo assumes certain wage levels; however, pay inflation, overhead inflation and rises in pension and employer’s NICs will increase costs over time.

20. The absolute nature of the new duties, particularly the proactive publication requirement and the designation of FOI Officers, creates a statutory obligation that will require resourcing. This removes flexibility in managing FOI budgets and may necessitate the diversion of resources from other areas.

21. Additional financial implications could include the need for digital infrastructure upgrades to support proactive publication and FOI tracking. This may involve procurement of new content management systems, integration with existing platforms, and cybersecurity enhancements.

22. In addition to the direct costs outlined, indirect financial implications should be considered such as digital infrastructure upgrades, legal compliance support, and the provision of ongoing assistance to newly designated bodies. These pressures may impact the capacity of public services and require coordinated planning across departments to ensure effective delivery of the Bill's provisions.

23. Further information is required to fully understand the financial impact of the Bill's provisions. Clarity is needed on the scale and timing of new designations, the operational readiness of affected bodies, and the extent to which existing systems and staffing can accommodate the new statutory duties. Without this, there remains a high degree of uncertainty around the true cost of implementation.

The Scottish Government's Position

Presumption in favour of disclosure

24. Section 1 of the Bill provides for the addition of an explicit presumption in favour of disclosure when considering the application of any 'non-absolute' exemption under Part 2 of FOISA. This would bring FOI requests in line with requests made under the Environmental Information Regulations. **The Scottish Government has a neutral position on this proposal.**

25. The Scottish Government considers that it is already well understood that the terms of FOISA create a presumption in favour of disclosure and we are not aware that the statutory presumption within the EIRs has any material impact on how information is released compared to how information is released under FOISA. We note that the previous Commissioner expressed a similar view in his written submission to the Member's consultation.

26. Nevertheless, whilst the Scottish Government is not persuaded of the need for this measure, we have no strong objection to it on grounds of principle.

Jointly owned public companies

27. Section 3 of the Bill would amend the definition of a publicly-owned company in terms of section 6 of FOISA, to include any company jointly owned by the Scottish Ministers in combination with one or more other authorities. **The Scottish Government supports this measure.**

28. During post-legislative scrutiny of FOISA in 2019-20, the Scottish Government acknowledged that the existing structure of section 6 creates an anomaly, which

ought in principle to be corrected.[3] The Scottish Government is satisfied that the provisions of section 3 of the Bill would have the effect of correcting that anomaly.

Measures intended to promote further extension of FOISA

29. The Bill as introduced contains the following measures intended to encourage and facilitate further future extension of FOISA to additional organisations in Scotland:

- Section 2(1) of the Bill would create a statutory obligation on the Scottish Ministers to consider any proposals made to them by the Commissioner in exercise of the Commissioner's power under section 43(4) of FOISA, to make proposals on the exercise of the Scottish Ministers' functions under sections 4 and 5 of FOISA.
- Section 2(2) of the Bill, along with section 4, would create a new power for the Parliament to extend FOISA by resolution.
- Section 5 of the Bill would create an obligation for Ministers to consider the use of their power under section 5 of FOISA, to extend coverage of the legislation to further organisations, within each two-year period for which it is required to lay a report in the Parliament in terms of section 7A of FOISA.
- Furthermore, the provisions of section 5 would require the Parliament to debate each such bi-ennial report on Scottish Ministers' exercise of the power, and to make a decision on whether to approve the report.

30. The Scottish Government is opposed to section 2(2) for reasons which are set out below. However, with some further work to clarify the intended outcomes, the Scottish Government accepts that other measures could be of some value in providing assurance that extension of FOISA will be actively considered to ensure that coverage keeps up to date with changes in service delivery models. The Scottish Government is therefore content to adopt a neutral stance in relation to these measures.

31. **Therefore, in regard to the first of these proposed measures, the Scottish Government has a neutral position.** The Scottish Government considers it clear that, were the Commissioner to submit any proposal to Ministers in exercise of the Commissioner's power under section 43(4), it would be appropriate for the Scottish Government to consider such a proposal. The Scottish Government would have no strong objection to being placed under a statutory obligation to do so, noting that any obligation to consider a proposal from the Commissioner would not commit the Scottish Government to accept that proposal.

32. **The Scottish Government is opposed to the measure proposed within section (2)2 of the Bill to enable the Parliament to extend FOISA by resolution.** This proposal represents a relatively unusual approach to the extension of FOISA in that it empowers the Scottish Parliament to unilaterally designate persons or organisations as 'public authorities' for the purposes of FOISA, without any involvement of the Scottish Ministers. The Scottish Government has concerns about

[3] See Minister for Parliamentary Business and Veterans letter to PAPLS Convener - 25 February 2021 (Annex - response to report paragraph 13)

whether it is appropriate for this power to be given as a parliamentary resolution power.

33. While there are a small number of examples of 'law-making by resolution' on the statue book, those powers usually relate to the internal running or administration of the Parliament, or matters of particular parliamentary interest, such that ministerial involvement is not necessary or appropriate. FOI, however, is not an area of solely parliamentary interest. Indeed, it is an area of great ministerial / executive interest - the proposed power in section 2(2) of the Bill has potentially far-reaching implications for the Scottish public sector and potentially to large parts of the private sector which may under the new power be designated as 'public authorities' for the purposes of FOISA. In turn, exercising this power would have financial ramifications for the Scottish Government (to whom the bodies would likely try to pass on their increased costs when agreeing any contractual services). As such, the Scottish Government is concerned that the Member has not given sufficient justification or explanation as to why the executive should be excluded from the law-making process in this area.

34. It is also unclear how a proposal to make a resolution would be initiated and how the Parliament would assure itself that the proposal had undergone appropriate consultation and was drafted in a way that it delivered its intent, effectively identifying and designating persons who "appear to exercise functions of a public nature", or adequately articulate specific functions to which a resolution applies. Under the existing section 5 process, the question of whether a body carries out functions of a public nature is informed by consultation and exploration carried out by Government teams that have expertise in the area the bodies operate in, with input from FOI policy leads. Without proper scrutiny built into the law-making process, it is possible that the quality and clarity of the law will suffer and decisions of the Parliament could be at risk of judicial review.

