

RESPONSE FORM

PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Questions

1. Do you have any suitable law reform projects to suggest?

Comments on Question 1

«Freedom of Information (Scotland) Act 2002 (FoISA)»

2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Comments on Question 2

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3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

«The Scottish Government has committed itself to principles of transparency, openness, and accessibility. The First Minister committed her Government to be an "outward looking Government which is more open and accessible to Scotland's peoples than ever before" and for her Government and public services: "to be known for the quality of our relationship with Scotland's communities". Following this statement, and with the support from civil society in Scotland, the Scottish Government successfully applied for Subnational Pioneer Status with the international Open Government Partnership. However, in practice, institutions have failed to live up to those promises. Freedom of information in Scotland has been roundly criticised by politicians, journalists, and outgoing commissioners. This is more than an issue of application, but goes to the core of the Scottish Government's commitments to open government and how citizens can generate meaningful accountability.

As recently acknowledged in Scottish Parliament as part of a debate led by Neil Findlay MSP, there is a great deal of criticism of the Scottish Government's handling of FoI requests, severely restricting, delaying or undermining the Government's stated commitment to transparency and openness. While there is political interest in reforming FoISA, we believe this process, due to its complexity, should be led by the SLC to ensure that it is a process based on law, as opposed to politics. This would avoid the topic being used to score political points instead basing reform on the best application of law.

Key issues that should be addressed in the FoISA to ensure it fully promotes and supports transparency, openness and accessibility include:

Application of law - delays and lack of communication

The FoISA, as implemented, has drawn a great deal of criticism due to the delays and lack of information shared. This was highlighted in a recent letter signed by journalists, campaigners and academics who criticised the application of the current law on the basis that:

- Information requests being repeatedly delayed significantly beyond the 20 working day deadline without clear justification or warning;
- Emails asking for an update on answering requests in cases of delays beyond the legal deadline being routinely ignored by officials;
- Officials delaying responses for so long that the initial requests only get answered under internal review, making it impossible for journalists to ask for incomplete replies to be internally reviewed again. This leaves them facing further longer delays by appealing to the Scottish Information Commissioner.

Perceived Independence

One of the key reasons we believe this is a reform for the SLC is the need to remove this from the political sphere to ensure reform establishes a robust foundation in law. As the law stands there is little to dissuade responses to FoI requests being shaped by political decisions that may be counter to the nature of the law, but not explicitly protected against in the statute.

Issues with the law include:

- Scottish Government officials taking control of requests to other government agencies without the consent of the applicant;
- Requests being blocked or refused for tenuous reasons;
- Requests being screened for potential political damage by special advisers and of responses to individual journalists being routinely handled by special advisers.

These issues that regularly amount to delays undermine the independence of the process ensuring that any political issues can interfere with the full functioning of the FoISA in an effective and transparent manner.

Exemptions & Restrictions

Qualified exemptions in FoISA are far too broadly drawn allowing information to be restricted based on vague terms that lack meaning or specificity. An example of this is the prejudice based qualified exemption National Security & Defence (s. 31(1)) that lacks one agreed or unified definition. This is an issue that is bigger than FoISA alone, but in FoISA we are seeing the exemption of national security & defence being used for a wide range of FoI requests that undermines any attempt of journalists, academics or campaigning organisations to explore and interrogate this complex but vital aspect of governance. The exemptions outlined in FoISA need to be drawn as narrowly as possible to ensure they do not make the law inherently incompatible with the objectives of openness and transparency as outlined by

the Scottish Government.

Bodies FoISA applies to

As the nature of bodies involved in public life change, FoISA needs to change to adapt with it. At the moment, there are private bodies, involved in delivering public services that are not subject to FoISA. For example, the Improvement Service is a national improvement organisation for local government in Scotland. The purpose of the organisation is to "help local councils and their partners improve the health, quality of life and opportunities of all peal in Scotland through community leadership, strong local governance and the delivery of high quality, efficient local services." However public minded this organisation is, and despite it receieving the majority of its budget through public money, due to the nature of its executive leadership it is exempt from FoISA as it currently applies.

While there is scope to add authorities to which FoISA applies via Scottish Ministers, it still does not reach the Improvement Service. Resorting to a political process to decide whether FoISA should apply to an organisation is the wrong way round. It would be worthwhile for the Scottish Law Commission to consider whether there is a better rule that fosters a greater option of transparency for organisations receiving the public pound with narrowly drawn exemptions.

