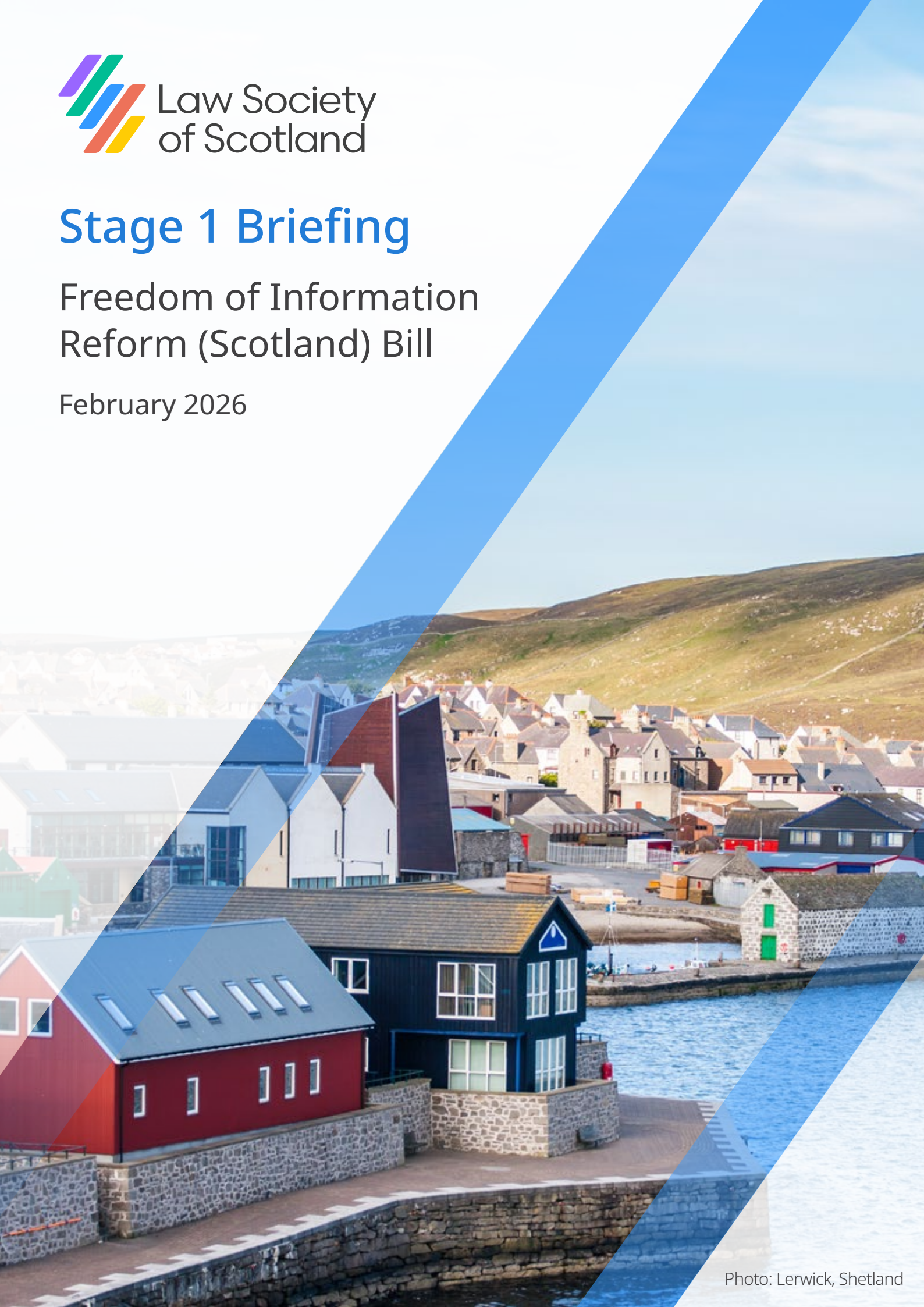
Law Society of Scotland

Stage 1 Briefing

Freedom of Information Reform (Scotland) Bill

February 2026



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Introduction

The Law Society of Scotland is the professional body for over 14,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

General Remarks

The Freedom of Information Reform (Scotland) Bill[1] (**Bill**) was introduced on 02 June 2025 as a member's bill by Katy Clark MSP and contains 23 sections. The Bill aims to strengthen transparency and accountability in Scotland's public sector by reforming certain parts of the Freedom of Information (Scotland) Act 2002 (**2002 Act**).[2]

We submitted written evidence to the Standards, Procedures and Public Appointment Committee on 22 October 2025 and provided oral evidence as part of the Lead Committee's Stage 1 consideration of the Bill on 13 November 2025. The Lead Committee's Report on the Bill at Stage 1 (**Stage 1 Report**) was published on 26 January 2026.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 17 February 2026.

