



31 March 2020

CORONAVIRUS (SCOTLAND) BILL: Schedule 6, Part 2: Freedom of Information Briefing from the Scottish Information Commissioner

1. This briefing sets out the views of the Scottish Information Commissioner regarding the Freedom of Information provisions included within the Coronavirus (Scotland) Bill Schedule 6, Part 2. The Scottish Information Commissioner is the independent public official responsible for promoting and enforcing Scotland's freedom of information (FOI) law.
2. This briefing sets out our key areas of comment or concern, and in Appendix 1 we set out specific technical changes which we believe should be made to ensure the FOI provisions in the Bill are enforceable in practice.

Areas of comment or concern:

3. The circumstances that public authorities across Scotland currently face are unprecedented, and we are wholly sympathetic to the pressures that the COVID-19 pandemic will be placing on public institutions, structures, resources and staff. Meeting the current 20 working day FOI timescales in circumstances where premises are closed, where information may be inaccessible, where staff are absent, or where organisations face unprecedented demands for essential services will undoubtedly create significant challenges for many organisations.
4. There will clearly be cases where organisations will be unable to respond to requests for information within the 20 working day timescale, and paragraph 2 of Part 2 of Schedule 6 reflects this. While it is challenging at this time to assess how long the current pandemic will last, the time-limited extension to 60 working days set by paragraph 3 of Part 2 of Schedule 6 may be appropriate for organisations such as those delivering vital health care services.
5. We are pleased to note, however, that the revisions ensure that the requirement to respond “promptly” contained in section 10 (and, for reviews, in section 21(6)) of the Freedom of Information (Scotland) Act 2002 (FOISA) are retained, and organisations should, wherever possible, continue to work to meet this requirement. Ensuring the effective provision of vital public services at this time is clearly of utmost importance, but the FOI principles of transparency, openness, accountability and engagement also play a vital role in ensuring trust in public services and decision-making can be maintained.
6. **We do, however, have particular concerns about the provisions contained in paragraph 5 of Part 2 of Schedule 6 to the Bill.** These provisions enable Scottish public authorities to extend their response timescale from 60 to 100 working days, where it is determined that it is not reasonably practicable to respond to a request either because of the volume and complexity of the information requested, or because of the overall number of requests being dealt with at the time the request is made.

7. **We are not satisfied that all provisions contained in paragraph 5 of Part 2 of Schedule 6 to the Bill are necessary at the current time. We have concerns around both the circumstances where the provisions might appropriately be used, and how they might effectively be enforced.** We highlight some of these concerns below, but we would also note that, in our view, the Bill currently contains a range of other provisions which may help to mitigate and address current concerns around FOI timescales, including:
- The extension of FOISA response timescales from 20 to 60 working days in most cases (paragraph 3 of Part 2 of Schedule 6)
 - The ability of the Commissioner to determine that an authority has not failed to comply with Part 1 of FOISA if the Commissioner is satisfied that the failure was due to the effect of coronavirus (paragraph 7 of Part 2 of Schedule 6)
 - The ability of Ministers to specify further circumstances where a public authority may extend a relevant period by direction (following consultation with the Commissioner) (paragraph 6 of Part 2 of Schedule 6).
8. **We consider it would be more appropriate therefore if the additional provisions which paragraph 5 of Schedule 6 is seeking to provide were considered - using the powers made available to Ministers by paragraph 6 of Part 2 of Schedule 6 - as and when it became apparent that such provisions were appropriate or necessary.** This would enable the impact and effect of such provisions to be more carefully considered than is possible within the current legislative timescale.
9. We highlight some of our concerns around elements of paragraph 5 of Part 2 of Schedule 6 below:

Paragraph 5(1)(a):

10. Paragraph 5(1)(a) (the “volume and complexity” provision) transposes phrasing from regulation 7(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Regulation 7(1) of the EIRs allows authorities to extend the timescales for responding to environmental information requests where the nature of the information requested makes it impracticable to comply within 20 working days. Unlike FOISA, the EIRs do not contain an upper cost limit for responding to requests, and these provisions ensure that where they apply, organisations can extend the timescale by a further 20 working days to make the information available.
11. FOISA, however, provides that information which costs more than £600 to provide can be refused by organisations. It will, in most cases, be the case that a request for information which is both complex and voluminous will be one where the FOISA “excessive cost” limit will apply.
12. **As such, we are not satisfied of the need for the provision contained under paragraph 5(1)(a) of Part 2 of Schedule 6.** Indeed, a possible consequence of the use of this provision may be that a requester (who under the current regime would receive a cost refusal within 20 working days with, wherever practical, advice on narrowing the scope of their request) would instead be required to first wait up to 60 working days, before then being informed of a 40 working day extension as a result of “volume and complexity” before finally being informed that the volume and complexity of the information also means that the £600 “excessive cost” limit can be invoked. This would not appear to operate in the interest of individual requesters or in the wider public interest. Where an organisation considers that an FOI request is complex and voluminous, we would advise that, at that stage, the cost provisions under section 12 of FOISA should be considered.

