



## Scottish Information Commissioner update

### Scottish Public Information Forum: 24 September 2020

#### FOI and the pandemic

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##### Response to the pandemic

We closed our office premises at the end of March in response to the Covid-19 pandemic, in common with many other organisations. Our full team is now up and running remotely, and our work progresses as normal, with most of our activities and services now operational.

We are, however, unable to offer a telephone enquiry service at the moment, but are currently responding to a wide range of enquiries via email and social media. Contact us at:

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) / [@FOIScotland](https://twitter.com/FOIScotland)

Our work on FOI appeals has continued throughout lockdown, with 40 decisions issued between April and August. A further 23 cases were resolved in this period, and our team responded to almost 400 enquiries.

We've also been publishing regular updates on our own response to the pandemic, along with advice and guidance for public authorities and those seeking information on our Covid-19 Info Hub (more on this below).

##### Coronavirus emergency legislation

###### *Background*

The Scottish Parliament has passed two pieces of emergency legislation in response to the pandemic, both of which impacted on FOI rights in Scotland. In April, the Coronavirus (Scotland) Act 2020 (the 2020 Act) made temporary amendments to a range of legislation, including the FOI Act, increasing the maximum timescale for FOI requests (and reviews) from 20 to 60 working days.

This change was later removed in May by the Coronavirus (Scotland) (No.2) Act 2020 (the Coronavirus No. 2 Act), which made further small, temporary, amendments to the FOI Act.

###### *Current impact*

The current situation is that:

- Requests for information and requests for review must be responded to promptly, and in no more than 20 working days

- The Commissioner can determine that a Scottish public authority has not failed to comply with the FOI Act even if it responds later than twenty working days, if he is satisfied that the failure to respond was due to the effect of coronavirus, and was reasonable in all the circumstances.

#### *Covid-19 decisions*

The Commissioner has so far issued one decision which considered the impact of Covid-19 on FOI response times. In that case (Decision 103/2020 NHS Highland), the Commissioner found that, while the request was made during the time where FOI timescales were extended, the authority had nevertheless failed to respond 'promptly'. We therefore found that the authority had breached section 21(1) of FOISA.

#### *Issue of notices*

The 2020 Act also enabled the Commissioner to issue notices (including decision notices) electronically for the first time. We do not anticipate that this provision will remain beyond the 2020 Act, so we may have to revert to sending them by post when the provisions of the 2020 Act expire.

#### *Environmental information*

The FOI provisions of the Coronavirus Acts apply only to the FOI Act. They do not apply to requests for environmental information under the Environmental Information (Scotland) Regulations 2004 (the EIRs).

#### *Transitional provisions*

Earlier this year we met with the Scottish Government to discuss transitional provisions they may wish to consider when the 2020 Act ceases to have effect. For example, we have suggested that the Commissioner's power to determine that an authority did not breach Part 1 of the FOI Act where there has been a late response as a result of the pandemic during the affected period should be continued for at least a year after the period ends and the 2020 Act ceases to have effect. We've suggested this because applications can take several months to reach the Commissioner after an initial request is made to an authority.

### **Covid-19 and FOI Info Hub**

Our Covid-19 and FOI Info Hub ([www.itspublicknowledge.info/covid-19](http://www.itspublicknowledge.info/covid-19)), which launched in April, provides advice, guidance and resources on a range of issues relating to FOI and the Covid-19 pandemic.

The Info Hub is split into five sections:

- **Emergency changes to FOI law in Scotland:** provides guidance on the changes introduced by the Coronavirus emergency legislation passed by the Scottish Parliament.
- **Making an information request during the pandemic:** guidance for anyone making a request at the moment, taking into account changes introduced by the Coronavirus Acts.
- **Guidance for public authorities on FOI during the pandemic:** guidance for authorities on timescales and on the Commissioner's policy on determining the effects of the coronavirus on request responses.
- **Latest news:** press releases and statements made by the Commissioner on Covid-19, including updates on our services during the pandemic.

- **Information we publish:** information to help inform service users and authorities. Includes responses to information requests and legal advice we've received relating to the Coronavirus Acts.

We will continue to add to and develop the info hub as required. If there is any additional guidance you feel would be useful please let us know by emailing [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info).

