
NORTH AYRSHIRE COUNCIL

21 March 2023

Cabinet

Title:	Access to information rights in Scotland: a consultation
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Purpose:	To seek approval for the proposed North Ayrshire Council submission to the Scottish Government's Consultation on access to information rights in Scotland.
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Recommendation:	That Cabinet approves the submission of the proposed consultation response provided at Appendix 2.
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1. Executive Summary

- 1.1 The Scottish Government has launched a Consultation seeking views on access to information rights in Scotland. The Consultation paper is provided at Appendix 1. Views are sought by 14 March 2023, however the Scottish Government has confirmed that they will accept a later response to allow time for the proposed response to be considered by Cabinet. This report summarises the key features of the consultation and seeks approval for the proposed response to the Consultation as provided at Appendix 2.

2. Background

- 2.1 At the Cabinet meeting on 21 February 2023, members approved a draft response to Katy Clark MSP's Consultation on the proposal for a Bill to reform Freedom of Information legislation in Scotland. The Scottish Government is conducting a separate consultation on possible reforms to access to information rights in Scotland as contained in the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIR).
- 2.2 The Scottish Government's Consultation was precipitated by a report published by the Public Audit and Post Legislative Scrutiny Committee (the "Committee") in May 2020, which recommended that there was a need for further public consultation in various areas.
- 2.3 The Scottish Government is of the view that the access to information rights framework in Scotland is fundamentally sound, but they wish to gain a better understanding of how it is operating in practice. The Scottish Government has indicated that where possible it wishes to identify opportunities to improve the operation of the regime within the existing legislative framework, for example by strengthening and clarifying guidance and codes of practice. It also seeks evidence and views in respect of any changes needed to the legislation in future.

2.4 There are four key areas upon which the Scottish Government is consulting:

2.4.1 The first is the agility of the regime in terms of maintaining and strengthening access to information rights in the context of varied models of service delivery. The Scottish Government notes that the Committee raised concerns about the dilution of information rights by outsourcing public services and ancillary services (i.e. internal services within an authority, such as cleaning of its offices) to private bodies that are not subject to freedom of information laws. The Scottish Government notes that there are existing safeguards to prevent outsourcing leading to a loss of information rights, specifically:

- Under section 5 of FOISA Scottish Ministers can extend the freedom of information regime to cover persons or bodies that exercise functions of a public nature or that provide, under a contract with a Scottish public authority, a service whose provision is a function of that authority. This power has already been used, for example, to extend the Act to cover Housing Associations and organisations delivering culture and leisure services on behalf of local authorities (such as KA Leisure).
- Under section 4 of FOISA Scottish Ministers can add further entities to the list of public authorities captured by the Act, provided they meet the definition of a Scottish public authority under the Scotland Act 1998.
- The Code of Practice for Scottish public authorities includes advice to ensure that when outsourcing services there is no resulting reduction in the public's right to access information, for example by ensuring that the contract stipulates what information may need to be disclosed.
- The principle of transparency is embedded in procurement legislation, which ensures that a large volume of information about public contracts is available publicly.

2.4.1.1 The Committee made various recommendations to address these issues, including the introduction of a "Gateway Clause" to the legislation. The purpose of such a clause would be to bring bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. This would bring certain bodies automatically within the scope of FOISA depending on their functions and/or funding. There are also proposals to provide a clearer legislative steer about when information held by contractors about the delivery of public services and/or ancillary services is to be considered "held" by the contracting authority for the purposes of FOISA and EIR. The Committee also recommended that FOISA be amended to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. The Scottish Government notes the importance of ensuring that there are measures within the legislation to allow for the protection of commercial interests, subject to the public interest test, and is of the view that it is rare that confidentiality clauses are used in a way that affects the discharge of a public authority's functions under FOISA.

2.4.2 The second is developments in Information Technology, in particular ensuring access to information rights in the face of changing modes of information use. Here, the Scottish Government notes concerns raised by the Committee that the use of unofficial platforms such as WhatsApp and private email addresses could lead to information being overlooked when responding to a freedom of information request. The Scottish Government notes that, legally, it is already clear that relevant

information stored on such platforms falls within the scope of the existing legislation, but that stronger guidance may help to raise awareness of this.

