



Coronavirus (Scotland) Act 2020

Determining the effects of the coronavirus on requests responded to between 7 April 2020 and 26 May 2020

Introduction

1. The Coronavirus (Scotland) Act 2020¹, which came into force on 7 April 2020, extended the maximum timescales for responding to requests for information and requirements for review under the Freedom of Information (Scotland) Act 2002. The key provisions were as follows:
 - the maximum time for responding to a request for information (section 10 of FOISA) or a requirement for review (section 21 of FOISA) was extended from 20 to 60 working days.²
 - even if an authority failed to respond within 60 working days, the Commissioner could find that this was not a breach of FOISA if the failure was due to the effects of the coronavirus³ and the delay was reasonable in the circumstances.
2. On 27 May 2020, the Coronavirus (Scotland) Act was amended by the Coronavirus (Scotland) (No.2) Act 2020. The Coronavirus (Scotland) (No.2) Act repealed much of the earlier emergency legislation, including the extended timescales. The maximum time for responding to a request for information or a requirement for review is now back to the pre-coronavirus limits of 20 working days.
3. When we refer to “the Coronavirus Act as amended” in this guidance, we are referring to the Coronavirus (Scotland) Act 2020 as amended by the Coronavirus (Scotland) (No.2) Act 2020. This guidance document reflects these latest changes.
4. Separate [guidance](#)⁴ has already been issued on the impact of the Coronavirus Act as amended on information requests and reviews received, but not responded to, by 26 May 2020. This document considers and provides guidance on what effect these changes have on requests for

¹ The Coronavirus (Scotland) Act 2020 (the Coronavirus Act) came into force on 7 April 2020. It is now due to remain in force until 31 March 2021, but this may be extended by the Scottish Ministers.

² The Coronavirus Act does not affect requests which fall within the scope of the Environmental Information (Scotland) Regulations 2004.

³ Also referred to in other Scottish Information Commissioner guidance as “Covid-19”.

⁴ The Coronavirus (Scotland) Act 2020: Determining the effects of coronavirus on an authority’s ability to respond to requests (updated 5 June 2020)

information and/or requirements for review which were responded to while the extended timescales were in force (between 7 April and 26 May 2020).

The impact of the pandemic on authorities

5. As set out in the guidance referred to in paragraph 4, the Commissioner recognises that the pandemic may impact on an authority's ability to respond to information requests in the following ways:
 - For a number of public authorities (for example, the NHS and local authorities), it will present a significant (direct) additional call on finite resources.
 - At the same time, sickness and diversion of staff away from their usual duties may affect the resources available to deal with requests and reviews.
 - Many premises are closed and significant numbers of public authority workers are working from home, potentially without access to the full range of systems they need to search to allow them to respond to information requests.
6. In such cases, authorities will need to provide the Commissioner with evidence as to the effects of the pandemic on its ability to respond promptly to individual requests.

Requests responded to between 7 April and 26 May 2020: failure to respond "promptly"

7. As noted above, the Coronavirus (Scotland) Act 2020 extended the maximum time for responding to requests for information and requirements for review from 20 to 60 working days. Cases where the response to the information request and/or review was issued between 7 April and 26 May 2020 will be judged by the Commissioner in accordance with the time limits set out in the first Coronavirus (Scotland) Act 2020. Therefore, such a response will, *prima facie*, be considered to have been made on time as long as it was provided within the 60 working day time limit. (In a case where a request for information was responded to between 7 April and 26 May, but the review in that case was not, the request for information will be subject to the 60 working day timeline, and the review will be subject to the current 20 working day timeline.)
8. However, it is important for Scottish public authorities to remember that, even when the 60 working day provision was in force, there was still a statutory duty to respond promptly. This means that a requester can request a review – and potentially make an application to the Commissioner – on the basis that a response, although provided within 60 working days, was late, because it was not made "promptly".
9. The Commissioner recognises that other demands on authorities as a result of the pandemic will be relevant in determining whether an authority has complied with section 10 or section 21 promptly. However, the duty to respond promptly remains a central part of FOISA and FOISA continues to have a central role in ensuring that public authorities remain accountable for decisions with profound implications for human life and well-being, the provision of vital public services and the maintenance of the economy.

