

Call for Views

Freedom of Information Reform (Scotland) Bill

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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.

Our Privacy Law Sub-Committee and Criminal Law Committee welcomes the opportunity to consider and respond to the Standards, Procedures and Public Appointments Committee of the Scottish Parliament's Call for Views¹ on Freedom of Information Reform (Scotland) Bill² (**Bill**).

General Remarks

The Bill was introduced on 2nd June 2025 as a private members bill by Katy Clark MSP and contains 23 sections.

We are aware that the stated intention of this Bill is to strengthen transparency and accountability in Scotland's public sector by reforming certain parts of the Freedom of Information (Scotland) Act 2002 (**2002 Act**).³

1. To what extent do you believe the proposals in the Bill will help achieve its primary aim of improving transparency in Scotland by strengthening the Freedom of Information (Scotland) Act 2002?

We have no comments to make on this question.

2. Do you support the proposal that when a public authority is deciding whether to withhold information under a qualified exemption, it must begin from the position that the information should be disclosed?

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 heading "General Entitlement". This states;

¹ https://yourviews.parliament.scot/sppa/freedom-of-information-reform-bill/consult_view/

² <https://www.parliament.scot/bills-and-laws/bills/s6/freedom-of-information-reform-scotland-bill>

³ [Policy Memorandum](#)

“A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”⁴

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 Marnoch⁵ (and endorsed by Lord Hope (at appeal) in the case of *Common Services Agency v Scottish Information Commissioner [2008]*⁶. 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 the Lords 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 agree with the proposed new wording. We consider this inserts provisions which appear to create a presumption in favour of disclosure in all circumstances of a particular type of exemption. This 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.

3. Do you agree with the repeal of the current provisions in relation to publication schemes and the introduction of a proactive publication duty and code of practice?

We support repealing the current provisions in relation to publication schemes and consider these as being no longer fit for purpose. We believe that those who want to find information published online will simply use a search engine to look for it rather than consulting an authority's publication scheme and associated guide to information.

However, the introduction of a proactive publication duty (and the associated code of practice) requires further clarity in terms of what this duty will precisely mean. We note that the Policy Memorandum⁷ states the aim is to ensure that public authorities routinely make available certain types of information without a

⁴ [Freedom of Information \(Scotland\) Act 2002](#)

⁵ Court of Session Inner House Judgment 58, 2007 SC 231, para 32.

⁶ [House of Lords - Common Services Agency V Scottish Information Commissioner \(Scotland\) Appellate Committee](#)

⁷ [Policy Memorandum \(Freedom of Information Reform \(Scotland\) Act](#)

formal request being made. However, we have concerns as to how this will be properly resourced in public authorities (both large and small) given the financial impact this duty is to likely have. We believe that the policy objective underpinning this proposed change could be achieved through greater resources and a culture change, with the latter being addressed through the Code of Practice⁸ issued under Part 6 (section 60) of the 2002 Act.

4. Do you support the proposal that the 20-day period for a response to be provided should be paused rather than reset in relation to requests on which the public body seeks clarification from the requester?

We do not support the proposal to pause the 20-day period for a response (rather than to reset it). Large 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, this time would be removed from the time the authority has to comply with the request. Alongside this, it is not uncommon for a request to significantly change or be extended in scope following clarification.

In view of these factors, FOI requests can understandably 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 note that section 14 of the Bill makes clear provision in terms of time for compliance.

5. Do you think that the provisions of the Bill in relation to the reporting by Scottish Ministers of the use of 'section 5' powers to designate new public authorities would, as the Policy Memorandum contends, "incentivise Scottish Ministers to regularly use their section 5 powers and at a pace which enables the system of independent regulation to operate effectively"?

We have no comments to make on this question.

6. Do you support the requirement for all public authorities subject to the Act to designate a Freedom of Information officer?

⁸ Part 6, section 60 - [Freedom of Information \(Scotland\) Act 2002](#)
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We support the underlying policy objective of section 16 of the Bill in trying to embed a professional culture, underpinned by sufficient resource within public authorities when it comes to handling FOI requests and publishing information.

In achieving this, 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. This approach can be seen by the insertion of a new section 61A (1) that requires a Scottish public authority to appoint a FOI officer. We believe this will encourage legal compliance and public reputation when it comes to FOI requests. We believe these benefits will be strengthened by the inclusion at sub-section (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 type of models. Alongside this, we consider that these requirements may also lend themselves to easier implementation to large public authorities, but that this may pose more of a challenge for smaller organisations. This stems from the inherent budgetary constraints within such organisations, an issue further complicated by the proposed insertion of section 61B to the 2002 Act laying down the organisational requirements for a FOI officer.

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 smaller organisations 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 given our belief that a FOI officer should be able 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 particularly important for smaller organisations in terms of wider information governance.

7. The Bill proposes the introduction of an offence to prevent destruction of information with the intent to prevent disclosure, even when no information request has been made. Do you support this proposal?

We note that section 18 of the Bill amends section 65 of the FOI 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.

