

From: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Sent: 18 February 2020 09:20
To: [REDACTED S38(1)(b)]@gov.scot>
Cc: [REDACTED S38(1)(b)]@gov.scot>; [REDACTED S38(1)(b)]@gov.scot>
Subject: RE: FOI - contingency planning

Thanks [REDACTED S38(1)(b)], this is very helpful. I'll find out what the planning process is for legislation and how we include this in the thinking.

Penny

Penny Curtis | Head of Elections and FOI Division | Directorate for Constitution and Cabinet | Scottish Government | 2W.02A | St Andrew's House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [REDACTED S38(1)(b)] Mobile [REDACTED S38(1)(b)]

From: [REDACTED S38(1)(b)]@gov.scot
Sent: 17 February 2020 19:27
To: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Cc: [REDACTED S38(1)(b)]@gov.scot; [REDACTED S38(1)(b)]@gov.scot
Subject: RE: FOI - contingency planning

Penny,

I can see some scope for emergency legislation, but only if faced with a prolonged crisis (as mentioned, there is some precedent in Scottish court procedure during the industrial disruptions of the 1970s, when timescales were widely modified).

The two principal time limits in FOISA that would be in issue are:

- the requirement to respond to a **request for information** promptly and in any event by not later than the **20th working day** (section 10(1))
- the requirement to respond to a **request for review** promptly, and in any event by not later than the **20th working day** (section 21(1))

There are two less significant time limits:

- the right to ask for a review has to be made within the 40th working day from receipt of the response to the request (or the authority's failure to respond)
- the right to appeal to the Commissioner before the expiry of the period of 6 months from receipt of the review response etc (section 47(4))

These time limits are less significant because authorities have a discretion (section 20(6)) to accept late requests for review if they consider it appropriate to do so. Similarly, the Commissioner may entertain late appeals where he considers it appropriate to do so. Those discretionary powers would likely be sufficient to deal with any reviews or appeals that were sought late.

By contrast, there is no discretion in relation to the requirements to respond to requests for information or for review. Neither the Commissioner nor the Scottish Ministers (nor indeed the courts) has any power to dispense with, vary or extend these time limits.

However, the Scottish Ministers may make regulations extending the period of 20 working days – in the case of requests, up to 60 working days; in the case of reviews, there is no limitation on the power. The enabling powers go on to say that in each case the Ministers may confer a discretion on the Commissioner. I take that to mean – though we would have to consult SGLD – that we could confer power on the Commissioner to extend the deadline in individual cases.

The potential issue with making regulations to extend the time period is that regulations made under the relevant powers are subject to the affirmative procedure. In the ordinary course of events, this is

unlikely to be sufficiently flexible to allow us to respond to an emergency. My recollection is that you are supposed to allow 56 days for the Parliamentary passage of an affirmative instrument, and that 40 days is the minimum specified in Standing Orders.

Of course, it might be the case that the Parliament suspends Standing Orders or modifies them for the purpose of passing emergency legislation. However, the Parliament would still require to vote to approve the draft instrument before it could be made. This is dependent on the Parliament being able to discharge its functions in the event of an emergency (i.e. would a quorum of MSPs be available, the necessary clerking resource etc?) However, we can say with reasonable confidence that the section 10(1) and 21(1) powers do not appear to have been contemplated for use in emergencies (otherwise we would presumably find a version of the old Class 3 (made affirmative) procedure which is used eg. in food safety contexts where it is much more likely that an order will have to be made during recess etc.)

Once the emergency had passed, we would need to pass a further affirmative instrument revoking the one extending the time limits to return to the usual position.

I mentioned in passing that the other option might be the prospect of slotting something FOI-related into emergency primary legislation, if a Bill is brought forward – or indeed an emergency framework Bill being passed that might confer wide powers on the Ministers to relax statutory requirements across a whole range of primary and subordinate legislation.

Summary

- As matters stand, the Commissioner is unable to extend the key time limits (those for responding to requests and reviews)
- There is potentially a question about whether we could confer power on the Commissioner to do so, but this would not be free from doubt, especially as to how such a discretion could be confined to duration-of-the-emergency cases rather than being a general discretion available at all times
- FOISA contains powers to extend the key time limits by subordinate legislation
- To exercise the powers, the Ministers have to make regulations and they are subject to the affirmative procedure in the Parliament
- This is likely to constrain the usefulness of the powers, unless the Parliament radically alters how it scrutinises affirmative instruments (including the suspension of Standing Orders)
- Passing an affirmative instrument would require the Parliament to be functioning at least at some minimal level – if it cannot secure a quorum, or the necessary clerking etc resource to operate, the instrument could not be approved and so the Ministers could not make it
- I could see no objection from our perspective to emergency primary legislation either directly relaxing the time periods in question, or conferring powers on the Ministers to do so (this would avoid the difficulties inherent in trying to use FOISA powers not obviously designed for this situation)

Happy to discuss.

