

Impact of Covid-19 on Freedom of Information in Scotland

Insights and reflections

Scottish Information Commissioner



Scottish Information
Commissioner

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Message from the Commissioner

These are not the circumstances in which I imagined laying my first Special Report as Scottish Information Commissioner. At the beginning of my term, I could not have foreseen that during my tenure there would be a time of such disruption, worry, fear, stress, and personal loss for so many. At the time of writing, vaccines have just begun to be administered, and although there is clearly a long way to go, it brings hope that the beginning of the end of the pandemic has arrived.



Earlier this year, as the full impact of Covid-19 began to hit Scotland, it became clear that, as with so many other areas, the pandemic would have an impact on Freedom of Information (FOI) practice, and possibly also performance. Across Scotland, as national restrictions on our normal way of life were introduced, public authorities closed premises and their staff faced unprecedented challenges in working from home (often at short notice and without full access to office systems), while also possibly managing caring responsibilities, self-isolation, shielding and, in some cases, sickness and the loss of loved ones.

It was equally clear that transparency, enabled by FOI, was an important part of the response to the public health crisis.

At times such as these, information, and the right to seek and receive it, have never been more important. The pushing out of information to the public has been key in governments' attempts to control and mitigate the impact of the pandemic.

In addition to proactive publication, inevitably we all have questions about the decisions being made by our governments and public services, and never more so than at a time when those decisions, sadly, may mean the difference between life and death, or impact jobs and personal liberties. That is why it is so vital that Scotland's law ensures everyone has a right to seek information from public authorities and – with only very few, limited exceptions – to receive it.

FOI is an essential part of an effective response to the pandemic, and must remain a priority. Sharing of information can help save lives.

I considered it to be important to collect data on the impact of the pandemic on FOI, to monitor how this developed, and to disseminate the findings. I therefore introduce my initial Special Report on the Impact of Covid-19 on FOI in Scotland, to share insights and reflections on an unprecedented year.

A handwritten signature in black ink, appearing to read 'Daren Fitzhenry'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Daren Fitzhenry
Scottish Information Commissioner

Executive summary of findings

- The pandemic has undoubtedly had an impact on FOI in Scotland. Public authorities told us that, due to Covid-19, they experienced reallocation of resources, closure of premises, limited access to necessary systems, staff shortages and absence of key staff, as well as other Covid-19 related factors, which caused responses to take longer. However, the impact does not appear to be as significant as some may have feared.
- Emergency legislation temporarily extended the maximum timescale for responding to FOI requests and reviews¹ from 20 to 60 working days. While relied on in a number of cases, this did not become the norm. During the period when the extended timescales were in force, 67% of initial requests and 71% of review requests were still responded to within 20 working days.
- Where delays did occur as a result of the pandemic, the most common reason given by public authorities was the reallocation of FOI resources. This underlines the importance of properly resourcing the FOI function.
- The power granted to me as Commissioner to find that a public authority did not fail to comply with its statutory duties, despite missing the maximum deadline, has not yet been used, despite its consideration in a number of cases.
- In the early stages of the pandemic, FOI activity was reduced, with request volumes across Scotland dropping by 39% compared to the previous quarter. There was no evidence of a general influx of Covid-related requests at that time. Since July 2020, there has been a return to more normal levels of FOI activity, with some authorities reporting higher than usual numbers of requests in the latter part of 2020.
- For authorities which have not yet returned their FOI staffing levels to pre-pandemic levels, this will continue to cause difficulties for them in maintaining their FOI performance and meeting the information needs of the public, whether through proactive publication or responding to requests.
- Authorities which have deprioritised their FOI function risk damaging not only their FOI performance but also the corresponding public trust in their organisations if FOI structures and resource are not restored.
- Public authorities generally took a proactive approach to publication of information about their responses to the pandemic. 83% proactively published information about their Covid-19 response and 39% indicated they were publishing more as a result of the pandemic.
- This approach to publication may, to some extent, have contributed to the initial reduction in request volumes. This highlights the importance of communicating clearly about change, and the role that a modernised proactive publication duty should have in the future.
- In the cases where I have issued decisions about compliance with FOI timescales during the pandemic, the focus has been on the need to respond promptly to requests – whatever the maximum timescale in force at the time the request was handled – as well as the need for authorities to be on top of the changes to FOI legislation and to continue to give FOI the prioritisation it requires and deserves.

¹ Requests for authorities to review their handling of FOI requests are known as review requests.

Introduction

In April 2020, in response to the Covid-19 pandemic, the Scottish Parliament passed the Coronavirus (Scotland) Act 2020 (the Coronavirus Act). It was emergency legislation which, among other things, temporarily altered the maximum timescales for responding to FOI requests.

This report considers how FOI law, practice and performance changed during the pandemic and provides insights into the impact that those changes, and the effects of the pandemic, have had on FOI to date. It also reflects on what we can learn from this experience as FOI continues to develop, and how my office will use these insights to guide our work moving forward.

The findings are split into three parts:

- (i) Part 1: the period during which FOI response timescales were extended (i.e. 7 April to 26 May 2020);
- (ii) Part 2: Quarter 1 of 2020/21 (i.e. 1 April to 30 June 2020); and
- (iii) Part 3: Quarter 2 of 2020/21 (i.e. 1 July to 30 September 2020).

It is important to acknowledge, however, that the pandemic is far from over, and its full impact on FOI, just as in many other areas, is still unknown. Recent changes to the Scottish Government's approach to the management of the pandemic, and the imposition of increased restrictions in many parts of the country, have shown that we are not on a linear path to recovery. This report is therefore principally an analysis of the impact of the pandemic on FOI from March until September 2020, and it is intended that more analysis will follow, examining the further impact of the pandemic on our initial findings.

Sources

The following sources have been consulted in researching the impact that the pandemic has had on FOI in Scotland:

- (i) quarterly statistics collected from Scottish public authorities via my statistics portal²;
- (ii) an additional survey of authorities in respect of the period during which the extended timescales were in force, i.e. 7 April to 26 May 2020;
- (iii) volumes of appeals made to my office;
- (iv) relevant decision notices I have issued relating to the legislative changes and compliance with timescales during the pandemic; and
- (v) information provided as part of the ongoing intervention into the Scottish Ministers' FOI practice and performance.

² Published at <https://stats.itspublicknowledge.info/>

Background

Coronavirus (Scotland) Act 2020³ and Coronavirus (Scotland) (No.2) Act 2020⁴

On 7 April 2020, the Coronavirus Act came into force, and made a number of temporary changes to the Freedom of Information (Scotland) Act 2002 (FOISA):

- (i) The maximum timescale within which Scottish public authorities had to respond to requests was extended from 20 to 60 working days (although authorities were still required to respond “promptly”).
- (ii) The maximum timescale within which Scottish public authorities had to respond to requests that it review its initial handling of an FOI request was extended from 20 to 60 working days (although, again, authorities were still required to respond “promptly”).
- (iii) The Scottish Ministers were given the power to extend the FOI response periods by up to 40 additional working days, in certain circumstances. I had to be consulted in relation to any use of this power, and the power could not be used to extend response times for Ministers themselves. This power was never used.
- (iv) I was given the power to find in my decisions that a Scottish public authority had not failed to comply with FOI duties if I was satisfied that the failure was due to the effect of coronavirus on that authority, and that this failure was reasonable.
- (v) Authorities were given the express power to issue notices electronically. This allowed me, for the first time, to issue my decisions by email rather than having to post hard copies.

