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25th February 2021

Dear Jenny,

RESPONSE FROM THE SCOTTISH GOVERNMENT TO THE PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE REPORT ON POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (FOISA)

Further to my letter of 25 November to the previously Acting Convener Anas Sarwar MSP, I am pleased to say that I am now in a position to provide the Scottish Government's formal response to the Committee's report on Post-Legislative Scrutiny of FOISA. I am grateful for the Committee's understanding of our reasons for delaying this response – the FOI Unit's policy development workstreams having been paused until recently as a consequence of the coronavirus outbreak.

I am grateful for the considerable time and energy the Committee has invested in considering the impact FOISA has had on public life in Scotland since the legislation came into force in 2005, and in considering how the information rights it secures can be further developed and strengthened. The Committee held a number of very interesting and worthwhile evidence sessions, with a wide range of stakeholders representing both public authorities and those with experience of exercising the rights enshrined in the Act.

Our response to the Committee's thorough and detailed report is included in the Annex to this letter. As set out in the response, and as I previously indicated in my letter of 25 November to Mr Sarwar, the Scottish Government is of the view that there should be a public consultation exercise early in the next Parliament to seek views on legislative change, following the Committee's report.

In our response we have provided the Scottish Government's comments on some of the substantive recommendations for future legislative change in the report. These are offered in a constructive spirit, to inform future discussion, not to close down any avenue of discussion. We foresee that a future public consultation will provide an opportunity to seek

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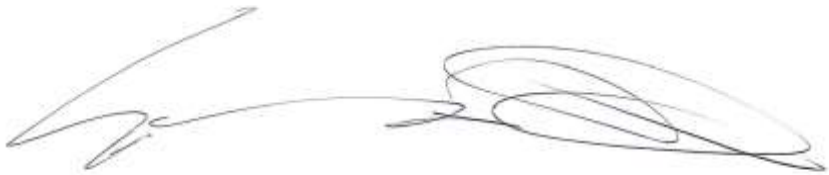
views from a wider set of stakeholders on all the Committee's recommendations, insofar as these relate to legislative change.

In the response, we have also addressed those recommendations addressed to the Scottish Government which relate to the implementation of the current statutory regime, rather than to legislative change. In addition, where we have felt it adds value, we have addressed the more general points and observations made in the report regarding the operation of FOISA.

Once again, I would like to thank the Committee for its efforts in relation to the Post-Legislative Scrutiny of FOISA. I hope the Committee finds our response to the report helpful.

Best wishes,



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ANNEX

Scottish Government response to the report on post-legislative scrutiny of FOISA

Overall impact of FOISA

We note the report's central recommendation that the Scottish Government should consult on future legislative change:

5. The Committee recognises that FOISA has brought important benefits in terms of greater transparency and accountability of public authorities in Scotland. However, there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication. A number of recommendations are made throughout this report. While some of the proposed improvements are a matter of implementation, others are likely to require an amendment to FOISA. The Committee recommends that the Scottish Government consult on the detail of the proposed changes before bringing forward the necessary legislation.

The Scottish Government takes no view at the present time on whether future primary legislation will be required to improve the current information rights regime. However, we are happy to confirm that we agree that a consultation on legislative change should take place early in the new session of the Parliament, taking the recommendations of the Committee's report as its starting point. Whether this exercise ultimately leads to new primary legislation will depend in part on the outcomes of the consultation exercise, as well as on the views of the new Parliament.

Who is covered

6. It would appear to the Committee from the evidence that it has received that FOISA has failed to keep pace with the changing nature of public service delivery in Scotland, meaning that a number of organisations that deliver public services and/or are in receipt of significant public funds do not fall within its scope.

7. The Committee considers that the overarching principle should be that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation.

8. The Committee notes that the Scottish Government's consultation on the extension of FOISA invites views on whether to include "organisations providing services on behalf of the public sector" not already subject to the Act. The Committee agrees that, in principle, organisations that provide public services on behalf of the public sector should be covered by FOISA in a proportionate manner.

9. The Committee is concerned at the slow pace by which organisations have been designated under section 5 of the Act. Witnesses commented that even where consultation has taken place, there has been considerable delay before a designation has been made. This suggests that the current legislation is insufficiently nimble to keep pace with the changing nature of the public sector landscape. As such, the Committee considers that changes need to be made to FOISA to address this.

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10. The Committee recognises that any solution needs to be proportionate. It therefore supports, in principle, the idea of a "factors" approach to the extension of FOISA, which is based on functional tests, such as the extent to which an organisation is delivering a public function; the degree of public interest in relation to the function/service being delivered and the cost to the public purse in delivering the function or service.

