

<b>Report to:</b>	Senior Management Team (SMT)
<b>Report by:</b>	Margaret Keyse, Head of Enforcement (HOE)
<b>Meeting Date:</b>	6 October 2020
<b>Subject/ Title:</b>	Determining the effects of the coronavirus on authorities' ability to respond to requests (VC139147)
<b>Attached Papers</b>	<ul style="list-style-type: none"> <li>• Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests (VC138230)</li> <li>• Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on requests responded to between 7 April 2020 and 26 May 2020 (VC139140)</li> </ul>

## Purpose of report

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1. To seek Senior Management Team (SMT) approval following the review of two policies prepared in the light of the Coronavirus (Scotland) Act 2020.

## Recommendation and actions

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2. I recommend that the SMT:
  - (i) approve the minor changes to the attached key documents
  - (ii) agree the key documents recommendations (see paragraphs 21 to 24 and the document control sheets attached to the key documents in question)
  - (iii) agree that this Committee Report and the attached papers can be published as set out in paragraph 26 and 27.

## Executive summary

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### The legislation

3. The Coronavirus (Scotland) Act 2020 came into force on 7 April 2020. Schedule 6 to the Act made temporary changes to the Freedom of Information (Scotland) Act 2002 (FOISA)<sup>1</sup>, including:
  4. extending the maximum time for responding to a request for information or a request for review from 20 to 60 working days.
  5. allowing the Commissioner to find that, even if an authority failed to respond within 60 working days, this was not a breach of FOISA if the failure was due to the effect of the coronavirus (i.e. the Covid-19 pandemic) and the delay was reasonable in the circumstances.
6. The Coronavirus (Scotland) (No.2) Act came into force on 27 May 2020.

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<sup>1</sup> The Coronavirus (Scotland) Act 2020 does not amend the Environmental Information (Scotland) Regulations 2004 (the EIRs)

7. The (No.2) Act removed the 60 working day timescales and required authorities to respond to requests within the normal 20 working day period. However, it also allowed the Commissioner to find that, even if an authority fails to respond within 20 working days, the failure did not constitute a breach of Part 1 of FOISA if:
8. the response was late because of the effects of the coronavirus<sup>2</sup> or because the authority was working to the extended timescales set when the Coronavirus Act first came into force and
9. the delay was reasonable in the circumstances. In deciding whether the delay was reasonable, the primary consideration for the Commissioner must be the public interest in complying with requests promptly.

### The policies

10. On 16 June 2020, SMT approved changes to an existing policy (*Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests*), to take account of the further changes made by the Coronavirus (Scotland) (No.2) Act 2020 and approved a new policy, i.e. (*Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on requests responded to between 7 April 2020 and 26 May 2020*).
11. Given that the relevant provisions of the Coronavirus (Scotland) Acts were due to come to an end on 30 September 2020, it was agreed that both policies should be reviewed at the end of September.
12. The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020, which came into effect on 29 September 2020, extended the relevant provisions until at least 31 March 2020. The policies have been updated to take account of these Regulations, as well as well as of a recent decision by the Commissioner which considered the effects of the coronavirus on an authority.

### The Commissioner's duties

13. Under section 43 of FOISA, the Commissioner has a duty to promote the observance by Scottish public authorities of the provisions of FOISA. Given the further, temporary changes to FOISA, it is important for the Commissioner to issue guidance to public authorities on the effect of the changes.
14. As the regulator of FOISA in Scotland, the Commissioner must investigate and make a decision in relation to applications made to him under section 47(1) of FOISA, i.e. whether a Scottish public authority has dealt with a request in accordance with Part 1 of FOISA.

### Risk impact

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15. The policies provide guidance to public authorities on the extended temporary timescales and will assist the Commissioner in determining whether a response by a public authority which took more than 20 working days (or, as appropriate, 60 working days), was a breach of Part 1 of FOISA. By publishing this document, the risks of not meeting our statutory duties and of not engaging with our stakeholders are mitigated.

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<sup>2</sup> Also referred to in other Scottish Information Commissioner guidance as "Covid-19".

## **Equalities impact**

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16. There are no direct equalities impacts arising as a result of the recommendations in this report.

## **Privacy impact**

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17. There is no direct privacy impact arising from this committee report or from the documents submitted for approval.

## **Resources impact**

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18. The guidance will assist the Enforcement Team when carrying out relevant investigations.

## **Operational/ strategic plan impact**

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19. The policies support various operational plan activities, e.g. providing new advice and guidance and registering, validating, investigating and deciding applications in line with approved procedures.
20. Adopting these documents will work towards the following strategic objectives as set out in the Strategic Plan 2020-2024:
- (i) Increase knowledge and understanding of FOI rights (Strategic Aim 1)
  - (ii) Enable and support high standards of FOI policy and practice (Strategic Aim 2)
  - (iii) Be recognised as an organisation of independent and trusted experts that is run efficiently, governed effectively and is open and transparent (Strategic Aim 6)

## **Records management impact (including any key documents actions)**

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21. Both of the documents submitted for approval are key documents and will be added to the Register of Key Documents, as soon as possible.
22. I am the responsible manager for both documents.
23. I have suggested that both documents are reviewed in March 2021, given that the Coronavirus (Scotland) Acts will, unless extended, expire at the end of March 2021.
24. Both documents will be published in our Guide to Information and also on the Covid-19 info hub.

## **Consultation and Communication**

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25. The original versions of the documents were drafted/revised by SMT and by members of the Enforcement and P&I Teams. This committee report allows the SMT to be consulted on the latest versions of the policies.

## Publication

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26. I recommend that this committee report is published in full.
27. I also recommend that the attached papers are withheld in full on the basis that they are exempt from disclosure under section 27(1) of FOISA (Information intended for future publication): the papers will be published in the next couple of weeks once the necessary key documents actions have taken place and once the documents are in final form.