

# FREEDOM OF INFORMATION REFORM (SCOTLAND) BILL CONSULTATION

## A COMMON WEAL RESPONSE

### INTRODUCTION

Common Weal has championed freedom of information and government transparency since our inception. It is absolutely vital for the security of a democracy that decisions are made openly and can be scrutinised. Politicians and those with power often dislike such transparency – if only because it is effective at uncovering their own failures – but this is all the more reason to insist on it and to push back against its restriction or misuse. We welcome this Members’ Bill designed to increase transparency as well as the steps that the Scottish Government has taken since its launch to adopt many of its principles, however we should be clear that Common Weal supports a “Glass Wall” approach to transparency whereby FOI legislation (i.e. the Freedom of Information (Scotland) Act, or FOISA) should ultimately be expanded to cover all uses of public money, whether spent “in house” by a public body, is outsourced to a private company or is used to provide a public service by any other means. We simultaneously campaign for the statutory duty for the pro-active publication of all information that could conceivably be published under current or future expanded FOISA legislation such that the actual, practical effect is that FOI requests become one means of locating already public information rather than the sole means of uncovering information and bringing it into the public domain. The limit of democratic transparency cannot and should not be the ability to frame a question in such a way that it reveals the desired information.

# RESPONSES TO QUESTIONS

## Section 1 – About You.

### 1. Are you responding as:

An individual

> **On behalf of an organisation**

### 2(a). Which of the following best describes you? (If you are a professional or academic whose experience or expertise is not relevant to the proposal, please choose “Member of the public”)

Politician (MSP/MP/Peer/MEP/Councillor)

Professional with experience in a relevant subject

Academic with expertise in a relevant subject

Member of the public

> **Not Applicable**

### 2(b). Please select the category which best describes your organisation:

Public sector body (Scottish/UK Government/Government agency, local authority, NDPB)

Commercial organisation (company, business)

Representative organisation (trade union, professional association)

> **Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)**

Other (e.g. club, local group, group of individuals, etc.)

### 3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

> **I am content for this response to be attributed to me or my organisation**

I would like this response to be anonymous (the response may be published, but no name)

I would like this response to be confidential (no part of the response to be published)

Organisation: Common Weal

### 4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

Craig@common.scot

## Section 2 – Aim and Approach

### 5. Which of the following best expresses your view of the proposed Bill?

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your

response.

Common Weal supports greater government transparency in all of its forms and has in particular championed the extension, expansion and deepening of Freedom of Information laws for many years. We fully support the aims and approach of this Members Bill, welcome the recent Government announcement to incorporate some of its aims into their own review (the consultation of which we have also responded) and we shall encourage both groups to cooperate and extend the scope of Government transparency even further.

**6. Which of the following best expresses your view on the private sector being designated under FoISA if it is publicly funded and the service is of a public nature?**

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

**Please explain the reasons for your response.**

Public money should be spent transparently wherever and by whomever it is spent. There can be no opportunity to hide public services from scrutiny by privatising or otherwise outsourcing those services, whether to a private company, a third-sector organisation or any form of technically publicly-owned but “arms-length” organisation that somehow falls outwith the remit of FOISA. The guiding principle of disclosure should be that if public money was spent to provide a service that would be covered by FOISA if it was provided internally, then it should be covered by FOISA.

**7. Which of the following best expresses your view on the third/charitable/voluntary sector being designated under FoISA if it is publicly funded and the service is of a public nature?**

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

**Please explain the reasons for your response.**

See answer to Q6. If a public service or the spending of public money can be removed from scrutiny by Freedom of Information by any form of outsourcing then this should be considered a loophole to be closed by this review.

**8. Which of the following best expresses your view on the creation of a new statutory officer within designated authorities – a Freedom of Information Officer?**

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

**Please explain the reasons for your**

## response.

It is sometimes difficult for organisations (and even more so for private individuals) to identify which person or department should be the target of a particular FOI request. A statutory officer within designated authorities would provide a central point of contact from which FOIs could be redirected (something which sometimes, but not always, happens when an FOI is submitted to the “wrong” department within an authority and which can lead to an FOI being rejected because the misidentified department technically does not hold the requested information even though another department within the same organisation does).