The Scottish Government accepts the principle that information held by non-public sector bodies which relates to the delivery of public services and/or the spending of public funds should be accessible under freedom of information legislation.

We accept that there have been changes to the delivery of public services in Scotland over the 19 years since FOISA was enacted. In some instances these may indeed have affected the accessibility of information through FOISA and its sister information rights regime, the Environmental Information (Scotland) Regulations 2004.

However, it should also be recognised that it has in fact always been the case that not all organisations which receive an element of public funding are subject to FOISA. Grant funding to third sector organisations was commonplace in 2002, as it is now, and there were also prominent examples at the time of private sector involvement in the delivery of some services. The Official Report shows that issues regarding coverage of the legislation, the powers bestowed upon Ministers to extend the legislation to new entities, and the need for these powers and their use to be proportionate were discussed by the former Justice 1 Committee during the passage of the Freedom of Information (Scotland) Bill in 2002.

We therefore welcome the Committee's recognition that any approach to extension of the legislation has to be proportionate and the Committee's support in principle for a factors-based approach, similar to that which the Scottish Ministers have historically applied. The first use of the Scottish Ministers' section 5 powers to extend the legislation was in 2013, and those powers have been used twice since then. Nevertheless, we recognise the Committee's clear concern that the designation of new bodies has historically taken place at too slow a pace.

The Committee's specific suggestions for possible legislative changes to address this issue are addressed later in this response. However, we can commit to resuming our work on extension, considering the future use of the Scottish Ministers' existing powers under the legislation, as soon as circumstances allow. We will take the Committee's view about the need for a robust approach to extension into account as we take that work forward. It is our expectation that, following our evidence and opinion-gathering consultation undertaken in 2019, the Scottish Ministers will be in a position to consult on a set of specific proposals for extension early in the new Parliament.

11. The Committee is also attracted to the idea of the legislation being amended to introduce a "gateway clause" which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA in relation to those elements of the organisation concerned with the provision of those services or spending of such funds. As such, the Committee recommends that the Scottish Government consults on amending FOISA to introduce a mechanism by which relevant elements of non-public sector bodies would automatically fall within the scope of FOISA if they fulfilled certain criteria relating to the provision of public services or functions and/or receipt of significant public funds.

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We are willing to consult on the principle of legislative change to the basis on which bodies become subject to the Act. However, any such change would need to provide clarity. For example, 'significant' funding is not the same for a small charity or SME as for a large organisation. In our view the principal difficulty with a 'gateway clause' is that it potentially creates uncertainty about which bodies are, or are not, subject to the legislation.

This is already an issue in respect to the provisions of section 6 of FOISA relating to publicly-owned companies. Indeed, some stakeholders have expressed dissatisfaction that it is not possible to produce a definitive list of publicly-owned companies subject to FOISA. A 'gateway clause' could result in a similar issue applying across all third and private sector partners of public bodies – there could be scope for uncertainty about which entities are subject to the legislation and which are not. Any such uncertainty would be problematic since, for FOISA to function effectively, bodies subject to the Act have to be fully aware of their statutory responsibilities, including with respect to proactive publication. Furthermore, there is a risk that any set of criteria set within legislation for automatic designation under FOISA may incentivise avoidance activity.

The report *Freedom of Information International Review: scope of bodies included*, pubished by the Scottish Government on 22 January 2020 at the request of the the Committee, provides extensive comment on the different possible approaches to the designation of public authorities under information rights legislation. The report considers the relative advantages and disadvantages of the approaches taken in various jurisdictions, including the real-world impact of lack of certainty over the scope of legislation.

These issues would need to be considered carefully before proposing any legislative changes affecting the basis on which bodies become subject to FOISA. However, a future consultation on legislative change may provide an opportunity for the further consideration of these issues.

12. The Committee also considers that the Scottish Government should consult on amending FOISA to prevent reliance on confidentiality clauses between public authorities and contractors providing public services. This would be in similar terms to section 35(2) of the Irish Freedom of Information Act 2014 which prevents public authorities and those bodies providing services to them from relying on confidentiality clauses in their contracts to prevent access to information held by the public authority.

We would be content to explore the issue of amending legislation to prevent or limit reliance on confidentiality clauses between Scottish public authorities and contractors as part of a wider consultation on possible legislative change. However, at the current time we are not convinced that new legislation will be required to address this issue.

We are not aware of any evidence to suggest that there is a reliance on confidentiality clauses between Scottish public authorities and contractors providing public services in Scotland. Furthermore, we would highlight that the section 60 code of practice already stipulates that authorities should exercise caution about making any confidentiality agreements with third parties (see para 7.1.2).

