

Access to Information Rights: SPSO response to the Scottish Government consultation

Submitted 13 March 2023

Agility of the regime - maintaining and strengthening access to information rights in the context of varied models of service delivery

1. Do you or your organisation have direct experience of access to information rights operating in relation to 'outsourced' services?

Yes

If 'yes' how would you rate your experience of access to information rights in relation to such services?

Somewhat problematic

As a body corporate and independent decision maker, the SPSO outsources very little and what we do outsource relates to non-statutory functions or duties. Access to information in respect of SPSO's statutory functions is provided for in the Scottish Public Services Ombudsman Act (Scotland) 2002 which gives us the powers to obtain information in relation to investigations from third-parties that may be challenging for complainants to access. It is in respect of outsourced functions of public bodies where we are sometimes unsure as to who holds the information/ data we need and where the responsibility lies for providing it.

2. (a) If seeking information about a public service delivered under contract by an external provider, how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority on whose behalf the service is being delivered?

Not sure

We have no direct experience of this matter. Our experience of complaints in outsourced services is that it is not always clear who to complain to and that can cause confusion. It is possible there are similar issues about when and how a person can exercise their information rights.

(b) If seeking information about an ancillary service previously delivered in house - but now delivered under contract by an external provider - how confident would you be that a member of the public could use their access to information rights to seek the relevant information, by making a request directly to the public authority to which the service is being delivered?

Not sure

Addressing concerns about agility of the regime and loss of information rights, within the current statutory framework

3. (a) Would you welcome further assurance about the future use of the Scottish Government's section 5 power to maintain and extend access to information rights in Scotland?

Not sure

(b) What, if anything, would provide you with greater assurance that the power can be used consistently to ensure coverage of the Act can keep pace with any changes in the delivery of public services?

There are a number of things that could be considered:

- Including a purpose clause, which would "follow" the contractual/ procurement journey of the functional changes
- The Scottish Parliament could include questions about access to information rights as part of the consultation and co-design of services when major reforms are underway to public service delivery as standard

- A risk based approach that ensures the risk of losing access to information rights are mitigated
- Make access to information rights integral to the procurement process and contract.

4. (a) Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs?:

Yes

Guidance would be helpful. Although we would not support guidance as a replacement for legislation, it may be something that could be addressed through statutory guidance which has the flexibility to be amended without a legislative change.

(b) Would stronger guidance for Scottish public authorities about the status of information held by contractors, give you greater confidence that information about outsourced services remains accessible under FOISA and the EIRs?

Yes (see above for more information)

5. Do you agree that it is relevant to make a distinction in guidance between public services (i.e. those provided directly to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility) and ancillary services (i.e. internal services provided to an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider)?

Not sure

This may depend on the ancillary service and how directly that is linked to service delivery.

Assessing the need for primary legislation

6. (a) What are your views on the introduction of a Gateway clause as a means of making the Act more 'nimble'?

We support the introduction of a Gateway Clause

We support the introduction of a mechanism to ensure information rights are not impacted if a public service is being delivered by the third or private sector. We are supportive of the principle and would be welcome any mechanism that achieved the same outcome(s).

In terms of (a) it is important to ensure that public bodies are accountable for the way they spend public funding to achieve value for money and best value in relation to the delivery of their statutory duties. It is also important that this accountability is effective and transparent. Access to information is based on a presumption of transparency and publication without there having to be a request, so consideration would need to be given as to how this could be achieved and preserved.

Where there would be need for caution and careful consideration is the extent to which it would apply so as not to drive up the costs of outsourced services or stifle competition during the procurement/ tendering process.

In terms of (b), ancillary services, the basic principle that might be helpful is the duty follows the function. If under non-outsourced arrangements there would have been access to information, any change in delivery arrangements should seek to ensure those rights are not lost or diminished. We would support a clause which had a presumption in favour of such services being covered but there may need to be some safeguards, e.g. for personal data and/ or third party personal data.

We have noted the government's concerns that such clause may

- (b) If a Gateway clause were introduced into the legislation, what would your

views be on a specific exclusion for small and medium-sized enterprises (SMEs)?

I would oppose a specific exclusion for SMEs

It is not clear why the size of the service delivery vehicle should be an issue. Some public services (e.g. primary care providers) would meet the criteria for an SME.

We would suggest that the need to provide for information rights is part of the tender and the resource for the outsourcing should include that this can be met. What may be needed to support this is access to support and guidance for SMEs who may not receive many requests for information.

(c) If a Gateway clause were introduced into the legislation, what would your views be on a specific exclusion for third-sector organisations?

I would oppose a specific exclusion for third-sector organisations

Please provide more information about your views below, including your thoughts on whether a distinction should be made between large and small/medium sized third sector bodies (e.g. those employing fewer than 250 staff members):

We suggest the starting point should be openness, transparency and access to information rights. The same distinction does not apply to public service bodies, many of which have fewer than 250 staff members (e.g. the SPSO and all of the other Parliamentary Office holders). Also, a small organisation is as capable of delivering services with a large impact on a sector or its users.