Appeal Process

With no tribunal system in place in Scotland, leaving the only avenue for appeal that of the Court of Session on points of law only, we believe the appeal process establishes too high a threshold for civil society to reach to appeal any decision made in respects to a Fol request. Bringing appeals to the Court of Session is a costly and lengthy process that will be beyond the reach of many people seeking information from the Scottish Government, so reform should definitely look at this process to ensure it remains cheap, easy and accessible for civil society from a range of backgrounds to appeal Fol decisions.

European Court of Human Rights Case Law

The judgement in case of **Magyar Helsinki Bizottság v. Hungary (Application No. 18030/11)** clarified areas of discussion for Article 10 of the ECHR. It also redefined the application of the public interest test, and provided guidance on application of exemptions based on the identity of the applicant. The Scottish Law Commission is well placed to assess these recent case law developments, and how FoISA should be reformed to correspond to these changes.

Upcoming General Data Protection Regulation compliance

The General Data Protection Regulation has made some significant changes to the access to information regime, particularly with regard to disclosing personal data. The restriction in the General Data Protection Regulation, Article 6(1)(f) for public authorities to justify disclosure of personal data 'in the performance of their tasks', would benefit from guidance from the SLC. »

(b) Please provide us with information about the impact this is having in practice:

«These issues represent a clear barrier to openness, accessibility and transparency for a number of key reasons. The delays documented by journalists, academics and latterly the Open Government Network Scotland hamper the effective use of data obtained through FoI for journalists whose work is prioritised by the 'newsworthiness' of a story which is diminished by delays to publication. This represents a direct threat to free expression and the ability of the press to inform the public.

Beyond this, with no appeal process short of the Court of Session, this is a process that is out of reach for many people seeking information from public bodies in Scotland, leaving transparency in the hands of those able to commit resources to the appeal process. While the internal review process is an accessible way to appeal an initial response to a request, it cannot be seen as an independent process as the review is undertaken by a representative of the same organisation. Without a tribunal system there remains very limited avenues for an independent, impartial and accessible appeal process.

The prejudice based qualified exemptions such as s. 31(1) and s. 35 (a & b) result in responses to requests that offer very little to individuals and organisations looking for transparency in relation to important issues such as national security and defence. Without being more granular in nature, these exemptions demarcate entire topics as out of reach of FoISA guidelines undermining independent scrutiny of issues including surveillance, policing, tendering processes and adherence to relevant regulations and laws.»

(c) Please provide us with information about the potential benefits of law reform:

« Reform would potentially improve:

- Public access to information.
- Public understanding of government and its actions.
- Improve the standard of political debate by making previously suppressed information available,
- Improve accountability for private sector clients delivering public initiatives.
- Improve audit and scrutiny of spending.
- Bring FoISA in line with recent case law and legislative developments in Europe.

The Scottish Government has already committed to being the most open and transparent government Scotland has ever seen. At the moment Scotland is falling short. A reform of Freedom of Information laws, that focuses on maximising disclosure and minimising the ability to delay and reject requests will help to meet the standard of transparency and openness the government has set for itself. There are examples of more open freedom of information laws that are respected and have improved public awareness of issues from policing in the United States to public administration in Sweden. Scotland could learn from these countries that have had longer histories of freedom of information laws, and adopt a

framework that sets it on the path for future leadership in this area. Important areas to consider also include who should be subject to the law. With private bodies delivering public services, yet not subject to FoISA, the current procedures for adding new actors to being subject to the law clearly need reconsideration to ensure the law is not implemented unfairly across the country. This would prevent individuals with privately provided public services from using the FoISA. To equally benefit everyone in Scotland, legal reform should look at the changing face of public service and how that impacts the effective utilisation of FoISA.

Reform would help bring FoISA in line with the judgement from the European Court of Human Rights in Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary with regard to the appropriate application of access to information through Article 10 of the European Convention on Human Rights. Additionally, it would allow for the current set of rights for requesting information in FoISA to be tested against the upcoming General Data Protection Regulation and provide Scotland with ample opportunity to become compliant with the upcoming Regulation before May 2018. Scotland's status as a Subnational Pioneer with the Open Government Partnership reiterates the country's commitment to display leadership on issues around transparency and accessibility on an international scale and reforming FoISA is a vital step for the government to take concrete and practical steps to ensure this commitment is reflected in legislation.»

General Comments

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Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.