The Scottish Government is committed to being transparent about how it spends public money and improving accountability. Our legislation requires all public bodies to publish

contract award notices valued at £50,000 or more for goods and services and £2 million or more for works.

Our Open Government National Action Plan 2018-20 has also resulted in the publication of Scottish Government contract documentation. At present, we publish documents for the following Scottish Government contracts:

- all new collaborative procurement awards
- local or regional awards (category C) when the value is £10 million or more
- More Powers awards (including Social Security Scotland) when the value is £10 million or more

In addition, there is a standard clause in Scottish Government services contracts which states that,'If the Purchaser receives a Request for Information concerning the Contract, the Purchaser is responsible for determining at its absolute discretion whether the information requested is to be disclosed to the applicant or whether the information requested is exempt from disclosure in accordance with FOISA or the Environmental Information Regulations'.

There is another standard clause in Scottish Government services contracts which states that contractors, 'must not make any press announcement or otherwise publicise the Contract in any way, except with the written consent of the Purchaser'. This, though, is not about preventing information about contracts going into the public domain. It is about ensuring the accuracy, appropriateness and consistency of such information.

13. The Committee considers that FOISA should be amended to address the current anomaly whereby bodies jointly owned by two or more public authorities do not fall within the scope of FOISA

As we indicated in our own written evidence to the Committee, we agree that this is an anomaly which should be corrected. We would be happy to include this within a future consultation on legislative change.

However, it is important to understand that the current anomaly only relates to jointly owned public companies *where one of the joint owners is the Scottish Ministers*. Companies wholly owned by a combination of other Scottish public authorities (e.g. by a combination of local authorities) are already considered subject to the Act and there are various examples of such bodies.

We acknowledge that our own written evidence to the Committee did not make that point entirely clear, for which we apologise.

What is covered by the Act

14. The evidence received by the Committee suggests that there has been a shift in recent years in the level of information being routinely recorded in connection with official public business. At the same time, a number of users of the Act have expressed concerns about the use of unofficial channels of communication, such as Whatsapp and private emails, and the extent to which such information is accessible under FOISA.

15. The freedom of information regime is underpinned by effective record keeping and management. The Committee emphasises the importance of documenting and recording relevant information. It is clear that there should be no deliberate attempt to evade FOISA by failing to do so. The Committee considers that much greater emphasis needs to be given by the public sector as a whole to adequately creating information trails, such as relevant drafts, memos, emails, correspondence and minutes of meetings, which show how key decisions have been reached and how public funds have been spent.

16. The Committee notes suggestions raised in evidence that tools such as WhatsApp messages and texts were being used for official business along with concerns about the use of private email accounts by Ministers. While there appeared to be no dispute that such information is covered by FOISA, the Committee considers that there may be merit in the legislation being amended to make explicit what is meant by the term "information." Consideration should also be given by the Scottish Information Commissioner (SIC) and the Scottish Government as to whether further guidance is required to ensure that such information is retained and accessible in an appropriate format so that it can provided under FOISA.

We would be content to consult on whether there would be benefit to further defining the term 'information' within FOISA. However, we are not convinced there is any substantial lack of clarity around the meaning of the term 'information' as it is currently defined. Indeed, the legislation is intentionally drafted in such a way so as to underpin the principle that all recorded information is subject to the Act, irrespective of the media or format in which it is held. To attempt to define information with reference to particular media or formats could in fact introduce ambiguity into the legislation and may serve to narrow the way in which 'information' is interpreted. There would also be substantial challenges in 'future-proofing' any such definition in anticipation of further developments in information technology. The existing definition of 'public record' in section 3 of the Public Records (Scotland) Act 2011[1] is similarly broad, for related reasons.

We acknowledge that there is a need for public authorities to ensure that staff members handling FOI requests are fully aware that business-related information held outwith formal systems is subject to the FOISA, whether that be handwritten notes or information held on digital platforms such as private email, WhatsApp or other social media. We recognise the risk that such information could be overlooked when conducting searches for FOI and EIRs requests.

We will consider these issues fully, seeking the views of the Scottish Information Commissioner, when we next revise the Scottish Ministers' section 60 code of practice. The code as it currently stands is already clear that authorities should think beyond conventional places where information may be held, when conducting searches.

17. The Committee recognises that any system requiring specified information to be recorded must be enforceable. As such, if there is a duty to record, it is important that there are clear definitions of what should be documented. The Committee considers that there would be merit in legislation setting a requirement for certain key information to be recorded; for example, minutes of ministerial meetings or Scottish Government meetings with external organisations. The Committee recommends that

[1] https://www.legislation.gov.uk/asp/2011/12/section/3
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the Scottish Government consult on the type of provision that could be incorporated into legislation and how best to ensure that it would be enforceable. In the first instance, the Scottish Government may wish to commission research into the approaches to this issue in other jurisdictions to seek to identify what models work well (and what do not).