Paragraph 5(1)(b)

13. **We also have concerns around the interpretation and enforceability of the paragraph 5(1)(b) of Part 2 of Schedule 6.** This provision enables the response timescale to be extended by a further period of 40 working days where an authority determines that it is not reasonably practicable to respond because of the overall number of requests being dealt with at the time the request was made. The provision as it currently stands does not take account of a range of other factors that may impact on an organisation's ability to respond to the requests it receives, including the size of the organisation, the resources available, or the demand (or otherwise) for its services during the pandemic. It will also be challenging for the Commissioner to assess and enforce the appropriate use of this provision, given the discretion afforded to organisations around its use.

Potential impact on perception of Scotland's commitment to transparency, openness and right to information

14. **The provisions set out in this Bill include change to a number of areas which may negatively impact on international perception of Scotland's commitment to transparency and accountability through strong FOI law.** In particular, the significant extensions to maximum timescales and additional permissible extensions may be perceived as backward steps in relation to the Global Right to Information Rating framework, the Open Government Partnership and Scotland's National Performance Framework. We note, however, the temporary nature of these provisions, and would urge that Scotland's FOI law be restored to its full strength at the earliest opportunity.

Guidance and information required

15. We also note that a range of guidance will be required regarding changes implemented by the final Act to ensure they work effectively in practice. This will include guidance for members of the public on how their rights will be impacted by any changes, and guidance for public authorities on how the changes will be enforced (in addition to stressing that duties to respond "promptly" remain despite any extension in maximum timescale provisions, and also that timescales for requests covered by the EIRs remain unchanged). The Scottish Information Commissioner's office will prepare such guidance once the final provisions are confirmed, but this guidance may take some time to prepare, given the nature of changes proposed and current capacity limitations arising from office closure as a result of COVID-19.

Further information and contact:

16. Full detail on the role of the Scottish Information Commissioner is available at www.itspublicknowledge.info. For more information or to discuss matters raised in this briefing, please email enquiries@itspublicknowledge.info
17. **Please note:** *As the Commissioner is currently absent due to ill-health, this briefing has been prepared by his Head of Policy and Information, Head of Enforcement, and their teams.*

APPENDIX 1: Specific technical changes required:

Para	Heading	Comment
5	Extension of periods in which authorities may respond	<p>This allows a Scottish public authority to extend the relevant period by a further period of up to 40 working days if it determines that it is not reasonably practicable to respond to the request within the relevant period because of (a) the volume and complexity of the information requested, or (b) the overall number of requests being dealt with by the authority at the time the request is made.</p> <p>While paragraph 5(3) provides that, if the authority wishes to do this, it must notify the requester and provide information, inter alia, about their appeal rights, paragraph 5 does not amend FOISA. Therefore, it is not clear that the Commissioner will have the power to determine whether an extension in paragraph 5(3) was reasonable.</p> <p>S47(1) of FOISA provides that a person may make an application to the Commissioner for a decision whether their request was dealt with in accordance with Part 1 of FOISA, and s49(6) gives the Commissioner the power to find that an authority has not complied with Part 1 of FOISA. Para 5(3) does not form part of Part 1 of FOISA.</p> <p>We suggest that s47(1) and s49(6) of the FOISA be amended for the period of the Bill to ensure that requesters can apply to Commissioner about failures to comply with paragraph 5(3) as well as failures to comply with Part 1 of FOISA.</p> <p>If the extension is made in response to a requirement for review, the notice must instead specify the appeal rights currently set out in s21(10) of FOISA, i.e. the rights to appeal to the Commissioner and to appeal to the Court of Session. Paragraph 5 will need to be amended to reflect this.</p>
8	Giving notice electronically	<p>This allows notices to be transmitted by electronic means and is welcomed by the Commissioner.</p> <p>The word “and” where it appears at the end of s74(1)(a)(ii) should be deleted before the insertion set out in para 8 is made.</p>
3	Order-making powers re time periods for responding to requests	<p>An additional provision could be added so that the order-making powers in s10(4) and 21(6) have no effect for the duration of the Bill.</p> <p>It is confusing for the order making powers in s10(4) and 21(6) (with their temporarily out of date references to the 20th and 30th working days) to remain in force at the same time as the various order-making powers in the Bill are in force.</p>