If the issue is in relation to affordability by the third-sector, rather than include this on the face of legislation, they may be the need to give consideration to statutory guidance, funding models and the outcome of impact assessments.

7. What are your views on the desirability of broadening the section 5 power to

enable Scottish Ministers to extend FOISA to a wider range of bodies?

We support broadening the section 5 power to enable Scottish Ministers to extend FOISA to a wider range of bodies

While we are supportive of the principle, thought would need to be given as to how the section 5 power is exercised. In particular in relation to statutory consultation, the relationship with Parliamentary intent, and to ensure that the exercise of such power does not undermine or contradict other legislation such as procurement.

8. (a) What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of public services (i.e. any service provided directly to members of the public, for which the authority itself is regarded as having ultimate responsibility) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs.

Not sure/have no view. See also the response to 6(a).

We question whether legislation is required or whether the same outcome can be achieved through guidance in relation to contracting, tendering or statutory guidance.

- (b) What are your views on the necessity of amending legislation to provide a clearer legislative steer about when information held by contractors about the delivery of ancillary services previously delivered in house (i.e. any internal service within an authority which it has traditionally tasked its own directly employed officers or staff to deliver, but has now contracted to an external provider) is to be considered 'held' by the contracting authority for the purposes of FOISA and the EIRs.

Not sure/have no view

The same arguments apply as in response to 6(a). The principle that access to

information rights should not be diminished or undermined, nor should the requirement to make publicly available information that was previously available.

9. Do you have other thoughts on how the Committee's general concern about the agility of the legislation, in terms of its ability to keep pace with developments in the way public services are delivered, might be addressed?

Additional issues concerning agility of FOISA in the context of varied models of public service delivery (1)

10. Do you have any experience of a confidentiality clause agreed between a Scottish public authority and its contractor - as opposed to a wider concern to respect commercial interests - acting as a barrier to the release of information under FOISA?

Yes, we are aware of at least one such instance

We regularly use expert external advisers. They give us advice about matters relating to the handling of complaints and whistleblowing concerns in the NHS. We are required by law to investigate in private and prohibited from disclosing information unless it is covered by exceptions in our legislation (the Scottish Public Services Ombudsman Act 2002) The information we share is also often sensitive, special category data – including social work and clinical records. We require our external advisers to keep this work and information confidential.

11. Do you favour amending FOISA to prevent Scottish public authorities from relying on confidentiality clauses with contractors as a basis for withholding information?

Yes, I would favour making this amendment

We support this in principle but extreme caution would have to be exercised in how this was drafted to ensure that there is protection for members of the public

(and some contractors) in relation to personal data (particularly special category data). Many confidentiality clauses are put in place to protect members of the public and specialist advisers and this should not be undermined or reduced in any way. This is not in the public interest and for the SPSO could undermine our ability to deliver our statutory functions and procure specialist advice.

Additional issues concerning agility of FOISA in the context of varied models of public service delivery (2)

12. Are you aware of any specific instances where access to information through FOISA has been frustrated as a consequence of the current structure of the section 6 provisions?

I don't know/would prefer not to say

13. Do you agree that the wording of section 6 of FOISA should be amended so as to ensure all companies wholly-owned by any combination of schedule 1 authorities, including the Scottish Ministers, fall within the definition of a 'publicly-owned company'?

Yes, I would favour making this change

Such companies should clearly be covered and we agree that this amendment would be helpful.

Developments in Information Technology – ensuring access to information rights in the face of changing modes of information use

14. Do you agree that updating the Section 60 Code of Practice, to provide explicit guidance on mitigating the risks associated with any use of unofficial platforms, would be the best way to provide greater assurance that authorities are fully appraised of their obligation in relation to information held on unofficial platforms?

Yes

15. Do you believe there would be value in amending FOISA to incorporate a fuller definition of the term 'information' within the legislation?

No, I would not be in favour of such a change

While additional guidance is always welcome, we consider the legislation is already clear,

16. If a definition of information were incorporated within FOISA should this definition be:

'any information in written, visual, aural, electronic or any other material form'

Improving proactive publication – promoting openness as 'business as usual' in a digital age

17. Do you agree that the current provisions of sections 23 and 24 of FOISA, in regard to publication schemes, require to be updated?

I don't know/have no view

Section 23 and 24 could be simpler and set out the duty to publish information in line with the statutory guidance issued by the Commissioner; include reference to enforcement powers if that compliance is not (in the view of the Commissioner) is not met, and set out the duty of the Commissioner to consult on, publish and review such guidance.

Including less information on the face of the legislation would help future proof as the information and data environment, and structure of public services develops and changes.

18. Do you agree with the Commissioner's proposal that the requirement to adopt and maintain a publication scheme should be replaced by a simple duty to

publish information, supported by a Code of Practice on publication, set by the Commissioner subject to Parliamentary approval?

Yes, I would be in favour of such a change. See above, Q17.

19. Is there any other alternative, that you see as preferable to the Commissioner's proposed approach?

I don't know/have no view

Improving approaches to proactive publication within the existing statutory framework

20. (a) How satisfied are you with the availability of information about the work of government and public services in Scotland in the public domain?