The amended provisions were initially due to expire on 30 September 2020, although the Coronavirus Act also gave Ministers the power to extend the lifespan of changes if necessary.

The amendments applied to FOISA only. In particular, there was no change to the Environmental Information (Scotland) Regulations 2004 (the EIRs).

However, the Scottish Parliament later reviewed and amended the emergency legislation. On 27 May 2020, the Coronavirus (Scotland) (No.2) Act (the Coronavirus No.2 Act) came into force, revoking or amending a number of the changes that had been made. Accordingly, the provisions as enacted by the Coronavirus Act only applied from 7 April to 26 May 2020.

Current legislative status

The Coronavirus No.2 Act is, at the time of writing, still in force. The current legislative position is that:

- (i) Requests for information and requests for review must be responded to promptly, and in no more than 20 working days.
- (ii) The 20 working day limit applies to requests that had been received but not responded to before 27 May 2020 – when the amendments in the Coronavirus No.2 Act took effect – as well as to requests received on or after 27 May.

³ <https://www.legislation.gov.uk/asp/2020/7/contents>

⁴ <https://www.legislation.gov.uk/asp/2020/10/contents>

- (iii) Where a response to a request was issued in the period 7 April to 26 May 2020, this will be determined in accordance with the 60 working day maximum limit that was in force at that time (although authorities are still required to respond “promptly”).
- (iv) I have the power to decide that a Scottish public authority has not failed to comply with FOISA by failing to respond to a request within the relevant maximum timescale, if I am satisfied that the failure to respond on time was:
 - (a) due to either the effect of the coronavirus on that authority or due to the authority acting under the 60 working day timescale when it was in force (7 April to 26 May inclusive); and
 - (b) reasonable in all the circumstances. In considering what is reasonable, the primary consideration is the public interest in responding promptly.
- (v) Scottish Ministers must report specified information to the Scottish Parliament, every two months during the lifespan of the Coronavirus Act, about their responses to requests for information.
- (vi) Scottish public authorities can issue notices relevant to FOI electronically, which allows me to continue to issue decisions by email rather than having to post hard copies.

These new provisions were initially due to expire on 30 September 2020, but in September 2020 this was extended to 31 March 2021 (by The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020⁵). They can be extended further if necessary, and specific provisions may be terminated early if appropriate.

FOI policy in Scotland before the pandemic

Before the pandemic struck, the future shape and development of FOI in Scotland were under discussion. The Scottish Parliament’s Public Audit and Post-Legislative Scrutiny Committee had concluded its post-legislative scrutiny of FOISA, and in its report⁶, published on 19 May 2020, made a number of recommendations about how FOISA could be strengthened and improved.

The Scottish Ministers had begun their most recent consultation on extending FOI to cover new bodies: contractors providing services on behalf of public authorities. Once responses have been analysed further, and candidates for coverage are identified, it is anticipated that targeted consultation will follow.

I have been mindful of both of these developments, as well as pre-pandemic FOI practice in Scotland generally, in presenting my insights and reflections into the impact that the pandemic has had on FOI, and how FOI policy in Scotland may develop in the future.

⁵ <https://www.legislation.gov.uk/ssi/2020/299/contents/made>

⁶ <https://digitalpublications.parliament.scot/Committees/Report/PAPLS/2020/5/19/Post-legislative-scrutiny--Freedom-of-Information--Scotland--Act-2002>

How the Scottish Information Commissioner responded to the pandemic

My office took a number of steps in response to the pandemic. These included:

- **Engaging with the Scottish Parliament on the proposed Coronavirus (Scotland) Bill.** We produced a briefing for MSPs⁷ on the FOI provisions within the draft Bill (within 24 hours of first seeing it), on the day before it was to be introduced to Parliament.
- **Creating new guidance for both public authorities⁸ and the public⁹** on the changes brought about by the new legislation, and amending this as the legislative position changed.
- **Launching our Covid-19 Information Hub¹⁰** on 16 April 2020. Via this Hub, we published our briefing for MSPs, our new guidance, and other resources about the operation of FOI and our own services.
- **Conducting additional research**, via a survey of public authorities, into the extent to which and ways in which the pandemic had affected FOI practice.
- **Applying and adapting our regulatory approach** to take account of the circumstances, particularly in relation to interventions work with public authorities. For example, in the ongoing intervention into the Scottish Ministers' FOI performance, I have urged the Scottish Ministers to direct immediate attention towards restoring their FOI function, directing focus towards the following areas initially:
 - (a) restore trained FOI staff to key FOI roles;
 - (b) implement urgent improvements to ensure FOI record-keeping is robust, appropriate and effective;
 - (c) ensure that appropriate training, development and support measures are in place for staff involved in the handling of requests;
 - (d) restore resource within the Scottish Ministers' FOI Unit to ensure that the emerging benefits from new triage, advice and training responsibilities are protected; and
 - (e) consider whether internal Key Performance Indicators can be introduced in relation to the time taken to respond to both routine and sensitive / exceptionally complex cases.

I have also opened several new interventions since the pandemic began, specifically looking at authorities¹¹ for whom issues had emerged before the pandemic, but appear to have been exacerbated by it. The approach we have taken is to explore what the issues are with the authority and offer support to overcome them, taking account of the circumstances in setting appropriate targets and timescales. Some of the areas recommended in the

⁷ <https://www.itspublicknowledge.info/home/News/20200401.aspx>

⁸ <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Covid-19AuthorityGuidance.aspx>

⁹ <https://www.itspublicknowledge.info/YourRights/Covid-19.aspx>

¹⁰ <https://www.itspublicknowledge.info/home/News/Covid-19InfoHub.aspx>

¹¹ I have opened new Level 2 interventions with the Scottish Police Authority, the University of Edinburgh and the Scottish Ambulance Board. I have also recently agreed to open Level 1 interventions for a number of other authorities, highlighting their performance and enquiring further about the specific effect of the pandemic on their FOI function.

Scottish Ministers intervention as above will similarly be areas which these authorities ought to prioritise.

We have also adapted our approach to investigating appeals, and made changes to our Investigation Handbook¹² in June and August 2020. These included changes to meet the new legislation, to record delays caused to investigations as a result of Covid-19, and to recognise Covid-related reasons for accepting appeals that were made late.

- **Proactively publishing information about our response to the pandemic**, such as our communications to public authorities about the changes to FOI law, legal advice received by the Commissioner on the interpretation of the legislative changes, and responses we issued to FOI requests made to us about the pandemic¹³.
- **Holding authorities to their FOI duties**, in particular the need to respond to FOI requests “promptly”, despite the extended maximum timescales, as demonstrated in the decision notices and interventions mentioned in this report.