35. Further, it is unclear from the current drafting when a legal change would take effect under a section 5A resolution. It may be that the normal rules about decisions and voting in the Scottish Parliament's Standings Orders (Rule 11) would apply, with the result that the designation would take immediate effect once the motion was passed. Equally, it may be that the intention is for the Standing Orders to be updated to specifically address the new FOI resolutions, including details of when the legal change would take effect, in line with the approach taken in relation to previous parliamentary resolution powers (for example rules 8.11B relating to pensions motions; or rule 3C relating to Lobbying motions). Were the provision to be accepted as drafted, the Scottish Government considers that this uncertainty would need to be addressed either expressly via amendment to section 2(2), or by updating the Standing Orders.

36. We understand that the Member has recently responded to the DPLRC's letter regarding the proposed resolution power. **We have had the opportunity to read both the Member's response and the DPLRC's report of 30 October 2025.** However, the points raised in the Member's letter have not assisted our understanding of why a parliamentary resolution power is considered appropriate in these circumstances, nor lessened the concerns we have highlighted above.

37. We would also note that the Member's Policy Memorandum states at paragraph 34 that this is a power to "add, by resolution, to the list of Scottish public authorities in schedule 1 of the FoI Act". However, it should be noted that the power does not allow for the text of schedule 1 itself to be changed. Instead, the power allows a resolution to be passed which supplements FOISA (in a similar way to, for example, the Freedom of Information (Scotland) Act 2022 (Designation of Persons as Scottish Public Authorities) Order 2019), made under section 5 FOISA.

38. **The Scottish Government has a neutral position on the proposals within section 5 of the Bill**, which are intended to increase parliamentary scrutiny of the Scottish Ministers' exercise of their power under section 5 of FOISA to extend coverage of the Act to further bodies, considered to be delivering functions of a public nature. The Policy Memorandum accompanying the Member's Bill is explicit that the policy intention of the measure is to incentivise greater use by Ministers of their extension power.

39. The duty for Ministers to lay a report in the Parliament every two years was created by the Freedom of Information (Amendment) (Scotland) Act 2013. Since the passage of the 2013 Act, Ministers have exercised their powers to extend FOISA to the following bodies:

(a) arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities (2013 Order)
(b) grant-aided schools and independent special schools (2016 Order)
(c) providers of secure accommodation (2016 Order)
(d) Scottish Health Innovations Limited (2016 Order)
(e) private prison contractors (2016 Order)
(f) Registered Social Landlords and their subsidiaries (2019 Order)

40. As noted earlier in this memorandum, the Scottish Government is currently developing a consultation on extension of FOISA to private and third sector providers of care home and 'care at home' services which, if proceeded with, would be the most significant extension of FOI law in Scotland to date in terms of the number of bodies brought within scope of law.

41. The Scottish Government therefore rejects any suggestion that it has been slow to make use of its extension power. The existing requirement for Ministers to report to Parliament on a biennial basis provides accountability for its use, but should not be regarded as giving rise to an expectation that the power will be exercised during every two year period. Rather, Ministers consider that they should exercise the power where necessary in order to protect or expand access to information rights.

42. In doing so, Ministers will always remain mindful that designation as a Scottish public authority under FOISA brings with it a number of clear statutory obligations, the discharge of which will inevitably impact on the resources of organisations. These obligations are of course designed to be proportionate. Furthermore, the greater openness and transparency which may result from an organisation's designation under FOISA may also bring tangible benefits for that organisation – such as stronger public trust.

43. Nevertheless, the Scottish Government is clear that extension of the statutory obligations of FOISA should be proportionate and only undertaken where there is a clear case that doing so will add genuine value to the ability of members of the public to access information about government and public services in Scotland.

44. In light of the above considerations, the Scottish Government is not necessarily opposed to being placed under an obligation to consider the use of the power within each two-year reporting period, or to the Parliament being placed under an obligation to debate and vote on the biennial reports laid before it in accordance with section 7A. The Scottish Government acknowledges that such arrangements could have some value in adding a further level of accountability for Ministers' use of the section 5 power. However, the Committee will wish to consider whether such measures are proportionate in the round, taking account of the Parliamentary time they would require. In particular, a time-sensitive requirement to hold a debate would bind the Parliament's own hands regardless of the nature of the report and the existence of other pressing business. The Parliamentary Bureau is of course designed as a cross-party mechanism for agreeing business programmes in a way that is more flexible than that proposed by the Bill. The Bill is also silent on what would happen were the Parliament to decide not to approve the Scottish Government's report. Clarity on that would be needed.

Specification that an address for correspondence may include an electronic address

45. Section 6 of the Bill proposes an amendment to section 8 of FOISA to specify that the requirement for a requester of information to state an address for correspondence is inclusive of electronic addresses. **The Scottish Government has a neutral position on this proposal.**

46. The Scottish Government considers that it is already well established that an electronic address is adequate for the purposes of submitting an information request. The overwhelming majority of requests submitted to the Scottish Government are received by email, with many requesters providing no contact address other than the email address from which they have sent their request. Such requests are accepted as valid and are processed in the usual way.

47. The Scottish Government is confident that the same is likely to be true for most other Scottish public authorities. The Scottish Government therefore does not consider this proposed addition to the wording of section 8 to be necessary, but is not opposed to it in principle. If such an addition were to be made, it considers that the drafting may need to be revisited. Stating, as section 8 of the Bill currently does, that the address which has to be provided may *include* (rather than may *be*) an electronic address makes clear that an electronic address could be given alongside a physical one. However, this wording may not make it sufficiently clear that an electronic address alone is sufficient.

Changes to time for compliance – seeking clarification

48. Section 7(1) of the Bill proposes changes to the way the statutory deadline for an FOI request is calculated, when an authority has deemed it necessary to seek further information from a requester in order to identify and locate the information

requested (i.e. to seek 'clarification' of the request). Under the existing provisions of FOISA, any authority that has found it necessary to seek clarification from a requester in this way is entitled to the full statutory 20 working day timescale in which to respond to a sufficiently clarified request once one has been received.