18. The Committee acknowledges the evidence from witnesses, including the SIC and the Scottish Government, that the section 61 code of practice has been superseded by relevant records management legislation and notes proposals that any provision concerning a duty to document should be made to that legislation rather than to FOISA. This appears to be a sensible approach and one that the Committee supports.

Both the Scottish Government and the National Records of Scotland (NRS) are open to further engagement on these issues. In particular, Scottish Government officials have had preliminary discussions with NRS colleagues about the principle of commissioning research along the lines recommended by the Committee, to consider the approaches taken in various jurisdictions. There is agreement that this is an area that would indeed merit further research. Discussions on this are continuing and Ministers will update the Committee or its successor on the next steps arising from those discussions in due course.

Without prejudice to the outcomes of any future research work, or actions arising from it, we would highlight that the current statutory regime in respect of public records has been refreshed relatively recently (2011) and has been designed to strike a balance between requiring a robust approach to records management by public authorities on the one hand, whilst avoiding an overly prescriptive approach on the other, and recognising the diverse nature and needs of the public authorities subject to the legislation.

The Public Records (Scotland) Act 2011 requires scheduled public authorities to create the infrastructure and frameworks to better manage public records, over time. Since 2013, the Keeper of the Records of Scotland has invited 265 public authorities to submit detailed Records Management Plans (RMP) evidencing that proper arrangements are in place for the creation, management, security, disposal and preservation of these records, regardless of media or format. To date 237 plans have been agreed.

The assessment system, which underpins the implementation of the legislation, requires all scheduled authorities to submit for scrutiny, a Business Classification Scheme or Information Asset Register which identifies all the classes of public records created by that authority. The full RMP further provides detailed evidence of the management processes to which these records are subject, e.g. disposal and retention periods; destruction arrangements; information security procedures. Full details of the requirements of an RMP are included in the Keeper's 15 point model plan.

Scottish public authorities have been creating important public records for decades, but the coming into force of the Public Records (Scotland) Act 2011 in 2013 has necessitated the commitment to the development of policies, structures and processes to put in place management, control and security around these public records. By international comparison, Scotland's existing Public Records legislation is considered robust, comprehensive and has seen improvements to management and safeguarding of the public records since its rollout in 2013. This is important, since excellent records management provision is indeed essential to supporting access to information rights.

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The Memorandum of Understanding between the Keeper and the Scottish Information Commissioner sets out the understanding between them on the operation of the section 61 Code of Practice and their cooperation in relation to the issuing of practice recommendations. This provides an avenue for the Scottish Information Commissioner to raise concerns with the Keeper if the Commissioner feels a public authority has failed to conform to the code and is failing to follow its own Records Management Plan. There may be merit in closer cooperation between the Keeper, the Scottish Information Commissioner and the (UK) Information Commissioner's Office, to strengthening the approach to promoting and enforcing good records management across the public sector in Scotland.

Our written evidence to the Committee did indeed indicate that we consider that the usefulness of the section 61 Code of Practice on Records Management by Scottish Public Authorities may now be superseded by the provisions of the Public Records (Scotland) Act 2011. We would propose to consult on possible changes to section 61 of FOISA as part of a future consultation on legislative change. However, any change would have to take careful consideration of the needs of those Scottish public authorities which are subject to FOISA but which are not similarly subject to the Public Records (Scotland) Act 2011. This would include many smaller authorities, such as the many GP practices, community pharmacies and dentists which are subject to FOISA, as well as many of those authorities which have become subject to FOISA as a consequence of the Scottish Ministers' exercise of their powers under section 5 to extend the coverage of the Act.

Proactive publication

19. It is clear from the evidence received by the Committee that the aspiration for FOISA to drive proactive publication has not been fully realised. While public authorities highlighted positive examples of proactive publication, the Campaign for Freedom of Information in Scotland (CFoIS) considered that there had been a "regression" in what was published.

20. There was a general consensus that the publication scheme model is outdated and does not reflect the way in which members of the public search for or access information. The SIC recommended that the requirement for public authorities to adopt a publication scheme should be removed and replaced with a statutory duty to publish information, supported by a new legally enforceable Code of Practice on Publication to ensure consistency. The Committee recommends that the Scottish Government consult on this amendment to FOISA.

Given the substantial increase in the ease with which public authorities can make information available online, we find it counterintuitive to suggest that there has been a 'regression' in the extent of proactive publication since FOISA came into force in 2005.

