



The Scottish Parliament
Pàrlamaid na h-Alba
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The Scottish Parliament
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Response to the Committee's Stage 1 report on the Freedom of Information Reform (Scotland) Bill

Dear Martin,

I write to set out my responses to the Stage 1 Report on my Freedom of Information Reform (Scotland) Bill given it is anticipated that the Bill will be referred back to your Committee for Stage 2 consideration, although I recognise that the limited time remaining in this parliamentary session means that Stage 2 is unlikely to take place.

General presumption in favour of disclosure (Paragraphs 23 to 25)

This proposal was incorporated because successive Information Commissioners, academics, those who have engaged in FOI reform discussions, civil society, and other individuals have recommended this change over many years.

It amplifies existing obligations and strengthens existing law.

The Right to Information (RTI) Global Standard rates laws against 61 indicators and three focus on general entitlement and the Bill is drafted to comply with 2 and 3;

- the legal framework (including jurisprudence) recognises a fundamental right of access to information;
- the legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions;
- the legal framework contains a statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of right to information.

Those who campaign for FOI reform believe strongly that this general presumption would be more effective in shifting the culture towards transparency and provide a stronger legal base for disclosure.

They argue that whilst the Freedom of Information (Scotland) Act 2002 (FOISA) has been a success, the current framework has not been as effective as it had originally been envisaged. Interestingly, those who were directly involved in work that led to the enactment of FOISA such as the late Lord Wallace and the Campaign for Freedom of Information in Scotland, and other individuals who were involved in the drafting of FOISA have argued this point strongly.

In the consultation that I undertook, there was no rebuttal to these arguments which is why I included this in the Bill.

I will give careful consideration to the points made in the Stage 1 report and discuss them with campaigners prior to Stage 2.

Further powers to designate Scottish public authorities (Paragraph 31)

I note that the committee has no concerns about this proposal.

Power of the Parliament to designate Scottish public authorities (Paragraphs 46 to 50)

The Committee heard evidence and received written submissions relating to the failure of the Scottish Government to designate new bodies and, indeed, the loss of rights that have taken place since FOISA, particularly due to outsourcing and privatisation. These arguments were also made in the Stage 1 debate.

I gave very careful consideration to both this proposal and the drafting of the provision. I do not believe it would have been appropriate to provide more detail on the face of the Bill on the process. This would be more appropriately set out in the Standing Orders of the Parliament. However, I am happy to discuss with the Scottish Government, the Parliament and others what such detail might look like.

Of course, it would be a matter for a Committee of the Parliament if it chose to instigate an inquiry into whether a particular organisation, a number of organisations, or an entire sector should be required to comply with FOI when delivering public services with public funding.

I have absolutely no doubt that had this provision been in FOISA that there would have been much stronger parliamentary scrutiny of the designation process, far greater pressure on the Scottish Government to designate, and the designation of bodies such as housing associations would have happened more speedily.

I appreciate that the Committee may be of a different view and will give consideration as to whether any amendments are required to put more detail on the face of the Bill or what other approaches might be available, but I would not intend to remove these provisions from the Bill.

Extending the definition of publicly owned companies (Paragraph 56)

I note the view of the Committee that this is the right approach to this issue.

Reports on use of Section 5 powers (Paragraphs 63 to 66)

I would be happy to put forward an amendment to increase these provisions from 20 sitting days given the content of the Stage 1 report. The intention of this provision is to increase transparency and focus on FOI given the slow pace of change in terms of designation. It is envisaged this provision would instigate a debate and would not empower the Scottish

Parliament to fail to agree the section 5 report or put obligations or sanctions on the Scottish Government if they failed to do anything.

Requesting information with an electronic address (Paragraph 70)

I note that the Committee is content with this proposal.

Pausing the 20 working-day time limit for compliance (Paragraphs 83 to 85)

These provisions are supported by the current Information Commissioner and strongly supported by those who campaign for FOI reform. These are fairly technical provisions in my view, and I would suggest that I discuss with the Information Commissioner if any alternative proposal might go some way in addressing the issues which these provisions seek to address given his written submission.