[REDACTED S38(1)(b)]

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T: (0131) 244 [REDACTED S38(1)(b)] M: [REDACTED S38(1)(b)]

From: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>

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Subject: FOI - contingency planning

[REDACTED S38(1)(b)]

We discussed the scope of our business contingency planning for the division at the management meeting last week. I'll get a note of that circulated shortly which will commission the material for our plan. We discussed what we would do internally to deal with casework.

If we were dealing with a serious crisis (Covid 19 epidemic is obviously what we're thinking about just now) with significant impact across the public sector, might we consider emergency legislation on FOI – lengthening timescales for response for example? Could you give me some quick initial thoughts about what would be involved, things we'd need to consider etc? There is likely to be a C19 legislative programme in Scotland so we can discuss with James Hynd division if necessary once we've got an idea about what might be involved if needed.

Thanks

Penny

Penny Curtis | Head of Elections and FOI Division | Directorate for Constitution and Cabinet | Scottish Government | 2W.02A | St Andrew's House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [REDACTED S38(1)(b)] | Mobile [REDACTED S38(1)(b)]

Freedom of Information (Scotland) Act 2002
Options for relaxing duties to comply

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
1	Relax the statutory timescales for compliance with FOISA (Blanket extension to 60 working days for all authorities)	Affirmative instrument under ss. 10(4), 20(7), 21(6) and potential 47(6) of FOISA Could be included in emergency primary legislation, but may not meet the criteria for inclusion because an existing subordinate legislation power is available	<ul style="list-style-type: none"> • Authorities have longer to respond to requests and reviews (up to 60 working days instead of 20) • It is a straightforward change that would readily be understood by authorities and requesters • It does not require any additional resource (unlike Option 3) • The FOI regime otherwise continues to operate as normal 	<ul style="list-style-type: none"> • Authorities still have to deal with requests and reviews, so the work is only deferred, not avoided • Time required to pass an affirmative instrument means this is not a quick fix • Relatively inflexible – many straightforward requests will not need this • There is a risk that this is perceived as being done to minimise access to information rather than to help authorities cope 	<ul style="list-style-type: none"> • The Commissioner does not think this is necessary • However, he would not oppose the extension of timescales 	Options 1 to 3 are essentially variants of each other, so we discuss them together. On balance, we think Option 1 is the most <u>feasible</u> . Option 2 would require significantly more time to instruct and draft
2	Relax the statutory timescales for compliance with FOISA (Targeted extension for specified authorities to a period between 20 and 60 working days)	Affirmative instrument under ss. 10(4), 20(7), 21(6) and potential 47(6) of FOISA Could be included in emergency primary legislation, but may not meet the criteria for inclusion because an existing subordinate legislation power is available	<ul style="list-style-type: none"> • Authorities have longer to respond to requests and reviews (up to 60 working days instead of 20) • Targeting minimises the risk that we are accused of limiting access to information (e.g. there is probably greater sympathy for relaxing deadlines for Health Boards, local authorities etc. than culture and leisure organisations (many of 	<ul style="list-style-type: none"> • Authorities still have to deal with requests and reviews, so the work is only deferred, not avoided • Time required to pass an affirmative instrument means this is not a quick fix • It would be challenging to come up with a coherent approach quickly enough that would target relief at those authorities that needed it • We would run the risk of having to lay a series of 	<ul style="list-style-type: none"> • The Commissioner does not think this is necessary • However, he would not oppose the extension of timescales 	as well as engaging with affected authorities). Option 3 seems to be of limited practical value given the curtailment of the Commissioner's functions as a result of the closure of his office. That

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
			<p>which are closed to the public anyway)</p> <ul style="list-style-type: none"> • It does not require any additional resource (unlike Option 3) • The FOI regime otherwise continues to operate as normal 	<p>Orders as pressures afflicted different categories of authorities, and that may not be feasible within the legislative programme/Parliamentary constraints</p>		<p>option would impose a significant burden on him and his staff, and it seems unlikely that they could deliver an additional workstream at this time.</p>
3	<p>Relax the statutory timescales for compliance with FOISA</p> <p>(Confer a discretion on the Commissioner to relax timescales, either on application by authorities or of his own volition)</p>	<p>Affirmative instrument under ss. 10(4), 20(7), 21(6) and potential 47(6) of FOISA</p> <p>Could be included in emergency primary legislation, but may not meet the criteria for inclusion because an existing subordinate legislation power is available</p>	<ul style="list-style-type: none"> • Authorities have the ability to seek extensions where needed by applying to the Commissioner • The FOI regime otherwise continues to operate as normal 	<ul style="list-style-type: none"> • Authorities still have to deal with requests and reviews, so the work is only deferred, not avoided • Time required to pass an affirmative instrument means this is not a quick fix • If authorities have to apply for an extension, this has resource implications for them and for the Commissioner 	<ul style="list-style-type: none"> • The Commissioner's office is closed from Monday 23 March, and it has limited capacity for remote working • The Commissioner has already prioritised workstreams considerably (appeals work, for example, is going to be limited) • Considering applications for extension is likely to impose further burdens on resources, particularly his staff 	<p>There is a separate question about whether Option 1 is desirable at this time, and in particular about whether legislating for this is a sufficiently high priority given other likely demands on SG and Parliamentary resources.</p> <p>Overall, our conclusion is that this represents the only feasible option to relax the</p>

