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Coronavirus (Scotland) (No.2) Act 2020: third report on the Scottish Ministers' responses to requests for information under the Freedom of Information (Scotland) Act 2002

Laid before the Scottish Parliament by the Scottish Ministers under paragraph 12 of schedule 4 to the Coronavirus (Scotland) (No.2) Act 2020.

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Introduction

Purpose of report

1. The Coronavirus (Scotland) Act 2020 (“the first Act”) responds to the emergency situation caused by the coronavirus outbreak. It contains temporary measures to ensure that essential public services can continue to discharge their functions in the way that they were intended to. The Freedom of Information (Scotland) Act 2002 (“FOISA”) is temporarily modified by these measures in two ways:

- (a) the Scottish Information Commissioner (“the Commissioner”) is given discretion to take the impact of the coronavirus outbreak into account when deciding whether Scottish public authorities have failed to comply with the timescales prescribed in FOISA;
- (b) the Commissioner and Scottish public authorities are enabled to issue formal notices under FOISA electronically.

2. The Coronavirus (Scotland) (No.2) Act 2020 (“the second Act”) makes further provision about the emergency situation caused by the coronavirus outbreak. Paragraph 12 of schedule 4 to the second Act provides that while the temporary modifications to FOISA made by the first Act are in force, the Scottish Ministers must report to the Scottish Parliament on certain aspects of their responses to requests for information under FOISA. This requirement is referred to in this report as “the coronavirus FOI reporting requirement”.

3. This is the third report laid before the Scottish Parliament in accordance with the coronavirus FOI reporting requirement.

The Freedom of Information (Scotland) Act 2002

4. FOISA came into force on 1 January 2005. It provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and the Scottish Government to local authorities, NHS boards, higher and further education institutions, doctors and dentists, among others.

5. Requested information must be provided unless it is subject to one or more exemptions, as set out in FOISA. If a requester is dissatisfied with the response received to a request or does not receive a response, he or she can ask the authority to review its decision or handling of the request.

6. The Commissioner both promotes and enforces FOISA. Requesters who remain dissatisfied with the conclusions of an authority’s review of their request can appeal to the Commissioner for a decision.

Existing reporting arrangements

7. While the second Act has introduced the coronavirus FOI reporting requirement, the Scottish Ministers (and other Scottish public authorities) report on their FOI performance in terms of several existing reporting arrangements. We have summarised these existing arrangements to provide wider context for this report, and in the interests of promoting access to them.

8. The Scottish Government reports **monthly** to the Commissioner on its FOI performance. This arrangement was put in place in April 2017 and the Scottish Government agreed targets to improve response times, with a target of 85% of request and review responses to be issued within the relevant deadlines in FOISA and the Environmental Information (Scotland) Regulations 2004 in 2017, 90% in 2018, and 95% by 2019. We publish our performance figures proactively on the Scottish Government website¹, with the most recently-published figures relating to August 2020.

9. In common with all other Scottish public authorities, the Scottish Government reports **quarterly** to the Commissioner on a wider range of statistics in relation to FOI performance. The quarterly returns are published via the Commissioner's statistics portal², with returns required approximately six weeks after the end of each quarter to give authorities time to collect the necessary data and report it to the Commissioner. The Commissioner's website contains detailed information about the list of statistics that have to be provided, and details about what should be submitted³.

10. The Scottish Government also publishes an **annual** report on their handling of information requests, and have done so since FOISA came into force in 2005. These reports are accessible on the Scottish Government website⁴, with the most recent report relating to the handling of information requests in 2018. Work on the report for 2019 would ordinarily have begun in spring 2020, but it has been paused in consequence of the significant redeployment of staff from the FOI Unit to coronavirus-critical roles.

¹ <https://www.gov.scot/publications/freedom-of-information-foi-reporting/>

² <https://stats.itspublicknowledge.info/>

³ <http://itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx>

⁴ <https://www.gov.scot/publications/freedom-of-information-foi-reporting/>

Approach to reporting

The reporting period

11. The second Act came into force on 27 May 2020. It provides for reporting periods to be two months long, so this report covers the period from 27 September to 26 November 2020.