Reducing the time limit for compliance for grant-aided and independent schools (Paragraphs 91 and 92)

This is an issue which the Campaign for Freedom of Information in Scotland have been heavily involved with over many years. I am happy to attempt to provide the Committee with further information in relation to this matter or ask the Campaign for Freedom of Information in Scotland to do so.

This amendment is designed to amend FOISA to ensure compliance with the UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

Repealing the publication scheme duty and introducing a duty to proactively publish (Paragraphs 106 to 109)

I note the broad support from the Committee for this proposal and the suggestion that it would be helpful for the Committee and stakeholders to have an indicative code of practice. The code of practice would be drafted by the Commissioner, and I will ask his office to give consideration to what can be provided to the Committee to satisfy the concerns being raised.

The costs of such work is included in the Financial Memorandum and, therefore, it is unlikely that the Information Commissioner would have capacity to do considerable work until the Bill was passed.

This proposal relates to Indicators 58 and 60 of RTI compliance.

Exempt information (Paragraphs 116 and 117)

I am happy to work with the Scottish Government to attempt to find an agreed form of wording.

General functions (Paragraph 123)

I note that the Committee agrees with this proposal.

Enforcement (Paragraphs 130 and 131)

I would suggest that it might be appropriate for the Information Commissioner to provide more information on how the firewall would work in practice, but many public bodies who provide a regulatory function have to operate in this manner. I will provide examples of how the firewall successfully operates in other public bodies.

Enforcement notices (Paragraphs 139 to 141)

I will attempt to discuss with the Scottish Government whether an agreed amendment may be possible.

Repeal of the First Minister's "veto" (Paragraph 152 and 153)

I note the Committee is supportive of this proposal.

Failure to comply with a notice (Paragraph 161)

I am happy to provide the Committee with any further information I can on this matter and suggest that this may be something for the Information Commissioner to be asked to comment on.

Freedom of Information Officers (Paragraphs 171 to 173)

The intention of this provision is not to add to cost, but to give authority to those already carrying out this work. Work is being undertaken on the Financial Memorandum which deals with likely costs, and which will deal with this issue in more detail. This proposal also relates to Indicator 54 of RTI compliance.

Disclosure of information to Audit Scotland (Paragraphs 178 and 179)

I note the Committee's suggestion in relation to Audit Scotland. I am happy to give consideration and consult on this point.

Offence of altering records with intent to prevent disclosure (Paragraphs 195 and 196)

This provision mirrors the drafting of the existing offence which can take place after a submission of an FOI request. It is being put forward as a result of real cases but of course would not be retrospective.

The threshold of criminal intent is a high one evidentially. Given this is a proposal in relation to criminal law, any prosecution would require establishing proof beyond all reasonable doubt to lead to a conviction. It could not be as a result of reckless behaviour or is not a strict liability offence and would not occur accidentally as criminal intent would have to be proved.

While it is my understanding that specialists in criminal law are of the view that it is drafted in such a way that the threshold is sufficiently clear and that prosecutions could be brought, it is not possible to get the advice of the Crown Office which would, of course, be helpful. However, I can attempt to engage with the Crown Office to see if they are able to provide any input.

This proposal is supported by the Information Commissioner and his office as they believe it would enable them to take steps in some of the worst examples of attempts to evade FOI law and transparency.

This proposal also relates to Indicator 50 of RTI compliance.

Costs associated with the Bill (Paragraphs 214 and 215)

I am looking carefully at what the Scottish Government have now said in relation to costs, and I am undertaking further work on the Financial Memorandum as previously indicated.

More generally, I am now seeking a meeting with the Scottish Government to explore whether it is possible to agree any amendments to the Bill, and I will reach out to the Information Commissioner regarding any amendments that his office is seeking. I will engage with any bodies who have raised specific concerns about any particular clause of the Bill to see if any of these concerns can be addressed.

I hope this response is helpful in outlining my current thinking and my intention to work to bring forward amendments at Stage 2.

I look forward to hearing from you further.
Yours sincerely,



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