Nevertheless, we agree that approaches to proactive publication could be strengthened. Ensuring greater proactive publication must be an essential element of our efforts to build a culture of openness, and more effective public engagement across the public sector in Scotland. We recognise the evidence that making information readily available to members of the public, without the need to submit an information request, has value in building public trust.

We agree in principle that the current legislative requirement for authorities to maintain a publication scheme may be outdated, given the way most public services now use online

platforms for the publication of information. Plainly, a robust statutory requirement for bodies subject to FOISA to adopt an effective approach to proactive publication must remain. However, there may well be better approaches to this than those enshrined in the current legislation. We would propose to explore these issues further as part of a future consultation on legislative change.

21. The Committee also considers that public authorities should routinely publish their responses to FOI requests (with any personal data removed).

The Scottish Government already does this. We agree that this is a desirable approach for public authorities to take where possible. However, we recognise that the circumstances for every authority are different and this needs to be proportionate.

22. However, it is evident to the Committee that, even with these developments, there needs to be a significant cultural shift in the way in which public authorities approach proactive publication. In particular, as a first step, authorities need to think carefully about how the public wishes to access the information that they hold - whether by topic, sector or geographical area - and reflect this in the way in which they create, store and publish information. The Committee recognises that, in the short term, the development of a coherent system of proactive publication may require an initial increase in resources, but notes the significant benefits in the longer-term, including increasing public trust in public authorities, but also in reducing the number of requests.

23. The Committee sees a clear role for both the SIC and the Scottish Government on leading in the promotion of proactive publication, including by developing comprehensive guidance and sharing good practice. The Committee also sees a continuing role for the SIC in monitoring progress on an ongoing basis and in intervening to encourage proactive publication where it appears that sufficient progress has not been made.

As noted above, the Scottish Government recognises the value of effective approaches to proactive publication. The number of FOI requests made to Scottish public authorities has steadily increased over time since FOISA first came into force. This is likely to have been driven by a number of factors, including greater awareness of the legislation and greater ease of communication. It is difficult to tell whether proactive publication has value in reducing the number of requests to authorities. However, our own experience as a public authority is that proactive publication can make requests more straightforward for officials to respond to, and can help requesters to more precisely formulate requests – which in turn is helpful to the public authority.

We acknowledge the important statutory role of the Scottish Ministers in publishing the section 60 code of practice, which advises Scottish public authorities on the fulfilment of their duties in regard to proactive publication. The central plank of that guidance as it currently stands is to direct authorities to the Scottish Information Commissioner's Model Publication Scheme.

We see the role of providing detailed guidance, and of promoting better approaches to proactive publication by authorities, as being primarily that of the Commissioner, rather than the Scottish Government. As a Scottish public authority subject to FOISA, our principal responsibility is for ensuring the robustness of our own approach. While we aspire to set a

positive example for other authorities in this area and we are happy to assist with the sharing and promotion of good practice in any way we can, while being mindful of the need to avoid giving the impression of seeking to inappropriately influence other authorities' approaches.

Resourcing and fees

24. A key issue raised by public authority respondents was the level of resources required to respond to requests for information, something that was seen as particularly challenging in the context of budget constraints and increased demand for public services. The Committee notes that last year the number of requests reached a record high of almost 84,000, a rise of 8% compared to the previous year.

25. While, in general, there was little appetite among witnesses to increase the fees that could be charged under FOISA for responding to requests for information, public authority respondents emphasised that, in practice, the fees that could be charged did not compensate for the amount of work involved. Both the Scottish Government and the SIC suggested that a better approach might be to estimate the amount of staff time involved in dealing with the request, rather than the cost of complying. The Committee recommends that the Scottish Government consult on this option as part of its consultation on other legislative changes recommended in this report.

We agree that the basis on which authorities can charge fees for responding to requests, and the definition of the cost limit, are issues which should be considered further in a future consultation on legislative change.

As we indicated in our own evidence to the Committee, there would be some merit in amending the legislation to allow the limit – above which the cost of compliance would be deemed excessive – to be expressed in terms of working hours rather than a monetary value. Both the monetary cost limit and maximum rate at which staff time can be charged for locating, retrieving and providing information have remained fixed, at £600 and £15 respectively, since regulations were initially made by the Scottish Ministers in 2004.

Few employees across the public sector have a cost per hour below £15 when the full costs of their employment are considered and, given that most requests are now received and responded to electronically rather than in hard copy, there are seldom any significant costs associated with locating, retrieving and providing information apart from those associated with the staff time required to carry out those tasks. The cost limit under the current regulations is therefore effectively equivalent to a staff time limit of 40 working hours in most cases. Formalising that position may make the cost limit easier for members of the public to understand.