How the reporting requirements have been interpreted

12. Paragraph 12(2) of schedule 4 to the second Act sets out the matters that must be included in the report as follows:

- (a) backlogs in responding to requests
- (b) how many requests have been responded to
- (c) what was provided in response to requests
- (d) cases which were partially refused
- (e) the number of requests subject to an internal review
- (f) backlogs in the internal review process
- (g) appeals made to the Commissioner in respect of requests

13. In order to assist readers of this report, we have explained below how we have interpreted each of these requirements. Where possible, we have interpreted the matters broadly in conformity with the basis on which we report quarterly to the Commissioner, to facilitate comparisons.

14. However, a direct comparison is unlikely to be possible because the respective requirements do not align precisely. The reporting periods do not match the Commissioner's quarterly reporting cycle. Additionally, the six-week period following the end of each quarter mentioned above allows us to ensure that our case-handling system is updated as far as possible with data relating to that quarter, improving the accuracy of those statistics. By contrast, this report requires to be laid before the Parliament no later than 14 days after the expiry of the reporting period. Accordingly, the case-handling system has to be interrogated for the relevant data immediately at the end of the period, without allowing for any updating.

What is covered by this report

15. Paragraph 12(1) of schedule 4 to the second Act requires the Scottish Ministers to lay reports before the Scottish Parliament in accordance with paragraph 12 on their responses to requests for information under FOISA. Accordingly, it does not contain information about our handling of requests for environmental information, because these are handled under the Environmental Information (Scotland) Regulations 2004 instead of FOISA.

Bodies covered by this report

16. The reporting requirement in the second Act applies to the Scottish Ministers, who are listed as a Scottish public authority for the purposes of FOISA in paragraph 1 of schedule 1 to FOISA. The report is therefore concerned with the core directorates of the Scottish Government and its associated executive agencies, in accordance with our usual FOI practice.

17. The reporting requirement does not apply to the wider Scottish Administration, and in particular to the non-Ministerial officeholders listed in Part 2 of schedule 1 to FOISA. Some of these officeholders such as the Keeper of the Records of Scotland and the Registrar General of Births, Deaths and Marriages for Scotland use the Scottish Government's FOI case-handling system, MiCase. However, we have excluded information about these officeholders because they are separate Scottish public authorities for the purposes of FOISA, and the reporting requirement does not apply to them.

18. Executive agencies of the Scottish Ministers generally use MiCase and information in relation to them is included in this report. However, this report does not include information about the Scottish Prison Service ("SPS"), which has an entirely separate FOI handling system. SPS has historically reported its statistical information to the Commissioner separately, and we consider that including SPS information in this report would potentially be confusing, as this information is never normally aggregated with that of the Scottish Ministers.

19. Information in relation to the Crown Office and Procurator Fiscal Service ("COPFS") is also excluded from the scope of this report. This is because it is partly covered by the Scottish Ministers' designation and partly covered by the separate designation of procurators fiscal in Part 2 of schedule 1 to FOISA. As with SPS, COPFS has historically reported its statistical information to the Commissioner separately, and we consider that including COPFS information in this report would potentially be confusing, with the added complication that the majority of COPFS requests fall outwith the Scottish Ministers' designation.

Requests for information

(a) *Backlogs in responding to requests*

20. Under section 10(1) of FOISA, a Scottish public authority must respond to requests for information promptly, and in any event by not later than the 20th working day after it receives the request⁵.

21. We have interpreted “backlogs in responding to requests” as meaning requests for information under FOISA which:

- (a) were not answered by the 20th working day after receipt; and
- (b) remained unanswered at the end of the reporting period on 26 November 2020.

22. The number of requests in this category is 148.

(b) *How many requests have been responded to*

23. We have interpreted this as relating to the number of requests for information under FOISA that were responded to at any point within the reporting period, regardless of the date on which those requests were received.