¹² Available at <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx#procedures>

¹³ All available at <https://www.itspublicknowledge.info/home/AboutSIC/Covid-19PublishedInformation.aspx>

Impact of Covid-19 on FOI – Part 1: 7 April to 26 May 2020

Background to supplementary survey

I collect statistics from public authorities every quarter to monitor how FOI is being used across Scotland, and how Scottish public authorities are complying with their Freedom of Information (FOI) duties. Statistics collected include how many requests have been received, how many have been responded to on time, whether information has been disclosed in response, and which exemptions have been applied by authorities to withhold information.

In addition to the usual quarterly statistics return for Quarter 1 of 2020/21 (April to June 2020), I asked authorities to complete a supplementary survey. The purpose of that survey was to gather data on the impact that the pandemic (and in particular the extended timescales introduced by the Coronavirus Act) had had on request response times and proactive publication, as well as asking questions about volumes of requests relating to the pandemic and how authorities' responses to the pandemic affected their FOI function.

The survey was completed by authorities in respect of the period from 7 April to 26 May 2020 (i.e. the period during which the extended timescales were in force).

Summary of survey key findings

Response times: Despite concerns that Covid-19, and specifically the increase to the maximum timescales set out in the Coronavirus Act, would have a significant impact on authorities' response times, initial findings are encouraging, showing that the majority of responses kept to the 20 working day timescale for responding to requests and reviews. Responding within 60 working days did not become 'the norm'.

Reasons for delays: Where requests did take longer, the main reason given for this was the re-allocation of resources due to Covid-19. Closure of premises due to Covid-19 and limited access to necessary systems as a result of Covid-19 were the next most common reasons cited, followed by staff shortages caused by Covid-19 and absence of key staff as a result of Covid-19.

Pandemic-related requests: Authorities do not appear to have received an influx of requests about Covid-19 in the period covered by the survey.

Proactive publication: Most authorities proactively published information about their Covid-19 response. 39% of respondents said they were publishing more information.

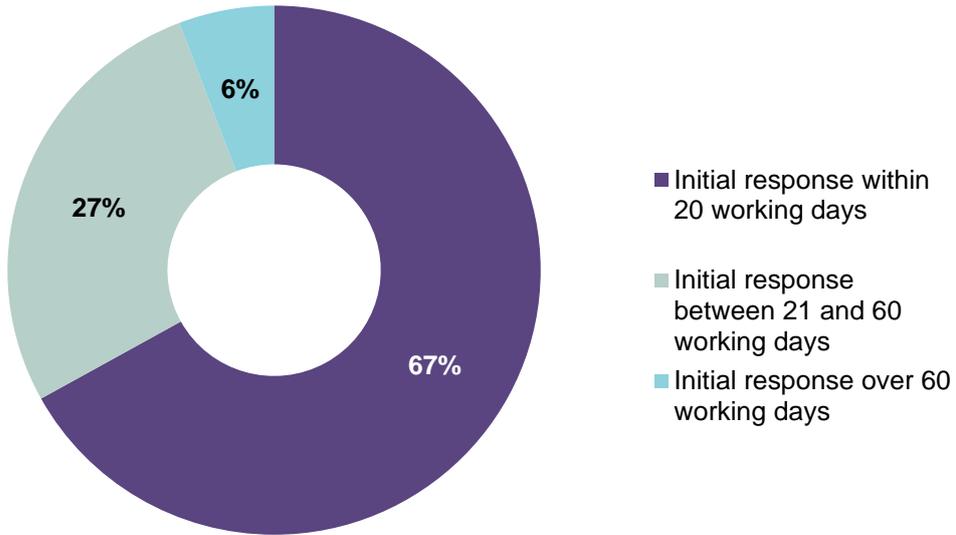
Response times

What impact did Covid-19 have on response times for FOI requests and reviews?

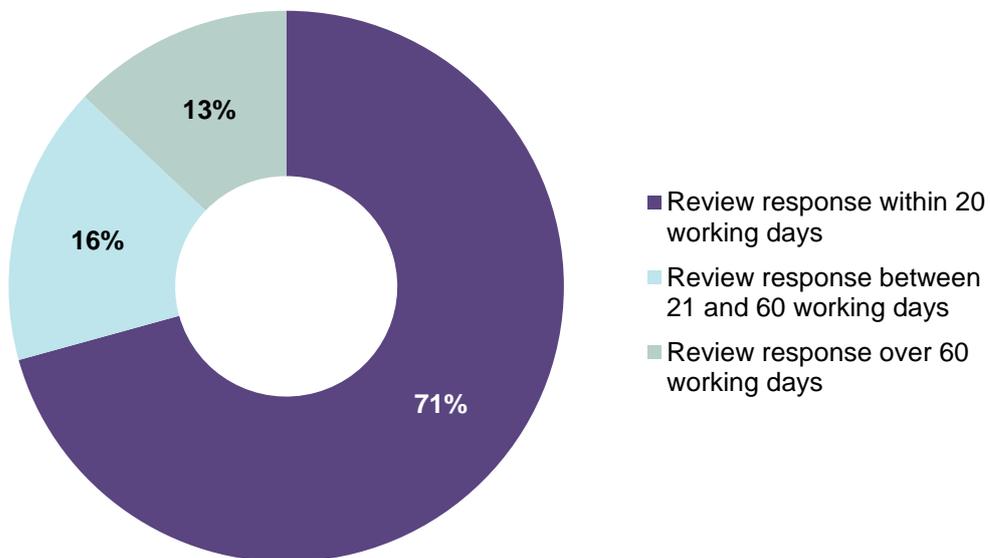
Most requests and review requests were responded to within 20 working days, despite the timescales being extended.

Two thirds (67%) of requests, and more than two thirds (71%) of review requests, received a response within the normal statutory timescales of 20 working days. 27% of initial responses, and 16% of review responses, made use of the extended deadline. 6% of requests at initial stage were responded to in over 60 working days, and 13% at review.

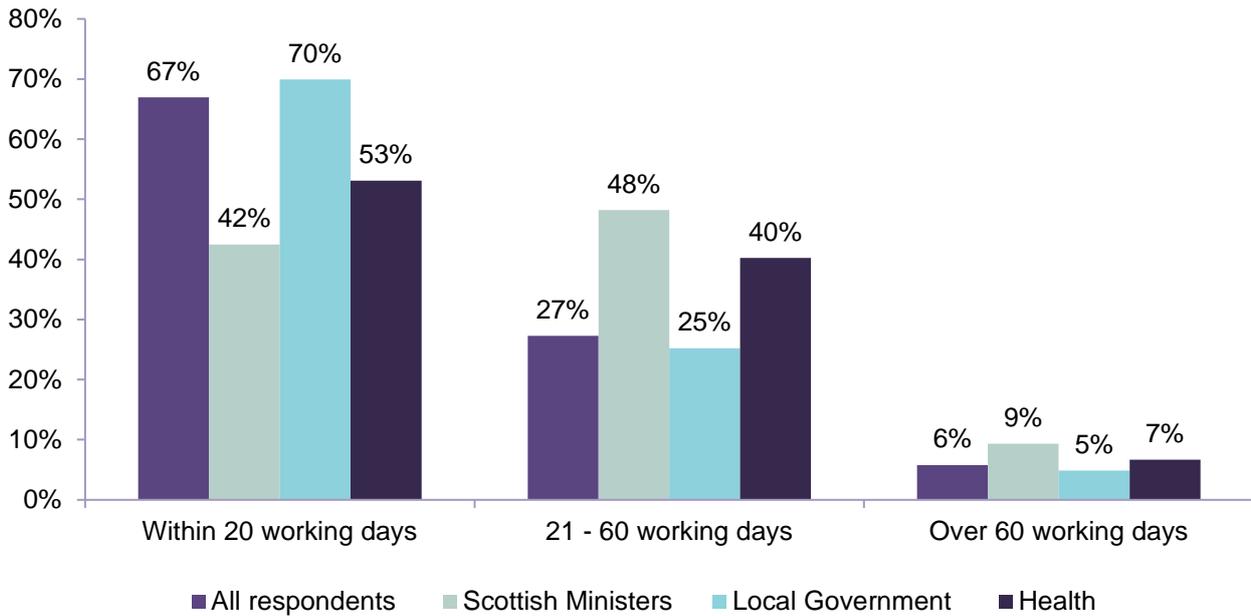
Initial response times 7 April - 26 May 2020