49. The provisions would amend section 1 of FOISA so that any working days which have already elapsed between the date an authority has received any request, and the date on which it has contacted the requester to seek clarification of that request, would be deducted from the statutory timeframe within which the authority would be required to respond to a sufficiently clarified request once received. This would have the effect of merely 'pausing' the clock when clarification is requested rather than effectively 'restarting' it, as under existing legislation.

50. **On balance, the Scottish Government is opposed to this proposal.** The Scottish Government recognises requests for clarification can cause frustration to requesters, particularly if a request for clarification is received some way into the original 20 working day period, within which they had expected to receive a substantive response to their request.

51. This issue was considered in the Scottish Government's own consultation on Access to Information Rights in Scotland in 2022-23. In the consultation document the Scottish Government set out that it saw a need to consider carefully the appropriate balance between allowing authorities sufficient time to respond to a clarified request once it has been received, and the legitimate expectations of requesters that they be asked for clarification promptly, when required.[4]

52. The requirement to respond within the 20 working day statutory timeframe can be challenging for authorities, particularly when handling large or complex requests. Authorities cannot be expected to take forward the response to a request which does not adequately describe the information requested.

53. The Scottish Government also notes the former Commissioner's comments in response to the Member's consultation that amending the provisions of section 1 of FOISA in this way could have the effect of incentivising authorities to simply reject unclear requests as invalid. The former Commissioner suggests this could be done on the grounds that the request fails to describe the information requested in terms of section 8(1)(c) of FOISA.[5]

54. The Scottish Government has no view on whether requests which are insufficiently clear are necessarily always therefore 'invalid' on the grounds that they do not describe the information requested. However, it does seem clear that there is at least an overlap between requests which require clarification, and those which fail to describe the information sought.

55. As the Commissioner highlighted in his response to the Member's consultation, the Scottish Government did set out a possible compromise approach to this issue in its own consultation document. It was suggested there that rather than a

[4] see Section 6.2 - Access to information rights in Scotland: consultation - 29 November 2022
[5] see Scottish Information Commissioner - Response to Katy Clark MSP FOI Member's Bill Consultation (pages 25-27)

straightforward approach of 'pausing' the clock when clarification is sought, authorities might be allowed a defined period of time after a request has been received to seek clarification if necessary, and that the authority should only be penalised in terms of the statutory timescale available to respond to a sufficiently clarified request if it has failed to seek clarification within the defined period.

56. The Scottish Government continues to consider that such an approach would represent a fairer and more proportionate response to concerns about delays by authorities in seeking clarification than the measures contained within section 7(1) of the Bill. The Committee may wish to consider the merits of such an approach.

57. However, the Scottish Government consultation also acknowledged that such an approach would add complexity to what is currently a fairly simple position. It is also the case such a proposed compromise approach would not entirely address the former Commissioner's concern that authorities could elect to refuse some unclear requests as invalid, as an alternative to seeking clarification, if doing so would allow the authority to avoid penalisation in relation to the statutory timescale for compliance.

58. In its response to the analysis of its consultation, the Scottish Government ultimately concluded that it was not persuaded of the need for changes to legislation in this area. Instead, the Scottish Government indicated that it would seek to provide clearer guidance to authorities regarding the approach to seeking clarification, in a revised edition of the Code of Practice issued by Ministers under section 60 of FOISA.[6] Work on a revised edition of the section 60 Code is ongoing.

59. It remains the Scottish Government's position that it is not persuaded of the need for changes to legislation in this area. However, the Committee will wish to consider the full range of possible approaches.

Time for compliance – grant aided and independent special schools

60. Section 7(2) of the Bill proposes to repeal the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 – which allow an extension of no more than 60 working days for grant aided and independent special schools whenever the statutory deadline for responding to a request would otherwise fall on a day which is not a school day.

61. These Regulations were made by Ministers at the time of extension of FOISA to grant aided and independent special schools by the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016. They were made to address concerns that such schools, which by definition cannot rely on the support of a local authority in the discharge of their obligations under FOISA, might otherwise be required to respond to requests for information during periods when the school is closed, principally during school holiday periods.

62. The regulations were made following public consultation and were supported at the time by the Commissioner.[7] The Scottish Government sees no reason to now

[6] see Conclusion - Access to information rights consultation: response - 28 November 2023
[7] S ee Response 841993165 to Freedom of Information (Scotland) Act 2002: 'Time for Compliance' Regulations - Scottish Government consultations - Citizen Space

repeal the regulations (but would note that if it became appropriate to repeal or alter them in future then this could be done under existing powers). **The Scottish Government is therefore opposed to this provision of the Bill.**

Measures intended to promote stronger approaches to proactive publication

63. Section 8 of the Bill proposes the repeal of sections 23, 24 and 25(3)(a)(ii) (and the related definition within section 73) of FOISA which set out and refer to the obligation on Scottish public authorities to maintain a publication scheme and the Commissioner's role in approving such schemes and the Commissioner's power to set model publication schemes for authorities to follow.

64. Section 15 of the Bill proposes the insertion of new sections 60A and 60B of FOISA to replace these features of FOISA. The proposed new section would create a broad "proactive publication duty" for all authorities to take reasonable steps to organise and keep up to date information relevant to their functions and to make that information available to the public. Furthermore it would require the Commissioner to set a new Code of Practice on proactive publication and would further require authorities to comply with a new Code of Practice on proactive publication, to be set by the Commissioner, subject to the approval of the Parliament.

65. **The Scottish Government cannot support these proposals as currently constructed.** These measures would interact with the measure contained within section 12 of the Bill, which would empower the Commissioner to issue enforcement notices in relation to non-compliance with the statutory codes of practice issued under FOISA – including the proposed new Code of Practice on Proactive Publication to be set under the new section 60B. This would mean that the Commissioner, having originally set the Code, would also be empowered to require public authorities to comply with the Commissioner's interpretation of the Code. In the event of failure to comply with an enforcement notice the Commissioner would be empowered to refer the matter to the Court of Session. This could ultimately result in the authority being treated as though it had committed a contempt of court.