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
						requirements of FOISA in the short term. We are not persuaded however that it is an immediate priority.
4	Reduce the cost limit threshold (presently £600 per request)	<p>Affirmative instrument under section 12(1) of FOISA; ancillary negative instrument under section 13(1)</p> <p>Could be included in emergency primary legislation, but may not meet the criteria for inclusion because an existing subordinate legislation power is available</p>	<ul style="list-style-type: none"> Reducing the cost limit may reduce the requirement for authorities to respond to the most voluminous requests, which are likely to be most challenging 	<ul style="list-style-type: none"> Authorities still need to undertake searches to identify the volume of information etc Authorities still require to respond to each request, explaining why the cost limit is met Authorities also have to give advice and assistance about how to bring the request within the cost limit The cost limit remains unchanged since 2004 and there have been calls (e.g. to PAPLS) for it to be increased Decreasing the cost limit is likely to be perceived poorly, particularly if the reduction is extensive enough to have any practical impact Would have no impact on reviews or appeals (which are vastly more resource- 		<p>We have little confidence that this would in fact reduce the burden on authorities – particularly authorities who receive high volumes of requests that can be answered relatively quickly.</p> <p>We expect that the public reaction to this would be broadly negative.</p> <p>Accordingly, we do not recommend this option.</p>

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
				intensive) as the cost limit does not apply to those stages		
5	Create a two-tier regime where “straightforward” requests would be answered as normal, with “complex” requests delayed	Primary legislation	<ul style="list-style-type: none"> • Prioritising requests according to complexity should mean a quicker response to straightforward queries 	<ul style="list-style-type: none"> • This would require a significant amendment to FOISA to introduce a stage where authorities categorised requests • It is entirely unclear what criteria authorities would use to do so – something that is complex for Authority A to respond to might be straightforward for Authority B (e.g. if they have different records management setups) • If authorities make a determination of this sort, consistency with other FOI decisions would require this to be susceptible to internal review and then appeal to the Commissioner 		<p>Introducing an additional stage into FOI handling appears to us to make the process more complex and likely to be delayed.</p> <p>It is unlikely that requesters and authorities will agree on complexity, which means that we should expect a significant number of reviews and appeals, at least until the measure beds in. The Commissioner is unlikely to be able to resource this, based on current circumstances.</p>

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
						Accordingly, we do not recommend this option.
6	Suspend authorities' duties to respond to requests for information	Primary legislation	<ul style="list-style-type: none"> • Authorities would be freed from their duties to respond under the legislation • Authorities could therefore redeploy resource used to handle FOI requests elsewhere 	<ul style="list-style-type: none"> • This would represent a substantial violation of Ministers' commitment to openness and transparency • It is highly unlikely to attract cross-Chamber support, especially when opposition MSPs see FOISA as an important tool for ensuring the accountability of the Scottish Government • We could expect widespread public criticism that the Scottish Government had "something to hide" in relation to its handling of the present emergency • It is entirely improbable that the Commissioner would support this option, and we would anticipate strong public criticism from him • It is unlikely to deter requesters from asking for information, so the resource saving would be diminished • 	<ul style="list-style-type: none"> • We are not aware that any other country has as yet taken a step as radical as this. 	<p>We think that the negative consequences of suspending FOISA outweigh the potential benefits. We also consider it improbable that the necessary political support could be secured for this option at this time.</p> <p>Accordingly, we do not recommend this option.</p>

	<u>Policy option</u>	<u>What would be required?</u>	<u>Pros</u>	<u>Cons</u>	<u>Other factors</u>	<u>Conclusion</u>
7	Relax the notice provisions to allow the Commissioner to issue formal notices electronically	Primary legislation	<ul style="list-style-type: none"> • This would make issuing decisions easier for the Commissioner, and facilitate remote working by his team • It would result in cost savings for the Commissioner (notices are presently issued by recorded delivery) • It is a minor, technical change that is unlikely to be controversial 	<ul style="list-style-type: none"> • Impact is very limited, especially as the Commissioner's ability to undertake appeals work at the moment is limited by the closure of his office 	<ul style="list-style-type: none"> • We would be likely to take this change forward in any case when there is next a suitable legislative vehicle (i.e. if primary legislation is needed to respond to the PAPLS report) • If introduced, there would be no need for this to be a temporary measure 	<p>If there is to be primary legislation, we could see little harm arising from including provision of this sort. It would allow increased efficiency on the part of the Commissioner and reduce costs.</p> <p>Against that, it offers very little benefit in dealing with the present emergency.</p> <p>While this might be of assistance in the longer term, we do not think of itself that it is likely to be a candidate for emergency legislation at this time.</p>

Notes

Comparison with FOIA

For the sake of completeness, we have considered the UK legislation (FOIA) to see if any of the ways in which it differs from FOISA would assist at present. We do not consider that the procedure differs significantly – the closest case is a variant of Option 5, in that authorities are not obliged to comply with the 20th working day time limit *if* the authority is applying an exemption which is subject to the public interest test or if it wants to confirm or deny whether it holds the information (in which cases it can extend for a period which is “reasonable in all the circumstances”).