## Reports and publications

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### Scottish Government Intervention: 2<sup>nd</sup> progress report

On 10 September we published the second progress report on our intervention to improve the Scottish Government's FOI practice and performance. The progress report considers the Scottish Government's actions and performance between 1 April 2019 and 31 May 2020, and is available in full at:

[www.itspublicknowledge.info/SGIntervention](http://www.itspublicknowledge.info/SGIntervention)

In summary, the report finds that:

- Between April 2019 and March 2020 the Scottish Government made significant progress towards delivering its FOI improvement action plan. Progress was achieved through a wide-ranging improvement programme implemented across the Scottish Government.
- The steps taken contributed towards a significant improvement in the Scottish Government's FOI performance during 2019/20. This included a sustained improvement in 'on-time' responses to FOI requests, and reductions in the number of FOI reviews and appeals.
- However, during April and May 2020, FOI performance fell dramatically as it diverted resources in response to the pandemic. The extent and speed of the decline raises concerns about the sustainability of the Scottish Government's FOI improvement work.

The report urges the Scottish Government to direct immediate attention towards restoring its FOI function, with a particular focus on restoring trained staff to key roles, implementing improvements to record keeping and ensuring that training and support measures for staff are in place.

### 2020 to 2024 Strategic Plan

We've started working towards our Strategic Plan for the next four years. The plan contains six key objectives, which are focussed on increasing the impact of FOI in Scotland and enhancing people's rights to access the information that matters to them. Our Strategic Plan, along with our Operation Plan for 2020-21, is available at:

[www.itspublicknowledge.info/home/AboutSIC/StrategicPlan.aspx](http://www.itspublicknowledge.info/home/AboutSIC/StrategicPlan.aspx)

### 2019/20 Annual Report

Our 2019/20 Annual Report will be laid in the Scottish Parliament in the coming days. It reports on a busy year for FOI and the Commissioner, covering a period which included the post-legislative scrutiny of FOI law, an extension consultation, the largest designation of new public bodies to date, and the first weeks of the coronavirus pandemic. The Report will be published on our website ([www.itspublicknowledge.info](http://www.itspublicknowledge.info)) and promoted via our Twitter feed (@FOIScotland) following publication.

## Herald article

In June the Herald published an article by the Commissioner which stressed the value and importance of FOI in times of uncertainty and change. Read the article at:

[www.heraldscotland.com/news/18502465.opinion-daren-fitzhenry-uncertain-times-freedom-information-important-ever/](http://www.heraldscotland.com/news/18502465.opinion-daren-fitzhenry-uncertain-times-freedom-information-important-ever/)

## FOI Resources

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### Publishing decisions

While we have been working to progress and resolve appeals over the last few months, we have been unable to publish any decisions, or issue our Decisions Round-up, since lockdown and the closure of our office premises. We expect to be able to start publishing decisions again this week.

### New newsletter launching soon

We've been busy during lockdown developing plans for a new email newsletter to replace our Decisions Round-up. The new newsletter will continue to report on learning from decisions, but will also providing a wider range of FOI news and comment.

The newsletter will launch later this year. Details of how and when you can sign up will be announced shortly - keep an eye on our Twitter feed (@FOIScotland) for more information.

### FOI statistics

The Commissioner asks Scottish public authorities to submit data relating to their own FOI request handling on a quarterly basis, via an online portal (<https://stats.itspublicknowledge.info/>). This portal can be used by anyone to generate reports and review performance.

Data for 1 April to 30 June 2020 suggests that FOI activity reduced during this period, with 12,578 requests reported, compared to 19,844 during the previous quarter, and 20,108 in the same quarter last year. This may in part be due to a reduction in request activity during the Covid-19 lockdown, although a small number of bodies have also yet to submit data for this period.

In our most recent call for data, covering the period between 1 April and 30 June 2020, we also asked public authorities to provide additional information on their FOI response during the pandemic and on any impact of changes on response times. Analysis of this data is underway, and a summary of the key points will be included in an insights briefing the Commissioner will publish on the impact of Covid-19 on FOI in Scotland in due course. In the meantime, however, early analysis suggests that:

- Approximately two thirds (67%) of FOI responses, and 71% of review responses, were sent within twenty working days during the period when extended timescales were in force.
- Just over one quarter (27%) of FOI responses, and 16% of review responses, utilised the extended timescale.
- 6% of FOI requests, and 13% of review responses, were not responded to within the extended timescale of 60 working days.
- Where responses were late, the reallocation of resources due to Covid-19 was the most common reason given.

- Most authorities report that they have been proactively publishing information about their Covid-19 response.

