

**CFoIS**

**Promoting the Right to Information in Scotland**

**Submission to the Scottish Government’s Consultation**

**Terms of Reference - Inquiry on Management and Impact of**

**COVID-19 pandemic**

*Access to reliable information saves lives. Misinformation and rumours can cost them. This simple lesson is one we have learnt to our detriment in recent years. Whether fighting a global pandemic or supporting public debate, we need free, reliable and independent information as the foundation upon which democratic societies are built. This is why, for UNESCO, ensuring access to information is a top priority, and one enshrined in our Constitution. It is also why this fundamental human right is written into the goals of the 2030 Agenda for Sustainable Development****.* Director-General of UNESCO[[1]](#footnote-1)**

**Introduction**

The Campaign for Freedom of Information in Scotland (CFoIS) welcomes the opportunity to submit its evidenced views. The right to life is a fundamental human right protected by Article 2 of the European Convention on Human Rights (ECHR). Delivering the duty to protect life and health needs to be fair and proportionate.

This submission draws on previous briefings and communications on compliance with and enforcement of, accessing to information rights during the Scottish Government’s and publicly funded agencies’ management of the pandemic.

CFoIS wishes to put on records its thanks to the public sector workers for their service. We also recognise the crucial role of private sector workers in protecting the physical and mental health of the population during the pandemic.

**FoI Law**

FoISA became effective on 1st January 2005 and places clear duties on 10,000 bodies specifically designated for coverage: to properly manage information so that it can be disclosed ‘promptly; to answer individual request for information unless covered by one of many exemptions; to advise and assist requestors; and to pro-actively publish information. It provides for the individual right to be enforced through an internal review process and an external appeal to the Scottish Information Commissioner[[2]](#footnote-2).

FoISA and the Environmental Information (Scotland) Regulations 2004’ (EISRs) provide the main legal framework to deliver Article 10 of the ECHR and Article 19 of

the International Covenant on Civil and Political Rights (ICCPR) on the right and the freedom to seek, receive and impart information and ideas …’[[3]](#footnote-3). FoISA and the EISRs have made a huge difference but action is needed to keep the rights modern, accessible, relevant, effective and robust.

**Terms of Reference**

* **What do you think the Inquiry should, and should not, cover?**

1. What representations were made by Ministers and public agencies that resulted in the curtailment of FoI rights on 1st April 2020.
2. What impact did the changes make within organisations designated under FoISA?
3. How many key public sector agencies have reduced staffing on FoI Teams which has negatively impacted on their ability to respond promptly and within the maximum 20 working day response timeframe?

* **What should be done to ensure everyone learns from the Inquiry?**

The Inquiry should work with existing regulators of duties and rights to ensure strategic and organisational learning. For example work with the Scottish Information Commissioner (SIC) to learn from the organisational culture, records management and priority given to FoI rights in Scotland and how will that inform the enforcement of FoI law in Scotland?

CFoIS acknowledges the importance of pro-active publication of information by the Scottish Government on rates of infection and death in Scotland, the location of staff infected e.g. in care homes and levels of testing. We also acknowledge the flow of information from other public bodies such as the National Records of Scotland. Pro-active publication is fundamental to FoI law in Scotland as it avoids the need for people and organisations to make a specific FoI request. However not all the information is available and in a format that people need so inevitably people will feel compelled to make an FoI request.

The decision of the Scottish Parliament to weaken the Freedom of Information (Scotland) Act 2002 (FoISA) on 1st April 2020, impacted on the behaviour of duty bears and significantly impacted on people’s right to access information during the pandemic. This was a disproportionate and unreasonable response as it negatively impacted on the human right to form an opinion by receiving and imparting accurate, official information. Although most legal changes were reversed on 27th May 2020, it remains a significant matter of concern that this human right was so easily restricted. Furthermore, it amplifies a pre-existing concern that, in some organisations, FoI rights and duties are seen to hamper the delivery of public services and are costly.

Other problems with the legislative approach taken in response to COVID- 19 were: a) it focused on the needs of designated bodies at the expense of the rights of requestors; and b) no public interest test was included to prioritise FoI Requests related to the coronavirus crisis. A law could have been introduced which reflected a proportionate response. Some delays in answering FoI requests during lockdown could be caused for understandable reasons, such as having to physically access the information from a closed public office.

Some Non-Governmental Organisations (NGOs) haver reported that they were consulted on various measures prior to the first Bill being published. CFoIS wishes to confirm that it was not consulted. This was unfortunate as we would have been delighted to lend our expertise to address the issues. Consultation was a reasonable expectation as CFoIS is the organiser of the Scottish Public Information Forum (SPIF), to which the Scottish Government regularly contributes. Furthermore, SPIF is referred to in the Scottish Government’s six FoI principles as being a mechanism of engagement with stakeholders.