Somewhat dissatisfied

While we are generally satisfied with the amount of information we can easily access online, finding it is not always straightforward.

(b) Specifically, what types of information regarding the work of government and public services in Scotland do you consider should be made available proactively?

In addition to what is already available, more information about how policy decisions are made.

(c) How would you prefer to access information about government and public services in Scotland?

Online

Technical and other changes – ensuring the Act remains fit for purpose

21. Do you support changes to FOISA, and to the fees regulations, to permit authorities to estimate excessive cost of compliance in terms of staff time, rather than financial cost (the limit being set at 40 working hours)?

Yes, I would support changes of this nature

This would better reflect the reality of such work. Often this is the first stage of a calculation of impact where excessive costs are considered and the amount is, in effect a proxy for staff time. It would be both simpler and more accurate to calculate staff time.

Amending FOISA to allow requests to be transferred between Scottish public authorities (similar to the way in which EIRs requests can be transferred).

22. Are you aware of any examples or evidence of how the existing power to transfer requests under the EIRs regime has affected the service provided to requesters, either positively or negatively?

No

23. Do you favour introducing a provision into FOISA to allow the transfer of requests between authorities, similar to that contained within Regulation 14 of the EIRs?

No, I would not be in favour of such a change

Signposting is relatively straightforward and ensures that the person making the request remains in control of the request.

Amending the provisions of FOISA with respect to time for compliance so that requests for clarification merely pause - and do not reset - the 'clock' for compliance within the statutory timescale.

24. Which of the following approaches in relation to the effect of seeking clarification do you most favour:

Please select from dropdown menu:

Amending FOISA to ensure that the 'clock' is only paused, not reset, from the date clarification is requested

There are cases where the request is so unclear and/ or embedded in documents relating to other processes (e.g. complaints) that it is either not identified initially or the requestor subsequently clarifies that there was a request.

We agree clarification should not be delayed unreasonably, and making it a pause rather than a reset would encourage public bodies to make contact with requesters earlier.

Removal of (section 48) prohibitions against appeals being made to the Commissioner against: the Commissioner himself; procurators fiscal; the Lord Advocate in his capacity as head of the systems for criminal prosecution and the investigation of deaths

25. In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of the Commissioner's own office, subject to assurances about the internal independence of that process?

No, I would not be in favour of such a change

Please explain your reasons for either supporting or opposing such a change or your reasons for being unsure:

26. In principle, would you favour allowing the Scottish Information Commissioner to consider appeals concerning decisions of procurators fiscal and the Lord Advocate (relating to the systems of criminal prosecution and investigation of deaths)?

Yes, I would be in favour of such a change

These decisions have real, lasting impact on individuals. We have received complaints where people have been left confused and uncertain by the reasons given them by the COPFS. We would welcome greater transparency and think it is inappropriate that it is left to the organisation themselves to decide what is or is not releasable.

Removal of First Ministerial ‘veto’ power (section 52)

27. Do you support the retention of the First Minister’s ‘veto’ power in relation to the release of information held by the Scottish Administration, or do you consider the power should be removed from FOISA?

I consider that the power should be removed

The Scottish Administration should be operating just as any other public authority, within the provisions of legislation, held to account by the same standards. It also reinforces that the FOI framework is legislatively based and independent of any suggestion of political influence.

Add provision to FOISA, similar to 10(2)(b) of the EIRs, ‘that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure’.

28. Do you agree that specific provisions requiring the restrictive interpretation of exemptions and a presumption in favour of disclosure require to be incorporated within FOISA?

Yes, I would be in favour of such a change

While we see this as an opportunity for greater consistency, we would qualify our response to also be mindful of the potential unintended consequences of doing so for organisations subject to provisions against disclosure in their own legislation. The provision to withhold in other legislation is there for a reason and undermining it any way would have significant impact on their ability to operate and the confidence and trust in their services.

Amend section 53(1)(a) to make it clear that failure to comply with a decision on time can also be referred to the Court of Session

29. Do you support amending section 53(1)(a) to make it clear that failure to comply with a decision notice on time can be referred to the Court of Session?

No, I would not be in favour of such a change

The power sought is for the Commissioner to be able to go to court, after the delay has been remedied. We agree that it is appropriate they should have the power to do so before this point. It is not though clear that it would be a proportionate use of court time to seek a legal sanction once this has been remedied.

Amend definition of “information” to exclude environmental information as defined in the EIRs

30. Do you favour amending the definition of ‘information’ within FOISA so as to specifically exclude environmental information, within the definition of Regulation 2(1) of the EIRs?

No, I would not be in favour of such a change. Do not consider it is needed.

Provide an exemption for information provided to the Commissioner under or for the purposes of FOISA

31. Do you support the creation of a new exemption, available only for use by the Commissioner, specifically for information provided to the Commissioner under, or for the purposes of FOISA?

Yes, I would be in favour of such a change

While this appears to be a technical point, it is not uncommon for appeals to be made because we have withheld personal data including special category data

or because the information is subject to a legislative prohibition in our governing legislation. That information, if supplied as part of an appeal, should remain protected.