Our next deadline for the submission of FOI statistics, covering the period 1 July to 30 September, is 6 November 2020.

### **New self-assessment tools for authorities**

Earlier in the year we published a new module in our public authority self-assessment toolkit, this time focusing on ‘conducting reviews’. Another module, ‘Managing and monitoring FOI performance’, will be published in October. The toolkit is designed to help public authorities assess and improve their FOI practice. Our six toolkit modules are:

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|---------------------------------------|--|
| 1. Responding on time                 | 4. Publishing information                  |
| 2. Searching and locating information | 5. Conducting reviews                      |
| 3. Giving advice and assistance       | 6. Managing and monitoring FOI performance |

Modules are available at: [www.itspublicknowledge.info/toolkit](http://www.itspublicknowledge.info/toolkit)

## **FOI updates**

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### **Designation of Registered Social Landlords (RSLs)**

RSLs and their subsidiaries were designated under the FOI Act in November 2019, and have been working to meet their FOI duties since that time. The extension of FOI to cover RSLs and subsidiaries was the most extensive designation of new bodies to date, bringing almost 200 new bodies under the scope of FOI.

Data from our statistics portal reveals that 471 FOI and EIR were reported by RSLs and subsidiaries between 11 November 2019 and 30 June 2020. The data also indicates that, where requested information was held by the organisation, 72% of requests resulted in the requester receiving all the information requested, and 92% resulted in the requester receiving some or all of the information. The Commissioner has also received a small number of appeals relating to RSLs.

We are also working to promote FOI rights to tenants and tenant groups. While participation in live conferences and events has been disrupted by the pandemic, we have delivered an online training workshop in partnership with Tenant Participation Advisory Service (TPAS) Scotland and will be participating in their conference scheduled for January 2021. We have also prepared articles to introduce and promote FOI rights for a number of tenant publications.

### **Post-legislative scrutiny**

On 19 May 2020, the Scottish Parliament’s Public Audit and Post-legislative Scrutiny Committee’s published a report on its review of the FOI Act. The report is available at:

[www.parliament.scot/newsandmediacentre/115191.aspx](http://www.parliament.scot/newsandmediacentre/115191.aspx)

The Committee recognised that the FOI Act has improved the transparency and accountability of public bodies. It makes a total of 39 recommendations to help the legislation keep pace with the changing nature of public service delivery, new forms of communication and the way in which the public accesses information. The report states that the Scottish Government should consult on the following suggested changes:

- Designation of new bodies: introduce a “factors” approach based on functional tests – e.g. quantifying degree of public interest in the function / considering cost to the public purse.
- Designation of new bodies: introduce a “gateway clause” which would automatically bring those elements of organisations fulfilling certain criteria within the scope of the FOI Act.
- Introduce a statutory code to publish information.
- Require certain key information, such as minutes of ministerial meetings, to be recorded.
- Prevent reliance on confidentiality clauses between public authorities and contractors.

The Commissioner has responded to Parliamentary Committee, welcoming its Report. Read our response at:

[www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=13670&slD=377](http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=13670&slD=377)

## Extension consultation

The Scottish Government closed its consultation on the extension of FOI to additional organisations in December 2019. In his response to the consultation, the Commissioner highlights a range of organisations as appropriate for further consideration by Ministers, including:

- Health and social care services provided under contract to Scottish public authorities
- Services provided under Private Finance Initiative (PFI) / Public Private Partnership (PPP) / Non-Profit Distributing (NPD) contract arrangements
- HubCos and services provided under contract through the hubCo model
- Transport services provided on behalf of Scottish public authorities

The Commissioner’s response is published at:

[www.itspublicknowledge.info/home/News/20191204.aspx](http://www.itspublicknowledge.info/home/News/20191204.aspx)

The Scottish Government plans to undertake further, targeted consultation once candidates for inclusion in a particular section 5 Order have been identified. For further information and updates visit the Scottish Government’s consultation page at:

<https://consult.gov.scot/constitution-and-cabinet/freedom-of-information-extension-of-coverage/>

## Holyrood Conference

This year’s Holyrood FOI conference will be taking place on 1 December 2020. Given current events, this year’s event will take place online. Further information will be available from [www.holyrood.com/events](http://www.holyrood.com/events) shortly.

**Follow us on Twitter (@FOIScotland) to get all the latest updates and learning points from our decisions**

## Contact us

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