



**CFoIS**

**Promoting the Right to Information in Scotland**

## **Briefing on the Coronavirus (Scotland) Act 2020**

### **Overview**

The Campaign for Freedom of Information in Scotland (CFoIS) acknowledges and applauds the hard work and dedication of Scotland's public sector workers generally and specifically during this national emergency. CFoIS recognises the right of all staff to be safe when they are at work during the COVID-19 pandemic. Inevitably some of the reported concerns of people on the pandemic will turn into FoI requests.

The Coronavirus (Scotland) Bill<sup>1</sup> was introduced to manage the impact of this emergency on all our lives. The legal changes form part of wider measures on the functioning of public bodies in Scotland but this briefing is confined to those parts which amend The Freedom of Information (Scotland) Act 2020 (FoISA). FoISA is an established route to help deliver transparency and accountability because it enables scrutiny: by encouraging the pro-active disclosure of information from over 10,000 public bodies; by enabling an enforceable right to access official information. The Coronavirus (Scotland) Act 2020<sup>2</sup> was passed in a one-day session at the Scottish Parliament and its FoI provisions will negatively impact on the enforcement of rights until 30<sup>th</sup> September 2020. Similar UK legislation did not change UK FoI rights.

The FoI provisions focus on the needs of designated bodies at the expense of the rights of requestors. A fair balance could have been struck but was not, so the purpose of this briefing is to explain the practical impact. Right to information laws allow people to ensure government officials make good decisions even in a national emergency. The need to maintain public trust in and enable scrutiny of, public services is critical in helping public services do better as well holding the Government to account in real time and retrospectively. Therefore, CFoIS can highlight other legislation on transparency and accountability:

- The Environmental Information (Scotland) Regulations 2004 govern access to environmental information held by Scottish public authorities. The EIRs require every Scottish public authority to publish environmental information and make it available on request. Guidance on how to use it, including a video, at <http://www.itspublicknowledge.info/Law/EIRs/EIRs.aspx>
- The Local Government (Access to Information) Act 1985 provides 'for greater public access to local authority reports and documents subject to specified confidentiality provisions; to give local authorities duties to publish certain information; and for related purposes.'<sup>3</sup>
- The UK Freedom of Information Act 2000 covers reserved areas such as DWP and BBC. The UK Information Commissioner has helpful Guides.<sup>4</sup>

<sup>1</sup> [https://www.parliament.scot/S5\\_Bills/Coronavirus%20\(Scotland\)%20Bill/SPBill66S052020.pdf](https://www.parliament.scot/S5_Bills/Coronavirus%20(Scotland)%20Bill/SPBill66S052020.pdf)

<sup>2</sup> The Act is available at <http://www.legislation.gov.uk/asp/2020/7/contents/enacted>

<sup>3</sup> See Act in full at <http://www.legislation.gov.uk/ukpga/1985/43?view=extent>

<sup>4</sup> See ICO website <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

### **The Freedom of Information (Scotland) Act 2002 (FoISA)**

FoISA gives people the right to ask over 10,000 public bodies for information including health boards, local authorities, regulators and housing associations. Although there are numerous exemptions on disclosing information, the right has been very effective in being used and there are four key elements:

- Duty on 'designated bodies' to proactively disclose information making the need for an FoI request redundant.
- The right to request information and receive an answer within 20 working days. The right may be used by a person, a community group, a trade union, a private company or a professional association.
- The right to request an internal review from the designated body if no answer is received and if all or none of the information requested has been provided.
- A right of appeal to the Scottish Information Commissioner (SIC) if the requestor is unhappy. The process is free.

### **The Coronavirus (Scotland) Act 2020**

The Act was considered and passed on 1<sup>st</sup> April, received Royal Assent on 6<sup>th</sup> April and mainly comes into force on 7<sup>th</sup> April 2020. It sets out specific reasons to delay answering FoI requests on any topic and in undertaking an internal review of an FoI request on any topic if the delay can be explained by the pressure on the designated bodies resources in dealing with COVID-19 which has impacted on its ability to meet FoISA timelines. As many designated bodies have had to reorganise staffing, departments and resources to meet this urgent health emergency, for some it will be possible to evidence specific reasons which led to delays. Ultimately it will come down to interpretation of the law by the designated bodies and by requestors and adjudications provided by the SIC.

