

## Evidence on Post-Legislative Scrutiny of Freedom of Information (Scotland) Act

from

### CCPS - Coalition of Care & Support Providers in Scotland

CCPS welcomes the opportunity to submit evidence on behalf of our membership. We would like to thank the staff and MSPs of the Public Audit and Post-Legislative Scrutiny Committee for taking the time to consider our submission after the call for evidence has been closed.

#### **Summary**

CCPS support the principle of transparency in public expenditure.

Our submission concerns the current implementation and practice of extension of FOISA and how it might affect the voluntary social care sector, as in the most recent Scottish Government Consultation opened in August of 2019 which focuses on 'organisations providing services on behalf of the public sector'<sup>1</sup>.

**1. We believe that the proposed extension is unnecessary** due to the level of regulation of the services our members provide, the transparency that results and the publicly-available information generated by the regulators and the contracting authorities.

**2. We are concerned that such an extension would impact our members adversely, affecting their ability to provide statutory social care services**, due to the additional costs they would have to meet in order to comply with FOISA.

**3. We want to highlight a particular challenge of FOISA for providers of Social Care services**, specifically the tension between meeting a FOISA request and ensuring any such request remains compliant with the General Data Protection Regulation (GDPR) and the Data Protection Act (DPA).

**4. Our members previous experience of their sector's support of policy goals (e.g. Scottish Living Wage) leave us with significant concerns about how an extension of FOISA to the sector would be funded**, and how much of the burden of funding compliance would fall on already financially-stretched sector.

**These points are expanded in the following pages.**

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<sup>1</sup> *Freedom of Information Extension of Coverage*, Scottish Government, August 2019, para 22

## **1. Necessity of extension of FOISA to Third Sector Organisations.**

CCPS' members provide Social Care services on behalf of local authorities throughout Scotland. Contracts which we enter into with a local authority are subject to FOISA through the local authority, including the winning tender, as per the Scottish Information Commissioner's (SIC) decision 104/2008 (Streetwork and Glasgow City Council). The service provided under contract is inspected by the Care Inspectorate (CI) as part of its remit laid out under Public Services Reform (Scotland) Act 2010, and these inspections are made available on their website. Inspections are conducted in line with Health and Social Care Standards, and the quality frameworks for inspection are available for the public to review. The staff employed by our members are regulated through the Scottish Social Services Council (SSSC) under the Regulation of Care (Scotland) Act 2001 and must be registered under the Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013. Details of their registration, along with any conditions, are available via a public database. Finally OSCR publishes our yearly accounts, and under the Charities and Trustee Investment (Scotland) Act 2005, we are obliged to make available copies of the latest statement of account if asked.

All of the regulators in question either publish this information or can make it available with a FOISA request, which means the public can already scrutinise the services we provide under public contract. Furthermore, specific questions about the services contracted can be met by the local authority who are well resourced to deal with individual requests. Where necessary they can consult with our members regarding the individual service, and the relevant FOI Officer can make the necessary judgement as to what can be released in light of the requirements regarding General Data Protection Regulation (GDPR) and the Data Protection Act (DPA) and the other exceptions that can be applied through FOISA.

Our members agree with the principle of transparency and its value to the public. But given the amount of information already available, and the capability of existing staff within the contracting local authority to respond to individual FOI requests, we are unclear what further public interest needs would be met by the extension of FOISA to charity organisations that provide services under public contracts. Being subject to FOI legislation would also impose a significant administrative and financial burden that would have a disproportionate business impact whilst providing minimal benefit to the general public.

## **2. Impact of Extension of FOISA on provision of Social Care Services**

The context in which third sector care providers operate is important. CCPS members currently provide social care and support to more than 200,000 people and their families in Scotland. All our membership are non-profit distributing voluntary organisations. Approximately 70% of our members combined income relates to public funding.

Our members deliver social care service in a challenging financial environment. CCPS produce an annual Business Resilience Survey to gauge the challenges and trends our membership are dealing with. In the most recent survey this year, 61% of our membership reported their funding was either staying the same or increasing only modestly (between 1-5%). Even more worryingly, the percentage of members who report that 75-100% of their services are funded at sustainable levels has steadily dropped since 2017, from over 50% of our membership to 39% this year. In order for such services to be run sustainably, 34% of our members report having to fund such services from reserves or charitable donations.

The sector continues to see funding increase modestly at best, and despite this the number of social care services that are funded sustainably by local authorities has continued to drop. This was recognised in the recent Pre-Budget Scrutiny Report by the Equalities and Human Rights

Committee, which noted that third sector organisations, particularly in social care, “are struggling to provide adequate services for the prices councils are able/willing to pay”<sup>2</sup>.

Given this context, we have significant concerns about the impact of preparation for the extension of FOISA and the cost of continued compliance. Preparation will require additional funds to train up all our members’ staff to recognise FOI requests and the relevant procedures for forwarding them onto a FOI officer. Considerable staff time and resources will be required to audit existing information we produce and prepare a publication schedule.