Review response times 7 April - 26 May 2020



Initial response times 7 April - 26 May 2020 by sector



When responding to requests at the initial stage, the Scottish Ministers and the health sector were significantly more likely to use the extension than others.

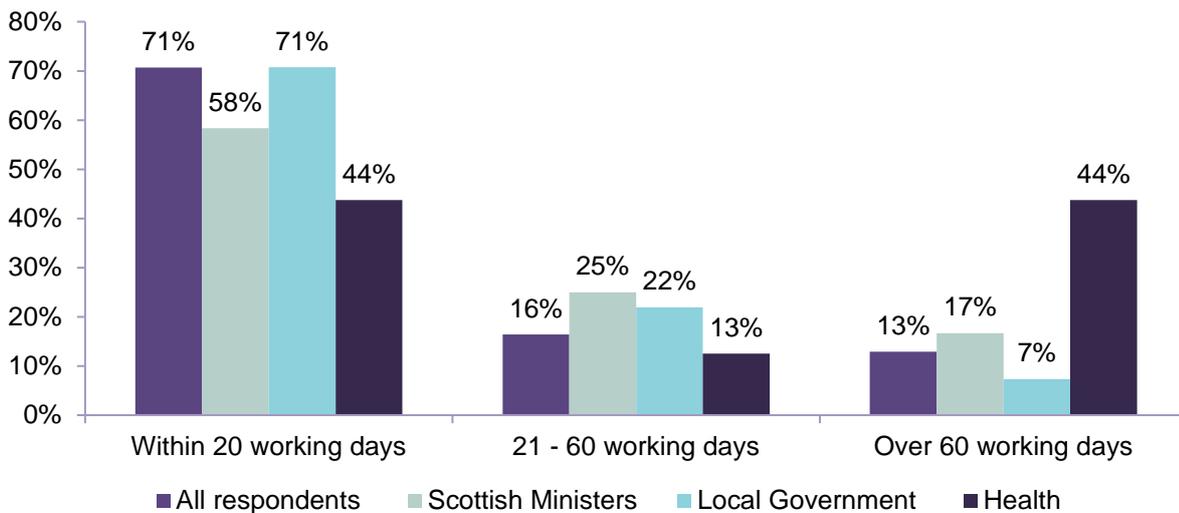
On 10 September 2020, I published a second progress report on the ongoing intervention to improve Scottish Ministers' FOI practice and performance. The report shows that measures taken by the Ministers up to March 2020 contributed towards a significant improvement in FOI performance during 2019/20, including a sustained improvement in 'on-time' responses to requests.

However, during April and May 2020, performance fell dramatically as the Ministers diverted resources in response to the pandemic. The extent and speed of the decline raises significant concerns about the sustainability of improvement work carried out to date, and I have urged the Ministers to direct immediate attention towards restoring their FOI function, and recommended areas for priority focus¹⁴.

The health sector had a larger proportion of review responses that took over 60 working days compared to other sectors. However, the figures need to be read in context: this sector is much smaller than others, with only 22 authorities forming the group. Review request numbers in this group were also very small, with a total of only 16 review responses sent between 7 April and 26 May. While still clearly disappointing, the 44% of review responses sent after 60 working days therefore represents just 7 responses, sent by 3 authorities.

¹⁴ The full report and recommendations can be read at <http://www.itspublicknowledge.info/SGIntervention>.

Review response times 7 April - 26 May 2020 by sector



Why did responses take longer?

The survey issued to public authorities asked two separate questions about the reasons for responses taking longer than normal. Firstly, they were asked to tell us the main reasons for responses to FOI requests or review requests being issued during this period (7 April to 26 May 2020) **in more than 20 working days but within 60 working days**. Separately, they were asked for the main reasons for responses to FOI requests or review requests being issued during this period in **more than 60 working days**.

Reasons for using extended deadline

The most common reason for authorities using the extended deadline (i.e. for taking more than 20 but no more than 60 working days to respond to an FOI request) was that resources had been reallocated by the authority due to Covid-19. 69% of authorities which reported using the extended deadline cited this as a reason for doing so.