CFoIS understands that the Act provides for the following:

- Extends the maximum time that public authorities have to respond to FoI requests from 20 working days to 60 working days, if the reason for the extension is to deal with the impact of Covid-19. (para 3(1) )
- Extends the maximum time that public authorities have to undertake an internal review of requestors complaints - from 20 working days to 60 working days, if the reason for the extension is to deal with the impact of Covid-19. (Para 3(2) )
- Sets out the conditions and rules for designated authorities seeking a further extension of up to 40 working days – both for initial requests and for reviews. A 'directive' will be triggered when Scottish Ministers believe the further extension of time 'will enable Scottish public authorities to better utilise resources to respond to coronavirus.' (para 5(1) )
- Before Scottish Ministers issue such a 'direction', they must consult the SIC (para 5(5)). The 'direction' may specify different provision for different purposes and, in particular, different provision in respect of different Scottish public authorities.
- The SIC can now dismiss appeals made to him by requestors if the reasons for the appeal are due to 'the effect of coronavirus on the authority generally or its ability to carry out its functions'. This includes 'any action it had to take to better utilise its resources to deal with the effect of coronavirus', and that was 'reasonable in all the circumstances'. The effect is that requests and appeals which pre-date the Act ie before 7<sup>th</sup> April, will be covered and that

includes late responses to initial requests, requests for an internal review, mute refusals, incomplete answers or refusal to make a disclosure of any information<sup>5</sup>. (Para 6)

- The SIC will issue guidance in respect of Schedule 6 Part 2.
- The measures are in force until 30<sup>th</sup> September 2020 with the possibility of further extensions up to 31<sup>st</sup> March and 30<sup>th</sup> September 2021.

It is anticipated that there will be co-ordinated delivery of changes introduced by the Act within some sectors such as the NHS which may include the individually designated GP surgeries. It will be important to have any such sectoral guidance made public.

### **The Public Interest Test**

There is no variation in the new response timelines if the public interest is engaged by the purpose or nature of the information requested. Even if the public interest is in favour of the information being disclosed within the original maximum time of 20 working days, the law now permits disclosure being delayed for up to 60 working days.

Under section 1(1) of FoISA, a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. This right is not absolute. In some cases, information is exempt from disclosure detailed in Part 2 of FOISA. Most of the exemptions in FoISA are qualified so are subject to the public interest test - “qualified exemptions.” Where a qualified exemption applies, the information must be disclosed unless the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. Where the competing public interests are evenly balanced, the information should be disclosed.<sup>6</sup>

There is a concern that blanket extensions to response times now operate which apply to some designated bodies that are able to reply within current timescales and that is un-necessary. Whatever the timeline, FoISA still expects any information request to be answered ‘promptly’, under Section 10(1), and so the onus will still be on the designated body to prove the reasons for the delay.

### **Human Rights**

CFoIS disagrees with the Scottish Government’s assertion during the passing of the Bill that ‘no detrimental effects’ on human rights are ‘anticipated’.<sup>7</sup> Article 10 of the European Convention on Human Rights (ECHR) has been ruled to give the right to information in order to form an opinion.<sup>8</sup> The cases have related to requests for information which are in the public interest and that is established by examining: the

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<sup>5</sup> <http://www.legislation.gov.uk/asp/2002/13/section/47>

<sup>6</sup> More information and guidance available at SIC <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>

<sup>7</sup> Policy Memorandum para 361 at <https://www.parliament.scot/parliamentarybusiness/Bills/114929.aspx>

<sup>8</sup> For example, the Grand Chamber decision in the case of on Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) 8<sup>th</sup> November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30<sup>th</sup> January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435>

purpose of the information request; the nature of the information sought; the particular role of the seeker of the information in “receiving and imparting” it to the public; and whether the information was ready and available. Such criteria can be adopted when prioritising answers to existing FoI requests in Scotland.

