



Scottish Information  
Commissioner

*it's public knowledge*

**Our Ref:** RFI08

**Your Ref:**

Neil Findlay MSP  
By email

29 April 2020

Dear Mr Findlay

### **The Coronavirus (Scotland) Act 2020 Schedule 2 Part 6**

Thank you for your letter dated 20 April 2020, regarding the Coronavirus (Scotland) Act 2020 Schedule 2 Part 6 (the Coronavirus Act).

My Head of Enforcement, Margaret Keyse, will reply separately to the two specific requests for information you made in your letter, in line with [our policy on requests for information](#). However, below I set out my reply to the other points in your correspondence.

### **Remarks made by Mr Russell in Stage 2 debate of the Bill**

My office submitted a briefing to the Scottish Government's FOI Unit and to all MSPs on the evening of 31 March 2020 regarding the draft Coronavirus (Scotland) Bill ([available on our website](#)). Circulation of this briefing was the only manner in which the Commissioner's office shared substantive input on the content of the draft Bill between its publication on 31 March 2020 and it being passed by the Scottish Parliament on 1 April 2020.

Without asking Mr Russell himself, I cannot be certain what he was referring to in his remarks during Stage 2. It seems that it may be a reference to the comments made by my office in paragraphs 6 and 7 of the briefing referred to above, which raised specific concerns about the plan to allow Scottish public authorities to extend their response time from 60 to 100 working days. This provision was dropped by the Government during Stage 2.

It may be helpful to highlight that one week previously, in email correspondence with the Scottish Government's FOI unit ([available on our website](#)), we had noted a number of issues with the broad proposals as they had been communicated to us at that time – but this was prior to having sight of the draft Bill itself, which we saw only when published on 31 March 2020. With regard to your question of when and how often my office discussed the extension of response times with the Scottish Government, this will be addressed separately in the response to your request for information.

## **My view on extension of response times**

As I am sure you are aware, the changes and disruption being experienced following 13 March 2020 as a result of the pandemic were considerable. Views were taken in the context of those fast-moving changes and the increased challenges many authorities would face in responding to information requests within the existing timelines. The reasoning for the Commissioner's position in relation to timescales proposed in the Bill is set out in the briefing circulated to MSPs on 31 March 2020 (link provided above). It should be noted that due to the legal construct of the organisation (an officeholder appointment), the phrases "the Scottish Information Commissioner" and "the Commissioner" are used interchangeably in various correspondence to mean me in my work capacity, but also to mean the office. This can be seen clearly in the briefing circulated to MSPs.

You note that the UK ICO has agreed a non-legislative approach to FOI during this period. It may be helpful to note that the rules on timescales in the (UK) Freedom of Information Act 2000 (FOIA) are more flexible than those in the Freedom of Information (Scotland) Act 2002 (FOISA).

FOIA already allows authorities to extend the 20 working days for complying with a request "until such time as is reasonable" in certain cases (for example, if the authority wishes to apply an exemption which is subject to the public interest test).

Similarly, unlike FOISA, FOIA does not require an authority to carry out a review within 20 working days. (The Code of Practice<sup>1</sup> which accompanies FOIA says that reviews should normally be carried out within 20 working days, but allows an authority to take longer. According to the Code, there may be legitimate reasons for extending the response time even beyond 40 working days.)

Accordingly, there is already a certain amount of flexibility built into FOIA which does not appear in FOISA. While we would all rather not be in the position we are in, I would suggest that it is at least helpful (for both authorities and those requesting information) that the current position in Scotland provides clarity on the duties and expectations placed on public authorities at this time – and that these have been set by the Scottish Parliament as a matter of law, rather than determined by an individual in the form of a regulator.

You noted in your letter that FOISA still requires information requests to be answered "promptly". In this regard, you may be interested in [our guidance on this point](#), which makes it clear that, while the Coronavirus Act has extended the maximum time for responding to requests and requests for review from 20 to 60 working days, it is important for Scottish public authorities to remember that, in both cases, FOISA makes it clear that authorities must still respond promptly.

Lastly, I would highlight the recent statement from the International Conference of Information Commissioners, which stresses that: "As a global community, we recognise that resources may be diverted away from usual information rights work. Public organisations will rightly focus their resources on protecting public health, and we recognise our role in taking a pragmatic approach, for example around how quickly public bodies respond to requests. But the importance of the right to access information remains."

## **My role as Commissioner**

While your query on the degree of clarity the Scottish Government has about my role as Commissioner is a matter for the Scottish Government to respond to, I hope that the information

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

provided above and the separate response Ms Keyse will send to your requests for information will clarify the nature of the discussions our offices have had regarding this matter.

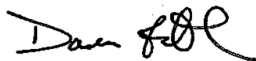
I feel it is appropriate and correct for a government to alert me regarding planned changes to legislation affecting freedom of information, and for the government and parliamentarians to receive input from me on these matters. This is particularly important when emergency timescales such as those recently experienced do not allow for the full consultation which would usually be required.

I would also stress that, as Commissioner, I carry out work to understand and balance the needs and rights of both public authorities and members of the public as I fulfil my duties, and will continue to do so. However, my role is focused on delivering the statutory functions assigned to the Commissioner by FOISA, and not to act specifically or directly as representative of either group.

For completeness, as Commissioner I receive funding through the Scottish Parliamentary Corporate Body (SPCB) and the SPCB approves my annual budget.

Lastly, as noted in our acknowledgement letter last week, my office is committed to being as open and transparent as possible. As such, I will publish your correspondence and this reply on my website in due course. If you wish to discuss this, or any element of this matter further, please do contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daren Fitzhenry', with a stylized flourish at the end.

**Daren Fitzhenry**  
**Scottish Information Commissioner**