OPINION OF COUNSEL

for

THE SCOTTISH INFORMATION COMMISSIONER

I refer to the email instructions dated 7 April 2020.

1. The Coronavirus (Scotland) Act 2020 Schedule 6 Part 2 paragraphs 2-7 make modifications to certain provisions of the Freedom of Information (Scotland) Act 2002 ('FOISA'). These are intended to be temporary. In particular, they modify the times for compliance with a request under section 10 and a requirement for review under section 21, from 20 to 60 days.
2. The modified text of section 10 reads as follows:

> '10 Time for compliance
> (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the sixtieth ~~twentieth~~ working day after—
> (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
> (b) in a case where section 1(3) applies, the receipt by it of the further information.' …

3. Section 17 of the 2020 Act provides that the Act comes into effect on the day after Royal Assent. That was 7 April 2020. The 2020 Act contains no transitional provisions relevant to sections 10 or 21.

Question 1: Whether the provisions relating to FOISA in the Coronavirus (Scotland) Act 2020 apply only to requests made under FOISA from the date on which the 2020 Act came into force; or whether they also apply to requests already made to public authorities

4. In my view, the modifications apply to all pending requests.
5. First, it has to be acknowledged that the language of the modified section 10 (and 21) is neutral on the question whether it applies prospectively only. The language is in my view at least capable of applying to all pending requests. Whether it actually does so depends on applying general principles and presumptions.
6. Second, a public authority is under a continuing duty to comply with its statutory duties (cf. Interpretation Act 1978 section 12(1); Interpretation and Legislative

Reform (Scotland) Act 2010 section 7(1), (2)). In my view, that means complying with the terms of sections 10 and 21 as they currently stand. The matter can be tested in this way: on what basis could a public authority which missed the 20-day deadline be said to be in breach of statutory duty? Or on what basis could an aggrieved applicant complain about such a delay? Given the modification of the times for compliance in sections 10 and 21, there would seem to me to be no foundation for a complaint of breach of statutory duty, precisely because currently there is no 20-day statutory deadline.

7. Third, if one has regard to the purpose of the modifications, there is no evident basis for distinguishing between pre- and post- 7 April 2020 requests. The Scottish Government guidance refers to a statement made by the Scottish Information Commissioner, which helpfully identifies the purpose of the modifications:

> '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.'

8. The challenges identified are clearly as significant for requests made before as for those made after 7 April 2020, precisely owing to issues about the availability of staff and their access to the necessary information.
9. For these reasons, subject to the question of retrospectivity, I would conclude that the modifications apply to all pending requests whether made before or after 7 April 2020. But the issue of retrospectivity is of such importance that it may be necessary to revisit this provisional conclusion after addressing questions 2 and 3.

Question 2: If the 2020 Act provisions apply to requests already made prior to the 2020 Act coming into force, are those provisions to be categorised as retrospective?

10. In my view, the modifications are not retrospective in the strong sense of altering vested substantive rights (e.g. property rights) or imposing liabilities which did not previously exist. Nonetheless, so far as pending requests made before 7 April

2020 are concerned, the modifications are in my opinion retrospective inasmuch as they qualify the section 1 rights of affected applicants: they prevent applicants from requiring provision of information within the 20-day time limit previously applicable. There is therefore an effect on established rights, and to that extent it seems to me that these modifications can properly be characterized as 'retrospective'.

11. The most helpful modern guidance on retrospectivity is, I think, set out by Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525 D-H. There he first quotes Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724:

> 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

12. Lord Mustill then continues:

> 'Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say. … the

approach I propose involves a single indivisible question, to be answered largely as a matter of impression …'

13. On this approach, the question is essentially one of fairness, and it is one that is to be answered not mechanistically but as a matter of impression.
14. In my opinion, any unfairness involved in these modifications is minimal:

(i) the substance of the right to have information provided promptly is unaffected, and the only alteration is to the maximum length of time within which the public authority must comply with its statutory obligations;

(ii) the point just made reflects the distinction found in some of the earlier cases to the effect that retrospectivity is problematic if it affects substantive rights but not if it affects procedural ones: see e.g. *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 558; on that approach, the rights in issue here are procedural;

(iii) the extension of the time limit is temporary, until 30 September 2020: section 12(1) of the 2020 Act;

(iv) the circumstances of enactment of the legislation (summarized in § 7 above) in my view speak against unfairness to applicants by setting out cogent considerations of practicability for extending the time limits.

15. My conclusion is that the provisions in issue here pass the test of fairness, for the reasons set out above. Accordingly, the fact that they have a retrospective effect does not alter my provisional view (set out above in § 9) as to their proper interpretation.

Question 3: If the provisions are retrospective, are there implications e.g. in terms of Article 10 ECHR?

16. Article 10 ECHR is potentially relevant to requests for information under FOISA. By virtue of *Magyar Helsinki Bizottság v Hungary* (app no 18030/11), article 10 does not establish a general right of access to information held by a public authority. But article 10 does have to be interpreted so as to be practical and effective. From this it follows, where access to information is instrumental to the exercise of the right of freedom of expression, that a right of access to that information may arise, depending on the purpose of the information request; the nature of the information sought; the role of the applicant; and the ready availability of the information.

17. The question arises whether, for the class of case to which article 10 applies, the modifications made by the 2020 Act give rise to any further concerns.
18. It does not seem to me possible to give a definitive answer to this in the abstract. But in general it seems to me unlikely that ECHR considerations add anything to the considerations that arise under the test of fairness discussed above. There is no general principle of ECHR hostile to retrospectivity: everything turns on the particular circumstances, scrutinized in relation to whether the legislation in question serves a legitimate aim in a proportionate manner: for a recent example (albeit in relation to Article 1 of the First Protocol) see *Axa General Insurance Co Ltd* 2012 SC (UKSC) 122. In the circumstances discussed here, it seems to me unlikely that the necessary balancing exercise would arrive at a conclusion on the validity of the provisions of the 2020 Act different from the one set out above.

Conclusion

19. I conclude that the modifications made by the 2020 Act apply to all pending requests whether made before or after 7 April 2020.

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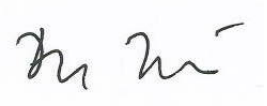

8 April 2020 DAVID JOHNSTON QC