



## Consultation on a proposed Freedom of Information Reform (Scotland) Bill

Consultation response, March 2023

### Introduction to Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Its member bodies represent a wide community of environmental interest, sharing the common goal of contributing to a more sustainable society. LINK provides a forum for these organizations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for the environment. Acting at local, national and international levels, LINK aims to ensure that the environmental community participates in the development of policy and legislation affecting Scotland.

LINK works mainly through groups of members working together on topics of mutual interest, exploring the issues and developing advocacy to promote sustainable development, respecting environmental limits. This consultation response was written by LINK's Governance Group.

#### 1. Response

Freedom of Information is an important right which ensures transparency and encourages good governance. In principle, LINK is supportive of measures to improve the effectiveness of the current system and to improve access to information on public services. Since FOISA was passed in 2002, many public services have been privatised, or outsourced to the private and third sectors. There is currently an 'unlevel playing field', where third sector and public sector bodies could both be bidding for the same contract, but different standards apply in terms of the level scrutiny each entity is subject to. It is therefore important that FOI laws keep pace with such developments. Freely accessible information is fundamental to democratic oversight and accountability, and can improve the overall functioning and responsiveness of service providers to serve the public good.

The provisions of this Bill have the potential to reduce delays in accessing information; ensure better compliance; and improve proactive publication by public authorities as well as third parties currently outside the scope of FOISA. They will also help FOISA to align more closely with Environmental Information Regulations. In some instances, this Bill could complement and strengthen the procedural elements of the human right to a healthy environment, which is due to be incorporated into Scots law as part of the Human Rights (Scotland) Bill.

It is, in principle, appropriate that some organisations performing services on behalf of the government should be subject to Freedom of Information. However, any extension of Freedom of Information must however be proportionate and clearly defined. The proposal in the consultation to extend the duty onto third sector organisations requires greater clarity to reassure that the impact of this extension would be appropriate.

Transparency is a good thing. Third sector organisations should seek to be open and accountable, and this is particularly true when they are in receipt of public funding. However, it is important to distinguish between different organisations with charitable status in the third/ voluntary sector. A number of public authorities have transferred assets/functions (e.g. leisure and recreation) to arms length bodies specifically established to take advantage of charitable status. There is no reason for such organisations to be exempt from FOI law. However, the key issue is to ensure that the public and in particular those who are in receipt of the service can access information regarding the delivery of public services.



The consultation proposes that the duty to comply with Freedom of Information should be extended to charities receiving public funding to deliver services “of a public nature”. This is not defined with the consultation paper and is open to interpretation. Arguably all charitable functions are of a public nature – indeed, by law, charities are required to provide public benefit. A clearer definition is needed to allow effective comment on whether this proposal is proportionate.

For example, the current Scottish Government consultation on FOI refers specifically to the outsourcing of public service as being “the direct provision of a service to members of the public, for which the authority itself is commonly regarded as having ultimate responsibility”.

Where a third sector voluntary organisation is publicly funded to provide a public service then in principle it is appropriate for FOISA to be applicable, specifically in relation to the performance of that service. But a proportionality test should apply – relating to the scale of funding and the nature and length of time the service is to be provided.

Many third sector organisations receive public funding, either on a grant or core-funding basis. This funding can come from the Scottish or UK governments, local authorities, or other public bodies. Such funding often includes requirements to provide reports on the use of the funds – submitted to the public funding agency responsible. In such cases, where the information sought is provided by contracted organisations to a public body, the public agency is the appropriate body to respond to FOI requests.

Some grants to third sector organisations are small, or may cover work performed over short periods. If such a grant required the organisation to be subject to Freedom of Information, this could cause a disproportionate impact on the organisation’s resources, and could even act as a disincentive to smaller organisations to accept public funding. We further note that the Scottish Government consultation categorises small/medium third sector bodies as those with fewer than 250 employees. The proposed Bill must be clear which organisations would be subject to FOI and under which circumstances. In addition, there should be clear exemptions where information is publicly available or will be in due course, such as through reports for OSCR.

We are fully supportive of subjecting the private sector to FOI requirements in instances where it is in receipt of public funds and the services provided are of a public nature. This would extend the reach of Environmental Information Regulations and the Aarhus Convention, with more environmental information being made available from private bodies such as highway maintenance and harbour authorities.

We support the establishment of a new, statutory Freedom of Information Officer. Many countries (e.g. Brazil, Croatia) have such a provision in their FOI laws along with specific responsibilities attached to such a post. These are usually responsible officer roles to oversee compliance, to monitor performance, by providing expert internal advice, engaging with the Commissioner etc, and can ensure that FOI requests are handled in a competent and efficient manner. It should be noted that other legislation requires a designated officer. The Ethical Standards In Public Life etc. (Scotland ) Act 2000 (Register of Interests) Regulations 2003 provides that:

- 3.—(1) Every council and National Park authority shall have a proper officer.
- (2) Every devolved public body other than a National Park authority shall have a standards officer.

On the use of exemptions, we propose that, where exemptions apply, they should be subject to the harm and public interest test. There are no absolute exceptions under the Environmental Information Regulations, so there could be a disparity if a request includes environmental and non-environmental information.



Finally, we note that public authorities subject to FOI are exempt from the requirements to record activity in the Lobbying Register. If FOI reporting was extended as proposed, in practice this would mean that third sector and other organisations may be subject to a greater administrative burden than public bodies.

This response was compiled on behalf of LINK Governance Group and is supported by:

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