As we are already continuing to cross-subsidise/pay out of reserves to ensure the viability of existing services, we are concerned that FOI preparation, training and the staffing resources required will put further pressure on our members’ budgets. In some cases, factoring in FOI costs into given contracts may result in another spike in handing back contracts. We last saw this kind of increase in 2017 when 30% of our membership reported having to hand back contracts<sup>3</sup>. Ultimately this results in failure of provision of social care services.

Our members are worried that extension of FOI to our sector will result in significant costs within a funding environment which cannot guarantee supporting those costs. On the face of existing evidence from our Business Resilience Surveys, the only place this funding can come from is organisational reserves, which in over a third of our members’ cases are already being used to sustain funding of existing services. The likely outcome is even more pressure on the sustainability of existing services and the likelihood of handing back contracts to deliver social care services to the local authority, with the result that people’s social care needs will not be addressed.

### **3. The tension between FOISA and GDPR for Social Care Service Provision**

Of particular relevance to voluntary social care providers will be the cost of employing experienced FOI Officers who also have a good grasp of GDPR and the DPA. This is important as information about our members’ services by their nature involve the private information of people who are often considered vulnerable – so the tension between FOI and DPA/GDPR will take more experienced and knowledgeable staff, who won’t come cheap in jobs market where GDPR knowledge and experience is at a premium. The tension is also likely to mean that as a sector we cannot benefit from proactive publishing, as requests are more likely to require case by case consideration to ensure rights to information and privacy are appropriately balanced.

It should not be forgotten that these social care services are themselves a statutory obligation of the local authorities. This potentially creates a tension between delivering statutory services to individuals who should be supported and maintaining commitments to FOI. Any budgeting decisions our members make about the funding of FOI compliance effectively necessitates a further balancing exercise, not just with regard to privacy rights, but with regard to a supported individual’s right to a family life and the protection of their physical, moral and psychological integrity under Article 8 of the ECHR.

Finally, there is an additional concern about dealing with vexatious requests. We already have anecdotal evidence from members of staff time spent on dealing with unreasonable subject access requests under GDPR. Unlike previous extensions of FOISA to other sectors, the nature of social care provision and the people our members support means it can be a sensitive issue, and owing to the individuals’ circumstances and their concerns about adequate support, may result in frequent FOI requests from the same individuals. Again, given the frequently personalised nature of social

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<sup>2</sup> *Looking Ahead to the Scottish Government’s Draft Budget: Valuing the Third Sector*, Equalities and Human Rights Committee, p27, available at: <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/11/7/Looking-ahead-to-the-Scottish-Government-s-Draft-Budget-2020-21--Valuing-the-Third-Sector>

<sup>3</sup> See *Handing Back Contracts* by Baluch, Cunningham, James, Jendro and Young, available at [http://www.ccp Scot land.org/wpcontent/uploads/2019/05/Handing\\_Back\\_report\\_CCPS.pdf](http://www.ccp Scot land.org/wpcontent/uploads/2019/05/Handing_Back_report_CCPS.pdf)

care and support, this is not the kind of information which can necessarily benefit from a schedule of publication – each request will need to be individually considered, and consequentially have a greater resource impact on the organisation.

#### **4. Concerns about funding required to meet compliance with FOISA**

It has been suggested at two consultation sessions attended by CCPS that the cost of FOISA compliance could be factored into contracts, and financial support given through transition period. Unfortunately our members' experience of supporting the Scottish Government policies such as that of living wage suggests that we will end up subsidising some of the cost of FOISA extension. The Scottish Government has been investing in money to subsidise living wage amongst care workers since the 2016-17 Budget. Despite this, our most recent living wage survey in August of this year shows that 41% of rates offered by local authorities for care provision are not sufficient for the payment of the Scottish Living Wage. Referring back to our Business Resilience Survey, this means our membership must subsidise the policy through reserves or cross-subsidisation to ensure services are sustainable. There is a concern amongst our membership that extension of FOISA will result in a similar situation, with the sector disproportionately shouldering the burden of costs and putting further pressure on existing service provision.

Many thanks for taking the time to read this submission.

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#### **About CCPS-Coalition of Care & Support Providers in Scotland**

CCPS-Coalition of Care & Support Providers in Scotland is a members organisation representing the Third Sector voluntary care and support providers. Our mission is to identify, represent, promote and safeguard the interests of third sector and not-for-profit social care and support providers in Scotland, so that they can maximise the impact they have on meeting social need.

CCPS membership comprises over 80 of the most substantial care and support providers in Scotland's third sector, providing high quality support in the areas of community care for adults with disabilities and for older people, youth and criminal justice, addictions, homelessness, and children's services and family support.

Our members support over 206,000 people and their families; employ approximately 43,000 staff and work with approximately 5000 volunteers in providing services. They work in all 32 of Scotland's council areas.

CCPS is a company limited by guarantee registered in Scotland No. 279913, and as a Scottish Charity registered with the Office of the Scottish Charity Regulator (OSCR) Charity No. SCO29199