2.4.3 The third is improving proactive publication and promoting openness as “business as usual” in a digital age. Currently, FOISA requires each authority to adopt and maintain a publication scheme setting out information to be published by that authority. Authorities have a duty to publish the information set out in their publication scheme. The Commissioner has developed a model publication scheme which sets out broad categories of information to be published. The model scheme has been adopted by most if not all public authorities, including North Ayrshire Council. The Committee recommended that the Scottish Government consult on a proposal that the current statutory duty to maintain a publication scheme be replaced with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication. The Scottish Government is open in principle to this idea and are of the view that it would likely be appropriate for any new Code to be prepared by the Commissioner. The Scottish Government has however expressed doubts that such a Code could be legally enforceable as it would not have the status of legislation.

2.4.4 The fourth is technical and other issues, all with a view to ensuring that the Act remains fit for purpose. The Consultation document sets out several proposals made by the Committee in this regard, for example that:

- Fees charged under FOISA be calculated by estimating the staff time involved in responding to a request, rather than the current method of estimating the cost of compliance.
- Where an authority does not hold the information requested in a freedom of information (“FOI”) request but believes that another authority may do so, they should have powers to transfer the request to that other authority, in the same manner as is allowed under the EIR.
- Where an authority requests more information from a requester to enable it to respond to a FOI request, the 20 working day “clock” should be paused and restarted when the information is provided. Currently the legislation allows for the 20 working day clock to reset when the requested information is provided.
- FOISA be amended to provide that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure.
- Where the Commissioner has issued a Decision Notice and a public authority fails to comply with its terms within the specified time limit, the matter can be referred to the Court of Session. Currently, only an outright failure to comply with a Decision Notice can be referred to the Court of Session, and no further action can be taken if an authority has complied with a Decision Notice late.
- The definition of “information” in FOISA be amended to exclude environmental information, which is instead disclosable under the EIR.

3. Proposals

3.1 That Cabinet approves the submission of the proposed consultation response provided at Appendix 2.

4. Implications/Socio-economic Duty

Financial

- 4.1 Some proposals under consideration may lead to financial implications depending on whether and how they are taken forward. For example, if a legally enforceable Code of Practice was introduced there may be financial penalties for non-compliance.

Human Resources

- 4.2 None at this stage.

Legal

- 4.3 The Consultation may lead to amendments to the existing legislation and/or the supporting Guidance and Code of Practice. Should any amendments be made then changes may be required to the Council's policies and procedures to ensure our continued compliance.

Equality/Socio-economic

- 4.4 None at this stage.

Climate Change and Carbon

- 4.5 None.

Key Priorities

- 4.6 Robust FOI processes support the Council's priority of being accessible and putting residents and communities at the heart of what we do.

Community Wealth Building

- 4.7 Not applicable.

5. Consultation

- 5.1 Once the responses to the Consultation have been received and analysed, the Scottish Government will provide a formal response to the consultation setting out the next steps and in particular whether it intends to introduce a Bill to make any amendments to FOISA. Any such Bill would be subject to further full public consultation. The Scottish Government will also continue to engage widely on the development of access to information rights within the existing statutory framework.

Aileen Craig
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For further information please contact **Raymond Lynch, Senior Manager (Legal Services)**, by email to raymondlynch@north-ayrshire.gov.uk or by telephone, on 07799199641.

Background Papers

None.

Proposed Response to Consultation on Access to Information Rights in Scotland

North Ayrshire Council is committed to the principles of openness and transparency and welcomes proposals to modernise FOI legislation in Scotland to better reflect these principles. The Council welcomes the opportunity to comment on the proposals at this early stage and looks forward to providing further feedback on any more concrete proposals which may be developed in future.

The Council has experience of receiving requests for information relating to “outsourced” services. In these cases, the requested information has been provided by the Council insofar as this is required under FOISA / EIR. In the Council’s experience the correct application of the rules under the current regime does enable members of the public to access information about outsourced public and ancillary services via the designated authority. The Council’s view is that the current legislation is sufficient clear in terms of what information is subject to a duty to disclose, and that any ambiguity is likely to be better addressed by stronger guidance than by legislative reform.

The Council is regularly asked to provide information held by contractors and is comfortable assessing when such information is to be treated as being held on the Council’s behalf for the purposes of FOISA and the EIRs. However, stronger guidance in this area would be welcomed, both in relation to public and ancillary services.