The Human Rights Act 1998 places duties on those delivering public services and services of a public nature to comply with the ECHR. In addition, the Scotland Act 1998 requires that any legislation passed is compliant with the ECHR. It also places duties on public authorities and Scottish Government Ministers to comply with human rights law including UN treaties which the UK has ratified. Compliance is subject to periodic review by the UN and that process is currently underway on the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UN ICCPR sets out the right and the freedom to seek, receive and impart information and ideas ...<sup>9</sup>. In General Comment 34 on Article 19 ‘public bodies’ are broadly defined.<sup>10</sup> CFoIS has submitted evidence to the UN Human Rights Committee to assist its scrutiny of Scotland’s compliance with Article 19 but the meeting to agree the ‘List of Issues Prior to Reporting’ (LOIPR) has understandably been postponed.<sup>11</sup>

## Analysis

CFoIS has a number of concerns about the impact on FoI rights.

1. The UK Coronavirus Act introduced by the UK Government resisted any such restrictions on FoI citing the reasoned arguments of the UK Information Commissioner who provided reassurance and boundaries on compliance by stating that ‘organisations will not be penalised during this extraordinary period.’<sup>12</sup>
2. The Scottish Information Commissioner had also issued guidance to requestors and designated bodies under FoISA urging patience at a critical time given the pressures caused by the global pandemic.<sup>13</sup> CFoIS supports this Guidance.
3. The result is draconian: requests for information, however routine and basic, can take up to five months and internal reviews can take up to five months; appeals to the Scottish Information Commissioner can take 10 months from the date of the first request. By the time the information is received by the requestor, the need for the information may well be redundant.
4. As there is no public interest test to the extended response times and given that the criteria to permit the longer response times by designated authorities is sufficiently vague, there is a real concern that delays will become routine. FoISA provides for a ‘public interest’ test to be applied to many of the legal exemptions to providing information. This concept is fundamental to the drive to disclose information.

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<sup>9</sup> Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>10</sup> ‘General comment No. 34 on Article 19: Freedoms of opinion and expression’, 2011 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en)

<sup>11</sup> CFoIS website at <https://www.cfois.scot/wp-content/uploads/2020/01/CFoIS-ICCPR-Final-Jan-2020.pdf>

<sup>12</sup> UK Parliament website at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-18/31658/>

<sup>13</sup> Issued on 13<sup>th</sup> and 20<sup>th</sup> March and available at [http://www.itspublicknowledge.info/home/News/Latest\\_news.aspx](http://www.itspublicknowledge.info/home/News/Latest_news.aspx)

5. FoI rights have not become much more complicated and the complexity may increase if further extensions of 40 days are provided, by directive, to some public bodies and not others.
6. The legal changes can be tempered by FoISA designated public bodies increasing the flow of information, the kind the public wants to see, through pro-active publication. In particular the UN and the World Health Organisation has emphasised the importance of measures and actions to combat the proliferation of false information about the virus.<sup>14</sup>
7. The Cabinet Secretary for the Constitution, Europe and External Affairs Mike Russell stated in the Stage 2 debate that ‘ the recommendations that we have brought forward are the recommendations of the Information Commissioner. It would be perverse if the Parliament were to reject the recommendations of the person it entrusts to monitor the legislation...’ It is unclear if the ‘recommendations’ are on the Government’s amendments to its own legislation or the provisions restricting FoI rights.
8. The SIC is now assumed to represent the public as well as those who have designated duties under FoISA. Going forward how he exercises those dual responsibilities evenly whilst remaining independent and funded by the Scottish Government through the Scottish Parliament will be very interesting.
9. From the evidence of decisions over the last 15 years provided by decisions on FoI appeals to the SIC, we know that decisions to refuse disclosure will often be made in the interest of the organisation rather than the public. From the debate in the Scottish Parliament on 1<sup>st</sup> April, there is a danger that the two are being conflated: the public interest may be different from that of the organisation that holds the information.
10. Any further extensions to the Act’s provisions will coincide with the campaign around the Scottish Parliament elections which take place in May 2021. When ‘fake’ news is a real threat in political campaigns it is essential that the flow of official and accurate information is unhindered.
11. Those who were successful in securing amendments in other aspects of the Bill were well resourced and influential. As we are a tiny, civil society organisation with little funding, but lots of enthusiasm, we operate at a significant disadvantage.
12. CFoIS now seeks to ensure there is a correct understanding of the proceedings – as a non-party political organisation we were happy to work with all parties.