However, if proposing change in this area it would still be necessary to consider whether Scottish public authorities should retain the right to charge fees for information under certain circumstances and – if so – what those circumstances should be and the basis on which such fees should be calculated. Our written evidence to the Committee suggested there may be a case for considering the future of the fee regime more widely and for further circumscribing the discretion available to public authorities to charge fees for responding to requests. However, this is certainly an area that stakeholders – particularly public authorities – will wish the opportunity to input on in the context of a future consultation on legislative change.

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As our written evidence noted, and as was indicated in the Committee's evidence session with public authorities, many public authorities opt not to charge for responding to requests under FOISA. We believe that in general public authorities want to provide information as openly as possible and do not wish to charge members of the public to access information about their business where this can be avoided. Nevertheless, the detail of any changes needs to be considered carefully since the ability to levy fees is one of the few levers public authorities have available to them to mitigate the cost of responding to requests for information where this might prove necessary.

26. The Committee considers that there needs to be a fundamental shift in the way in which FOI is viewed in many public bodies. In essence, public sector bodies need to view FOI as an essential element of public service provision and ensure that it is resourced accordingly.

We fully endorse the view that FOI is an essential element of public service provision and must be resourced accordingly. However, we consider that most public authorities already recognise this. It seems clear that significant resource is indeed deployed by public authorities to meeting their statutory obligations under FOISA.

27. Both the SIC and the Scottish Government emphasised that the resource issues could be addressed by better and more efficient ways of working. As noted above, the Committee considers that a significant shift towards proactive publication needs to take place, and notes that in the longer term, such an approach is likely to reduce the number of requests for information to which authorities are required to respond and, in so doing, reduce the pressure on their resources of responding to such requests.

We agree that the adoption of better working practices by public authorities can help to ease resource pressures associated with fulfilling the statutory obligations under FOISA. Sound processes for handling requests, training and support for staff and robust approaches to record keeping and information management can all help to make the process of responding to requests less labour intensive. As noted above, we also recognise that greater proactive publication of information can play a role in reducing the burden of responding to requests.

Requests for information

28. The Committee understands the frustrations of users of the Act who have experienced difficulties in requesting information due to the different arrangements that public authorities have established to receive FOI requests. On the other hand, the Committee notes that establishing a specific format, route or template for requesting information could result in frustrating an individual's basic right to information.

29. The Committee considers, however, that there should be regular monitoring of the request process across public authorities to ensure that the process is as accessible as possible.

It is a key tenet of the legislation that all written requests for information should be handled in accordance with FOISA, irrespective of the format in which they are presented or the route by which they are communicated to the authority. We would see this as an important principle, which we would be reluctant to alter or dilute in any way. However, we recognise that it is helpful, both to members of the public considering making a request and to

authorities themselves in managing requests, for authorities to provide guidance on the most appropriate contact point for the submission of requests.

We agree with the Committee that it is for each public authority to keep its own arrangements under review, in order to ensure they are as accessible as possible. We observe that the Scottish Information Commissioner monitors processes across authorities in order to discharge his responsibilities under section 43 of FOISA.

30. The Committee considers that there may be benefit in amending the law to allow public authorities to transfer requests in a similar manner to that permitted under the Environmental Information (Scotland) Regulations 2004 (EIRs). It recommends that the Scottish Government consult on this aspect when consulting on the other legislative changes proposed in this report.

We are willing to consult on such a change. However, introducing the ability to transfer requests between authorities could create greater scope for confusion in the handling of requests. It may also lead to public authorities failing to fully search their own records to respond to requests, where they consider another authority more likely to hold relevant information.

Whilst it is true that under the EIRs requests for environmental information can sometimes be transferred from one public authority to another, we understand that this occurs infrequently in practice.

31. The Committee emphasises the important principle of the legislation being applicant blind and that all those who make requests for information should be treated in the same way.

32. The Committee acknowledges that users of FOISA, including journalists and MSPs, have raised serious concerns about the way in which, on occasion, their FOI requests have been handled by public authorities, in particular by the Scottish Government. These issues have been examined in some detail in the SIC's intervention report and the Committee notes that the SIC is still monitoring the Scottish Government's implementation of its action plan. The Committee notes that the Scottish Government has subsequently put in place revised guidance for handling requests to address the SIC's concerns.

33. The Committee is in no doubt that journalists (and others) will continue to monitor the treatment of their requests by the Scottish Government (or by any other public authority) and raise concerns where they consider that their requests are being treated differently because of their profession.

34. The Committee anticipates that the SIC will continue to monitor the treatment of different classes or categories of applicants to ensure that there is no differential treatment of users of the Act.