The Environmental Information (Scotland) Regulations 2004

It should also be noted that the above applies only to FOISA. The EIRs, which apply to environmental information, derive first from an EU Directive and in turn from a UN Convention. The underlying Directive would not appear to offer any leeway to take up Options 1 to 4 or 6 (so far as we can see) – the time limits etc are set in the Directive (and indeed the Convention). The EIRs already has a version of Option 5 in that the time for compliance can be extended to 40 working days if the information requested is complex and voluminous and the authority would not be able to respond within 20 working days. Option 7 is not relevant, as the FOISA provision is indirectly applied, so if changed in FOISA it would change for the EIRs too.

[REDACTED S38(1)(b)]
FOI Unit
[REDACTED S38(1)(b)]

19 March 2020

From: Penny Curtis
Head of Elections & FOI Division
23 March 2020

Cabinet Secretary for Constitution, Europe and External Affairs
Minister for Parliamentary Business & Veterans

COVID-19: FOI PROVISIONS IN SCOTTISH EMERGENCY BILL

Purpose

1. To propose provisions for the pre-Easter Scottish COVID Emergency Bill.

Priority

2. **Immediate.**

Background

3. FOISA has no provision for derogation from the duty to respond within 20 days in a national emergency. It has a regulation-making power to allow the 20-day period to be extended, but that would reduce net FOI demand for at most 40 days.
4. The proposals here cover FOISA, but not the Environmental Information Regulations as those implement an EU Directive which has no provision for derogation. The EIRs do, however, allow a public authority an extra 20 working days to respond if the volume and complexity of the information sought justifies that.
5. The Scottish Commissioner's Office published the following on 13 March:

Statement on the impact of the Covid-19 virus on FOI timescales

A number of Scottish public authorities have contacted the Scottish Information Commissioner to ask about the requirements to comply with the timescales in the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) given the effect the Covid-19 virus is likely to have on their ability to respond to requests on time.

In the event that an appeal is made to the Commissioner about a failure by a public authority to respond on time, the Commissioner would, as things stand, have no option but to find that a public authority had failed to respond within the 20 working days set down by FOISA.

However, the Commissioner will be sympathetic to the effects that Covid-19 had on the public authority's ability to respond to requests timeously in the event that staff are unable to attend work to answer requests or are unable to carry out full searches for information because they are, for example, working from home and are unable to access information. Any (unavoidable) reasons for delay would be recognised in any decision issued by the Commissioner.

Looking forward, discussions have been taking place with the Scottish Government on whether and/or when it would be appropriate for the Scottish Parliament to enact emergency legislation to extend the 20 working day timescales in FOISA. (Given that the EIRs are based on an EU Directive, which, in turn, is based on a UN Convention, the Scottish Parliament would not have the same power to extend the timescales in the EIRs.)

The Commissioner does not believe that extending the timescales is necessary at this stage.

The Commissioner will continue to keep in contact with the Scottish Government and will update this website as and when necessary.

6. The UK Government's published guidance (FOI regime covering England, Wales, Northern Ireland and authorities carrying out reserved functions in Scotland) on the outbreak states that:

It is important that departments continue to respond to FOI requests. Statutory timescales relating to the FOIA will not be extended and organisations should continue to respond to requests in the usual way. In some cases, departments may not be able to meet statutory deadlines as a result of re-prioritisation or other pressures or because of limited access to relevant information. The ICO has indicated that it will not penalise organisations that need to prioritise other areas or adapt their usual approach during this period.

Factors to consider

7. If we do nothing, despite the commissioner's statement, that would still leave authorities breaking the law, potentially making a range of inconsistent decision, and in a quandary about guidance to staff.

8. Any relaxation of the FOISA regime would have to be, and be seen to be, proportionate to the current circumstances and would not undermine transparency, particularly after the pandemic.

Why the regulation power in FOISA is insufficient

9. FOISA enables regulations to extend FOI deadlines to up to 60 working days for requests, or by for any period for reviews. Such regulations could provide different periods in different cases, or confer a discretion on the Commissioner to extend deadlines in individual cases. To have such regulations in force quickly would require suspension of standing orders as they otherwise would need the 40 days of the affirmative procedure.

10. We do not think that such regulations are the solution for the current circumstances. Commissioner discretion in individual cases would be counterproductive requiring bureaucratic decision-making to justify each decision. Extending the deadline from 20 to 60 days would provide flexibility for public authorities in the short term, but after a 40-day lull the FOI workload would resume thereafter and peak once the extension ceased to have effect.