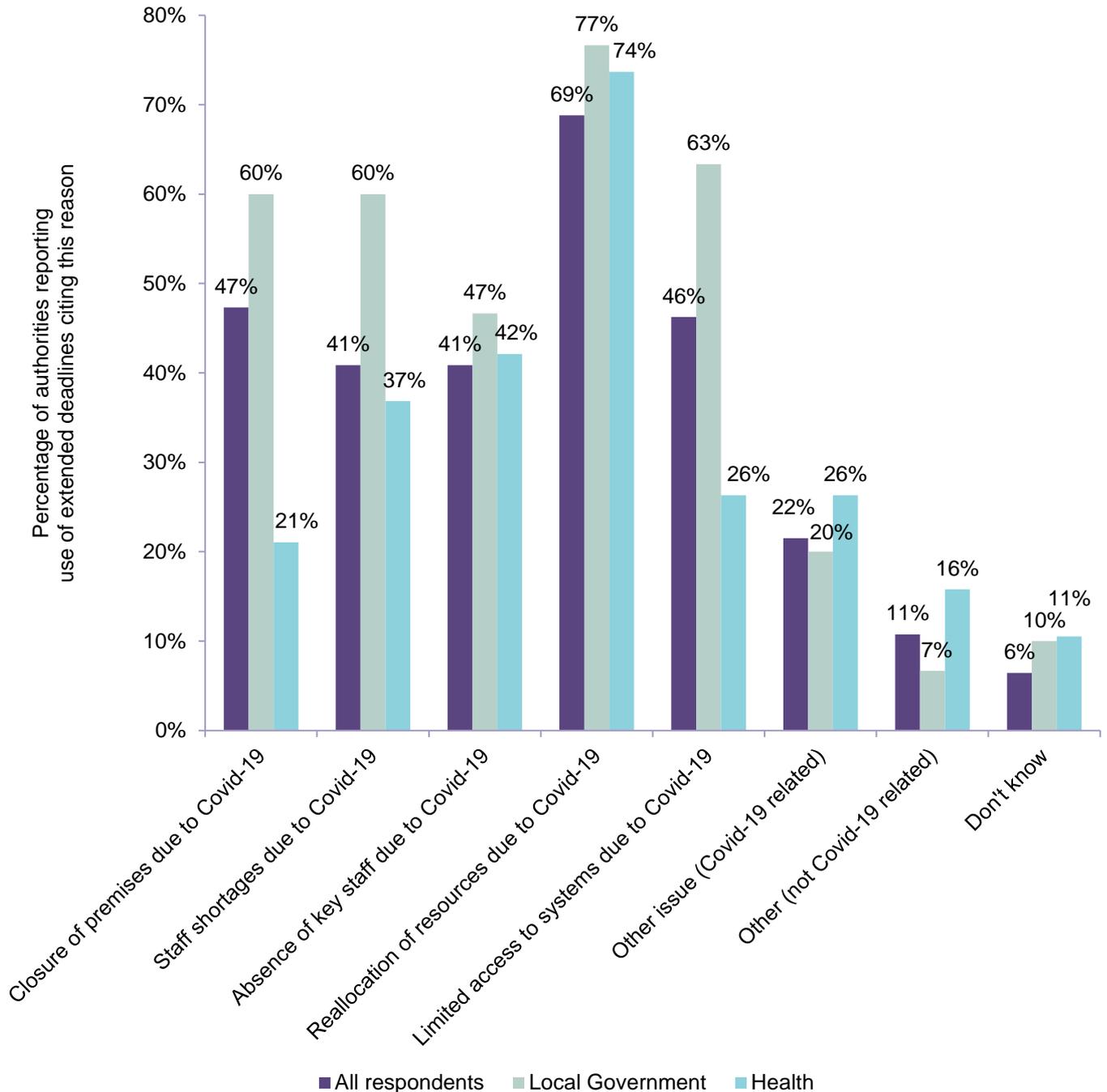
Closure of premises due to Covid-19 and limited access to necessary systems as a result of Covid-19 were the next most common reasons cited (respectively, 47% and 46% of authorities reporting use of the extension cited these), followed by staff shortages caused by Covid-19 and absence of key staff as a result of Covid-19 (each cited by 41% of authorities which reported use of the extension). 19% of respondents cited "Other issue (Covid-19 related)" and 13% cited "Other issue (not Covid-19 related)". 6% chose "Don't know"¹⁵.

By breaking down responses by sector, it becomes apparent that more local government respondents cited closure of premises, staff shortages and limited access to systems than respondents from other sectors. For the health sector, it appears that reallocation of resources was the most common reason for relying on the extended deadline.

The Scottish Ministers told us that the reasons for using the extended deadline were: closure of premises, staff shortages, absence of key staff and reallocation of resources.

¹⁵ N.B. these figures do not total to 100% because authorities were able to select as many of the reasons from the list as they wished, in order to give the clearest indication of the factors that led to the pandemic having an impact on FOI performance.

Most common reasons for using extended deadline



Reasons for late responses

The most common reasons cited for responses being sent in more than 60 working days were very similar to those for use of the extended deadline. The most common reason cited was reallocation of resources due to Covid-19: 65% of authorities which reported sending responses in more than 60 working days cited this reason.

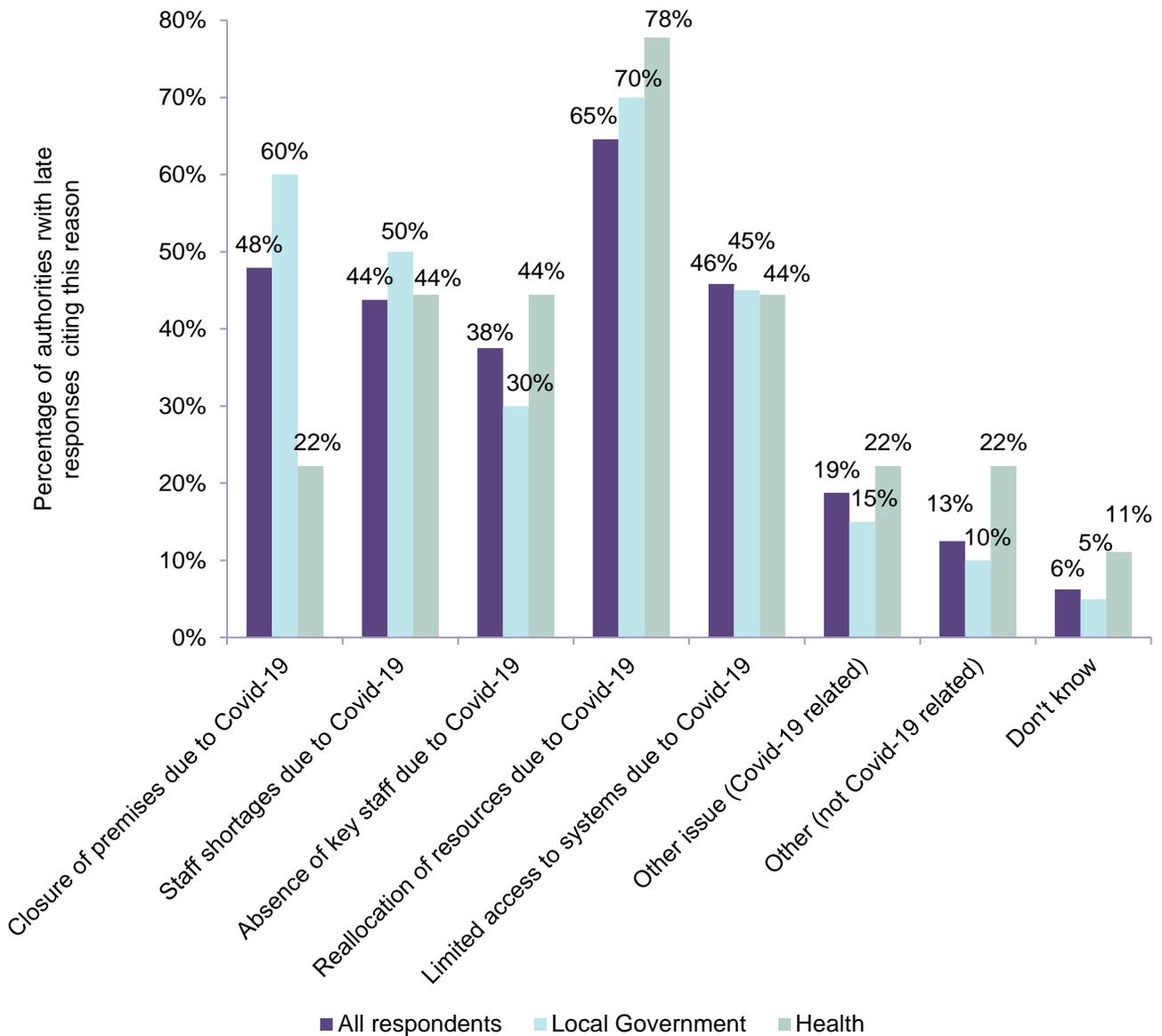
The other reasons for issuing responses in more than 60 working days were:

- Closure of premises due to Covid-19 (48%)
- Limited access to necessary systems due to Covid-19 (46%)

- Staff shortages due to Covid-19 (44%)
- Absence of key staff due to Covid-19 (38%)
- Other issue (Covid-19 related) (19%)
- Other (not Covid-19 related) (13%)
- Don't know (6%).

