



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 (the Coronavirus Act) came into force on 7 April 2020. It is due to remain in force until 30 September 2020, but this may be extended by the Scottish Ministers.
2. The Coronavirus Act¹ makes some changes the Freedom of Information (Scotland) Act 2002 (FOISA). The key provisions are as follows:
 - the maximum time for responding to a request for information (section 10 of FOISA) or a request for review (section 21 of FOISA) is extended from 20 to 60 working days.²
 - even if an authority fails to respond within 60 working days, the Commissioner may find that this was not a breach of FOISA if the failure was due to the effects of the coronavirus³ and the delay was reasonable in the circumstances.
3. This guidance looks at both of these provisions; tells authorities how the Commissioner will apply them and recommends actions authorities should take in the light of disruption caused by the coronavirus.

The new timescales

4. As noted above, the Coronavirus Act has extended the maximum time for responding to requests and requests for review from 20 to 60 working days.
5. However, it is important for Scottish public authorities to remember that, in both cases, the FOISA makes it clear that authorities must still respond promptly.
6. The Commissioner recognises that other demands on authorities as a result of the pandemic will be relevant in determining whether an authority has complied with section 10 or section 21.

¹ See Part 2 of Schedule 6 to the Coronavirus (Scotland) Act 2020:
<http://www.legislation.gov.uk/asp/2020/7/contents/enacted>

² The Coronavirus Act does not affect requests which fall within the scope of the Environmental Information (Scotland) Regulations 2004.

³ Also referred to in other Scottish Information Commissioner guidance as "Covid-19".

However, the duty to respond promptly remains a central part of FOISA and FOISA continues to have a central role in ensuring that public authorities remain accountable for decisions with profound implications for human life and well-being, the provision of vital public services and the maintenance of the economy.

Definition of “prompt”

7. The Commissioner has not issued decisions which specifically deal with the definition of “prompt” in FOISA. However, he has issued decisions⁴ which look at the meaning of the equivalent provision in the Environmental Information (Scotland) Regulations 2004. This requires responses to be given “as soon as possible”.
8. In these decisions, the Commissioner found it was reasonable for a consistent approach to be taken to the consideration of “promptly” and “as soon as possible”. The Commissioner also found common ground with the conclusions of the UK Upper Tribunal in the case of *John v Information Commissioner and Ofsted* [2014] UKUT 444 (AAC)⁵.
9. In that case, the Tribunal concluded that “as soon as possible” did not mean “immediately” – public authorities don’t only have information requests to answer. The Tribunal considered that “without delay” was a more appropriate interpretation. In determining whether a response had been made without delay, the Tribunal identified three key factors:
 - The resources the authority has available to deal with requests, bearing in mind that a balance needs to be struck between responding to requests and carrying out other core business. In *Decision 120/2016*, the Commissioner acknowledged the need to prioritise those (finite) resources to meet a range of deadlines and statutory requirements.
 - 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.
10. In *Decision 038/2017*, the Commissioner also specifically recognised the importance of taking time to get the response to the request right.
11. While it is important for authorities to respond promptly, therefore, what is appropriate in each situation must be considered on a case-by-case basis, taking account of the demands of each individual request.

The impact of the pandemic on authorities

12. 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.

⁴ *Decision 120/2016 Residents Against Turbines Scotland and the Scottish Ministers* and *Decision 038/2017 Salmon and Trout Conservation Scotland and the Scottish Ministers*

⁵ <http://www.bailii.org/uk/cases/UKUT/AAC/2014/444.html>

- Many premises are closed and significant numbers of public authority workers are working from home, potentially without access to the full range of systems they need to search to allow them to respond to information requests.
13. The Commissioner recognises that an authority's ability to respond to a request during the pandemic may be affected in some, or all, of these ways.
 14. While the Coronavirus Act is in force, the Commissioner is likely to receive applications (appeals) which ask him to determine whether a response to a specific request was prompt. (Indeed, authorities are also likely to receive requests for review asking them to consider whether their response to a request was prompt. This guidance should prove helpful in those situations.) Authorities will therefore need to provide the Commissioner with evidence as to the effects of the coronavirus on its ability to respond promptly to individual requests.

Recording issues with particular cases

15. We recommend that any authority affected by the coronavirus records the ways in which it 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.
16. Authorities should only take account of those factors which are actually relevant in the circumstances. Not all Scottish public authorities are facing a direct additional call on services as a result of the pandemic and not all are impacted significantly in their ability to respond to requests by remote working.
17. 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 promptly and, wherever possible, within the normal 20 working day response timescale.

Failure to meet extended timescales – the Commissioner's ability to take account of the impact of coronavirus

18. As noted in paragraph 2, the Coronavirus Act allows the Commissioner to decide that a Scottish public authority complied with FOISA, even if it didn't respond within the extended timescales (60 working days). While the Coronavirus Act is in force, the Commissioner is likely to receive applications (appeals) which will require him to determine whether an authority complied with Part 1 of FOISA, despite taking more than 60 working days to respond.
19. We set out some of the potential effects of the coronavirus on public authority resources above (paragraph 12). These will also be relevant when deciding whether an authority complied with FOISA, despite failing to reply in 60 working days. In considering whether he can find an authority complied with FOISA for these purposes, the Commissioner will need to know:
 - how the coronavirus affected the authority generally or how its ability to carry out its functions (including its any action it needed to take to better utilise its resources to deal with the effect of the coronavirus) prevented it from meeting the timescales and
 - why the failure to meet the timescales should be considered reasonable in all the circumstances.

20. 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.

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

- record decisions – and the reasons for those decisions – for 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)
- 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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