Our briefing includes the following key points:

- We believe that the general legal presumption of disclosure defined in the 2002 Act is the preferable duty to impose in consideration of both class and absolute exemptions in freedom of information requests.
- We welcome the proposals to encourage Ministerial and Parliamentary involvement in the designation of Scottish Public Authorities (**SPAs**).
- We do not support the repeal of section 52 of the 2002 Act in relation to the First Minister's powers to override the Scottish Information Commissioner's decision or enforcement notices.
- We believe that alternative options exist to the introduction of a new section 18 offence relating to the destruction of information.

We have the following detailed comments for consideration.

[1] Freedom of Information Reform (Scotland) Bill as introduced
[2] Policy Memorandum

Section 1 – General Entitlement

Section 1 inserts a new section 5A to the 2002 Act introducing a duty on SPAs to apply a presumption in favour of the disclosure of information in response to an information request, save for instances where an absolute exemption applies.

We are unclear on this proposal. We believe there already exists a general legal presumption of disclosure underpinning the 2002 Act, reflected in the wording of section 1(1) under the "General Entitlement" heading. This states:

> *"A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."*[3]

We consider that is effectively a purpose clause outlining the policy intentions behind the 2002 Act. We believe it is preferable to retain this wording to ensure that the wider public have a better understanding of their rights in terms of a Freedom of Information (**FOI**) request.

However, we note the views expressed by Lord Marnoch[4] (and endorsed by Lord Hope (at appeal)) in the case of *Common Services Agency v Scottish Information Commissioner [2008]*[5]. These assert that although the whole purpose of the 2002 Act was the release of information and that this should be construed in as liberal a manner as possible, this proposition must not be applied too widely, without regard for other laws. Whilst these observations were made in relation to the application of exemptions under the 2002 Act for third party personal data (an absolute exemption), we consider this a valid point that may apply to class-based qualified exemptions, alongside others including common law legal privilege under section 36(1) of the 2002 Act.

Therefore, given that the 2002 Act works by importing legal tests and presumptions from other areas of statute and the common law, we do not support the proposed new wording. We consider this inserts provisions which appear to create a presumption if favour of disclosure in all circumstances which may lead to confusion and thus legal uncertainty. We believe that there are circumstances in which class exemptions are needed to protect the integrity of other areas of the law, rather than changing how they apply in respect of public authorities.

We note that the Lead Committee takes a similar view in the Stage 1 Report confirming that they are not convinced of the necessity or material effect of the proposed new section 1[6]. We agree and believe that the current provision found at section 1 of the 2002 Act is sufficient and takes into account that certain exemptions to a general presumption of disclosure are required.

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[3] Freedom of Information (Scotland) Act 2002
[4] Court of Session Inner House Judgment 58, 2007 SC 231, para 32.
[5] House of Lords - Common Services Agency v Scottish Information Commissioner (Scotland) Appellate Committee
[6] Stage 1 Report, page 5, paragraph 23

Sections 2 to 5 - The Designation of SPA's and Ministerial Reporting

Section 2(1) sets out a new requirement for Scottish Ministers to consider any proposal made by the Scottish Information Commissioner (**SIC**) when deciding whether to designate a SPA. Section 2(2) (inserting section 5A to the 2002 Act) also confers powers on the Scottish Parliament to add, by resolution, to the list of Scottish public authorities in Schedule 1 to the 2002 Act.

Alongside this, Section 5 strengthens the duty to report to Parliament as Scottish Ministers *"must consider the exercise of the section 5 power during the reporting period"*[7].

We support the underlying policy intention behind both of these provisions and agree it will encourage the further designation of SPAs. Whilst we view existing powers as being relatively broad and flexible in approach, we also recognise the need for reforms, particularly in view of comments[8] made by the SIC that these provisions have been underused in the 10 years since this law came into effect.

We therefore welcome these reforms and believe it will lead to better transparency and accountability in the public sector. We consider that the increased use of section 5 reports in Parliament outlining how Scottish Ministers have exercised the use of their powers will increase rates of designation. This will better serve capturing areas where a change in delivery in public services has occurred (or is about to occur) and will ensure that the 2002 Act keeps pace with the way that public services are delivered in Scotland.

We also believe that wider Parliamentary involvement will further embed a consultative process in the designation of SPAs, which will mitigate the risk of any arbitrary designation.

