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Your ref:  
Our ref: POL/34035

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Dear Daren

**CORONAVIRUS (SCOTLAND) BILL  
PROVISIONS RELATING TO THE FREEDOM OF INFORMATION (SCOTLAND) ACT  
2002**

I know that you have acknowledged the pressures that are on public authorities at this time of global emergency due to the coronavirus pandemic, and have recognised the impact that this may have in terms of compliance with timescales under the Freedom of Information (Scotland) Act 2002 (“FOISA”). I also note that the current legislation offers you no discretion in terms of finding that any Scottish public authorities who fail to respond on time would have failed to comply with Part 1 of FOISA.

At a time when staff in public authorities are rightly focused on the protection of the public and maintaining vital services, the Scottish Ministers consider it is only right that we offer public authorities some breathing space for the duration of the pandemic while maintaining the public’s right to know.

Today, the Scottish Ministers have introduced the emergency [Coronavirus \(Scotland\) Bill](#), including provisions to extend timescales under FOISA. It is intended that the Bill will go through all of its Parliamentary Stages on tomorrow.

The provisions relevant to FOISA can be found in Part 2 of schedule 6 to the Bill. You will note that there are three key changes to the existing law:

- the current long-stop date of 20 working days for responding to requests and reviews will be extended to 60 working days;
- if it is not reasonably practicable to respond within 60 working days, because of the volume and complexity of the information requested, or because of the overall volume



of requests being dealt with, it will be possible to extend the time on a case-by-case basis for up to 40 further working days;

- where it is not possible to comply with these extended timescales, authorities will be able to claim that they had reasonable cause for not doing so when a case is appealed to the Commissioner.

I would like to assure you that this is not a suspension of information rights under FOISA. It will allow public authorities who are unable to meet the 20 working day time limit for requests and reviews some additional breathing space to respond within 60, or 100, working days. These timescales will only apply for as long as the legislation, subject to approval by the Parliament, is in force: section 11 provides for it to expire on 30 September 2020 unless the Parliament agrees to extend it for a further period of 6 months (which it can do twice).

You may also wish to note that we have made a minor technical change to section 74(1)(a) of FOISA to enable authorities and you to issue notices electronically.

I am grateful to your team for the comments that they offered on the policy at such short notice last week, and regret that it has not been possible to respond to those helpful suggestions before now. However, our response is set out in the **Annex** to this letter and we would be happy to discuss these points (or any other matters arising).

The Scottish Government will continue to respond as promptly as possible to requests for information and expects that other Scottish public authorities will endeavour to do so too.

Yours sincerely

Penny Curtis  
Deputy Director, Elections and Freedom of Information Division

## Annex

### Points raised in Erin Gray's email of 25 March 2020 at 1646

- 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.

## Scottish Government response

1. We can confirm that the duty to respond promptly has been retained, with the modifications affecting only the maximum time periods in sections 10(1) and 21(1). As we note above, the Scottish Government will respond as promptly as possible to requests for information and it expects that other Scottish public authorities will endeavour to do so too.
2. We confirm that the extension provision is intended to work procedurally in the same way as regulation 7 of the Environmental Information (Scotland) Regulations 2004. Accordingly, paragraph 5(2) of schedule 6 to the Bill requires the authority to give notice promptly, and any event no later than before the expiry of the 60 working day period. Paragraph 5(3) prescribes the content of the notice, including the right to seek a review or to appeal to the Commissioner, as the case may be. While we note your comments in relation to the overall number of requests as a justification, we consider that it is appropriate to include provision to this effect. We note that the authority would have to set out its reasons for considering that this criterion was satisfied, giving applicants the opportunity to set out their dissatisfaction and ultimately to have that determined by the Commissioner. We think that this is a matter which could usefully be addressed further in guidance.
3. We confirm that the measures in the Bill apply only to FOISA and not to the EIRs. Our communications with authorities will highlight this.
4. We note your comment, and think that guidance of this sort would be most helpful in setting out the expectations for authorities.
5. These matters have been explored further in the course of drafting the Bill, and we set out the expiry provisions above. You may wish to note that section 12 of the Bill gives the Scottish Ministers the power to bring forward expiry of Bill provisions in appropriate cases. We would highlight that appropriate transitional provision will be needed whenever the provisions relating to FOISA expire and the original timescales are restored, and we look forward to discussing this further with you when planning for expiry takes place.
6. We propose to prepare guidance on the effect of the Bill as a whole, and would be happy to discuss how that interacts with any guidance that you plan to issue. We appreciate that you will wish to consider the implications of the Bill provisions for the practice of your office now that the provisions have been published. The intention, however, has been to disturb as little as possible the ordinary appeals procedure. We would, however, be very happy to discuss further once you have had an opportunity to assess the provisions.