Unsurprisingly, health sector authorities were less likely to report closure of premises as a reason contributing to lateness. The Scottish Ministers told us that the reasons for their responses being sent after more than 60 working days were: closure of premises, staff shortages, absence of key staff and reallocation of resources.

Most common reasons for late responses



Volumes of information requests related to Covid-19

Did authorities receive extra FOI requests about Covid-19 and their responses to it?

Most authorities reported receiving no Covid-19 related requests in the initial period between 7 April and 26 May 2020. However, for the health sector, most found that between one quarter and one half of requests they received (26-50%) were about Covid-19, with all health sector respondents reporting at least one request or more related to Covid-19.

For local authorities, most reported that up to one quarter of their requests (1-25%) related to Covid-19. The Scottish Ministers selected "Unsure" in response to this question.

Proportion of Covid-19 related requests*

Proportion of requests relating to Covid-19	Type of respondent		
	All	Local government	Health
0%	36%	14%	0%
1% to 25%	31%	57%	26%
26% to 50%	15%	19%	37%
51% to 75%	4%	3%	16%
76% to 99%	3%	0%	11%
100%	6%	0%	0%
Unsure	6%	8%	11%
Total	100%	100%	100%

* excluding authorities which responded to no requests or reviews and selected "0%"

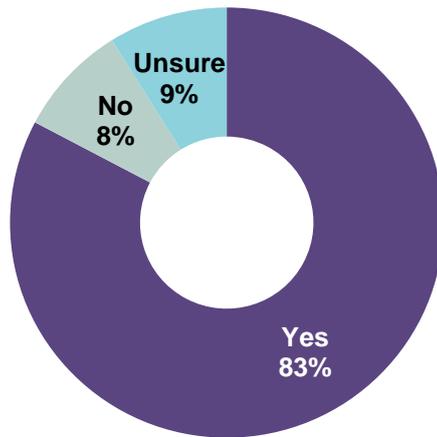
Proactive publication

How did Covid-19 affect proactive publication of information?

83% of authorities had proactively published information about their Covid-19 response. Only 8% said they had not.

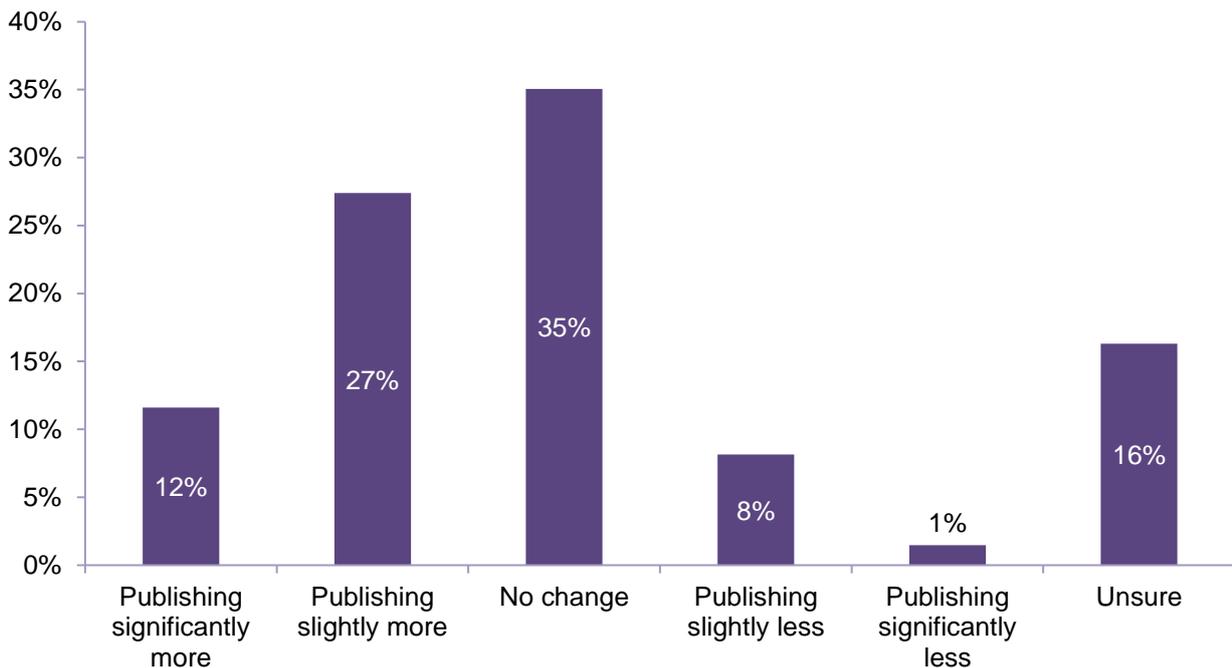
This pattern was mirrored in analysis by sector: 86% of local government respondents confirmed they had published information about their Covid-19 response. The figure was lower in health sector respondents (68%), but only 9% said they had not published such information – more respondents in the health sector were unsure (23%, compared to 9% of all respondents and 5% of local government respondents).

Has your authority proactively published information about Covid response?



39% of respondents indicated they were publishing more information, with only 9% saying they were publishing less. 35% said there was no change to amount of information they published.

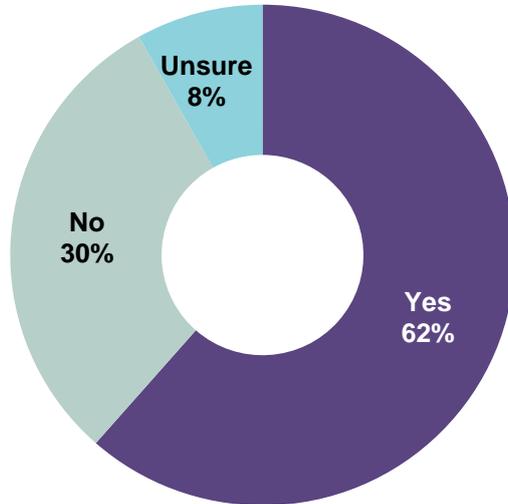
Amount of information published



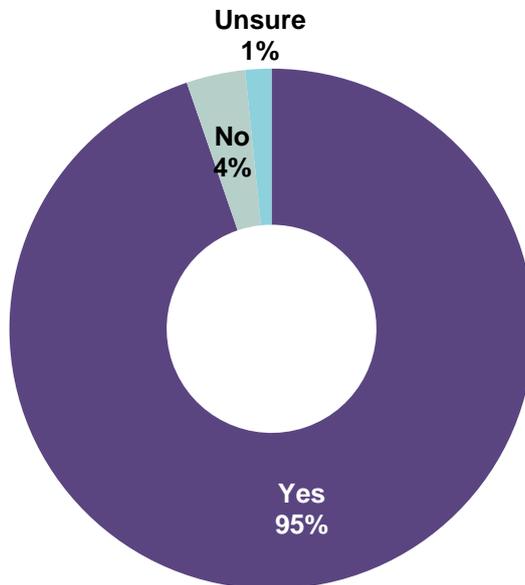
There was greater uncertainty in the health and local government sectors, with the majority still reporting either no change or an increase in publication. 62% of authorities had a dedicated webpage for information about Covid-19 impact. 30% did not.