We note that these views have been acknowledged in the Stage 1 Report[9] and that various other arguments exist to provide an additional avenue for the designation of public bodies. However, we also note that questions have been raised in the Stage 1 Report as to the process of how Parliament would initiate, consider and decide on whether a public authority would be designated, and that there is a need for the procedure behind this to be clarified in legislation before it may be reflected in the Parliament's Standing Orders[10].

In view of these comments, we would welcome further clarity on the process that would be adopted in the designation of public authorities. In doing this, we would ask that consideration is given to the associated difficulties with timing that may arise in opening up the powers of designation to the Scottish Parliament. Should any delays arise in the Parliamentary process, certain organisations that may have

[7] Section 5(a)(1)
[8] FOIR(S) Bill Policy Memorandum, at Para 37
[9] Stage 1 Report, page 8, paragraph 46
[10] Stage 1 Report, page 8, paragraph 47

otherwise fallen within scope may avoid designation until such a point that a public sector contract has either commenced or concluded. We therefore welcome the Bill's insertion of section 5A into the 2002 Act which requires that a section 5 report is debated within twenty sitting days of it being laid. However, we note from the Stage 1 Report that further consideration may be needed as to whether this is an appropriate period for effective scrutiny[11].

Alongside this, we believe that it may also be prudent to consider what other triggers in process might encourage (or require) Ministers to lay a report outside of the 2-year reporting period required under the section 7A(3) of the 2002 Act[12]. One such trigger may be at the request of a particular quasi-organisation delivering both public and private services.

We would also ask that consideration is given to complexities that may arise in designating non-Scottish registered companies or cross-border contractors in terms of enforcement issues that may present themselves should a specific breach arise.

We would therefore welcome the opportunity to engage in further consultation on these points given that the Lead Committee are not persuaded that these provisions would necessarily increase the pace of designation of public bodies. We also look forward to further information being provided at the Stage 1 debate as to how the Scottish Government intends to prioritise the making of designations beyond its current consultation in respect of private and third sector care providers.

Section 6 to 7 - Requesting Information and Time for Compliance

We have no comments to make on Section 6.

Section 7 (amending section 10 of the 2002 Act) provides that the deadline for a SPA to comply with an information request does not restart in circumstances where the authority requests more information from the requester. Instead, the amendment will pause the 20-working day response time and excludes the time between the authority requesting more information from the requester and receiving that information.

We do not support this proposal. Larger public authorities often require input from multiple teams across their organisation and it may only become apparent that a request is unclear once it has been assigned to someone with technical or expert knowledge of the subject matter. The request for clarification may therefore take some time to issue without there being any failure on the part of a public authority to expedite matters. However, under this proposal, this time would be removed from the time for compliance. Alongside this, it is not uncommon for a request to significantly change or be extended in scope following clarification.

[11] Stage 1 Report, page 11, paragraph 64
[12] Freedom of Information (Scotland) Act 2002 – section 7A

In view of these factors, FOI requests can take time or require wider involvement from within the public authority following any request for clarification. We therefore have concerns that this proposal would effectively reduce the timescales for responding to such requests, in turn, placing additional pressures on certain authorities in terms of compliance.

We do, however, note from the Stage 1 Report that certain information requesters may have experience of public authorities using clarification requests as a delaying tactic[13]. We do not advocate any such approach and would welcome further data and information as to the extent to which public authorities have engaged in this practice. Until such a point, our view remains unchanged and we do not support a proposal to pause the 20 working-day deadline in responding to information requests.

Section 8 – Publication Schemes and Model Publication Schemes

Section 8 of the Bill repeals section 23 of the 2002 Act in terms of the requirement on SPAs to make publication schemes.

We support this repeal and consider these provisions of the 2002 Act as being no longer fit for purpose. We note from the Stage 1 Report that this view was shared by other stakeholders including the Scottish Government and that its repeal would be the correct approach provided a suitable alternative provision is developed.

Currently, we believe that those who want to find information on an SPA published online currently use simple search engines to look for information on a public authority in terms of their policies and procedures, minutes from meetings, annual reports and financial information. However, we believe that a more robust mechanism needs to be found to assist the wider public in this regard. We would support the development of a code of practice on proactive publication as outlined in the Stage 1 Report[14] and would welcome the opportunity to engage with further consultation on this point.

Sections 9 to 12 – Information provided to the SIC, General Functions of the SIC, Exempt Information and Enforcement

We have no comments to make on these sections.

Section 13 – Exception to comply with certain notices

Section 13(c) (repealing section 52 of the 2002 Act) removes the power of the First Minister to override the SIC decision or enforcement notice in relation to information deemed to be of exceptional sensitivity.