66. The broad reasons why the Scottish Government has concerns about seeking to make the statutory codes of practice issued under the Act legally enforceable in this way are set out later in this memorandum. In addition to those wider considerations, the Scottish Government sees particular challenges associated with the proposal to empower the Commissioner to both set, and have powers to legally enforce, the Code. The Scottish Government acknowledges that some checks and balances would be provided by the proposal to make the content of the Code subject to approval by the Parliament. Authorities would also have the right to appeal to the Court of Session on a point of law against any enforcement notice issued. Nevertheless, the Scottish Government is not persuaded that this approach strikes the appropriate balance between the role of the officeholder and the role of Ministers, the legislature and the courts.

67. The Scottish Government considered the replacement of the publication scheme requirement in its own consultation on Access to Information Rights in Scotland in 2022-23. The consultation document set out the Scottish Government's view at that time that any codes of practice set under FOISA should play the ordinary

role of statutory guidance in setting out best practice for authorities to follow. It should not rise to itself become tantamount in status to enforceable law.[8] That remains the Scottish Government's position.

68. In its response to the consultation analysis the Scottish Government set out that it remained open to the replacement of the publication scheme duty by a Code of Practice, and that responsibility for setting such a code should sit with the Commissioner, rather than the Ministers, in view of the fact that under the current regime the Commissioner is already responsible for setting broad expectations in relation to proactive publication through their power to set model publication schemes.

69. The Scottish Government also set out that it continued to have some concerns about the workability of such a scheme.[9] As set out in this memorandum, the Scottish Government's position is that codes of practice set under FOISA should remain as statutory guidance - rather than becoming legally enforceable in the way the Member's Bill envisages. However, the Scottish Government would also be concerned to ensure that any new arrangements continue to provide the Commissioner with levers at least equal to those already available to them, to require proactive publication of information by authorities.

70. Under sections 23 and 24 of FOISA the Commissioner has a specific role in approval of authorities' publication schemes and in preparing and approving model publication schemes. Under section 51 of FOISA the Commissioner can also issue enforcement notices in relation to failure to adopt and maintain a publication scheme in terms of section 23. The repeal of sections 23 and 24 of FOISA, as proposed by section 8 of the Bill, could therefore weaken the Commissioner's power in this area in ways not fully counterbalanced by the introduction of a new statutory Code of Practice, if that Code is to remain as non-legally binding statutory guidance, in line with the Scottish Government's preference.

71. In light of the above considerations we think there would be merit in the Committee considering whether the existing publication scheme duty within FOISA should in fact remain, but be supplemented by a new statutory Code of Practice on Proactive Publication to be set by the Commissioner, but constructed on a similar basis to the two existing codes of practice set by Ministers under sections 60 and 61 of FOISA i.e. as statutory guidance for Scottish public authorities on the discharge of their obligations. Such a Code could still be underpinned by a 'proactive publication duty' (although not in the current terms proposed in the Bill, which are discussed below), and by the existing requirement for authorities to adopt a publication scheme. The Code could provide detailed guidance for authorities on what constitutes good practice in the discharge of these duties.

72. Such an approach would maintain the Commissioner's lead responsibility for setting expectations in relation to proactive publication – and for enforcing compliance with the minimum standard provided by the publication scheme duty. Granting a public officeholder the power to set legally enforceable standards within a Code of Practice

[8] See Section 5.1 - Access to information rights in Scotland: consultation - 29 November 2022
[9] See Section 4 - Improving proactive publication - Access to information rights consultation: response - 28 November 2023

should be underpinned by careful consideration of the appropriate balance between the role of the officeholder and the role of Ministers, the legislature and the courts.

73. On balance, the Scottish Government does not consider that a legally enforceable Code of Practice – set by whatever process - represents a proportionate solution to the challenge of encouraging stronger proactive publication practices by Scottish public authorities. Rather, the Scottish Government sees a need for a co-operative approach rooted in the support and promotion of good practice, also underpinned by clear statutory requirements for authorities as at present.

74. The Scottish Government's view that any Code should remain as statutory guidance for authorities, without becoming legally enforceable, should not be taken as scepticism about the value that such a Code might add. Clear statutory guidance in this space, carrying the authority of the Commissioner, could play a significant role by giving authorities clear benchmarks against which to design, plan and measure their approach to the fulfilment of their proactive publication duties. In doing so, such a Code may drive forward the development of higher quality approaches to proactive publication, thereby producing tangible benefits for members of the public and also for authorities.

75. As under the existing Codes of Practice set under sections 60 and 61 of FOISA, the Commissioner would have the power to issue formal practice recommendations to authorities to promote compliance with the Code. Promotion of compliance with the Code could also be expected to shape the Commissioner's approach to their intervention activity.

76. The provisions of the proposed new section 60B(2), in relation to the matters on which the Code should provide guidance, seem broadly reasonable to the Scottish Government (although the concept of information which an authority "must" publish would need to be adjusted if the code were to be non-binding). The list of organisations with which the Commissioner should be required to consult before setting the Code also seems broadly reasonable and we would strongly agree that the Commissioner should be required to consult others, including Ministers, before setting the Code.

77. The requirement within the proposed new section 60B(3)(b) that the Code must be approved by the Parliament would certainly be essential in the case of a legally enforceable Code of the type envisaged by the Bill as introduced. The Committee may wish to consider whether that would remain a proportionate requirement were to Code to be issued by the Commissioner as statutory guidance on a similar basis as the two existing Codes issued by the Scottish Ministers.

78. There is currently no similar requirement for those other two codes, set by the Scottish Ministers, to be approved by a resolution of the Parliament. Therefore, to place such a requirement on the new Code may seem excessive if that Code is intended to function on a similar basis. On the other hand, a vote of the Parliament could still be regarded as desirable in order to ensure democratic accountability in view of the more indirect accountability of the Commissioner to the Parliament than exists in the case of Ministers.