Proposal for the Emergency Bill

11. We propose a package of temporary amendments to the FOISA regime as follows:

- extension of the default deadline from 20 working days to 60 working days (3 months) for information requests and reviews.
- a provision similar to that in the EIRs allowing an authority to extend a response deadline by a further period (we propose 2 months) if voluminous and complex information is sought
- a “without reasonable cause” qualification of the duty to comply with the deadline
- an explanation in the explanatory notes to the Emergency Bill/Act that such reasonable causes include workload pressures relating to the pandemic or recovery from it.

12. Such a package would reduce the pressure on public authorities significantly for the next 5 months. There would be a back-log after the pandemic, but the reasonable cause qualification could be extended for a few months to allow that to be cleared without an excessive burden on resources.

13. We have also looked at blanket or sectoral disapplication of the FOISA duty to respond for (say) 3 months, with provision for renewal, but those options are clumsier and would result in a big peak of FOI pressure as soon as the suspension ceased.

Presentation

14. Any relaxation of FOI may, of course, attract some criticism. An announcement would be accompanied by assurances about the Scottish Government’s commitment to openness about all aspects of its business, particularly the response to COVID.

Recommendation

15. That you:

- consider whether the proposed approach can be defended as appropriate during the pandemic; and
- subject to that, agree that we should develop it for inclusion in the pre-Easter Scottish COVID Emergency Bill.

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Minister for Europe and International Development			✓		
Lord Advocate			✓		
Solicitor General			✓		

Permanent Secretary Ken Thomson David Rogers Ruaraidh Macniven

Colin Troup

James Hynd

Alison Coull

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[REDACTED S38(1)(b)]

Liz Lloyd

Ewan Crawford

From: Rogers D (David) (Constitution and Cabinet Director) <David.Rogers@gov.scot>
Sent: 23 March 2020 13:13
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Cc: [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>
Subject: RE: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

[REDACTED s30(b)(ii)]

There is text in the submission dismissing a blanket ban as too clumsy. But you could offer as an alternative, as it has the merit of simplicity and we would include some provisions allowing secondary legislation to allow phased reintroduction of the duty to allow the backlog to be cleared in a manageable way. Or leave that to a recovery bill.

David Rogers

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From: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
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Subject: RE: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

Ok, 2 options here:

- Stick with what we're proposing – proportionate but not over-reaching or removing people's rights
- Offer an alternative of blanket suspension of FOISA for a Covid period – simple, offers certainty for public authorities, might be proportionate in response to the level of the emergency, but it's a judgement – might not get support, too far-reaching.

David – are you saying what we're proposing is better or what's suggested is better?!

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Subject: RE: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

Adding [REDACTED s38(1)(b)] and [REDACTED s38(1)(b)].

That's what we are proposing – only better.

David Rogers

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From: Hynd JS (James) <James.Hynd@gov.scot>

Sent: 23 March 2020 11:41

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Subject: FW: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

To see.

David, Penny - to see the FOI reference in (my) yellow highlight

James

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Head of Cabinet, Parliament and Governance Division
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From: [REDACTED s38(1)(b)]@gov.scot **On Behalf Of** Cabinet Secretary for Constitution, Europe and External Affairs

Sent: 23 March 2020 09:54

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Cc: Cabinet Secretary for Constitution, Europe and External Affairs <CabSecCEAEA@gov.scot>

Subject: FW: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

Hi all

See return from Ms Freeman.

Thanks

[REDACTED s38(1)(b)]

[REDACTED s38(1)(b)]

Deputy Private Secretary to the Cabinet Secretary for Constitution, Europe and External Affairs

T4.21 | Scottish Parliament | Edinburgh | EH99 1SP | 0131 244 [REDACTED s38(1)(b)]

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From: [REDACTED s38(1)(b)]@gov.scot **On Behalf Of** Cabinet Secretary for Health and Sport
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Cabinet Secretary for Health and Sport <CabSecHS@gov.scot>
Subject: RE: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation

[REDACTED s38(1)(b)],

The Cabinet Secretary has asked for the following issues to be included in the emergency legislation. These have been passed to SGLD colleagues taking forward this work.

Many thanks,
[REDACTED s38(1)(b)]

[REDACTED - OUT OF SCOPE]

Suspension of **FOI legislation** in order to allow staff (NHS and Local Government, but potential to extend more widely) to focus on essential activities.

[REDACTED - OUT OF SCOPE].