The [**Coronavirus (Extension and Expiry) (Scotland) Bill**](https://www.parliament.scot/bills-and-laws/bills/coronavirus-extension-and-expiry-scotland-bill) has been passed by the Scottish Parliament. The Act extends some of the provisions of the Coronavirus Acts and provides that the remaining provisions will expire on 30th September 2021.

Currently the SIC can consider the impact of COVID19 when deciding if an authority failed to comply with FOI timescales. In practice, this transitional approach means the impact of the pandemic may continue to be a relevant consideration in some decisions made by the Commissioner for some time.

Questions

CFoIS is aware of many questions people have and information they seek to assist them to form an opinion on what happened in the past, how that impacts on the present and what lessons we can take forward:

1. The impact of ‘Exercise Iris’, the table-top exercise held in March 2018 to assess NHS Scotland’s response to a suspected outbreak of MERS-CoV,[[4]](#footnote-4)
2. What decisions were made about preparedness for a pandemic that health professionals and academics had warned was ‘overdue’.
3. About the provision of PPE and strategies to secure it since December 2019
4. How were decisions made to purchase care home places and release patients into care homes without testing from December 2019 – May 2020?
5. When and what steps were taken to ensure staff in the NHS and in care homes were tested?
6. What guidance was issued and by whom on managing the impact of the pandemic in care settings?
7. Has there been guidance issued on the inspection of education standards during lockdown?
8. What role did the Integrated Joint Boards[[5]](#footnote-5) play in designing Scotland’s response to COVID-19?

S**cotland** must ensure it is better prepared for a future pandemic as well as managing the current one**.**  In that regard the extension of FoISA is key. FoISA allows the Scottish Government to extend the number of bodies designated eg to keep up with changes in how publicly funded services are delivered. It has already consulted on the potential for extension to organisations which exercise functions of a public nature such as private care homes funded by public money and Third Sector organisations.[[6]](#footnote-6) The Inquiry should not delay such legal changes to FoISA which should proceed at speed.

**Inclusive Process**

* The Inquiry be designed to ensure people are at the centre and voices are heard?

CFoIS welcomes the provision in the Coronavirus (Scotland) No 2 Act on mainstreaming ‘inclusive communication’[[7]](#footnote-7) which can be delivered with the help of the Inclusive Communication Hub funded by the Scottish Government. Inclusive communication needs to be integrated into the design and delivery of this consultation.

The adoption of the ‘digital first’ approach, needs to be rolled out inclusively which means addressing equipment, connectivity and skills deficits.

**Other Comments**

* Do you have any other comments about the design of the COVID-19 Public Inquiry?

The inquiry should be open, transparent and ensure accountability.

**Conclusion**

28th September as the annual International Day for Universal Access to Information (IDUAI). UNESCO’s theme for 2021 is to highlight the role of access to information laws and their implementation to ‘build back strong institutions for the public good and sustainable development, as well as to strengthen the right to information and international cooperation in the field of implementing this human right.’[[8]](#footnote-8)

During a national emergency, there needs to be continuity and certainty in the practice and enjoyment of rights including under FoISA. The rights and duties within EIR(S)s) remained throughout creating two tiers of information access rights and duties. The Inquiry will be key in delivering scrutiny and planning as envisioned by UNESCO.

**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. CFoIS is a Scottish Charitable Incorporated Organisation (SCIO) no SC051263.

**For further information contact:** [www.cfois.scot/](http://www.cfois.scot/) [info@cfois.scot](mailto:info@cfois.scot) @CFoIScot

**30th September 2021.**

1. [Message from Ms. Audrey Azoulay, Director-General of UNESCO, on the occasion of the International Day for Universal Access to Information, 28 September 2021 - UNESCO Digital Library](https://unesdoc.unesco.org/ark:/48223/pf0000379069.locale=en) [↑](#footnote-ref-1)
2. See <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx> [↑](#footnote-ref-2)
3. Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [↑](#footnote-ref-3)
4. Scottish Government published report on 3rd June 2020 at <https://www.gov.scot/publications/exercise-iris-report/> [↑](#footnote-ref-4)
5. Roles and responsibilities set out at <https://www.gov.scot/publications/roles-responsibilities-membership-integration-joint-board/pages/2/> [↑](#footnote-ref-5)
6. See analysis of responses at <https://www.gov.scot/publications/freedom-information-extension-coverage-consultation-analysis/> [↑](#footnote-ref-6)
7. Section 6 at <https://www.legislation.gov.uk/asp/2020/10/section/6/enacted> [↑](#footnote-ref-7)
8. At [International Day for Universal Access to Information (unesco.org)](https://en.unesco.org/commemorations/accesstoinformationday) [↑](#footnote-ref-8)