79. However, the Scottish Government has significant concerns about the proactive publication duty as currently drafted (see inserted section 60A). In its present form, this would appear to require reasonable steps to be taken to make available to the public any information a public authority holds which is relevant to its functions. By definition, the expectation would be that all information an authority holds is relevant to its functions or else there would be no reason for it to hold it. The provision would therefore seem to require public authorities to take reasonable steps to make all information that they hold available to the public.

80. This may not represent the Member's intention. However, there is no attempt within the provision to limit its scope to especially important information or information of a particular type. In addition, no exceptions are applied, as it does not exclude information which is designated as exempt information under Part 2 of FOISA. Although the obligation is supplemented by an obligation to also comply with the code of practice, the code of practice would not be able to undercut the duty to take reasonable steps to publish information (or else public authorities would be subject to two equally binding and yet conflicting obligations). As such, the code of practice could not be used to mitigate the sweeping nature of the duty. The Scottish Government considers that the apparently unqualified nature of this duty as currently drafted should be a matter of significant concern to the Committee.

New exemption – Information provided to the Commissioner

81. Section 9 of the Bill proposes the creation of a new exemption, to protect information provided to the Commissioner for the purpose of the Commissioner's consideration of FOI appeal cases. The Policy Memorandum sets out that this is intended to ensure that the Commissioner has robust grounds for refusing to release information provided to him by Scottish public authorities in submissions made regarding FOI appeals. The Policy Memorandum justifiably comments that any such release of information by the Commissioner would substantially prejudice the delivery of the Commissioner's functions.

82. It is further noted that the Commissioner currently relies on other exemptions under FOISA, particularly section 30(c) (substantial prejudice to the effective conduct of public affairs) in order to withhold such information from release. This approach is considered necessary because of the Commissioner's understanding that section 45 of FOISA, which more generally prohibits the Commissioner and their office from disclosing information provided to the Commissioner, does not create a statutory prohibition on the release of information in response to a request under FOISA, and that consequently it would not be competent for the Commissioner to rely on section 26 (prohibitions on disclosure) in order to withhold such information.

83. **The Scottish Government has a neutral position on the principle of whether a new exemption is needed, but cannot support the proposal as currently drafted.** This issue was raised by the former Commissioner during post-legislative scrutiny of FOISA in 2019-20[10] and subsequently considered by the Scottish Government in its consultation on Access to Information Rights in Scotland. In its

[10] see Post-legislative scrutiny of FOISA - Written submission from Scottish Information Commissioner (REF NO. PAPLS/S5/19/FOIA/19) (Appendix, row 6)

response to the analysis of responses to the consultation the Scottish Government set out that it remained open to legislating in the future to create a new exemption, if that would be helpful to the Commissioner and if there were clear evidence that so doing would have a material impact. However, the Scottish Government also noted that existing arrangements appear to have operated effectively since the legislation came into force in 2005, and that it therefore did not perceive this issue to be a matter of urgency.[11]

84. This remains, broadly, the Scottish Government's position. The existing provisions of FOISA in this area appear to have operated effectively now for over 20 years. The Scottish Government is not aware of any instance over that period in which any Commissioner has released information provided to them by an authority against the wishes of that authority. Neither is the Scottish Government aware of any reticence on the part of authorities to furnish the Commissioner with information, due to concern about that information being disclosed by the Commissioner. It is therefore not clear to the Scottish Government that there is a need for any change in this area.

85. However, the Scottish Government would comment that to the extent that the proposed change is intended to remedy a perceived problem regarding the interaction between sections 45 and 26 of FOISA – it is not clear that it achieves that aim. Firstly, the exemption is not limited to FOI requests made to the Commissioner in respect of information held by him. This means that once information is provided to the Commissioner for the purpose of a section 47 application, it becomes exempt – even if it would previously not have benefited from any exemption. As drafted the provision would appear to allow the authority which had provided the information also to rely on the exemption as a basis for further withholding that information in response to other requests. If the intention is that the new exemption should be available for use by the Commissioner only, the provision would need to be amended.

86. Secondly, the change would still not address the basic concern expressed by the Commissioner - that the provisions of section 45 do not create a statutory prohibition on the release of information in compliance with the Commissioner's statutory obligations under FOISA.

87. The Policy Memorandum comments that section 45 of FOISA is intended to create such a statutory prohibition on disclosure, but does not in fact do so (at least, not in terms which would render section 26 applicable). If it is considered that this leaves authorities with insufficient assurance that information provided to the Commissioner in confidence, for the purpose of considering appeals, will not be released by their office then the most straightforward remedy would be to address any perceived issue in the interaction between sections 45 and 26 of FOISA, to ensure that the former does in fact create a statutory prohibition on disclosure in terms of the latter – and that disclosure of such information by the Commissioner's office would therefore be unlawful.

88. The provisions of section 9 of the Member's Bill would not address the perceived defect in the existing law.

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[11] see Section 5.9 - Technical and other issues – ensuring the Act remains fit for purpose - Access to information rights consultation: response - 28 November 2023

New power for Commissioner to compel individuals

89. Section 10 of the Bill proposes a new power for the Commissioner to compel any officer, employee or agent of a Scottish public authority to provide information to the Commissioner to enable the Commissioner to discharge their functions. The Policy Memorandum sets out that the Member is persuaded that such a power is needed to ensure the Commissioner is able to access all information held by an authority and to ask questions of all relevant persons for the purpose of fulfilling the Commissioner's regulatory and enforcement functions.

90. The Commissioner already has clear powers to compel the provision of information by authorities for the purposes of discharging their functions, and it is already an offence under section 65 of FOISA for any employee or officer of an authority to conceal requested information with the intention of preventing the release of that information. It is therefore unclear to the Scottish Government why such a significant new power for the Commissioner would be required.

91. The Scottish Government is of the view that engagement with the Commissioner in relation to any FOI appeal case should be by the relevant authority, rather than by individual staff members. It is ultimately the authority – not any one employee – which is responsible for the fulfilment of its statutory obligations under FOISA.

92. The Scottish Government would not wish FOISA compliance activity to intrude into the personal space of public authority staff, or to place individual staff members under personal pressure at an individual level. Under this provision, individual members of staff could be required to provide information about matters which they are not connected with, or where there may be other good reasons (such as health issues) why any obligation should be fulfilled by a different member of the authority.