In principle the Council would welcome further use of the Scottish Government’s section 5 powers to extend coverage of the Act where appropriate. In cases where both the local authority and another body designated under section 5 have access to the same information, the Council would welcome clear guidance on the best approach to responding to duplicate FOI/EIR requests in order to avoid disproportionate expense to the public purse.

The Council does not have a strong view on whether a hard distinction should be drawn between “public” and “ancillary” services delivered under contract in any future guidance but welcomes the Scottish Government’s stated approach of being mindful of proportionality.

If a Gateway clause were introduced to the legislation, the Council would welcome a proportionate approach to ensure that small and medium-sized enterprises and third-sector organisations are not deterred from contracting with public authorities. The Council is not best placed to comment on the specific implications of such organisations being caught by any Gateway clause but would be keen that the views of the relevant sectors are taken into account when considering this proposal further.

In relation to confidentiality clauses, the Council is of the view that section 36 of FOISA strikes an appropriate balance between the duty to disclose information and the competing rights to confidentiality which may arise for a variety of reasons. It is noted that the exemption at section 36(1) is subject to the public interest test, and the exemption in section 36(2) only applies to information obtained by a Scottish public authority from another person, the disclosure of which would constitute an actionable breach of confidence (for example because it would result in losses being

sustained by a third party). A confidentiality clause alone is not sufficient to restrict the disclosure of information: in each case, a public authority is required to carry out an independent assessment of the circumstances before deciding whether the exemption applies. If there are concerns that confidentiality clauses are being used to refuse to release information inappropriately this issue might be more appropriately dealt with by raising awareness of the current legislation, rather than amending it. It is appropriate that some commercially sensitive information should remain confidential and the Council would therefore oppose any amendment of the legislation to impose an outright ban on confidentiality clauses. The current system which allows for discretion to be applied to individual circumstances is preferable.

The Council is not aware of any specific instances where access to information has been frustrated due to the information being held by a company wholly owned by a combination of authorities. We would have no objection in principle to the wording of section 6 of FOISA being amended to ensure that all companies wholly-owned by any combination of schedule 1 authorities fall within the definition of a “publicly-owned company”.

North Ayrshire Council is aware that the current legislative framework requires disclosure of information held on unofficial platforms in certain circumstances. It would have no objection to the Code of Practice being updated to provide explicit guidance on mitigating the risks associated with any use of unofficial platforms. It is not considered necessary to amend the definition of “information” within the legislation to achieve this outcome.

The proposals to introduce a “legally enforceable” Code of Practice on publication are noted. North Ayrshire Council is committed to accountability and transparency and seeks to proactively publish more information than is strictly required in terms of the model publication scheme. In principle the Council welcomes any measures to increase accountability and transparency. We would however invite the Scottish Government to give careful consideration to ensuring that any penalties for failure to comply with such a Code would not put undue pressure on the public purse. The Council’s preference would be to retain the current arrangements, subject to any modifications of the model publication scheme that may be made from time to time.

In general, North Ayrshire Council welcomes measures to simplify the process of requesting information. The proposals to amend FOISA and the fees regulations to permit authorities to estimate cost of compliance in terms of staff time rather than financial cost are welcome insofar as they may make the process easier to understand for those requesting information. In practice, the Council very rarely elects to charge for information.

In practice, North Ayrshire Council has been cautious to utilise the power to transfer requests under the EIRs regime due to concerns about data protection, and generally favours signposting requesters to the authorities most likely to hold the requested information. In this regard the Council has no strong views on introducing a similar provision into FOISA to allow the transfer of requests between authorities.

North Ayrshire Council would have no objection to amending FOISA to ensure that the “clock” is only paused, not reset, from the date clarification is requested. It has in fact been North Ayrshire Council’s practice to treat the clock as being paused in these circumstances anyway. Similarly, the Council endeavours to adopt a restrictive interpretation of exemptions and a presumption in favour of disclosure whenever dealing with a FOI request, and would have no objection to this requirement being made explicit in the legislation.

In principle, the Council would have no objection to harmonising the approach taken to late compliance with Decision Notices, Information Notices and Enforcement Notices by allowing the Commissioner to refer late compliance with a Decision Notice to the Court of Session.

The Council would have no objection to an amendment to the definition of “information” to specifically exclude environmental information. While it is not anticipated that such a change would materially affect the manner in which requests for environmental information under FOISA are dealt with, it is acknowledged that this amendment may improve clarity for those requesting information.