From: [REDACTED s38(1)(b)]@gov.scot **On Behalf Of** Cabinet Secretary for Constitution, Europe and External Affairs
Sent: 19 March 2020 09:18
To: DL Cabinet Secretaries <DLMPOPCABSEC@gov.scot>
Cc: First Minister <firstminister@gov.scot>; Cabinet Secretary for Constitution, Europe and External Affairs <CabSecCEAEA@gov.scot>
Subject: URGENT: Note from Mr Russell - Coronavirus Bill - Emergency Legislation
Importance: High

Private Offices

Please see note below from Mr Russell. Grateful if you could pass this on to your Cabinet Secretary as soon as possible. Mr Russell would be grateful for returns by **Monday 23 March 10 am.**

Many thanks
[REDACTED s38(1)(b)]

I am presently drawing together plans for a piece of emergency legislation to be taken through the Parliament in the week before recess which will be designed to ensure any absolutely urgent requirements for temporary legislative change which were not met in the UK Bill are put in place as soon as possible.

I know that there is an ongoing official trawl for issues to be addressed by a specifically Scottish Coronavirus Bill and that the Minister for PBV gave notice of this intention at the Ministers meeting last night but I now need to know by Monday what is urgently required so that we can get on with delivering those items as fast as we can. Items of less urgency will be able to be delivered after Easter when we will be considering any further legislation we need.

However items that would be politically contentious – in that it would be difficult to get a majority for them in the Parliament – should only be included in this first bill they are essential as it would be my hope that this new bill would be able to get near unanimous approval in the chamber.

Please let me know by Monday 10 am if there is anything you wish to be considered and if there have been any drafting instructions prepared. I intend to give the Chamber notice today when making the statement on the LCM for the UK Bill that we are likely to bring forward an emergency bill very soon and to provide more detailed information to Cabinet on Tuesday.

MR

[REDACTED s38(1)(b)]

Deputy Private Secretary to the Cabinet Secretary for Constitution, Europe and External Affairs

T4.21 | Scottish Parliament | Edinburgh | EH99 1SP | 0131 244 [REDACTED s38(1)(b)]

All e-mails and attachments sent by a Ministerial Private Office to any other official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments.

Scottish Ministers, Special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

From: [REDACTED s38(1)(b)]@gov.scot
Sent: 23 March 2020 15:44
To: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>
Cc: [REDACTED s38(1)(b)]@gov.scot>
Subject: RE: IMMEDIATE - COVID-19: FOI PROVISIONS IN SCOTTISH EMERGENCY BILL

It's difficult to imagine a more technical and non-contentious provision – the more so when we see what is proposed alongside it!

The only issue would be sunseting: it would presumably be a nuisance for that change to expire when the Covid legislation does, meaning the Commissioner has to go back to issuing by post. That said, I imagine there will need to be legislation to put things back in proper order once this is all over, so perhaps we might be able to make the change perpetual at that point.

It would be a discretionary power, so the Commissioner could continue to issue by post where needed.

[REDACTED s38(1)(b)]

[REDACTED s38(1)(b)] | [REDACTED s38(1)(b)] | Freedom of Information Unit

M: [REDACTED s38(1)(b)]

I am currently working from home, and can be contacted by email, Skype for Business, or on my mobile.

From: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Sent: 23 March 2020 15:40
To: [REDACTED s38(1)(b)]@gov.scot; [REDACTED s38(1)(b)]@gov.scot
Cc: [REDACTED s38(1)(b)]@gov.scot
Subject: RE: IMMEDIATE - COVID-19: FOI PROVISIONS IN SCOTTISH EMERGENCY BILL

Yup, if it's doable and non-controversial (which I think it is) then probably a good thing – as [REDACTED s38(1)(b)] says, something they've asked for is a good thing. Any down side?

Penny Curtis | Head of Elections and FOI Division | Directorate for Constitution and Cabinet | Scottish Government | 2W.02A | St Andrew's House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [REDACTED s38(1)(b)] | Mobile [REDACTED s38(1)(b)]

From: [REDACTED s38(1)(b)]@gov.scot
Sent: 23 March 2020 15:38
To: [REDACTED s38(1)(b)]@gov.scot; Curtis PS (Penelope) <Penelope.Curtis@gov.scot>
Cc: [REDACTED s38(1)(b)]@gov.acot
Subject: RE: IMMEDIATE - COVID-19: FOI PROVISIONS IN SCOTTISH EMERGENCY BILL

Well timed – I'm just starting on the final section about ancillary matters... can't see that it would hurt to throw something in.

[REDACTED s38(1)(b)] | [REDACTED s38(1)(b)] | Freedom of Information Unit

M: [REDACTED s38(1)(b)]

I am currently working from home, and can be contacted by email, Skype for Business, or on my mobile.

From: [REDACTED s38(1)(b)]@gov.scot

Sent: 23 March 2020 15:37

To: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; [REDACTED s38(1)(b)]@gov.scot

Cc: [REDACTED s38(1)(b)]@gov.scot

Subject: RE: IMMEDIATE - COVID-19: FOI PROVISIONS IN SCOTTISH EMERGENCY BILL

Suddenly occurred to me (and [REDACTED s38(1)(b)] and I had chatted) that the Commissioner would like the Act to be amended to allow him to issue decisions electronically. Might we add that in [REDACTED s38(1)(b)]?

