



## Covid-19

### How the Commissioner will respond to FOI requests during the temporary office closure due to Covid-19

#### Introduction

1. Following Government advice on the need to contain the spread of coronavirus Covid-19, the Scottish Information Commissioner closed his office premises on 23 March 2020. The closure is being kept under review. At the time of writing, it is not yet known when the office will re-open.
2. This policy sets out how the Commissioner aims to comply with requests under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) during the office closure, in particular, the requirements to:
  - respond to information requests made under section 1 of FOISA and regulation 5 of the EIRs and
  - carry out reviews sought under section 20 of FOISA and regulation 16 of the EIRs.
3. A separate policy is in place for responding to subject access requests, etc. under the General Data Protection Regulation and the Data Protection Act 2018.
4. This note is not intended to be a comprehensive guidance note on the procedures that the Commissioner follows when responding to requests for information and requests for reviews<sup>1</sup> or an in depth overview of the provisions of the Coronavirus (Scotland) Act 2020 (the 2020 Act). Instead, it is intended to highlight the key changes to our processes for responding to requests for information and reviews while the office is temporarily closed including, where relevant, the changes made by the 2020 Act. The note also provides a short guide to public authorities, our stakeholders and the public regarding how this part of the new legislation may affect key areas of our business.

#### The Commissioner's aim

5. As the Commissioner noted in his recent briefing to the Scottish Parliament<sup>2</sup>, the circumstances that public authorities across Scotland currently face are unprecedented and he is wholly

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<sup>1</sup> The Commissioner's procedures for responding to information requests can be read here: <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx#procedures>

<sup>2</sup> <http://www.itspublicknowledge.info/home/News/20200401.aspx>

sympathetic to the pressures that the Covid-19 pandemic will be placing on public authorities, structures, resources and staff on complying with FOI timescales where premises are closed, where information may be inaccessible, where staff are absent, or where organisations face unprecedented demands for essential services

6. The Commissioner recognises the importance of FOI<sup>3</sup> rights, particularly during this unprecedented time. He also recognises that, as the regulator of FOI in Scotland, it is very important that he complies with – and is seen to be complying with – FOI legislation and that he himself exhibits best practice. Consequently, despite his office being closed, he will endeavour to respond to all information requests promptly<sup>4</sup> and within 20 working days<sup>5</sup>, wherever reasonably possible.
7. The Commissioner has a small team monitoring and responding to urgent enquiries and undertaking essential activities whilst the office is closed temporarily due to the Covid-19 pandemic. These members of staff are working remotely, however, so capacity and access to our usual systems is significantly limited. This will have an impact on our ability to respond to information requests within 20 working days, particularly those which require searches to be carried out on our office based systems.

### **The Coronavirus (Scotland) Act 2020 and this policy**

8. The Scottish Parliament has passed emergency legislation in response to the coronavirus pandemic. The Coronavirus (Scotland) Act 2020<sup>6</sup> (the 2020 Act) came into effect on 7 April 2020 and contains a number of amendments to the operation of FOISA in Scotland. (The 2020 Act does not affect the timescales in the EIRs.) These provisions are temporary and are due to expire on 30 September 2020, but may be extended by the Scottish Ministers.
9. While the 2020 Act is in force, the maximum timescale within which the Commissioner (and other Scottish public authorities) must respond to requests and requests for review is extended from 20 to 60 working days.
10. However, the Commissioner (and other Scottish public authorities) must still respond promptly, and without reasonable delay, to requests and requests for review and, in any event, within 60 working days. The 60 working day timescale is a maximum time period, and will not be viewed as a target or set as a key performance indicator by the Commissioner. This means that the Commissioner will only extend the 20 day response period with very good reason and with supporting evidence to justify the delay.
11. Given the temporary nature of this statutory extension, the Commissioner believes it appropriate for him to implement these provisions in as restrictive a manner as possible, taking into account the limits on his own resources. He will not seek to rely on extended time limits beyond the time necessary, taking into account all the circumstances at the time of the request. His aim, therefore, is to endeavour to respond to all information requests promptly and within the normal statutory timescales (20 working days), wherever reasonably possible.

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<sup>3</sup> “FOI” here refers to both FOISA and the EIRs.

<sup>4</sup> The EIRs require authorities to comply with a request as soon as possible and, in any event, no later than 20 working days – regulation 5(1)(a).

<sup>5</sup> This can be extended by up to a further 20 working days for requests made under the EIRs if the volume and complexity of the information requested makes it impracticable to comply with the request within 20 working days – regulation 7(1).

