



Scottish Information  
Commissioner  
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**24 June 2022**

### **Response to Consultation on Health and Social Care data strategy**

My role as Scottish Information Commissioner is to promote and enforce freedom of information (FOI) in Scotland, including the Freedom of Information (Scotland) Act 2002 ([FOISA](#)) and the Environmental Information (Scotland) Regulations 2004 ([EIRs](#)). In responding to this consultation, I want to show how the effective use of FOI legislation can play a vital supporting role in the development of Scotland's first data strategy for health and social care.

While the Scottish Government will be aware that identifiable personal information, including on health and social care, is largely exempt from disclosure under FOISA<sup>1</sup>, freedom of information remains particularly relevant in the area of non-identifiable health and social care data. Indeed, experience from the Coronavirus pandemic in Scotland and beyond, shows that it is more important than ever to be able to access high quality data for health-related research in the public interest.

In this regard, I am pleased to note that the consultation seeks to facilitate access to non-identifiable health and social care data for research purposes in a timely, yet, safe and secure manner.

FOI legislation can enable timely access to high quality health and social care data, and provides an existing and regulated structure for facilitating access to data.

As well as responding to requests, FOISA requires authorities to proactively publish specific categories of information they hold. This is referred to as the "publication scheme" duty. Under this duty, authorities must make certain information available to the public so that it can be accessed without having to ask for it. The inclusion of non-identifiable health and social care data as part of such publication schemes would be a welcome step forward, learning from the lessons of the pandemic and providing useful and useable information to the public in an open and transparent manner.

The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and EIRs (the [section 60 code](#)) sets out that authorities should

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<sup>1</sup> This information is more readily accessible under The Data Protection Act 2018 and UK General Data Protection Regulation.



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maintain an up to date publication scheme with new information added as necessary. Published information should be accessible to all and simple to find.

The Scottish Ministers' Code of Practice on Records Management by Scottish public authorities under FOISA (the [section 61 code](#)) sets out that authorities should have in place a records management policy which includes ensuring that records are stored securely and are retrievable. In addition, authorities should ensure that records shared with other bodies or held on their behalf by other bodies are managed by specified protocols agreed by all parties.

My office can step in to encourage authorities to maintain an adequate and up to date publication scheme. I can also issue a practice recommendation to help an authority improve compliance with its publication scheme duty and, where required, issue an enforcement notice to mandate compliance.

Existing FOI legislation can therefore support access to health and social care data for everyone in the public interest. This can include, but is not limited to use for research purposes and the wider public good. The publication scheme duty is a good foundation to enable an infrastructure for innovators, researchers and the general public, to access this data in a timely, safe and secure manner. In addition, it will be a transparent infrastructure, and therefore help build public trust in the way health and social care data is managed for the public good.

I also share the view of the Public Audit and Post-legislative Committee in its post-legislative scrutiny [report](#) on FOISA, that there needs to be a cultural shift in the approach to proactive publication by Scottish authorities.

Looking towards potential future changes in the access to information landscape in Scotland, proposed changes to the legislation include replacing the existing requirement to adopt a publication scheme with a statutory duty to proactively publish certain types of information, supported by an agile, legally enforceable Code of Practice. If this occurs, it will be a useful step in enabling such a cultural shift to develop and embed within authorities.

To conclude, effective use of the existing statutory framework for FOI with a positive focus on proactive publication, can help realise the vision expressed in the consultation; "to improve the health and wellbeing of the Scottish population through innovative, collaborative and ethical use of data."

Daren Fitzhenry

Scottish Information Commissioner