Additionally, Common Weal calls for a national central repository of FOI requests – perhaps modelled on the repository currently maintained by the England-based charity “What Do They Know?”. This repository itself helps to target FOI requests and ensures that responses are put properly into the public domain. However, the statutory right to Freedom of Information in Scotland cannot be adequately protected by a charity staffed by volunteers in another country – no matter how effective or well meaning they currently are – thus this service should be replicated as a statutory public body in Scotland.

### 9. Which of the following best expresses your view on creating a statutory duty to publish information?

- > **Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

**Please explain the reasons for your response.**

We have direct experience of discovering that not all FOI responses are placed fully in the public domain by Government. Only around 40% of responses to Scottish Government FOI requests in 2021 were published on the central repository (See: <https://commonweal.scot/foi-request/> and <https://commonweal.scot/info-be-free/>). The rest were largely “published” via a private response to the requester which satisfies the current legal duty of Government but does not allow the general public beyond the requester to read the FOI response unless the requester chooses to disclose it themselves (and even then, it won’t appear in a convenient central repository). It should be a statutory duty to publish all FOI responses promptly and in an easily discoverable manner unless there is a compelling reason not to (e.g. data protection) although as the goal should be for maximum disclosure there should be few if any exceptions that allow for information to be disclosed to the requester but not to the wider public.

### 10. Which of the following best expresses your view on reducing exemptions under FoISA?

- > **Fully supportive**
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

**Please explain the reasons for your response.**

Exemptions should be minimised throughout this review and in all cases where an exemption may apply, the principle should lean towards disclosure unless and only unless a compelling exemption is presented and justified on a case-by-case basis. Further, the appeals system should be made easier and more streamlined to

better empower citizens to access information.

**11. Which of the following best expresses your view on amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services?**

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

**Please explain the reasons for your response.**

Common Weal understands the need for confidentiality during, for instance, active negotiations or contract tenders but once contracts are signed then the presumption should be towards the proactive disclosure and publication of such information. As a distant second option, this information should be accessible via FOI without such confidentiality clauses. Transparency should be considered as one of the consequences of taking on public contracts.

**12. Which of the following best expresses your view on amending FoISA to prevent the use of confidentiality clauses where inappropriate between public authorities and contractors providing public services?**

> **Fully supportive**

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

**Please explain the reasons for your response.**

As with Q11, while we understand the need for commercial sensitivity at certain times such as ongoing negotiations, once procurement contracts are agreed then the terms and other relevant information should be proactively disclosed or, failing this, available to FOI requests. We should reiterate that Common Weal's "Glass Wall" principle of transparency demands that all information that could conceivably be disclosed by an appropriate FOI request either under current or future expanded legislation should, instead, be proactively disclosed where ever possible. This would obviate the need for an FOI at all (though finding the information may still require communication with an information officer or other data handler).

**13. Any new law can have a financial impact which would affect individuals businesses, the public sector, or others. Do you think any cost is outweighed by the public interest benefit?**

> **Yes**

No

Not Sure

**Please explain the reasons for your response.**

Any additional costs borne by private companies providing public services that would fall under expanded FOI legislation should be considered as the "price of doing business" with a transparent democracy that is accountable to citizens.

**14. Any new law can have an impact**

on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?

**Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.**

In terms of direct impacts, it is foreseeable that expanded information disclosure or FOI requests could disclose information that would impact on protected characteristics. It would be acceptable for information to be redacted if such disclosure could be negative and if non-disclosure is not outweighed by public interest. We should reiterate the principle that decisions should lean in the interest of disclosure unless a compelling reason suggests otherwise rather than the opposite.

**15. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?**

**Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts.**

In general, the foundational principle of transparency in Government is that decisions made openly are ultimately better than those made in secret. Expansion of FOISA will therefore ultimately allow for poor policies to be held more accountable and lessons to be learned from the development of even outwardly good policies.

**16. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?**

Common Weal reiterates our principle that a “Glass Wall” approach to transparency should be adopted whereby any information that could conceivably be disclosed by an appropriate FOI request either under current or future expanded legislation should, instead, be proactively disclosed where ever possible. If implemented, this would render the concept of FOI requests obsolete as the information requested would already be in the public domain – although we respect that finding such information in the archives may still require assistance from experienced data handlers who, in this case, would act more as librarians and guides rather than gatekeepers.

**- Dr Craig Dalzell, Head of Policy and Research, Common Weal**

[Response on behalf of Common Weal.](#)