

LEGAL ADVICE RECEIVED BY SCOTTISH INFORMATION COMMISSIONER

29 APRIL 2020

From David Johnston QC:

The Coronavirus (Scotland) Act 2020 replaced the ordinary 20-day time-limit for responding to requests and to requests for review with a 60-day time-limit. That time-limit applied from 7 April 2020 but was repealed by the Coronavirus (Scotland) (No 2) Act 2020 with effect from 26 May 2020.

The Commissioner has raised the question, where a public authority responded to a request or a request for review during the period 7 April to 26 May 2020 and did so in more than 20 but less than 60 days, whether the public authority is to be regarded as having complied with its obligation under Part 1 of FOISA.

In my view, yes.

First, because on this hypothesis the public authority will have complied with the time limit that was applicable at the time it was dealing with the request.

Second, because to decide otherwise would be retrospectively to impose on a public authority a duty which it did not owe at the relevant time.

I discussed the test for retrospective application of statutory provisions in §§ 11-15 of my opinion in relation to the first Coronavirus (Scotland) Act¹. In short: 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. On this hypothesis, it would in my view be unfair to public authorities to apply retrospectively a shorter time-limit than was applicable at the time they dealt with a request.

For that reason, I think that the compliance of the public authority with its statutory duty is to be assessed according to the statutory provision which was in force at the time it dealt with the request.

¹ Available at <http://www.itspublicknowledge.info/home/AboutSIC/Covid-19PublishedInformation.aspx>