We do not support this proposal. We consider that this power provides a necessary check on the SIC and that the existing provision contains a number of

[13] Stage 1 Report, page 13, paragraph 83
[14] Stage 1 Report, page 17, paragraph 108

inbuilt safeguards. This includes that a decision must be made on reasonable grounds and that the First Minister must consult with other members of the executive in taking such a decision. We also note that the veto power has never been exercised previously thereby suggesting it is not a decision that is taken lightly.

We also believe there are specific sectors whereby this power would be required as a last resort to protect the wider public interest. For example, this may be required in the work undertaken by the police to protect highly sensitive information that they uncover in the course of complex investigations.

However, we do also acknowledge that other mechanisms exist which act as an alternative check on a decision of the SIC. For example, we note that an application to appeal direct to the Court of Session is available under section 56 of the 2002 Act[15]. This is in relation to a decision notice that has been issued by the SIC where it is believed that an error of law may have been made as to its basis. Whilst we accept that this could act as an alternative provision to that of the First Minister's veto power, we would point to the significant financial resource (and time) that may be required in any appeal to the Court of Session. This could pose a challenge to certain smaller public authorities where financial resources are already stretched, or if the disclosure needs to be prevented in a timely manner.

In view of this, whilst it is the case that we do not support the proposed repeal of the First Minister's veto power, we do recognise that a range of arguments exist, both for and against, any repeal of this provision.

Section 14 to 15 – Failure to Comply with Notice and Proactive Publication Duty and Publication Code

We have no comments to make on Section 14.

Section 15 of the Bill introduces a duty of proactive publication by inserting section 60A to the 2002 Act. The duty requires designated bodies to organise and keep up to date the information, relevant to its functions, and make that information available to the public in an accessible form and manner. Its sets out a new Section 60B Code of Practice setting out how a SPA is to comply with this duty.

We believe that the introduction of a proactive publication duty (and the associated code of practice) requires further clarity in terms of how it will work in practice. We note that the Policy Memorandum[16] states the aim is to ensure that public authorities routinely make available certain types of information without a formal request being made. However, we are aware of concerns as to how this will be properly resourced in public authorities (both large and small). We believe that the policy objective underpinning this proposed change could be achieved

[15] Freedom of Information (Scotland) Act 2002 – section 56
[16] Policy Memorandum (Freedom of Information Reform (Scotland) Act

through greater resources and a culture change, with the latter being addressed through the Code of Practice[17] issued under Part 6 (section 60) of the 2002 Act.

Section 16 - Freedom of Information Officers

Section 16 (inserting a new section 61A(1)) makes provision for the new role of a Freedom of Information Officer and proposes the role is assigned within all bodies designated under the 2002 Act.

We support the underlying policy objective behind this in trying to embed a professional culture, underpinned by sufficient resource within public authorities when it comes to handling FOI requests and publishing information. The Stage 1 Report also confirms the Lead Committee's views that this proposal is a way to support culture change and improve the standing of FOI compliance within public authorities[18].

We note that the Bill is following a model used in data protection law where public authorities are required to appoint a data protection officer if they carry out certain types of processing activities. We believe this approach will encourage legal compliance when it comes to FOI requests. This benefit will be strengthened by the inclusion at section 16(2) of a requirement that public authorities consider the professional qualities of the FOI officer they intend to appoint. This is in terms of their expert knowledge and ability to perform their tasks (as outlined in the proposed section 61C insertion to the 2002 Act).

We do, however, urge that a cautious approach is taken in implementing this provision in that certain authorities do have decentralised models for FOI compliance. Therefore, it is possible that the prescriptive nature of these proposals may not fit readily into these types of SPAs. Alongside this, we consider that the proposal may be implemented more easily in large public authorities, but that this may pose more of a challenge for smaller organisations. This stems from the inherent budgetary constraints that are often found in smaller organisations, a point acknowledged by other stakeholders in the Stage 1 Report[19].

We also believe there are other issues around smaller organisations being able to attract and secure suitable officers to fill this post. Even if a suitable candidate is identified, complications may arise in terms of how a FOI officer role can be incorporated easily into existing staffing structures. These issues are likely to be exacerbated by the insertion of section 61B imposing a requirement to ensure the independence of that officer, alongside ensuring that they report to the highest management level of that authority. This problem could be further heightened if a FOI officer is to hold other roles within their organisation e.g. the role of data protection officer. We believe that many authorities will designate their existing data protection officer as also being their FOI officer and that this approach will be

[17] Part 6, section 60 - Freedom of Information (Scotland) Act 2002
[18] Stage 1 Report, page 26, paragraph 171
[19] Stage 1 Report, page 30, paragraph 204

particularly important for smaller organisations in terms of wider information governance.