93. Any information notice or other investigatory powers used by the Commissioner would still cover material held by individuals which relates to the authority's business, so it is not clear why it would be necessary or appropriate for the Commissioner to have a power to single out individuals and compel them to produce information personally. **The Scottish Government is therefore opposed to this proposal and believes that organisations should in general be held accountable at an organisational level, as is the case at present.**

Enabling Commissioner to consider appeals about own FOI handling

94. Section 11 of the Bill proposes to repeal the existing prohibition within section 48(a) of FOISA on the Commissioner considering FOI appeals regarding the handling of information requests to their own office. The Policy Memorandum sets out that this prohibition not only removes from such requesters the opportunity to appeal to the Commissioner, but also has the effect of removing any subsequent recourse to appeal to Court of Session. Therefore, the only recourse available to a requester who remains dissatisfied with the Commissioner's handling of their request following internal review stage is to seek a judicial review.

95. This issue was considered during post-legislative scrutiny of FOISA during 2019-2020[12] and subsequently in the Scottish Government's consultation on Access to Information Rights in Scotland in 2022-23.[13] In its response to the analysis of responses to the consultation the Scottish Government set out that it was not persuaded that this change would add genuine value to the rights of requesters, and therefore was not persuaded of it merits.[14]

96. Nevertheless, the Scottish Government understands the argument in favour of the change – which admittedly could bring about some, albeit limited, enhancement to the rights of requesters of information from the Commissioner's office. The Committee will wish to consider where the balance of considerations lies here. **The Scottish Government is therefore content to now adopt a neutral position on this aspect of the Bill.**

Commissioner power to issue enforcement notices in relation to Codes of Practice

97. Section 12 of the Bill contains measures to empower the Commissioner to issue Enforcement Notices under section 51 of FOISA in relation to non-compliance with the two codes of practice issued by Ministers under sections 60 and 61 of FOISA and the proposed new code of practice on proactive publication to be issued by the Commissioner as per section 15 of the Bill. It further proposes that the Commissioner should be required to consult with the Keeper of the Records of Scotland before issuing any such Enforcement Notice in relation to the section 61 Code on Records Management.

98. **The Scottish Government is opposed to these proposals.** As set out in the discussion above on 'Measures intended to promote stronger approaches to proactive publication', the Scottish Government does not consider that the statutory guidance issued under FOISA should be made 'enforceable' in this way. To do so would be effectively to elevate the code of practice to the status of law, which the Scottish Government considers would not be appropriate within the context of the existing legislative scheme.

99. The Scottish Government considers that the existing power for the Commissioner to issue practice recommendations under section 44, and the wider tools available to their office to promote awareness of and compliance with the Codes should be sufficient to encourage a culture of compliance on the part of authorities. The power to issue enforcement notices should, in the opinion of Ministers, remain confined to matters regarding compliance with Part 1 of FOISA i.e. with the statutory duties of authorities.

100. The Scottish Government considers that this approach to the issuance and use of the Codes has worked well over the 20 years during which FOISA has been in force, and allows a clear distinction to be maintained between the statutory obligations of Scottish public authorities under Part 1 of FOISA (which can be enforced through the courts) and statutory guidance which promotes good practice in relation to these. The Scottish Government sees no reason to dismantle that longstanding distinction.

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[12] See Post-legislative scrutiny: Freedom of Information (Scotland) Act 2002 (para 236-238 & 242)
[13] See Section 6.3 - Access to information rights in Scotland: consultation - 29 November 2022
[14] See Section 5.4 -Access to information rights consultation: response - 28 November 2023

101. The Scottish Government has set out in the above discussion on 'Measures intended to promote stronger approaches to proactive publication' that it agrees parliamentary approval of the proposed Code of Practice on Proactive Publication would be appropriate, were that code to be made legally enforceable in the manner envisaged by the Bill. Whist the Scottish Government is opposed to any such powers of enforcement becoming attached to any code of practice issued under FOISA, the Committee may wish to consider whether, in the event of such enforcement powers in fact becoming extended in this way, greater parliamentary oversight of the codes issued by Ministers under sections 60 and 61 would similarly be appropriate.

Repeal of First Minister 'veto' power

102. Section 13 of the Bill contains measures to repeal the provisions of section 52 of FOISA, which provide the First Minister with a limited power to overrule decisions of the Commissioner in relation to information held by the Scottish Administration. The power relates only to information which is exempt from disclosure under one of the following exemptions:

- Section 29 (formulation and development of Scottish Administration policy)
- Section 31(1) (National Security & Defence)
- Section 32(1) (International relations)
- Section 34 (Investigations by Scottish public authorities)
- Section 36(1) (confidentiality in legal proceedings)
- Section 41(b) (Honours)

103. Furthermore, the First Minister can only exercise this power where he has on reasonable grounds formed the opinion that the information in question is of exceptional sensitivity and that there has not in fact been any failure to comply with Part 1 of FOISA. It is not correct therefore to suggest that the First Minister has any general power of 'veto' over the release of information.

104. The issue of the First Minister's so-called 'veto' power was addressed during post-legislative scrutiny of FOISA and views were subsequently sought in the Scottish Government's consultation on Access to Information Rights in Scotland in 2022-23. In its response to the analysis of responses to the consultation the Scottish Government indicated that it was open to considering the future of the power.[15] This remains the Scottish Government's position. **However, the Scottish Government is not persuaded that the provisions of section 52 should be fully repealed.**

105. The Scottish Government considers that whilst never used, the existing provisions do have potential value as a backstop against the release of exceptionally sensitive information. The Committee may wish to consider whether further limitations on the use of the power would represent a wiser approach than its full repeal. In particular it seems to the Scottish Government that there could be particular merit in retaining the power in relation to information exempt under sections 31(1) (National Security & Defence), 32(1) (International relations) and 34 (Investigations by Scottish public authorities).