From: [REDACTED s38(1)(b)] and
[REDACTED s38(1)(b)]
Directorate for Constitution and Cabinet
23 March 2020

Cabinet Secretary for Constitution, Europe and External Affairs
Copy list,

CORONAVIRUS (SCOTLAND) BILL -- POSSIBLE CONTENT

Purpose

1. To share with you the results of cross-governmental trawls for possible subjects to be included in the Coronavirus (Scotland) Bill, and our initial thoughts about their prioritisation.

The content of the Bill

2. Please see the **Annex** for a table containing a summary of proposed measures following the result of the trawls. As you indicated, these have been assessed against the following criteria:

- **necessity:** that is, whether they are required to address the Covid-19 outbreak. The assessment of necessity also includes whether the measure can be achieved (or largely achieved) under existing powers, or under powers expected to be granted by the UK Coronavirus Bill.
- **urgency:** that is, whether only an emergency Bill can deliver the measure when it is needed. This assessment takes into account our view that it is now inevitable that there will have to be further primary legislation to respond to the Covid-19 outbreak after the Easter recess, for those measure that do not need to (or cannot) be brought into effect before then.
- **support:** that is, whether the measures are likely to have broad support across the Scottish Parliament, as would be expected for emergency legislation.
- **capacity:** in some cases, measures are easier to draft or instruct and can be included reasonably efficiently; in other cases, the urgent instruction and drafting of a measure may be impractical or may disrupt other urgent Covid-19-related preparations.

3. [redacted – out of scope]

4. [redacted – out of scope]

5. The product of this exercise would be a Bill with three main themes:

- [redacted – out of scope].
- [redacted – out of scope] extending FOI deadlines to allow public services to focus on dealing with the outbreak, [redacted – out of scope]
- [redacted – out of scope]

Timetable

6. [redacted – out of scope]
7. [redacted – out of scope]
8. [redacted – out of scope]
9. [redacted – out of scope]

Next steps

10. [redacted – out of scope]
11. [redacted – out of scope]
12. [redacted – out of scope]

[REDACTED s38(1)(b)]

[REDACTED s38(1)(b)]

[REDACTED s38(1)(b)]

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister Deputy First Minister Lord Advocate			X X X		
<u>Exec Team</u> Permanent Secretary DG Constitution and External Affairs <u>Constitution and Cabinet</u> David Rogers James Hynd [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] <u>Policy leads</u> [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] Richard Dennis [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] Don McGillivray [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] Bettina Sizeland Diane Strachan [REDACTED s38(1)(b)] [REDACTED s38(1)(b)] [REDACTED s38(1)(b)]		<u>Legal</u> Solicitor Alison Coull [REDACTED s38(1)(b)] Chief Parliamentary Counsel Ian Young Michael Anderson Legal Sec't to the Lord Advocate <u>Comms</u> Kenneth Fowler [REDACTED s38(1)(b)] <u>Special Advisers</u> Liz Lloyd Ewan Crawford Stuart Nicholson			

ANNEX

[Note: the Annex, with the exception of the material extracted below, is outwith the scope of the request as it does not concern the proposed changes to FOI legislation]

Green – strong candidate for inclusion

Amber – further checking required, or could potentially wait for future Bill

Red – does not look appropriate for emergency Bill

Policy area	Topic(s)	RAG	Comments
FOI	Extension of the default deadline from 20 days to 3 months		Fits well with lifting pressure off public sector, especially in relation to public services on the front line of the fight against coronavirus.
	A provision like that in the EIRs allowing an authority to extend a response deadline by a further 2 months if voluminous and complex information is sought.		
	A “without reasonable cause” qualification of the duty to comply with the deadline.		Some potential for criticism that Government relaxing duties on itself.
	An explanation in the explanatory notes to the Emergency Bill/Act that such reasonable causes include workload pressures relating to the pandemic or recovery from it.		

CORONAVIRUS (SCOTLAND) BILL
DRAFT CONTRIBUTION FOR POLICY MEMORANDUM
PROVISIONS RELATING TO FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Nature of the problem: the impact on statutory timescales caused by the coronavirus pandemic

1. Section 10(1) of the Freedom of Information (Scotland) Act 2002 (“FOISA”) imposes a duty on Scottish public authorities to respond to requests for information promptly, and in any event not later than the 20th working day after receipt of the request. A similar 20 working day limit applies under section 21(1) if an authority is asked by the requester to review the initial response.

2. FOISA has no provision to allow an authority not to comply with these timescales in an emergency. The Scottish Information Commissioner (“the Commissioner”) has no discretion to take into account the circumstances when considering whether such an authority has complied with Part 1 of FOISA. Accordingly, if a requester appeals to the Commissioner about a failure to respond on time, the Commissioner would have no option but to find that the authority had failed to comply with Part 1 of FOISA.

