



## Coronavirus (Scotland) Act 2020

### Determining the effects of the coronavirus on an authority's ability to respond to requests

#### Introduction

1. The Coronavirus (Scotland) Act 2020, which came into force on 7 April 2020, extended the maximum timescales for responding to requests and requests for review under the Freedom of Information (Scotland) Act 2002 from 20 to 60 working days. The 2020 Act was amended by the Coronavirus (Scotland) (No.2) Act 2020, which came into force on 27 May 2020, and which, among other things, removed those extended timescales. This guidance document reflects these latest changes.
2. This guidance looks at the impact of the new legislation on requests and requests for review which, as at 27 May 2020, had not been responded to. We have issued separate [guidance](#)<sup>1</sup> on the impact of the new legislation on information requests and reviews responded to between 7 April 2020 (when the Coronavirus Act first came into force) and 26 May 2020 (the day before that Act was amended).
3. When we refer to “the Coronavirus Act” in this guidance, we are referring to the Coronavirus (Scotland) Act 2020 as amended by the Coronavirus (Scotland) (No.2) Act 2020.
4. The Coronavirus Act was initially due to remain in force until 30 September 2020, but this has been extended by the Scottish Ministers to 31 March 2021.
5. The Coronavirus Act<sup>2</sup> makes some changes to the Freedom of Information (Scotland) Act 2002 (FOISA). The maximum time for responding to a request for information (section 10 of FOISA) or a request for review (section 21 of FOISA) remains at the pre-coronavirus limits of 20 working days.<sup>3</sup> However, the Commissioner may find that a late response was not a breach of FOISA if:

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<sup>1</sup> Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on requests responded to between 7 April 2020 and 26 May 2020.

<sup>2</sup> See Part 2 of Schedule 6 to the Coronavirus (Scotland) Act 2020:  
<http://www.legislation.gov.uk/asp/2020/7/contents/enacted>

<sup>3</sup> The Coronavirus Act does not affect requests which fall within the scope of the Environmental Information (Scotland) Regulations 2004.

- it was late because of the effects of the coronavirus<sup>4</sup> or because the authority was working to the extended timescales set when the Coronavirus Act first came into force, and
  - the delay was reasonable in the circumstances. In deciding what was reasonable, the primary consideration for the Commissioner must be the public interest in complying with requests promptly.
6. This guidance looks at these provisions as currently enacted; tells authorities how the Commissioner will apply them and recommends actions authorities should take in the light of disruption caused by the coronavirus pandemic.

### **The impact of the pandemic and related matters**

7. The Commissioner recognises that the pandemic may impact on an authority's ability to respond to information requests:
- For a number of public authorities (for example, the NHS and local authorities), it will present a significant (direct) additional call on finite resources.
  - At the same time, sickness and diversion of staff away from their usual duties may affect the resources available to deal with requests and reviews.
  - Many premises are closed and significant numbers of public authority workers are working from home, potentially without access to the full range of files and systems they need to allow them to respond to information requests.
8. The Coronavirus Act also recognises that an authority's ability to respond within 20 working days may have been affected by the fact that longer timescales (60 working days) were in place from 7 April until 26 May 2020. Working to these extended timescales at that time will have given staff involved in handling a request some reasonable expectations as to what was required, although, even when the extended timescales were in force, the authority still had to respond promptly.
9. The basic duty with regard to time is to respond promptly – any specified timescales are maximum limits, subject to the overriding requirement that the response must always be prompt. "Promptly" means "without delay" rather than "immediately."<sup>5</sup> In determining whether a response had been made without delay, the Commissioner will consider:
- The resources the authority has available to respond to requests, bearing in mind that a balance needs to be struck between responding to requests and carrying out other core business.
  - The time required to discover whether the authority holds the requested information and, if it does, to extract it and present it in the appropriate form.
  - The time required to be sure the information gathered is complete (and the response is the correct response overall to that particular request).
10. The Coronavirus Act recognises the public interest in complying promptly with requests and makes this the key consideration for the Commissioner in deciding whether any delay in responding was reasonable in all the circumstances. Authorities will therefore need to provide

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<sup>4</sup> Also referred to in other Scottish Information Commissioner guidance as "Covid-19".

