

EMAIL TO SCOTTISH GOVERNMENT FOI UNIT (via Gerry Hendricks)

FROM ERIN GRAY, OFFICE OF SCOTTISH INFORMATION COMMISSIONER

25 March 2020, 16:46

Hello Gerry –

Thank you for the update. We know you will be operating to very tight time pressure and appreciate the opportunity to comment.

From our initial research, it does not appear at this time that any other national jurisdictions / countries have made alterations of this kind to freedom of information legislation or duties as a result of COVID-19. This may mean Scotland would set an international precedent with such provisions, which may in turn have an impact on perception of Scotland's commitment to freedom of information, transparency and openness (for example in relation to areas of work such as the Open Government Partnership, the National Performance Framework etc).

You rightly comment that the Commissioner indicated earlier that he was not minded to oppose legislative change to the FOI regime in response to the pandemic. You will appreciate that, at that point, we were not aware of the nature or specifics of any changes were planned.

While we are not opposing the legislative changes now (it is not our role to do so), and while it is challenging to comment without sight of the draft provisions themselves, we would like to make the following points (numbered for ease of reference):

- 1. Regarding extending deadlines for responding requests and reviews from 20 to 60 working days:** While we have not seen the draft Bill, we would hope that the requirement to reply "promptly", as set out in section 10(1) and section 21(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), would still remain. Some public authorities will be able to respond to some information requests within the existing timescales and it would be unfair to requesters for responses to be delayed when such delay is unnecessary. It is also critical to recognise the legitimate need to hold public authorities to account in such unprecedented times.
- 2. Regarding enabling authorities to extend the period of 60 days by a further period of 40 working days in certain circumstances:** The provision you reference in the Environmental Information (Scotland) Regulations (EIRs) which allows public authorities to extend the timescale for responding to a request for environmental information which is both complex and voluminous (regulation 7(1)) requires the authority not only to notify the requester that the timescale is being extended, but to give the requester the right to ask the authority to review the extension and to refer the extension to the Commissioner to determine whether such extension is appropriate (regulation 7(3)). We hope that this would also apply for extensions in this case. We would also expect that the circumstances in which this provision would apply would be defined in a clear and specific way which is in line with existing FOISA policy and practice (sufficient 'overall volume of requests' for example would be particularly challenging to define/clarify).

3. **Regarding the scope of these changes:** It will also be necessary to ensure public authorities are aware that this Bill (so far as we are aware) will only affect information requests made under FOISA. The timescales for requests under the EIRs will remain (again, so far as we are aware) as they are.
4. **Regarding the Commissioner having discretion to find that notwithstanding a delay, an authority complied with Part 1 of FOISA:** As with point 2 above, this will require public authorities to keep records of the reasons for delay. The Commissioner will need to issue guidance on this point to authorities.
5. **Regarding the timeline for these provisions as for ‘the duration of the pandemic’:** Specific terminology and definition of ‘duration of the pandemic’ would be essential, to ensure clarity for all on when these provisions will cease, and that they will do so as quickly as possible. Again, in the absence of sight of the draft provisions, it is difficult to comment further.
6. **Regarding capacity of the office of the Scottish Information Commissioner:** We would note that changes of this nature will require preparation of guidance for public authorities, and also that any changes may require significant change to practice within the Commissioner’s office in investigating and gathering evidence regarding relevant appeals/applications.

Please let us know if further information on any of the above provisions is required. We would also like to re-state that while pressure on public authorities may well be substantial at this time and in the weeks and months ahead, equally the legitimate public interest in decisions made during this time is significant.

Lastly, as I’m sure you can appreciate, we feel our correspondence on this matter should be proactively published as soon as is possible. We recognise that your initial email was sent in confidence, and so intend to publish this correspondence on our website once the Bill has been introduced (and so the reasons for it to be kept in confidence will have passed). Please do let me know if you wish to discuss this, or any other element of this response.

Best wishes,

Erin

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