Sections 17 to 19 - Miscellaneous and Supplemental

We have no comments to make on section 17 relating to disclosure of information[20].

Section 18 of the Bill amends section 65 of the 2002 Act. This has the effect of extending the scope of an offence to circumstances where information is destroyed before any request for that information has been made, where the destruction is done with the intention of preventing the disclosure of that information. We note from the policy memorandum that this will be a prosecutable offence, and that this applies to both a public body and the staff member under its instruction.

We have concerns as to how this criminal offence will operate in practice. As the Bill stands, we believe this new offence will create legal uncertainty in terms of its application and enforcement.

Our concern is best explained by the example of when a public authority (or a member of its staff with delegated authority) decides to delete a document. This simple act is done in the full knowledge that this will prevent its disclosure in response to any future FOI request. Whilst the person's "*intent*" may have been good records management, we believe that it will be difficult to determine if their motivation was to also amount to an *"intention to prevent disclosure"*. We note that no criteria as to what would constitute a necessary *"intent"* have been provided in this Bill.

In view of this, we would ask that clarification is provided as to the criteria that will be used to establish *'intent'*, and how this will be defined for the purposes of this Bill. The issue in practice is that intention is typically proved through inference and there is rarely direct evidence of one's intent, for example, through words expressed at the time. Whilst the Courts are used to dealing with intention as a matter of inference, we believe that issues could arise, particularly when deletion is, on the face of it, in line with a records management policy. Therefore, there is unlikely to be any other evidence available pointing to the reasons for the decision to delete. This issue is further complicated by the fact that the criminal burden of proof is *"beyond reasonable doubt"*.

In view of the foregoing, we believe that prosecutions for this proposed offence are likely to be relatively rare and that it will take some time for it to be judicially analysed (typically in an appeal from conviction). We believe this will cause a period of uncertainty in terms of how intent can be established. We note that this point (and the lack of clarity on establishing intent to prevent disclosure) was acknowledged in the Stage 1 Report and that the establishment of a new section

[20] Disclosure of information to Scottish Public Services Ombudsman, Information Commissioner or to Audit Scotland

18 offence may not be an appropriate or proportionate approach[21]. We would therefore highlight that existing provisions do exist to address this issue, such as the common law crime of attempting to pervert the course of justice. We believe that this could be used as an alternative which can be prosecuted at any level and can result in a sentence of anything up to life imprisonment.

Furthermore, we believe that this new offence will serve to undermine already established data retention policies across various sectors. This may lead to wider unintended consequences for certain organisations, including:

- Discouraging people from recording information in the first place, for fear of being accused of committing an offence if they destroy it when, in their opinion, they are not required to keep it. We are already aware of difficulties in the way certain organisations deal with social media data retention and precisely what information should be extracted (or deleted) from discussions that are held over these platforms.
- Where records have been created, the new offence could have a chilling effect of discouraging people from engaging in good records management (either through a lack of understanding or making a conscious decision not to do so to avoid being accused under the new offence). This could mean certain organisations keep information indefinitely, thereby creating unnecessary cost for those already under significant financial strain. In the case of personal data being retained indefinitely, this would also run counter to the data minimisation and storage limitation principles contained within Article 5 of the UK General Data Protection Regulation[22].
- The proposed new offence could also result in an increase of baseless accusations that the police would need to investigate.

We suggest that a further alternative to section 18 would be to make clear to public authorities the kind of records that would be good practice to preserve (or be required to preserve).

For example, we would suggest that certain reforms could be made to the Public Records (Scotland) Act 2011[23]. This could include a clear steer from the Keeper of Records of Scotland as to when public authorities are required to look at their retention and destruction schedules, and also in terms of the kind of documentation and information that they are required to keep. We believe that this would likely promote good record management and thus encourage public authorities to comply with FOI requests more efficiently through not having to search through large datasets.

Final Provisions (Sections 20 – 23)

We have no comments to make on these sections.

[21] Stage 1 Report, page 29, paragraph 195
[22] UK GDPR Article 5
[23] Public Records (Scotland) Act 2011

Overall Conclusion

We note that the Lead Committee has been persuaded that legislation is now needed to update the FOI regime in Scotland[24]. We agree with the importance of this given that FOI plays an important part in the transparency of public services and thus the accountability of SPAs to the people that they serve.

Whilst the Lead Committee are of the view that this Bill, taken in its entirety, is not the correct vehicle for that update[25], we would welcome the opportunity to engage in further consultation on this area when further proposals are made.

[24] Stage 1 Report, page 33, paragraphs 216
[25] Stage 1 Report, page 33, paragraph 218

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