

20th April 2020.

Daren Fitzhenry,
Scottish Information Commissioner,
Kinburn Castle,
Doubledykes Road,
St Andrews, Fife
KY16 9DS

Dear Daren Fitzhenry

The Coronavirus (Scotland) Act 2020 Schedule 2 Part 6¹

On 1st April 2020 the Coronavirus (Scotland) Bill was introduced and passed by the Scottish Parliament. I tabled a number of amendments to stop and then reduce the excessive extended timescales being introduced for responding to Fol requests which are contained in Schedule 2 Part 6. I remain convinced that although our public services are under tremendous pressure due to the health emergency, this legislative response was disproportionate. I believe the impact of the legislation will be to reduce the effectiveness of Scotland's enforceable right to access information just when people really need to hold public bodies to account for decisions made such as on health, social care and the provision of equipment for frontline staff in the NHS, homecare, police and shop workers.

I am now writing to you to seek clarification on comments made by the Cabinet Secretary for the Constitution, Europe and External Affairs Mike Russell during the Stage 2 debate that appeared to be persuasive:

‘ the recommendations that we have brought forward are the recommendations of the Information Commissioner. It would be perverse if the Parliament were to reject the recommendations of the person it entrusts to monitor the legislation...’

Can you confirm if that is indeed the Commissioner's opinion and advise if the 'recommendations' are on the Government's amendments to its own legislation or the provisions restricting Fol rights?

I also note the Commissioner's helpful guidance to requestors and designated bodies under FoISA, published in March 2020, urging patience at a critical time given the pressures caused by the global pandemic.² On 13th March it was stated:

‘Looking forward, discussions have been taking place with the Scottish Government on whether and/or when it would be appropriate for the Scottish Parliament to enact emergency legislation to extend the 20 working day timescales in FOISA. (Given that the EIRs are based on an EU Directive, which, in turn, is based on a UN Convention, the Scottish Parliament would not have the same power to extend the timescales in the EIRs.) The Commissioner does not believe that extending the timescales is necessary at this stage. The Commissioner will continue to keep in

¹ UK Government website at <http://www.legislation.gov.uk/asp/2020/7/schedule/6/part/2/enacted>

² Issued on 13th and 20th March and available at http://www.itspublicknowledge.info/home/News/Latest_news.aspx

contact with the Scottish Government and will update this website as and when necessary.³

Therefore, can you advise when and how often you discussed with the Scottish Government the extension of response times and the dates. Also, can you set out the reasons which prompted you to change your view that extending the timescales was necessary, especially as the UK ICO and other Commissioners/Ombudsman had agreed a non-legislative approach?

The Scottish Government seems only to have discussed the changes to FoISA with yourself, so I am wondering if there is a confusion emerging in Government on your legislative role? For example, do you think it is possible to represent the public as well as those who have designated duties under FoISA whilst remaining independent of Parliament and funded indirectly by the Scottish Government?

I appreciate that FoISA still requires information requests to be answered 'promptly', under Section 10(1), and so the onus will still be on the designated body to prove the reasons for the delay. I also welcome the launch of your COVID-10 and FoI Information Hub.⁴

I look forward to hearing from you.

Yours sincerely,

Neil Findlay MSP.

³ <http://www.itspublicknowledge.info/home/News/20200313.aspx>

⁴ <http://www.itspublicknowledge.info/home/News/Covid-19InfoHub.aspx>