We are grateful for the Committee's acknowledgement of the action which the Scottish Government has taken to provide assurance that requests from journalists and other requesters will be handled in an impartial fashion. We welcome the ongoing scrutiny of stakeholders and continue to engage with the Scottish Information Commissioner in this matter.

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The Committee notes that a number of authorities have put in place internal processes so that the identity of the applicant is not known by the team retrieving the information and considers this to be good practice.

We recognise this may represent good practice, where practical. However, we note that there may be occasions when it is necessary for case-handlers to know who is requesting information, e.g. when considering whether a request is repeated or vexatious.

36. The Committee recognises the concerns of users of the Act and campaigners about the potential extension of the term "vexatious" or by making it easier to use. It also acknowledges the sensitivities and difficulties in objectively assessing what might be considered a "vexatious" request.

37. The Committee also notes the evidence from public authorities who indicated that there were a small number of individuals who were not using the Act in the spirit in which it was designed. The Committee further notes, however, that public authorities appear to be reluctant to use the vexatious provision within the Act (section 14) in such cases.

38. The Committee recommends that the use of section 14 of the Act is revisited to ensure that the SIC has sufficient powers to address concerns about vexatious requests. It recognises that the situation may be dealt with by the provision of more detailed guidance from the SIC, including case studies (for example) of requests that may or may not be considered vexatious.

It is for the Commissioner to consider whether there is a need for further guidance on the application of section 14 of the Act. The Scottish Government believes that section 14 provides an important safeguard for public authorities – but it is one which should be used sparingly, and only where there are sound reasons for considering a request to be vexatious.

39. A number of submissions from users of the Act commented on the delays experienced in receiving responses to FOI requests. On the other hand, the Committee notes the evidence from the SIC that, over the past three years, the rate of responses being made on time has been around 85 per cent consistently across public authorities, which is relatively high. It is clearly important for rates of responses across the public sector to be monitored and for appropriate action to be taken by the SIC if it appears that a public authority is regularly responding outwith the 20 day deadline or there is evidence to suggest that the level of late responses in respect of specific categories of requesters is particularly high.

40. Evidence from some public authorities also suggested that they worked to the 20 day limit rather than aiming to issue responses promptly, as required by the Act. The Committee considers that further promotion work may be required by the SIC to ensure that all public authorities are aware that the 20 day response timescale provided for by the Act is a limit, not a target and that authorities should be aiming to respond promptly.

The Scottish Government recognises the importance of responding to all requests as promptly as possible and of compliance with the statutory timescales within FOISA and the

EIRs. Our own performance in this regard has been addressed in the Commissioner in his interventions into our performance and practice.

Over the nine months prior to the coronavirus outbreak the Scottish Government consistently met its target – agreed with the Commissioner – of responding to 95% of requests on time. Our performance in terms of responding on time has suffered as a result of the response to the outbreak. Following a slump in the spring of 2020, our performance, in terms of the percentage of request and review responses issued on time, has now recovered to a significant extent, consistently around 83%. However, it remains a priority for us to return to previous performance levels as circumstances allow. We have restored resource to our central FOI Unit and are working to improve support, guidance and training for staff handling FOIs across the organisation.

41. In the event that a public authority needs to seek clarification from a requestor in respect of the information they are seeking, FOISA provides that the clock is effectively reset to zero and a new 20 day deadline applies from the date on which the clarification was received. Some evidence to the Committee suggested that officials were asking for further information towards the end of the 20 day limit, rather than requesting clarification in a timely manner. The Committee notes that the SIC indicated some sympathy for a change in the law whereby the clock was paused, rather than going back to zero. The Committee recommends that this revision is considered as part the Scottish Government's consultation on other legislative changes recommended in this report.

We recognise the legitimate nature of the Committee's concerns and we are content to consult on change in this area as part of a wider consultation on legislative change. However, there are a number of issues to consider.

Currently, FOISA provides that a request is not valid unless it clearly describes the information sought. By seeking clarification of a request, a public authority is effectively advising the requester that their request as originally constructed was not sufficiently clear to allow them to identify the information being sought. That is why the 'clock' only begins ticking once a sufficiently clear request has been received by the authority.

Some issues may arise from confusion between seeking 'clarification' in this formal sense and more general engagement with requesters in order to explore the interpretation of, or potential to narrow, a request. Early engagement with a requester to explore issues of interpretation and scope can add considerable value from both the requester's and the authority's perspective and can lead ultimately to more proportionate and better handling of requests. However, this should not be confused with seeking 'clarification' in the formal sense and should not cause a resetting of the clock on the statutory deadline.

Any future change to the legislation would have to balance the need of authorities to have sufficient time to consider and respond to any valid request once it has been received, with their obligation to inform the requester promptly if they consider a request to be invalid, on account of it being insufficiently clear.