## Context

All of this takes place against a backdrop of scrutiny and review of access to information rights in Scotland:

- FoISA is currently the subject of Post-legislative scrutiny by the Public Audit and Post Legislative Scrutiny Committee of the Scottish Parliament. Scrutiny was prompted by a unanimous motion at the Scottish Parliament on 21<sup>st</sup> June 2017 which in turn was prompted by a letter of complaint signed by journalists and repeated criticism from organisations such as CFoIS.

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<sup>14</sup> See UN website at <https://www.un.org/en/un-coronavirus-communications-team/un-tackling-%E2%80%99infodemic%E2%80%99-misinformation-and-cybercrime-covid-19>



- The Scottish Government's performance on FoISA delivery is still subject to enforcement action by the Commissioner as set out in correspondence dated 2<sup>nd</sup> February 2018.<sup>15</sup>
- The Scottish Information Commissioner reported in 2019 that his office carried out 251 formal 'interventions', an increase of 17 in one year, due to practice issues.<sup>16</sup>
- The public's use of FoI rights continues to grow and there is also evidence that more requestors are dissatisfied with the responses they receive so they complain to the Commissioner: there were 83,963 reported requests for information in 2018/19, up 8.3% from 2017/18; appeals to the Commissioner rose by 0.7% in 2018/19.

The level of informed criticism about FoISA means it is fair to conclude that it is overdue for reform. Therefore, further limiting its effectiveness at this time is worrying.

### **Conclusion**

CFoIS realises that all requests should still be dealt with 'promptly' under FoISA, but that has proven impossible to enforce even before the pandemic emergency, which is just one of the many reasons to reform FoISA. CFoIS recognises that the rights and duties within The Environmental Information (Scotland) Regulations 2004' (EIR(S)s) must still be adhered to and the effect will be to create two tiers of access: ready access to environmental information and slow access to everything else. This creates unfairness. The tests set down by the ECtHR relate to the public interest and despite high level political commitments in the Scottish Parliament to mainstream human rights, it is disappointing that they appeared to make no impact in draft or the final legislation.

### **About CFoIS**

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to improve public access to official information, to secure legal right to access information and to enforce that right. The initiative came from the Scottish Consumer Council. We believe in the right of people to find out about how they are governed and how their services are delivered.

The Bill's proposals were published without any consultation, despite CFoIS convening the Scottish Public Information Forum (SPIF) whose role is incorporated in the Scottish Government's Six FoI principles published in 2007: "We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum." <sup>17</sup>

**Please consider donating to CFoIS to help fund our work generally and during this time of attack on FoI rights.** Go to our website for more information. Contact: CFoIS [www.cfois.scot/](http://www.cfois.scot/) [info@cfois.scot](mailto:info@cfois.scot) @CFoIScot

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<sup>15</sup> Scottish Information Commissioner website at <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

<sup>16</sup> Annual Report and Accounts 2018/2019 pg. 15 at <http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx>

<sup>17</sup> The Scottish Government website at <http://www.gov.scot/About/Information/FoI/6principles>

### **For further information**

For those who want to read up on the detail here are the key references

- The Act is available at <http://www.legislation.gov.uk/asp/2020/7/contents/enacted>
- The full debate the Scottish Parliament at the key Stage 2, when amendments can be made to the Scottish Government Bill is available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12602>
- The timeline for the passage of this Bill and amendments debated are at <https://www.parliament.scot/parliamentarybusiness/Bills/114929.aspx>
- The MSP briefing from CFoIS and our subsequent press release are available at [www.cfois.scot/](http://www.cfois.scot/)
- The Scottish Information Commissioner website is at [http://www.itspublicknowledge.info/home/News/Latest\\_news.aspx](http://www.itspublicknowledge.info/home/News/Latest_news.aspx)