<sup>6</sup> <http://www.legislation.gov.uk/asp/2020/7/contents/enacted>

## **When and why are we likely to extend timeframes?**

12. Where requests for information or requests for review require members of staff to access our office-based systems, we may be unable to respond within 20 working days and we may be required to apply the extension provisions within the 2020 Act.
13. We may be able to access information held in our office based systems during the temporary closure, but not routinely and not on a daily basis. In line with government guidance, access to the building is currently only allowed for work needed to keep our office premises safe and secure, which means that we have very limited access to our office based systems.
14. Examples of the type of request that requires access to our office based systems include:
  - Correspondence relating to the handling of individual cases (with the exception of some hard copy files currently being worked on, and electronic correspondence sent or received after 23 March 2020). In most cases, this will include any withheld information which forms the basis of an investigation
  - Information contained solely on our office based systems
15. Examples of the type of request that may not require access to our office based systems include:
  - Information which is published on the Commissioner's website or which is known to be otherwise available to the requester – we will, where relevant, provide a link to the information and apply the exemption in section 25 of FOISA.
  - Requests which have clearly been misdirected to the Commissioner's office – we will notify the requester that we do not hold the information (section 17 of FOISA) and, where relevant, give advice and assistance about which body or bodies may hold the information.
16. Staff may also be absent and this may also affect our ability to respond to requests for information or requests for review.

## **Receiving requests while the office is closed**

17. We have taken steps to ensure that requesters are able to make information requests (and seek reviews) while the office is closed. For example:
  - Our website advises people who want to make a request to send the request electronically to [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info). This email address is monitored daily by at least two members of staff.
  - All members of staff whose email addresses are not being monitored have out of office messages asking requesters to contact [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) if they are making or if they want to make an information request
  - Anyone calling the Commissioner's office (this includes our main number and other direct dial numbers) will hear a recorded message asking requesters to contact [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) if they want to make an information request.
  - Where we are able to respond to requests while the office is closed, requesters are advised to send their request for review to [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info).

## **Corresponding with requesters while the office is closed**

18. All electronic requests will be acknowledged (we aim to do this within five working days of receipt). Where necessary, we will seek clarification within 10 working days.
19. When a request is received, we will record the request along with the date of the 20th working day. We will let requesters know as soon as possible if our response to the request is likely to be delayed beyond this date, together with the reasons for such a delay.
20. We recognise that our duty to provide reasonable advice and assistance under section 15 of FOISA (and regulation 9 of the EIRs) continues while the office is closed. Our response will, therefore, be combined with advice and assistance, whenever possible. This may, where relevant, include a summary of what the information is believed to be held: where we do this, it will be made clear to the requester that this is not a formal response to the request.

## **Reviews and complaints about delay**

21. If we believe a request will take more than 20 working days to comply with, we will notify the requester of their right to seek a review.
22. If a requester does not believe that we have responded promptly to a request, and their request for review complies with section 20(3) of FOISA, we will carry out a review, even if the 20th (or, where relevant, 60th) working day has not yet passed. Reviews will, wherever possible, be carried out by a member of staff who was not involved in the original request. However, given the small number of staff covering the work of the Commissioner, it is possible, contrary to the Commissioner's current practice (see paragraph 4), that the review may have to be carried out by someone who is not a Head of Department or by a member of the same team as the person who originally responded to the request.
23. If the requester is dissatisfied with the way in which we have handled their request for review, they can seek to have our decision judicially reviewed and/or complain about our service to the Scottish Public Services Ombudsman. More information about how requesters can make a complaint can be found here:  
<http://www.itspublicknowledge.info/home/AboutSIC/ComplaintsProcedure.aspx>

## **Proactive publication**

24. The Commissioner will publish as much information as possible about our response and actions in relation to the impact of the coronavirus on the operations of our office, and any impact on FOI rights more widely.
25. We will continue to publish our Senior Management Team meeting minutes and papers, here:  
<http://www.itspublicknowledge.info/home/AboutSIC/Governance/ManagingOSIC.aspx>
26. Guidance produced for public authorities and individuals wishing to request information from authorities during this period will be published here:  
<http://www.itspublicknowledge.info/covid19>
27. If we receive multiple requests for similar information while the office is closed, or where we consider the information to be of considerable public interest (particularly if it is related to the coronavirus), we may publish the response to the request on our website (subject to the redaction of personal data or other confidential information, as relevant).

28. The full range of information published by the Commissioner can be found in our [Guide to Information](#).

### **Re-opening of the office**

29. When the office is able to reopen, we will contact all requesters to let them know and to update them on when their request is likely to be dealt with.

30. We will also publish an action plan setting out how we plan to address any backlog in requests and/or reviews.

### **Contact us**

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