

<b>Report to:</b>	Senior Management Team (SMT)
<b>Report by:</b>	Margaret Keyse, Head of Enforcement/Helen Gardner-Swift, Head of Corporate Services
<b>Meeting Date:</b>	28 May 2020 (to be approved by email)
<b>Subject/ Title:</b>	Covid-19: responding to information requests during lockdown; the Coronavirus (Scotland) Act 2020 (VC133094)
<b>Attached Papers</b>	<ul style="list-style-type: none"> <li>• Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests</li> <li>• Covid-19: How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19</li> </ul>

## Purpose of report

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1. To seek Senior Management Team (SMT) approval for two policy documents prepared in the light of the Covid-19 pandemic and revised in the light of the Coronavirus (Scotland) (No.2) Act 2020.

## Recommendation and actions

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2. We recommend that the SMT:
  - (i) approve the changes to the following documents:
    - Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests
    - Covid-19: How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19
  - (ii) agree the key documents recommendations (see paragraph 22 and the document control sheets attached to the documents)
  - (iii) agree that this Committee Report and the attached papers can be published as set out in paragraph 24.

## Executive summary

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3. Following government advice on the need to contain the spread of coronavirus Covid-19, we closed the office premises on 23 March 2020. The temporary closure of the office premises is being kept under review. At the time of writing, it is not yet known when the office premises will re-open.

## The legislation

4. The Coronavirus (Scotland) Act 2020 came into force on 7 April 2020. Schedule 6 to the Act made temporary changes to the Freedom of Information (Scotland) Act 2002 (FOISA)<sup>1</sup>, including:

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<sup>1</sup> The Coronavirus (Scotland) Act 2020 does not amend the Environmental Information (Scotland) Regulations 2004 (the EIRs)

- (i) extending the maximum time for responding to a request for information or a request for review from 20 to 60 working days.
  - (ii) allowing the Commissioner to find that, even if an authority failed to respond within 60 working days, this was not a breach of FOISA if the failure was due to the effect of the coronavirus (i.e. the Covid-19 pandemic) and the delay was reasonable in the circumstances.
5. The Coronavirus (Scotland) (No.2) Act came into force on 27 May 2020.
6. The (No.2) Act removes the 60 working day timescales and requires authorities to respond to requests within the normal 20 working day period. However, it allows the Commissioner to find that, even if an authority fails to respond within 20 working days, the failure does not constitute a breach of Part 1 of FOISA if:
- (i) the response was late because of the effects of the coronavirus<sup>2</sup> or because the authority was working to the extended timescales set when the Coronavirus Act first came into force and
  - (ii) the delay was reasonable in the circumstances. In deciding whether the delay was reasonable, the primary consideration for the Commissioner must be the public interest in complying with requests promptly.

### **The Commissioner's duties**

7. Under section 43 of FOISA, the Commissioner has a duty to promote the observance by Scottish public authorities of the provisions of FOISA. Given the further, temporary changes to FOISA, it is important for the Commissioner to issue guidance to public authorities on the effect of the changes.

#### *Guidance for authorities on the Coronavirus (Scotland) Act*

8. As the regulator of FOISA in Scotland, the Commissioner must investigate and make a decision in relation to applications made to him under section 47(1) of FOISA, i.e. whether a Scottish public authority has dealt with a request in accordance with Part 1 of FOISA.
9. It is highly likely that the Commissioner will receive applications requiring him to determine whether a response by a public authority did not fail to comply with Part 1 of FOISA even where the response took longer than 20 working days.
10. The first document ("Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority's ability to respond to requests") updates public authorities on how the Commissioner will apply the provisions of the Coronavirus Act, as amended, set out in paragraph 6.
11. The document also contains recommendations on good practice in the light of the effects of Covid-19, one of which is to adopt and publish a policy on responding to requests and requests for review under FOISA and the EIRs while affected by the coronavirus.

### **Commissioner's policy on responding to requests**

12. The Commissioner is a public authority for the purposes of FOISA and is therefore required to respond to requests and requests for review within the timescales set down by the

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<sup>2</sup> Also referred to in other Scottish Information Commissioner guidance as "Covid-19".

legislation. The second document (“Covid-19: How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19”) updates the Commissioner’s policy for responding to requests (including requests under the EIRs) while the office is closed and while the Coronavirus Act, as amended, is in force.

13. The policy recognises the importance of FOI rights during this unprecedented time and also recognises that, as the regulator of FOI in Scotland, it is very important that he been seen to be complying with FOI legislation and to be demonstrating good practice.

## Risk impact

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14. The amended document (“Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority’s ability to respond to requests”) provides guidance to public authorities on the extended temporary timescales and will assist the Commissioner in determining whether a response by a public authority which took more than 20 working days, was a breach of Part 1 of FOISA. By publishing this document, the risks of not meeting our statutory duties and of not engaging with our stakeholders are mitigated.
15. Business continuity procedures have been put in place as far as possible, and these are reflected in the Commissioner’s policy on responding to requests for information and requests for review during the temporary closure of our office premises and mitigates the risk of not having effective policies and procedures in place. The Covid-19 pandemic is impacting the work of the public sector and is presenting this sector with significant resourcing challenges. The document (“Covid-19: How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19”) will assist the Commissioner – and the wider public sector – to demonstrate good practice in responding to FOI requests during the pandemic.

## Equalities impact

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16. The closure of the office has restricted the ways individuals can make FOI requests to us. This could affect, in particular, individuals with disabilities. The Commissioner’s policy on responding to FOI requests explains what arrangements we have put in place to reduce or mitigate any potential adverse or negative impacts.

## Privacy impact

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17. There is no direct privacy impact arising from this committee report or from the documents submitted for approval. The Commissioner’s usual rules regarding compliance with the General Data Protection Regulation and Data Protection Act 2018 remain in place.

## Resources impact

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18. As noted above, the Covid-19 pandemic is impacting our work and is presenting us with resourcing challenges. The interim policy on responding to information requests will allow us to continue to respond to FOI requests as efficiently and effectively as possible in the light of these challenges.
19. The guidance for authorities on the Coronavirus Act will assist the Enforcement Team when carrying out relevant investigations.

## Operational/ strategic plan impact

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20. The policies support various operational plan activities, e.g. providing new advice and guidance and registering, validating, investigating and deciding applications in line with approved procedures and responding to information requests and requests for review
21. Adopting these documents will work towards the following strategic objectives as set out in the Strategic Plan 2020-2024:
- (i) Increase knowledge and understanding of FOI rights (Strategic Aim 1)
  - (ii) Enable and support high standards of FOI policy and practice (Strategic Aim 2)
  - (iii) Be recognised as an organisation of independent and trusted experts that is run efficiently, governed effectively and is open and transparent (Strategic Aim 6)

## Records management impact (including any key documents actions)

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22. Both of the documents submitted for approval are new key documents. Please note the following:
- (i) both documents will be added to the Register of Key Documents, as soon as possible
    - the Responsible Manager for “Coronavirus (Scotland) Act 2020: Determining the effects of the coronavirus on an authority’s ability to respond to requests” is the Head of Enforcement
    - the Responsible Manager for Covid-19 pandemic: How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19” is the Head of Corporate Services
  - (ii) both are to be published in our Guide to Information and also on the Covid-19 webpage
  - (iii) the document control sheets have been completed as far as is currently possible for both documents – a short review period has been suggested for each of these documents..

## Consultation and Communication

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23. The documents were revised by the DHOEs in conjunction with the HOE and the HOCS. The HOPI and members of the P&I team have commented on the documents and their comments have been taken into account.

## Publication

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24. We recommend that this committee report and the attached papers are published in full.