



A Human Rights Bill for Scotland: A Consultation

Submission from the Scottish Information Commissioner

06 October 2023

1. This document is in response to the open consultation by The Scottish Government titled: **A Human Rights Bill for Scotland: A Consultation.**
2. As much of the Bill and details contained with the Consultation extends beyond the remit of my role and office, rather than respond to each part of the consultation I will instead focus my comments on 'Part 5: Recognising the Right to a Healthy Environment', aspects of which I regard as relevant to the remit of my role, and the work of my office.
3. As Scottish Information Commissioner, my powers and duties are set out in Parts 3 and 4 of the Freedom of Information (Scotland) Act 2002 (the FOI Act). This includes powers and duties to
 - enforce the FOI Act, the Environmental Information (Scotland) Regulations 2004 (the EIRs) and the Codes of Practice which may be issued under sections 60, 61 and 62 of the FOI Act and regulation 18 of the EIRs;
 - provide guidance on the FOI Act and the EIRs to the public and promote the following of good practice by Scottish public authorities; and
 - give advice to any person on these matters.

The Commissioner's statutory functions include:

- approving Scottish public authorities' publication schemes;
- investigating and deciding applications (appeals) and enforcing decisions in relation to authorities' handling of information requests;
- assessing, promoting and monitoring practice;
- giving advice and assistance about access to information under FOI legislation; and
- investigating and deciding complaints made under the INSPIRE (Scotland) Regulations 2009 involving refusal to grant full public access to a spatial data set or service.¹

¹ Scottish Information Commissioner, Annual Report and Accounts 2021-22, 'Meeting challenges and improving for the future', page 8

4. The FOI Act and the EIRs both came into force on 01 January 2005, and provided, for the first time in Scotland, a statutory right of access to information held by Scottish public authorities. Both regimes continue to be well utilised by the public to receive information from Scottish public authorities, with 83,918 requests for information made to Scottish public authorities in 2022-23. As detailed in my 2022-23 Annual Report, 527 appeals were made to my office of which 79 (15%) were in relation to requests for environmental information.²
5. The right of access extends to information held, regardless of how old the information may be, or format in which it is held, subject to the application of one of the exemptions or exceptions listed. While the legislation is written so to strike a balance between greater openness while allowing the non-disclosure of certain, limited categories of information.
6. Both regimes encourage the proactive publication of information. Public authorities subject to Freedom of Information must have a Publication Scheme which is approved by the Commissioner. The Scheme, and its supporting Guide to Information, specifies the information (including environmental information) that an authority will routinely publish. Under regulation 4 of the EIRs, authorities must also ensure that the environmental information they hold is made progressively available to the public by electronic means, unless it was collected before 14 February 2003 and is not available in electronic form.³
7. Part 5 of the Consultation, 'Recognising the Right to a Healthy Environment'⁴ references the 'Aarhus Convention'⁵, signed in 1998 it was the catalyst to the EU Directive on public access to environmental information⁶, which in turn led to the renewed domestic legislation providing a right of access to environmental information held by public authorities. In Scotland, the EIRs remain the principal legislative information rights regime in Scotland for accessing environmental information held by Scottish public authorities. In the year 2022-23 13% of the nearly 84,000 requests for information made to Scottish public authorities were from people using their right to access environmental information, and in 78% of those cases, it resulted in information being provided.
8. The objective of the Aarhus Convention was to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being' through an emphasis on procedural rights.⁷ Aarhus, the subsequent EU Directive and current domestic legislation sought to facilitate access to environmental information and public participation as well as access to justice in environmental matters.

ACCESS TO INFORMATION AS A HUMAN RIGHT

9. The matter of access to information, not considered to be environmental, being considered a Human Right has been a topic of legal discussion for many years. While Article 10 of the European Convention on Human Rights states that everyone has the right to freedom of

² Scottish Information Commissioner, Annual Report and Accounts 2022-23, 'FOI: Building a resilient future', page 6

³ Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities Under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 – SG/2016/225 – page 7

⁴ The Scottish Government – 'A Human Rights Bill for Scotland: A Consultation', June 2023, p21

⁵ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Aarhus, Denmark, 25 June 1998

⁶ Directive 2003/4/EC

⁷ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Aarhus, Denmark, 25 June 1998, Article 1

expression, including the freedom to receive and impart information, the rights in Article 10⁸ are not absolute. In 2014, the UK Supreme Court found that article 10 did not impose on anyone an obligation to impart information.⁹