In introducing this new criminal offence provision in the Bill, we have concerns as to how this 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 precise 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. It will take some time for it to be judicially analysed (typically in an appeal from conviction). We consider that this will cause a period of uncertainty in terms of how the Courts will approach the issue of establishing intent. This may undermine proper record keeping and management, and the objectives of the FOI legislation. However, we believe that in certain situations in which the proposed offence is designed to address, these could well be prosecuted using the common law crime of attempting to pervert the course of justice (which can be prosecuted at any level and can result in anything up to life imprisonment).

At an operational level, 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 the 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 an accusation under the new offence). This could mean certain organisations keep information indefinitely in many areas, 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 (GDPR).
- The proposed new offence could also result in an increase of baseless accusations that the Police would need to investigate, where an authority simply does not hold information or where it has been deleted in the interests of good records management. This is one of the policy principles underpinning the 2002 Act which we believe could be impacted by this new provision. This will likely make the task of proving this new offence as being extremely difficult (and costly) to control.

We suggest that a positive alternative to the section 18 provision would be to make it 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. 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 by not having to search through large volumes of information.

We would also request that section 19 (a) is better clarified in terms of its reference to the *"commencement of a criminal investigation"* given the ambiguity around when a crime is actually reported i.e. should this be considered as when it came to light or when an enquiry actually started? We would suggest one approach to be clarification through a signed certificate by an officer of the rank of superintendent or above confirming that the investigation commenced on a particular date. Such an approach is used in the current provisions adopted at Section 65A(4) of the 2002 Act.

8. Do you support the proposal to remove the power of the First Minister to 'veto' certain decision of the Scottish Information Commissioner in relation to information deemed to be of "exceptional sensitivity"?

We do not support the proposal to repeal section 52 of the 2002 Act. This confers powers on the First Minister to override a decision of the Scottish Information Commissioner (**SIC**) in cases where the SIC has issued a decision or enforcement notice to the Scottish Administration. We consider that this power provides a necessary check on the SIC and that the existing provision contains a number of inbuilt safeguards in any event. This includes that a decision must be made on reasonable grounds (thereby making the veto subject to judicial review), and that the First Minister must consult with other members of the executive in taking such a decision.

In further support of this view, we note that the veto power has never been exercised previously thereby suggesting it is not a decision that is taken lightly. Alongside this, we point to the fact that this power is not exercisable under any sections of 2002 Act other than information to comply with sections 29, 31(1), 32(1), 34, 36(1) or 41(b). We consider these as being sensitive sections where a discretionary power may be beneficial, particularly as section 52(2)(a) of the 2002 Act states *“the information requested is of exceptional sensitivity”*.

9. Do you support the proposals to strengthen the general functions and enforcement powers of the Scottish Information Commissioner, and to introduce an exemption for information provided to the Commissioner during the investigation of appeals?

We agree with the proposal to introduce an exemption for material provided to the SIC during the investigation of an appeal.

10. Do you have any views on the estimated costs and savings associated with the proposed changes set out in the Bill?

We believe that the extension of an offence under section 18 of the Bill (and the associated extension of FOI duties for public authorities), along with the wider proactive publication duty, will likely have a negative financial impact on both large and small public authorities. This challenge may be further complicated in smaller organisations in sourcing a FOI officer (as noted in our comments in Question 6 above). This stems from likely increased administrative burden of having to keep large volumes of data which could ultimately lead to compliance issues without proper support or funding.

Furthermore, we believe that certain types of public authorities are already under significant financial pressures irrespective of their size. This stems from wider cuts to funding amongst other factors. We therefore believe that these proposals are likely to have a significant impact on all public authorities in terms of sourcing a FOI officer, the proactive publication duty, review of policies and procedures, impacts if clarification timescales are amended; and the retention of data beyond business requirements if section 18 proceeds.

We believe these impacts to be significant and widespread across the sector which renders a need for careful consideration and a sufficient timeframe for implementation of this Bill should it pass.

11. Please use the text box below to set out any further comments you wish to make about the Bill.

We have concerns over the Parliamentary time that this Bill is likely to have given the up-and-coming Scottish Parliament elections expected in May 2026. This stems from our belief that many of the provisions in this Bill will require sufficient time for wider parliamentary scrutiny and a full analysis of the likely consequences arising from them.

The need for such scrutiny is heightened when considering that the specifics of an extension of the offence under section 18 of the Bill were not included in the consultation⁹ that preceded the Bill's introduction to the Scottish Parliament.

We would also raise a number of points regarding Schedule 3 of the 2002 Act (Powers of Entry and Inspection):

1. We would suggest that consideration is given as to whether Paragraph 1(1)(b) needs amending to include the provision of section 18 of the Bill i.e. to read "*after Sec 65 (1A)*".
2. Sub-section (b) of Schedule 3, Paragraph 2 gives no specific power to seize a computer or electronic device and a reliance on "*other material*" of the provision would be required to enable these items to be captured under the 2002 Act. Given the technological advances in electronic storage since 2002, we consider this provision could benefit from an update to include newer forms of technology.

⁹ [Freedom of Information Reform Bill Consultation \(Katy Clark MSP\)](#)
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