Reviews and appeals

The Committee recommends that the revisions proposed by the SIC in his written submission in relation to sections 48 and 52 of FOISA along with the technical amendments identified in an appendix to his written submission are considered as part the Scottish Government's consultation on other legislative changes recommended in this report.

(a) Commissioner's proposed revisions in relation to section 48
[Removal of prohibitions against appeals being made to the Commissioner against: the Commissioner himself; procurators fiscal; the Lord Advocate in his capacity as head of the systems for criminal prosecution and the investigation of deaths]

We are prepared to consider these issues as part of a future consultation on legislative change. However, these provisions of the legislation were included intentionally to avoid calling into question the independence of the prosecution service and to avoid any appearance of a conflict of interest arising from the Commissioner considering appeals about his own decisions.

We would need to be satisfied that any proposed changes to legislation took full account of these issues.

(b) *Commissioner's proposed revisions in relation to section 52*
[Removal of First Ministerial veto power]

The Scottish Government has a long-established view that the First Ministerial veto represents an important safeguard. The fact that the veto has never been used demonstrates that successive Administrations have recognised that the circumstances which would call for its use are genuinely exceptional.

Nevertheless, we are content to invite views on this subject as part of a future consultation on legislative change.

(c) Further technical amendments proposed in Annex to Commissioner's written submission:

(i) Add provision, similar to 10(2)(b) of the EIRs, 'that exemptions should be interpreted in a restrictive way and there should be a presumption in favour of disclosure'.

The Commissioner argues that this would strengthen the right to information and lead to improved recognition of Scotland's approach to information rights in international comparisons.

We are willing to consult on change along these lines as part of a future consultation on legislative change. However, we are sceptical about how significant such a change would be in practice, since it is already well established that there is a presumption in favour of disclosure under both information rights regimes (FOISA and EIRs).

(ii) Extend section 6(1) to cover companies owned jointly by Scottish Ministers and another public company

This has already been addressed in our response to paragraph 13 of the report (above).

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(iii) Amend section 53(1)(a) to make it clear that failure to comply with a decision on time can also be referred to the Court of Session

The Commissioner expresses concern that these provisions of the current legislation can lead to wasted resources in preparing litigation which subsequently has to be abandoned when an authority complies late.

We are open to consulting on changes in this area.

(iv) Amend definition of "information" to exclude environmental information as defined in the EIRs

This recommendation reflects the Commissioner's concern that the current relationship between FOISA and EIRs leads to non-user friendly and overly complex responses. The Commissioner argues that simply excluding environmental information from FOISA would create a simpler landscape for all.

This suggestion addresses similar concerns to – but goes further than – our own suggestion in our written evidence to the Committee, of making the exemption at section 39(2) of FOISA absolute. We would be happy to consult on the best approach as part of a wider consultation on legislative change.

(v) Amend wording of Section 74 to clarify that notice can be given by email

We agree this amendment should be made at the earliest opportunity. We have already made such an amendment on a temporary basis within the Coronavirus (Scotland) Act 2020.

We would include this proposal in a future consultation, and do not foresee that members of the public or other stakeholders are likely to raise concerns.

(vi) Provide an exemption for information provided to the Commissioner under or for the purposes of FOISA

This suggestion reflects the Commissioner's concern that section 45 of the Act as it stands does not fulfil Parliament's original intention of providing a statutory prohibition on his release of information which has been provided to him by public authorities to enable his consideration of appeals. The Commissioner currently has to rely on other exemptions contained within the legislation such as the provisions of section 30(c) (effective conduct of public affairs) to avoid doing this.

We would be happy to consult on changes in this area as part of a wider consultation on legislative change. It should be noted that any changes to FOISA in this area would not similarly protect environmental information from similar disclosure, so could not fully address the difficulty experienced by the Commissioner.

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Conclusion

43. There is a broad consensus that FOISA has brought significant benefits by establishing a statutory right of access to information held by Scottish public authorities that fall within the scope of the legislation. However, witnesses have identified a number of areas for improvement, both in terms of the legislation itself and in its implementation. The Committee recommends that the Scottish Government consults on the legislative changes proposed in this report and works with the SIC and public authorities across Scotland, as appropriate, to address the areas where implementation of the Act could be strengthened.

The Scottish Government agrees that FOISA has brought significant benefits. As we have indicated, we agree that there would be merit in a public consultation on the legislative changes proposed by the Committee. We will also continue work to strengthen our own implementation of the legislation, under the oversight of the Scottish Information Commissioner and look to work with other public authorities in Scotland to promote improvement and share good practice.

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