Of those that did, 95% made the dedicated page accessible from the homepage. We know that good proactive publication can lead to fewer requests received, which may have been one of the factors here. As noted later in this report, both appeal numbers received by my office, and request volumes over the quarter, were down.

Does your authority have a dedicated webpage for information about Covid-19 impact?



If yes, is dedicated page accessible from homepage?



Impact of Covid-19 on FOI – Part 2: Quarter 1 of 2020/21 (April to June 2020)

Reduction in FOI activity (requests and appeals to the Commissioner)

The usual statistics returned by authorities for the whole of the quarter April to June 2020 showed that the total number of FOISA requests received over the quarter (10,441) was lower than both the previous quarter (17,027¹⁶), and the same quarter of the previous year (17,631). This represents a 39% drop in requests received compared to the previous quarter.

Similarly, there were far fewer review requests received in Quarter 1 of 2020/21 than the previous quarter (202 compared to 342¹⁷), a continuation of a downward trend throughout 2019/20.

My office also saw a decrease in appeals received (if a requester remains unhappy after asking the authority to carry out a review, the requester can appeal to me and I will decide whether the authority complied with FOISA). I received 60 appeals in Quarter 1 of 2020/21, compared to 114 in the previous quarter¹⁸.

These statistics provide important context for the additional information provided via the survey.

Sudden repeal of extended maximum response timescales

The Coronavirus No.2 Act, which revoked the extension to FOI timescales, was introduced and passed by the Scottish Parliament in a short time frame. It was introduced on 11 May 2020 and came into force on 27 May 2020. The period between the Bill being passed on 20 May 2020 (when the final terms of the change in FOI timescales could be known) and its coming into force was just 5 working days.

I am aware that this meant authorities did not have much time to prepare for the change from the 60 working day maximum timescale back to 20 working days. Staff involved in handling requests will have been working within the framework of the extended timescales and it is likely that the suddenness of the change will have impacted on compliance with timescales in the days and weeks following repeal (from 27 May 2020).

For authorities which were operating within the 60 working day maximum timescale, and possibly already with a backlog of requests from the earlier part of the pandemic and sudden closure of their premises, this created a “cliff-edge”. In a very short space of time, all of the requests or reviews they were handling as at 27 May 2020, including those which were already older than 20 working days, became subject to the 20 working day maximum timescale again.

However, the impact of the sudden change back to 20 working days should have been mitigated by authorities continuing to respond to all requests “promptly”, even when the extended timescales were in force, as was at all times their statutory duty.

Within my own office, we experienced the impact of this change. We had one FOI request open at 27 May 2020, which required access to our office-based systems to locate the requested

¹⁶ Data downloaded on 21 August 2020. A small number of authorities in the local government, education and health sectors had not submitted at the point of data download.

¹⁷ Data downloaded on 21 August 2020.

¹⁸ However, as discussed below, this dip in appeal volumes was short-lived, with a return to ‘normal levels in Quarter 2.

information. By the time we were able to access those systems and carry out searches, the 60 working days maximum had reverted to 20 working days, resulting in the response being sent late.

The Scottish Ministers reported that while their 'on time' response rate in April 2020 was 90%, in May 2020 this dropped to only 58% of requests responded to on time. The May 2020 data included 16 cases which would have been classed as late were it not for the timescale extension introduced by the Coronavirus Act. The Scottish Ministers' review responses were similarly affected.

There is other evidence from appeal cases considered by me of the ways in which authorities responded to the sudden change back to the 20 working day maximum timescale.

In one appeal, discussed in more detail below, a university responded to a request received on 28 May 2020 – just after the maximum timescales reverted to 20 working days – late (i.e. it took longer than 20 working days to respond). The university's submissions in the appeal give some insight about how it perceived and responded to the change back to normal maximum timescales.

The university explained its approach to request handling at the time the timescale extension was repealed: it switched most of its attention to answering requests which had come in during the period when the 60 working day timescale was in place, in an effort to provide a response within 20 working days, even though this would negatively impact new requests received.

In addition, the university indicated that the extension of FOISA timescales had led to it switching attention away from FOI and towards complex data protection issues that had arisen during the pandemic.

For the reasons set out in more detail in the 'Commissioner's Decisions on response timescales during the pandemic' section below, and in the published Decision Notice¹⁹, I found that the university failed to comply with timescales set out in FOISA. Nonetheless it is instructive to see the approach taken by the authority.

¹⁹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000834.aspx>

Impact of Covid-19 on FOI – Part 3: Quarter 2 of 2020/21 (July to September 2020)

Return to ‘normal’ FOI request and appeal activity levels

Data collected from Scottish public authorities for July to September 2020 showed a return to more normal levels of FOI request activity. There were 17,101 FOI requests made in Quarter 2 of 2020/21, compared to the 10,441 in Quarter 1 and 18,483 in the same quarter of the previous year.

There were 461 review requests compared to the 202 in the previous quarter, and 422 in the same quarter in the previous year.

The volume of appeals received by my office also returned to more normal levels, with 108 appeals received in Quarter 2 of 2020/21.

	Q1	Q2	Q3	Q4	Total year to date
2020/21	60	108	-	-	168
2019/20	154	125	101	114	494
2018/19	139	112	132	177	560

Although request numbers have increased, a number of the pressures have remained, especially in relation to the reallocation of FOI resource away from FOI duties.

This issue, and its continuing impact on FOI performance, was raised in my recent progress report into the intervention to improve the Scottish Ministers' FOI practice and performance²⁰. My strong advice to the Scottish Ministers, and other authorities which are still working with reduced FOI staffing levels – which I have repeated at the annual Holyrood FOI Conference and in my recently launched newsletter – is to restore trained FOI staff to key FOI roles.

Some authorities are already indicating that request numbers for the latter part of 2020 have climbed to higher than normal levels. Authorities which have not returned their FOI resource to pre-pandemic levels will struggle to cope with any increase in request volumes.

I also note the increase in review requests over this period. We do not have data about the reasons requesters sought reviews. It is possible that this could be related to dissatisfaction regarding timescales, but this cannot be known from the data currently available. I will monitor the reasons provided for requesters making appeals to me over the coming months to check for any notable trends which may explain the increase.

²⁰ Available at <https://www.itspublicknowledge.info/SGIntervention>.

Commissioner's decisions on response timescales during pandemic

To date, I have not used the powers given to me in the Coronavirus Act and the Coronavirus No.2 Act to find that a Scottish public authority complied with FOI duties despite a failure to meet an FOI deadline because the failure was due to the effect of coronavirus on that authority, and was reasonable. However, there have been two noteworthy decisions issued which look at the issue of response timescales during the pandemic, and I anticipate that I will be determining a number of appeals dealing with this issue in the course of the next few months.