Definition of "prompt"

10. As set out in the guidance referred to in paragraph 4, the basic duty with regard to time is to respond promptly – any specified timescales are maximum limits, subject to the overriding requirement that the response must always be prompt.

11. “Promptly” means “without delay” rather than “immediately.”⁵ In determining whether a response had been made without delay, the Commissioner will consider:

- The resources the authority has available to respond to requests, bearing in mind that a balance needs to be struck between responding to requests and carrying out other core business.
- The time required to discover whether the authority holds the requested information and, if it does, to extract it and present it in the appropriate form.
- The time required to be sure the information gathered is complete (and the response is the correct response overall to that particular request).

12. Therefore, while it is important for authorities to respond promptly, what is appropriate in each situation must be considered on a case-by-case basis, taking account of the demands of each individual request.

Requests responded to between 7 April and 26 May 2020: failure to respond within 60 working days

13. As noted above, the Coronavirus Act allows the Commissioner to decide that a Scottish public authority did not fail to comply with FOISA, even if it didn’t respond within the extended 60 working day timescale. This means the Commissioner is receiving applications (appeals) which require him to determine whether or not an authority failed to comply with Part 1 of FOISA, despite taking more than 60 working days to respond, when the response was made in the period 7 April to 26 May 2020.⁶

14. In any such case which relates to a request for information and/or a requirement for a review responded to between 7 April and 26 May 2020, the law contained in the Coronavirus (Scotland) Act 2020 without the amendments made by the Coronavirus (Scotland (No2) Act 2020 applies. This means that:

- the maximum time for responding to a request for information (section 10 of FOISA) or a requirement for review (section 21 of FOISA) was extended from 20 to 60 working days.⁷
- even if an authority failed to respond within 60 working days, the Commissioner could find that this was not a breach of FOISA if the failure was due to the effects of the coronavirus⁸ and the delay was reasonable in the circumstances.

15. Paragraph 11 sets out some of the potential effects of the coronavirus on public authority resources. These will also be relevant when deciding whether or not an authority failed to comply with Part 1 of FOISA by failing to reply in 60 working days. In considering whether he can find an authority did not fail to comply with FOISA for these purposes, the Commissioner will need to know:

⁵ Decision 126/2016 Residents Against Turbines Scotland and the Scottish Ministers and Decision 038/2017 Salmon and Trout Conservation and the Scottish Ministers

⁶ In the first decision issued by the Commissioner under the Coronavirus Act (Decision 103/2020 NHS Highland), the Commissioner was not satisfied that the effects of the pandemic had had an impact on the timing of the response. He therefore found that, while NHS Highland had responded within the maximum timescales allowed at the time, it had failed to reply promptly.

⁷ The Coronavirus Act does not affect requests which fall within the scope of the Environmental Information (Scotland) Regulations 2004.

⁸ Also referred to in other Scottish Information Commissioner guidance as “Covid-19”.

- how the coronavirus affected the authority generally or how its ability to carry out its functions (including any action it needed to take to better utilise its resources to deal with the effect of the coronavirus) prevented it from meeting the timescales and
- why the failure to meet the timescales should be considered reasonable in all the circumstances.

Recording issues with particular cases

16. In line with the guidance referred to in paragraph 4, the Commissioner recommends that any authority affected by the coronavirus record the ways in which it had impacted on its ability to respond promptly to a request. It is appreciated that detailed time recording (or reasoning) may not always be possible at this time, but case-specific reasons will be important when considering whether the duty to respond promptly has been met or whether, even if it took more than 60 working days to respond, the delay was reasonable in all the circumstances. This could include a record of the fact that a key individual was unavailable or that it was not possible to access a specific set of information.
17. These records will provide important evidence for the Commissioner when determining whether a response was prompt or reasonable, as appropriate.

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