3. Many Scottish public authorities, such as Health Boards, GPs and pharmacies, are in the front line of responding to the coronavirus pandemic, and so will be experiencing an unprecedented demand for their services. Other authorities, including councils, are also experiencing office closures and staff absence on a scale never seen before, while diverting resources to tackle the pandemic. It is anticipated authorities are likely to need more time to meet statutory requirements and despite best efforts may fail to comply with the law.

4. *Policy solution in the Bill, and any relevant connection to UK Coronavirus Bill*

5. The Bill makes three main changes to the current law:

- (a) to extend the deadlines for responding to requests and reviews from 20 working days to 60 working days
- (b) to enable Scottish public authorities to extend the period of 60 working days by a further period of 40 working days in certain circumstances
- (c) to provide that, in any event, a Scottish public authority does not fail to comply with its duties under Part 1 of FOISA if it has reasonable cause for responding outwith the relevant timescales

6. Extending the deadlines for responding to requests and reviews for the duration of the pandemic is intended to reduce the immediate pressure on authorities, while still providing a long-stop date by which a response is due. A legal right to request information from authorities will be maintained, but authorities will have a longer period in which to respond.

7. We recognise that, in some circumstances, 60 working days may still not give authorities sufficient time to deal properly with a request for information. Accordingly, the Bill gives authorities the power to extend that period for up to a further 40 working days. An authority can use that power if it is impracticable to respond within the 60 working day deadline – either because of the volume and complexity of the information requested, or because of the overall volume of requests being dealt with by the authority. Authorities will have to tell requesters why they have extended the deadline. If the requester is dissatisfied, they will be entitled to a review by the authority, and can then apply to the Commissioner for a decision.

8. We recognise that authorities may be unable to comply with requests within these extended timescales for a range of reasons. Our policy is to enable the Commissioner to have the necessary discretion to consider whether the authorities had reasonable cause for failing to comply with the timescales. The Commissioner will have discretion to find that notwithstanding the delay the authority has complied with Part 1 of FOISA. The Bill also expressly states that the Commissioner is to take into account the Covid-19 pandemic or the recovery from it as factors in determining whether the authority had shown reasonable cause for failing to comply with the timescales.

9. The UK Government has not brought forward any measures to amend the equivalent timescales in the Freedom of Information Act 2000. We remain in close contact with the Cabinet Office, which leads on this area. They do not foresee legislation being brought forward at present.

Commented [A1]: DN – this is probably not for the Policy Memo itself, but rather to explain the (lack of) connection with the UK Bill.

Why dealing with this problem is necessary and urgent

10. Scottish public authorities are under significant and unprecedented pressure as a consequence of the pandemic. The existing timescales in FOISA for responding to requests exacerbate that pressure. Allowing for a temporary extension of timescales is a necessary mechanism to enable authorities to focus their main efforts on pandemic issues whilst ensuring that the operation of FOISA as a whole remains effective. Urgent action is required because of the growing strain on Scottish public authorities, particularly those in the healthcare sector in managing the pandemic response while dealing with significantly increased volumes of requests.

Any informal consultation with those affected

11. The Commissioner is responsible for promoting information rights as well as ensuring compliance with the legislation, and so is well-placed to balance the respective interests of requesters and authorities. We have been in regular contact with the Commissioner to discuss temporarily extending the timescales in FOISA, and have taken his views into consideration.

Alternative approaches

12. The Scottish Ministers have existing powers to extend the timescales in FOISA by regulations. However, this would only enable us to deliver the first of the changes in the Bill: the other changes require primary legislation. Additionally, the regulations would be subject to the affirmative procedure in the Scottish Parliament, and so they could not be brought into force quickly enough to address the pressures arising from the pandemic.

[REDACTED s38(1)(b)]

FOI Unit

[REDACTED s38(1)(b)] 25 March 2020

From: [REDACTED s38(1)(b)]

Sent: 27 March 2020 17:05

To: [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>

Cc: Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>; [REDACTED s38(1)(b)]@gov.scot>

Subject: RE: IMMEDIATE/URGENT - Coordination of the emergency Coronavirus (Scotland) Bill - CSCL paper - policy/handling issues to highlight (OFF/SEN) - FOI provisions contribution

Colleagues,

A contribution for the FOISA-related provisions is undernoted, cleared by [REDACTED] and my DD.

Happy to discuss.

Graham

[Undernote](#)

[redacted - out of scope]

Notable stakeholder reaction

The Office of the Scottish Information Commissioner has been made aware of the nature of the proposed changes (the Commissioner himself is on long-term sick leave). His Office has commented that the Commissioner does not oppose legislative change, and offered a number of safeguards that it would wish to see included in order to strike a balance between relieving pressure on Scottish public authorities and protecting the public's right to information. We consider that the Bill provisions adequately address the suggestions made by the Commissioner's Office.

[REDACTED s38(1)(b)] | [REDACTED s38(1)(b)]| Freedom of Information Unit

M: [REDACTED s38(1)(b)]

I am currently working from home, and can be contacted by email, Skype for Business, or on my mobile.