Decision 103/2020

It is important to draw attention to the requirement in FOISA that an information request must be responded to promptly, and that the maximum timescale provided by FOI law is just that – a maximum. It is therefore possible to find that, even where an authority responds to a request for information within the maximum timescale, it has nonetheless failed to comply with the law by not responding promptly. In Decision 103/2020²¹, I found that NHS Highland failed to respond to a review request promptly, despite sending it within the 60 working day maximum timescale that was in place at the time.

The initial request was made in December 2019 and was not responded to. The requester asked for a review on 30 January 2020. A review response was provided on 13 April 2020. At the time NHS Highland responded to the review, the applicable timescale was 60 working days. Although the authority responded within 60 working days, having considered whether the response was provided promptly, as is also required by section 21(1) of FOISA (as amended by the Coronavirus Act), I concluded that it was not.

The Decision Notice reads:

“[The review response] clearly was not “prompt” by the time it was issued, and the effects of the pandemic can reasonably be said to have had little, if any, impact on that lack of promptness. In all the circumstances, the Commissioner finds that NHS Highland did not respond to the Applicant’s requirement for review promptly and in that respect failed to comply with section 21(1) of FOISA.”

Decision 144/2020

In Decision 144/2020²², the request which became the subject of the appeal was received on 28 May 2020 (after the extension had been repealed). The University of Dundee did not respond within 20 working days and the requester asked for a review on 26 June 2020. The university provided its review outcome on 5 August 2020. One of the points made by the requester on appeal was dissatisfaction with the time taken to respond to the request and review request.

The university explained that, at the time the timescale extension was repealed, it switched most of its attention to answering requests which had come in during the period when the 60 working day timescale was in place, in an effort to provide a response within 20 working days. The university recognised that this had a negative impact on new requests coming in, and submitted that

²¹ The full Decision Notice is available at <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000495.aspx>.

²² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/202000834.aspx>

guidance was unclear for some time as to how the change made by the Coronavirus No.2 Act would affect what amounted to a “late” response.

The university also said that the extension of the maximum timescales created "breathing space" enabling the person responsible for answering FOI requests to switch their attention to focussing on addressing complex data protection issues that had arisen due to the pandemic.

The university only began processing the request received on 28 May 2020 after the 20 working days had passed. It considered that the combination of a department in high demand, experiencing a dramatic rise in data protection requirements and changes in the law, were significant negative contributing factors to the fact that it was unable to respond to the requester within 20 working days.

I did not exercise my discretion in favour of the authority in this case, and found that the university failed to comply with timescales set out in FOISA.

I did not accept that the university's lack of knowledge around the changes to the legislation, as made by the Coronavirus No.2 Act, was a reason for failing to comply with the appropriate timescales, particularly as guidance on the change was uploaded to my website both before (on 21 May 2020) and after (on 28 May 2020) the passage of the legislation, and was actively communicated to relevant staff members within Scottish public authorities by email on 25 May 2020 and 28 May 2020.

I also expressed concern that work to complete matters relating to data protection were given precedence over requests the university received under FOISA, which are also time-sensitive and subject to a statutory regime.

Conclusions

The pandemic has had an impact on FOI in Scotland. Public authorities told us that, due to Covid-19, they experienced reallocation of resources, closure of premises, limited access to necessary systems, staff shortages and absence of key staff, as well as other Covid-19 related factors, which caused responses to take longer. However, the impact does not appear to be as bad as some may have feared.

The extension of the maximum timescale for responses contained in the initial emergency legislation, while relied on in a percentage of cases, certainly did not lead to responding within 60 working days becoming the norm.

Where FOI delays (either late responses, or making use of the extended timescales) were caused by the pandemic, it was most commonly attributed to the reallocation of FOI resources within public authorities. This underlines the importance of properly resourcing the FOI function.

The pandemic did not (at least initially) create an influx of requests; in fact, request volumes and FOI activity in general (including appeals made to my office) reduced.

For authorities which have not yet returned their FOI staffing levels to pre-pandemic levels, this will continue to cause difficulties for them in maintaining their FOI performance and meeting the information needs of the public, whether through proactive publication or responding to requests.

Particularly in light of the sudden return to the 20 working day maximum timescale for response, and the return to more normal levels of FOI activity in July to September 2020, authorities which have deprioritised their FOI function risk damaging not only their FOI performance but also the corresponding public trust in their organisations if FOI structures and resource are not restored.

It is clear that the efforts of FOI practitioners within authorities kept FOI functioning during the initial stages of lockdown. Although some were redeployed, those who continued to work in proactively publishing information for the public and responding to their information requests did so in the face of incredible adversity. The contribution of FOI practitioners to keeping the public informed, and sharing information to help the fight against the pandemic, should not be overlooked.

Public authorities generally took a proactive approach to publication of information about the pandemic. This may, to some extent, have contributed to the reduction in request volumes. This highlights the importance of communicating clearly about change, and the role that a modernised proactive publication duty (which focuses on the public interest in information being proactively published and ensures its swift accessibility to the public) should have in the future.

In the cases where I have issued decisions about compliance with FOI timescales during the pandemic, the focus has been on the need to respond promptly to requests – whatever the maximum timescale in force at the time the request was handled – as well as the need for authorities to be on top of the changes to FOI legislation and to continue to give FOI the prioritisation it requires and deserves.

Looking forward

I anticipate that the pandemic will continue to have an impact on FOI practice for some time yet. Many authorities still do not have full access to their premises and systems, and I am aware that some FOI staff remain redeployed to other areas of the pandemic response.

The deprioritising of authorities' internal FOI infrastructure must be undone if good FOI performance is to be sustained, and it is essential that any authorities which have not already reinstated their FOI function do so now. Some of the areas recommended in the Scottish Ministers intervention for immediate attention will similarly be areas which other authorities ought to prioritise:

- (i) restoring trained FOI staff to key FOI roles;
- (ii) implementing urgent improvements to ensure FOI record-keeping is robust, appropriate and effective;
- (iii) ensuring that appropriate training, development and support measures are in place for staff involved in the handling of requests; and
- (iv) considering whether internal Key Performance Indicators can be introduced to return response times to pre-pandemic rates.

I will continue to monitor and analyse trends in the available data about FOI performance and practice, and will use the insights and reflections to guide the work of my office. This has already commenced in interventions work, for example in the intervention into the Scottish Ministers' FOI performance. It will influence other work to be taken forward over the rest of 2020/21 and into the following year, such as the issuing of new or updated guidance.

It remains to be seen what impact the good practice in proactive publication seen in April and May will have going forward. In particular, I will be examining what, if any, difference it will make to perceptions and lessons about how to present such information, and would like to see use of existing powers by the Scottish Ministers under section 60 of FOISA to enable modernisation of the statutory proactive publication duty. I have engaged with the Scottish Ministers on that point, through contact with their FOI Unit, and will continue to do so.

I will continue to monitor statistics over the coming quarters to inform next steps, and will report further on those findings.

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