[15] see Section 5.5 - Access to information rights consultation: response - 28 November 2023

Empower Commissioner to refer late compliance to Court of Session

106. Section 14 of the Bill would empower the Commissioner to refer late compliance with a Decision Notice to the Court of Session. The Policy Memorandum sets out that this is intended to avoid "the Commissioner spending public money on legal fees to commence the certification procedure [in the case of non-compliance], only for the authority to comply late, at which point the Commissioner can no longer pursue the matter".

107. This issue was considered during post-legislative scrutiny of FOISA in 2019-20 and in the Scottish Government's consultation on Access to Information Rights in Scotland in 2022-23. In its response to the analysis of responses to the consultation the Scottish Government set out that it was willing to engage further on this matter, but would need to give further consideration to the implications of any such change.[16] That remains the Scottish Government's position. **However, the Scottish Government is not persuaded of the case for this change.**

108. It is unclear to the Scottish Government what practical end would be achieved by continuing to pursue an authority through the Court for late compliance with a Decision Notice, after the substantive actions required by that Notice had in fact been taken.

Creation of new FOI Officer role

109. Section 16 of the Bill proposes the creation of a new statutory role of Freedom of Information Officer within every authority, with wide responsibilities for advising the authority on its FOI compliance obligations. The Policy Memorandum explains that the new role is intended to be analogous to the existing role of Data Protection Officer under Data Protection legislation.

110. The Scottish Government considers this to be an interesting proposal, which could have merit in enhancing the status of FOI compliance functions within public sector organisations. However, at this point in time the Scottish Government has not had the opportunity to carry out a full assessment on the impact of the proposal on organisations. **The Scottish Government therefore maintains a neutral position on the proposal at the current time.**

111. The Scottish Government notes the comments both in the Policy Memorandum and Financial Memorandum for the Bill, indicating the Member's expectation that this requirement would not generally require the recruitment of additional staff in most authorities. Rather the requirement is intended to create greater parity within organisations between Data Protection and FOI compliance functions, by putting the latter on an equivalent statutory footing to the former.

112. The Scottish Government further notes the Member's expectation, as set out in the Financial Memorandum, that some bodies to which FOISA may be extended in the future may need to employ an additional staff member in order to fulfil this

[16] see Section 5.7 - Access to information rights consultation: response - 28 November 2023

requirement. The Member expects this to be the case for only a minority of even those bodies, as many such bodies may be able to add the FOI Officer role to the duties of an existing staff member.

113. The Scottish Government agrees that in large public authorities there will invariably already be a well established FOI compliance function and that by requiring the designation of a Freedom of Information Officer, the Bill would not necessarily require the creation of a wholly new job role. The Scottish Government would therefore have greatest concern to assess the impact on smaller organisations.

114. The Scottish Government is also mindful of how the requirement may interact with its own existing commitment to develop and set out a clear, structured and consistent approach to the use of Ministers' extension powers, and with the Member's own clear wish to see greater extension of FOISA in the future.

115. The three principal duties of Scottish public authorities under FOISA are to proactively publish information, to respond to requests for information and to advise and assist requesters. Currently, in addition to assuming these principal duties, organisations becoming designated as Scottish public authorities are required to appoint a Data Protection Officer. This is because section 7 of the Data Protection Act 2018 defines a 'public authority' and 'public body' with reference to FOISA.

116. Bodies becoming subject to FOISA also become subject to certain duties under the Climate Change (Scotland) Act 2009. This is because that legislation also defines a public body with reference to FOISA.

117. When assessing the business and regulatory impact of any proposed extension of FOISA, the Scottish Ministers are therefore required to be mindful of impacts associated with these additional requirements over and above the impact of the principal duties conferred by FOISA. The addition of the Freedom of Information Officer requirement would add further still to these regulatory requirements on bodies becoming subject to FOISA. The Committee may wish to consider whether the Freedom of Information Officer requirement should apply to all organisations designated as Scottish public authorities under the FOISA, or to certain categories of authority only.

118. There is some precedent within FOISA for making distinction between those authorities which are subject to FOISA in relation to all of their functions, and those which have been made subject in relation to functions of a specified description only.

119. Section 6(1) of FOISA provides that an organisation will be considered a publicly-owned company for the purposes of the legislation if it is wholly owned by the Scottish Ministers or by any other authority listed in schedule 1 'other than an authority so listed only in relation to information of a specified description'.

120. One approach would be to similarly limit the Freedom of Information Officer requirement to bodies which are listed within schedule 1 other than only in relation to information of a specified description, and to publicly-owned companies (i.e. to companies wholly owned by such authorities). Such bodies certainly include some small organisations. However, such an approach would limit the Freedom of

Information officer requirement to bodies which would traditionally be considered to be part of the public sector.

121. It would carve out a large number of small-medium sized businesses, and some larger companies, involved in the delivery of primary care services (GP practices, dental practices, opticians, pharmacies) from the requirement alongside all bodies designated to date in exercise of Scottish Ministers' order-making power under section 5. It would also avoid adding to the regulatory impact associated with extension of FOISA to other private and third sector service providers in the future where such extension relates only to information of a specified description.

122. The Scottish Government recognises that this would mean that the advantages of the measure would be lost in relation to section 5 bodies designated only in relation to specific functions. Nevertheless, the Committee may wish to consider this as a possible approach to mitigating the regulatory impact of the proposal, in particular for private and third sector organisations currently subject to FOISA or which might become subject as a consequence of further extension.

Changes to enable Commissioner to share information with Audit Scotland

123. Section 17 of the Bill contains a measure to amend section 63 of FOISA to enable the Commissioner to share information with Audit Scotland where necessary in to enable Audit Scotland to carry out its functions. The Policy Memorandum explains that this is intended to ensure that audit of large public sector organisations is 'joined up' across regulators.

124. The Scottish Government notes that in his response to the Member's consultation the former Commissioner indicated that he was not aware of any specific problems in relation to the sharing of information with other regulators.[17] The Committee may wish to seek the views of the current Commissioner and of Audit Scotland itself about whether there is a need for any new power for information sharing. The Scottish Government would note in particular that section 24 of the Public Finance and Accountability (Scotland) Act 2000 does already provide a basis for the Auditor General to obtain information for the purposes of the audit of an account under section 21 or 22. This would therefore empower Audit Scotland to obtain information directly from the Scottish public authority whose accounts they were auditing.

