



Points on the Consultation on Access to Information Rights in Scotland¹

The BSA Scotland Group brings together large and small businesses and VCSE organisations delivering service and infrastructure projects across the private and public sectors in Scotland.

These organisations deliver ICT, business process outsourcing, facilities management, construction and infrastructure, and other project delivery.

General

1. BSA Scotland members strongly support the principles of openness and transparency in the use of public funds and the provision of public services, and Freedom of Information is an important part of implementing that principle. The BSA has long supported measures such as publication of contracts online, open book accounting, and, in respect of commercial confidentiality, agreement between public, private and voluntary sectors as to what this includes, so all sides have confidence and trust when the phrase is invoked.
2. In respect of next steps on Freedom of Information, we support the 'proportionate approach' set out in the consultation document.
3. As the consultation document notes, information on service and infrastructure project delivery is already subject to FoI under FOISA, the Freedom of Information (Amendment) (Scotland) Act 2013, which strengthened the operation of the FoI system.
4. As it states: 'substantial, detailed information regarding the delivery of that service will be provided to the authority under the terms of the agreement' and 'there is no ambiguity whatever that such information held by the authority is subject to FOISA and the EIRs'². Service and infrastructure providers report that they supply substantial amounts of information to contracting authorities, and larger ones typically have significant compliance operations which ensure that appropriate records are kept so requests can be responded to.
5. We are therefore aligned with the broad approach set out by the Scottish Government in the consultation document. We agree that the current legislative regime in Scotland as 'fundamentally sound and as working well'³. We also approve of a 'factors-based approach' guiding decisions about any extension - taking account of factors such as the extent to which a body is delivering a public function, the level of public interest in the relevant function and the cost to the public purse associated with the function.

¹ [Access to information rights in Scotland: a consultation \(www.gov.scot\)](http://www.gov.scot)

² Page 16

³ Page 25

Future Change

6. The broad questions rightly identified in the consultation are whether there are gaps in the existing system and what the consequences might be of various possible changes:
 - First there is the option of publicising the existence of existing powers.
 - Second there is the possibility of 'stronger guidance' regarding when, under the existing regime, information held by a contractor ought to be considered 'held on behalf' of the relevant contracting public authority for the purposes of FOISA and the EIRs⁴. We have no objection to guidance clarifying and embedding the current system, subject to the assessments set out below of the impact of any of such guidance on SMEs in particular.
 - Third, nor have we objection in principle to the idea of further legislation if this is shown still to be required, but we concur with the Scottish Government's view - namely that it is not at the current time persuaded of the necessity of new primary legislation in relation to FOISA⁵. We agree that the current legislative regime in Scotland is 'fundamentally sound and... working well', and note the possible effects, as set out in the consultation document, of further changes on businesses and the voluntary sector. Ultimately any such costs may impact on the costs of contracts for the public sector itself, and therefore on the public purse, at a time when the powers required for the transparency we support would seem already to exist.
Ultimately therefore we agree with the consultation document that 'the case for any new primary legislation must be thoroughly tested - and should only be considered where there are no satisfactory routes for improving the operation of the information rights regime within the current statutory framework'⁶.

Gateway Clause and SMEs

7. In particular we agree about the potential difficulties which may arise around what would and would not be covered by a 'gateway clause'. We support the approach set out in the consultation, namely that: 'The introduction of a gateway clause, unless very narrowly defined, would represent a significant departure from the approach originally taken in the legislation. The Scottish Government is yet to be convinced that such a significant departure would be beneficial, but we remain open to considering it further, subject to assurance that it could be capable of operating in a clear and proportionate way'⁷.
8. In particular we share the concerns of the Scottish Government about such a clause 'in terms of its potential impact on the third and private sector partners of public authorities, particularly where these are small or medium-sized organisations. The Scottish Government has a clear policy commitment to reduce barriers for small and medium-sized enterprises (SMEs) to doing business with the public sector in Scotland. We would have concerns about the impact of any measure which might lead to uncertainty on the part of SMEs bidding for public contracts regarding whether fulfilment of the relevant contract would bestow duties on the SME as a public authority under FOISA in its own right... Under current arrangements SMEs, third sector partners or other organisations fulfilling public contracts may sometimes have obligations to assist their contracting public authority with fulfilling its own FOI obligations. However, that is quite a different matter from the organisation becoming a public authority subject to FOISA in its own right with the full set of statutory obligations which accompany such a designation'⁸.
9. Typically SMEs do not have the resources to devote to compliance departments on the same scale as larger organisations. The reality is that supply chain SMEs are already included in the scope of FOI, insofar as they may be sources of information which Tier 1 contractors need to provide to authorities. It is possible that, were contractors of any size to become public authorities subject to FOISA in their own right, risk aversion means the amount of information they routinely require from multiple tiers of supply chain SMEs operating on the ground, and the amount of information stored in case requested as a result of an inquiry, would increase, irrespective of whether the intention is to exclude SMEs from any extension as suggested.

⁴ Pages 19-20

⁵Page 25

⁶ Page 7

⁷ Page 25

⁸ Pages 24-5

10. Therefore we request that the business impact assessment referenced in the consultation⁹ pays particular attention to the impact on SMEs, and that such an assessment is carried out alongside other assessments (for example equality impact) if any reform route is chosen.
11. We also agree with the proportionate approach taken to ancillary services, while recognising that they too are in receipt of public funds and so the principle of transparency applies: 'Whilst ancillary services can be very significant in terms of their cost to the public purse and may play a critical role in a public authority's delivery of its functions, ancillary services can also include functions which are only indirectly related to an authority's core functions e.g. the cleaning and maintenance of office space'¹⁰.

Confidentiality Clauses

12. On confidentiality clauses, the consultation notes that, 'The Scottish Government considers that the use of confidentiality clauses [as opposed to a commercial interests exemption, subject to the public interest test], of a type which would affect the discharge of a public authority's functions under FOISA, is in fact rare'¹¹.
13. Therefore we would need to see evidence that such clauses are a genuine barrier to FoI and transparency, and the reason(s) why such clauses were inserted, before supporting change.

⁹Page 7: 'Assessing the business and regulatory impact of any change will also be central to ensuring that approaches are proportionate and do not place unduly onerous burdens on public authorities or their partners'.

¹⁰ Page 20

¹¹ Page 33