<sup>5</sup> Decision 120/2016 Residents Against Turbines Scotland and the Scottish Ministers and Decision 038/2017 Salmon and Trout Conservation Scotland and the Scottish Ministers

the Commissioner with evidence as to the effects of the coronavirus (or of working to the previous extended timescales) on their ability to respond within the maximum 20 working day statutory timeline to individual requests.

11. FOISA has a central role in ensuring that public authorities remain accountable for decisions, including those which may have profound implications for human life and well-being, the provision of vital public services and the maintenance of the economy. In considering the public interest in responding promptly, and whether the delay was reasonable, the Commissioner will therefore take account of the actual information requested: for example, it may be unreasonable to delay complying with a request in a case where the information is of significant and urgent public interest.

### **Recording issues with particular cases**

12. We recommend that any authority affected by the coronavirus records the ways in which the coronavirus, or working to the previous extended timescales, has impacted on its ability to respond promptly to a request. Detailed time recording (or reasoning) may not always be possible at this time, but case-specific reasons will be important when considering whether the duty to respond promptly has been met. This could include recording the fact that a key individual was unavailable or that it was not possible to access a specific set of information.
13. Authorities should only take account of those factors which are actually relevant in the circumstances. Not all Scottish public authorities will be facing a direct additional call on services as a result of the pandemic and not all will be impacted significantly in their ability to respond to requests by remote working.
14. It is also worth bearing in mind that these are temporary provisions, designed to deal with a specific emergency in the light of the pandemic. The less an authority is affected by the pandemic, the easier it should be to respond within the normal 20 working day response timescale.

### **Failure to meet timescales – the Commissioner’s ability to take account of the impact of coronavirus and related matters**

15. As noted in paragraph 5, the Coronavirus Act allows the Commissioner to decide that a Scottish public authority did not fail to comply with FOISA, even if it didn’t respond within 20 working days. While the Coronavirus Act is in force, the Commissioner is receiving applications (appeals) which require him to determine whether an authority did or did not breach Part 1 of FOISA, when taking more than 20 working days to respond.<sup>6</sup>
16. Some of the potential effects of the coronavirus on public authority resources are set out above (paragraph 7). These will be relevant when deciding whether an authority did or did not breach FOISA, when failing to reply in 20 working days. In considering whether he can find an authority did not fail to comply with FOISA in such cases, the Commissioner will need to know:
  - how the coronavirus, or working to the previous extended timescales, affected the authority generally, or how its ability to carry out its functions (including any action it needed to take

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<sup>6</sup> In the first decision issued by the Commissioner under the Coronavirus Act (Decision 103/2020 NHS Highland), the Commissioner was not satisfied that the effects of the pandemic had had an impact on the timing of the response. He therefore found that, while NHS Highland had responded within the maximum timescales allowed at the time, it had failed to reply promptly.

to better utilise its resources to deal with the effect of the coronavirus) prevented it from meeting the current timescales and

- why the failure to meet the timescales should be considered reasonable in all the circumstances of the particular case (taking account of the public interest in responding promptly).

17. The Commissioner recognises that key decisions may need to be taken quickly and in challenging circumstances. However, authorities need to recognise that this is a temporary derogation from an important statutory right and therefore is not to be taken lightly.

18. With this in mind, the Commissioner recommends that authorities:

- record decisions – and the reasons for those decisions – reallocating resources (or capacity) away from handling information requests to other service priorities, and whether those reasons are related to the pandemic
- document any other practical challenges (such as absence or unavailability of key staff or inaccessibility of key records) which result from the coronavirus and which suggest that a significantly reduced level of FOI service could be considered reasonable in all the circumstances (with reasons why it should be considered reasonable)
- document reasons why (generally or in specific cases) using the extended timescales (when these were provided for) was considered reasonable in all the circumstances
- in specific cases, where relevant, document any consideration of why and how any of the above factors (or any other factors considered relevant) impact on the public interest in responding promptly
- where practicable, consider whether any changes affecting FOI service delivery are proportionate, or whether reasonable alternative approaches to balancing resources could meet the same ends
- where possible, maintain effective means of keeping requesters informed in relation to their requests and any delays (ensuring records are kept of that communication)
- adopt and publish a policy for responding to FOISA requests during the pandemic. This should cover the matters set out above and also explain what information the authority will publish proactively during the pandemic in line with its publication scheme duties. This will be particularly important where the information to be published relates directly to the pandemic. The Commissioner's own policy is available [here](#).

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