125. The new power seems intended to operate on a similar basis to the existing provisions of section 63 which enable the disclosure of information to the Scottish Public Services Ombudsman and to the (UK) Information Commissioner where it appears to the Commissioner that the information may be relevant to an investigation. However, the measure in the Bill relating to Audit Scotland seems to the Scottish Government to be somewhat more broadly drawn than those other existing measures.

126. The Public Finance and Accountability (Scotland) Act 2000 gives Audit Scotland broad powers to audit the accounts of any public body and to conduct value-for-money examinations of the economy, efficiency and effectiveness with which

[17] see Scottish Information Commissioner - Response to Katy Clark MSP FOI Member's Bill Consultation (page 33)

bodies and officeholders use their resources. It seems to the Scottish Government that the provision as introduced would therefore create a very broad basis on which the Commissioner would be empowered to share information with Audit Scotland, wherever information related to the accounts, economy, efficiency or effectiveness of any authority subject to the Public Finance and Accountability (Scotland) Act 2000.

127. **Whilst the Scottish Government remains open to the views of the Commissioner and of Audit Scotland on the need for any changes to the Commissioner's powers in this area, it is not so far persuaded of the need for any change and would have concerns about the apparent breadth of the measure as introduced.**

Changes to section 65 offence

128. Section 18 of the Bill proposes changes to the offence of 'altering etc. records with intent to prevent disclosure' within section 65 of FOISA. The provisions of section 18 would broaden the offence to include the destruction of a record to prevent its possible future disclosure under FOISA, even if no request for that information has in fact been made.

129. The Policy Memorandum sets out the reason for this change as being to safeguard against the improper deletion of information in an effort to circumvent the transparency provided by FOISA. The Scottish Government understands the intention behind the proposed change.

130. Nevertheless, the Scottish Government does not consider the proposed approach to be workable. Sound approaches to information management require that information be routinely weeded, with information not required for retention disposed of. This is recognised in records management guidance, including in the Code of Practice issued by Ministers under section 61 of FOISA. Regular review and deletion of records is also necessary to comply with data protection legislation, including the UK General Data Protection Regulations (UK GDPR) and the Data Protection Act 2018. Indefinite retention of corporate records without periodic review and deletion may be incompatible with data protection principles such as lawfulness, purpose limitation, data minimisation, and storage limitation. It would therefore be misguided to expect all information held by authorities to be retained by them indefinitely, in case a future request for that information should be received.

131. All Scottish public authorities subject to FOISA are advised to follow the guidance set out in the section 61 Code. Many of the authorities subject to FOISA are also subject to the Public Records (Scotland) Act 2011, and required to maintain a Records Management Plan under that legislation. Therefore, there is already a clear statutory framework in place to ensure sound approaches to records management across the public sector in Scotland. The Scottish Government is sceptical of any proposal which would move issues of records management generally into the space of criminal law.

132. In particular, the Scottish Government would not wish employees and officeholders to be made fearful or discouraged from engaging in legitimate weeding and disposal of information, through fear of being accused of committing an offence

under section 65. We consider that the existing provisions of section 65 strike an appropriate balance between ensuring that authorities, their officeholders and staff members can be held criminally accountable for intentional circumvention of FOISA without creating concern about potential prosecution in relation to the routine deletion of information. **The Scottish Government is therefore opposed to the proposal.**

133. Section 19 of the Bill proposes to alter the time limit for criminal proceedings under section 65. The measures in section 19 would remove the existing requirement that any proceedings must commence within 3 years of the date on which any alleged offence was committed. It is proposed to replace this with a requirement that proceedings may only commence within three years of any criminal investigation having been commenced.

134. The Policy Memorandum sets out the rationale for the timescale changes as being to recognise the severity of alleged offences under section 65. The proposed change is also designed to take account of the possibility that evidence of a section 65 offence having been committed may only come to light after considerable time has passed after commission of the offence.

135. The Freedom of Information (Amendment) (Scotland) Act 2013 previously amended FOISA to extend the time limit for prosecutions under section 65 from six months to three years. This was in recognition of the possible time-lag between any offence being committed, and its detection. The Scottish Government considered the extension of the time limit to three years to be a sufficient and proportionate measure following consultation, and that remains the Scottish Government's position.

136. **The Scottish Government is not persuaded that permitting prosecutions under section 65 after an indefinite period would be proportionate, and therefore does not support this measure.**

137. The provisions of section 19 would also remove the existing provision of section 65A(3) of FOISA allowing a criminal complaint to specify the entire period over which an offence has been committed, in the case of a continuous contravention. The Scottish Government understands why this provision might no longer be required were the time limit for proceedings to be amended as proposed in the Bill. The provision allows a criminal complaint for a continuous contravention to include within it events which began prior to the three year limit. This would indeed no longer be necessary were the three year limit to be removed.

138. However, the Member's Policy Memorandum sets out an understanding that the existing provision creates an impediment to prosecution in cases of continuous contravention. For the record, the Scottish Government does not agree with that understanding. The Member's Policy Memorandum also states that in the case of a continuous contravention, the complaint "must" specify the entire period during which the offence was committed. That is not correct: section 65A(3) of FOISA states that the complaint "may" specify the entire period.

Commencement

139. The Scottish Government notes that section 22 of the Bill would currently bring a number of the changes into force on the day after Royal Assent. In particular, this would include the offence within section 18 of the Bill. The Government believes that this is inappropriate. The Government's position is that, ordinarily, substantive provisions of Acts should not be commenced until at least two months after Royal Assent. While there are some limited exceptions to that, it is not considered appropriate to bring into force substantive changes in the law with no or only minimal notice. In particular, criminal offences should not normally be commenced without sufficient time for those who might commit an offence to be made aware that a particular act or omission has now been criminalised.

Conclusion

140. The Scottish Government is grateful for the opportunity to set out its position on the various aspects of the Bill and hopes that the above analysis will be helpful to the Committee.