10. The matter has also been the subject of examination by the European Court of Human Rights, particularly in the case of *Magyar Helsinki Bizottsag v Hungary* which noted¹⁰ that Article 10 and Article 8 of the Convention¹¹ did not necessarily coexist harmoniously with domestic norms providing for absolute limitations on public access to documents in, for example, the fields of national security, law enforcement or data protection. Subsequent UK judgments, for example *Moss v Information Commissioner and the Cabinet Office*,¹² considered the application of *Magyar*¹³ in domestic law and concluded that Article 10 does not create a right to request information from a public authority. Nor does it have any bearing on domestic FOI laws. In practice, this means that a requester cannot invoke Article 10 to achieve a more helpful outcome than they would otherwise get by applying the wording of the FOI Act and EIRs: an applicant cannot argue, for example, that an absolute exemption should be interpreted as being subject to the public interest test. Case law in other European jurisdictions have taken a different view as to the question of whether or not the right to request / receive information engages Article 10.

ACCESS TO ENVIRONMENTAL INFORMATION

11. I note the comment in this Consultation that the proposed Human Rights Bill would support the efforts of the Scottish Government to meet the recommendations of the Aarhus Convention, notably Article 9(4) of the Convention. It is in relation to this, that my office has a particular interest.
12. The EIRs enable a member of the public to request environmental information from a Scottish public authority. That public authority must respond to the request as soon as possible and within 20 working days. If a request is for environmental information and the information held is both complex and voluminous, the authority may extend this period up to a maximum of 40 working days.¹⁴
13. If the member of the public is dissatisfied with the response from the public authority, they may request an 'Internal Review', a time restricted opportunity, for the public authority to review their response. The public authority must respond with its decision as soon as possible and in any event, within 20 working days.
14. If the requester remains dissatisfied following the internal review, or fails to receive a response within the statutory timeframe, they have six months to appeal to my office for a decision regarding whether the public authority has appropriately handled their request.
15. The initial request, internal review, and appeal to my office are available free of charge to any member of the public, carried out on a case by case basis in accordance with the statutory frameworks. I am therefore of the view that the desire of the proposed Bill to implement remedies relating to access to environmental information and awareness, which are fair,

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) Article 10

⁹ *Kennedy v Information Commissioner*, [2015] A.C. 455 para 58

¹⁰ *Magyar Helsinki Bizottsag v Hungary* (App. No. 18030/11) [2016] ECHR 18030/11. Para 38

¹¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*

¹² *Moss v Information Commissioner and the Cabinet Office* [2020] UKUT 242 (AAC)

¹³ *Magyar Helsinki Bizottsag v Hungary* (App. No. 18030/11) [2016] ECHR 18030/11.

¹⁴ Environmental Information (Scotland) Regulations 2004, Regulation 7

equitable, timely and not prohibitively expensive is already the case as far as access to environmental information from Scottish public authorities is concerned via the EIRs.

16. What the EIRs provide is an accessible, free of charge, and timely mechanism available to anyone to appeal to the Commissioner, who will provide independent decision making as a specialist tribunal.¹⁵ There is an additional right of appeal from the Commissioner's decision to the Court of Session of a point of law only.
17. In the 19 years since the EIRs came into force no appeal has been made to the Court of Session following a decision issued by my office.
18. I would therefore make the case that the role and function of The Scottish Information Commissioner has included operating as an effective, independent, specialist tribunal, one which is free of charge to applicants to engage with, as well as being free of charge to the public authorities involved in responding.
19. While in some cases requesters and applicants may choose to employ the services of a legal advisor or solicitor to issue requests under either the EIRs or the FOI Act, this is a matter of preference or as a result of factors outside of the realms of the access legislation itself, not as a requirement of either information rights regime. The legislation and associated guidance are written in such a way that the public can interact fully with both the FOI Act and the EIRs without any specialist legal knowledge or experience being required.
20. The EIRs therefore represent and provide a free, timely, equitable and fair legislative and enforceable route for accessing environmental information from Scottish public authorities.
21. None of the four Conventions cited in the Consultation as far as I have been able to identify make specific mention of information rights or access to information. I therefore assume that the reference made to Article 9(4)¹⁶ is not intended to create any new and separate access to information regimes, and instead would rely upon the existing information access regimes, notably the EIRs in matters relating to environmental information.
22. Accordingly, I would strongly urge the Scottish Government to be wary of any developments arising from this Bill, or any other proposed legislation which may compromise the existing well used and understood rights and law relating to FOI and EIR legislation.

Daren Fitzhenry

Scottish Information Commissioner

¹⁵ *Beggs v The Scottish Information Commissioner*: [2023] CSIH 34 (38)

¹⁶ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Aarhus, Denmark, 25 June 1998