



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 temporarily closed his 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.
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 temporary closure of the office premises due to the Covid-19 pandemic, 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. Separate guidance 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 reviews¹ or an in depth overview of the provisions of the Coronavirus Act 2020.² Instead, it is intended to highlight the key changes to our processes for responding to requests for information and reviews while the office premises are 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.

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

² When we refer to the Coronavirus Act 2020 in this document, we are referring to the Coronavirus (Scotland) Act 2020 as amended by the Coronavirus (Scotland) (No.2) Act 2020.

The Commissioner's aim

5. As the Commissioner noted in his briefing to the Scottish Parliament at the end of March 2020³, the circumstances that public authorities across Scotland currently face are unprecedented and he is 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 FOI⁴ rights, particularly during this challenging 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 demonstrates best practice. Consequently, despite the office premises being temporarily closed, he will endeavour to respond to all information requests promptly⁵, and within 20 working days⁶ wherever reasonably possible.
7. The Commissioner has a small team monitoring and responding to urgent enquiries and undertaking essential activities whilst the office premises are closed temporarily due to the Covid-19 pandemic. These members of staff are working remotely, however, so capacity and access to any paper records is limited. This is likely to have an impact on our ability to respond to some information requests within 20 working days.

The Coronavirus Act 2020 and this policy

8. The Scottish Parliament has passed emergency legislation in response to the coronavirus pandemic. These provisions are temporary and are due to expire on 30 September 2020, but may be extended by the Scottish Ministers. All requests must be responded to promptly and within a maximum timescale of 20 working days. However, the Commissioner retains discretion to find that a public authority did not fail to comply with FOISA despite failing to meet the 20 working day timeframe. The Commissioner may find that a late response was not a breach of FOISA if:
 - it was late because of the effects of the coronavirus⁷ or because the authority was working to the extended timescales set when the Coronavirus Act first came into force, and
 - the delay was reasonable in the circumstances. In deciding what was reasonable, the primary consideration for the Commissioner must be the public interest in complying with requests promptly.
9. The Commissioner will endeavour to respond to all information requests promptly, and within the normal statutory timescales (20 working days), wherever reasonably possible. However, as recognised by the Coronavirus Act, there may be occasions where the effect of the Covid-19 pandemic impacts on the Commissioner's ability to respond to a request fully within the 20 working day timeframe.

³ <http://www.itspublicknowledge.info/home/News/20200401.aspx>

⁴ "FOI" here refers to both FOISA and the EIRs.

⁵ 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).

⁶ 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).

⁷ Also referred to in other Scottish Information Commissioner guidance as "Covid-19".

10. The Commissioner's [guidance](#) 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
 - 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
11. The Coronavirus Act also recognises that an authority's ability to respond within 20 working days may have been affected by the fact that longer timescales (60 working days) were in place from 7 April until 26 May 2020. Working to these extended timescales at that time will have given staff involved in handling a request some reasonable expectations as to what was required, although, even when the extended timescales were in force, the authority still had to respond promptly. The basic duty with regard to time is to respond promptly – any specified timescales are maximum limits, subject to the overriding requirement that the response must always be prompt.
12. "Promptly" means "without delay" rather than "immediately." In determining whether a response had been made without delay, the Commissioner will consider:
 - 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.
 - 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 (and the response is the correct response overall to that particular request).
13. The Coronavirus Act recognises the public interest in complying promptly with requests and makes this the key consideration for the Commissioner in deciding whether any delay in responding was reasonable in all the circumstances.

Impact of the Covid-19 pandemic on the Commissioner's resources

14. The Commissioner's office is not immune from the impact of the Covid-19 pandemic. Due to the impact of the pandemic, the Commissioner's office premises temporarily closed on 23 March 2020 and it is not yet known when these premises will reopen. From 23 March 2020, a limited number of staff have been able to work remotely but until very recently access to our office-based systems was restricted. Remote access to our office systems is now in place for those members of staff who are working remotely using laptops and we are expanding our remote working capacity. However, we do not have access to any records which are not held electronically.
15. In line with government guidance, access to the office premises is currently only allowed for essential work needed to keep our office premises safe and secure, which means that we have very limited access to hard copy information and information retained only in the office premises.

16. Due to the restrictions described in paragraph 15 above, information requests received from 23 March 2020 (the date our office premises were temporarily closed) may take longer than usual,. However, we are hoping that, with the expansion of remote working (including remote access to our office systems), this will not happen. In addition, until such time as the Commissioner's staff can access the office premises again, requests that require physical access to our office are likely to take longer than usual and/or receive partial responses.
17. Examples of the type of request that require access to our office premises includes:
- information contained solely in office files which are not held electronically
 - paper records that are not held electronically
18. Examples of the type of request that do not require access to our office premises include:
- requests for information which is held electronically and can be accessed remotely
 - requests for 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
19. In addition to the current limited number of staff able to work remotely, staff may also be absent which may affect our ability to respond to requests for information or requests for review within the 20 working day timeframe.

Receiving requests while the office is closed

20. 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 . 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 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 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
 - post sent to the Commissioner's office continues to be checked, although, at present this can only happen once a week. Similarly, hard copy correspondence that we are sending out can only be posted once a week. This means that responses to requests sent by post are likely to be delayed. Any person making a request by post is asked to provide the Commissioner with an email address if they have one.

Corresponding with requesters while the office is closed

21. 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.
22. 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.
23. 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 reasonably 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

24. 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.
25. 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 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 current small number of staff covering the work of the Commissioner, it is possible, contrary to the Commissioner's current practice, 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 subject to any relevant considerations relating to line management and accountabilities.
26. 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

27. The Commissioner will publish as much information as possible about our response and actions in relation to the impact of the coronavirus Covid-19 on the operations of our office, and any impact on FOI rights more widely. Information that we publish can be found here:
<http://www.itspublicknowledge.info/home/AboutSIC/Covid-19PublishedInformation.aspx>
28. We will continue to publish our Senior Management Team meeting minutes and papers, here:
<http://www.itspublicknowledge.info/home/AboutSIC/Governance/ManagingOSIC.aspx>
29. 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>
30. 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 Covid-19), we may publish the response to the request on our website (subject to the redaction of personal data or other confidential information, as relevant).

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

Re-opening of the office

32. When the office premises are able to re-open, we will contact all requesters whose cases have been delayed to let them know and to update them on when their request is likely to be dealt with.

33. 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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