24. The number of requests in this category is 746.

(c) *What was provided in response to requests*

25. We have interpreted this as relating to the information that is disclosed to requests for information under FOISA.

26. In the interests of openness and transparency, in July 2017 the Scottish Ministers began to publish online their responses to requests where information has been disclosed⁶. This information is accessible from the Scottish Government website⁷. Accordingly, we have not included this information in this report, as a single request may result in the disclosure of hundreds of pages of information.

27. Publication is not a mandatory requirement under FOISA, and relatively few authorities publish the information that they disclose in this way.

28. Within the Scottish Government, publication takes place after a final response has been issued to the requester. The final responses are passed to the FOI Unit, which selects the cases in which information has been disclosed and prepares them for response. This process involves a number of checks, principally to ensure that the

⁵ Unless it asks for clarification in accordance with section 1(3), or issues a fees notice in accordance with section 10(3). Other exceptions apply in relation to specific authorities, but not to the Scottish Ministers.

⁶ Responses where information is disclosed but it is of limited public interest (typically routine requests for information about roads maintenance) are not routinely published.

⁷ The Publications page, filtered for FOI responses published during the reporting period, is at: <https://www.gov.scot/publications/?cat=filter&publicationTypes=foi-eir-release&begin=27/09/2020&end=26/11/2020&page=1>

requester's personal information is not inadvertently disclosed. The FOI Unit also ensures that responses are prepared in an accessible format for online publication.

29. As noted in paragraph 10, approximately half of the staff of the FOI Unit, including two of our three publication officers, were originally redeployed to coronavirus-critical roles. Those remaining in the Unit focused on providing core services such as triaging and allocating new requests, and on providing essential support to staff across the organisation so that FOI requests and reviews could continue to be handled promptly and to a high standard.

30. This means that it has been taking longer than usual to publish responses. However, staff numbers in the FOI Unit are increasing and the Scottish Government remains committed to publishing the information disclosed in response to requests for information.

(d) Cases which were partially refused

31. We have interpreted this as relating to the number of requests for information under FOISA that we responded to within the reporting period where we:

- (a) disclosed some information; and
- (b) issued a refusal notice under section 16(1), (4) or (5) of FOISA in respect of other information

32. It excludes requests where we disclosed all the information requested and those where we did not disclose any information to the requester.

33. The number of requests where we disclosed some information, and issued a refusal notice under section 16(1), (4) or (5) of FOISA in respect of other information, is 146.

Reviews and appeals

(e) Number of requests subject to an internal review

34. We have interpreted this as relating to the number of requirements for review (in accordance with section 20(1) of FOISA) that were received at any point during the reporting period, regardless of the date on which the request to which the requirement for review relates was received or responded to.

35. The number of requirements for review in this category is 76.

(f) Backlogs in the internal review process

36. Under section 21(1) of FOISA, a Scottish public authority must respond to requirements for review promptly, and in any event by not later than the 20th working day after it receives the request⁸.

⁸ Some exceptions apply in relation to specific authorities, but not to the Scottish Ministers.

37. We have interpreted “backlogs in the internal review process” as meaning requirements for review under FOISA which:

- (a) were not answered by the 20th working day after receipt; and
- (b) remained unanswered at the end of the reporting period on 26 November 2020.

38. The number of requirements for review in this category is 10.

(g) Appeals made to the Commissioner in respect of requests

39. A person who is dissatisfied with the outcome of a requirement for review (or by the failure of a Scottish public authority to respond to such a requirement) may apply to the Commissioner for a decision whether the request for information has been dealt with in accordance with Part 1 of FOISA, in accordance with section 47(1) of FOISA. Such an application to the Commissioner is commonly referred to as an appeal.

40. As applications for a decision are made to the Commissioner, and not to the Scottish public authority in question, the authority may not immediately be aware that such an application has been made. This is because the application first goes through a validation process before the authority is given notice of it and invited to comment in terms of section 49(3) of FOISA.

41. Accordingly, we have interpreted this as relating to applications made to the Commissioner for a decision in accordance with section 47(1) of FOISA that are:

- (a) made in relation to a request for information made to the Scottish Ministers; and
- (b) received by the Commissioner during the reporting period.

42. We have asked the Commissioner to confirm the number of applications for decision that meet these criteria. The Commissioner has advised that the number is 11.



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