

Briefing template

Bill topic: Freedom of Information

Impact of coronavirus outbreak on policy area:

- The Freedom of Information (Scotland) Act 2002 contains statutory timescales for Scottish public authorities to respond to requests for information and to reviews.
- They have to respond to requests for information promptly, and in any event not later than the 20th working day after receipt of the request.
- These timescales also apply to reviews of the initial response.
- FOISA has no provision to allow an authority not to comply with these timescales in an emergency.
- The Scottish Information Commissioner has no discretion to take into account the circumstances when considering whether such an authority has complied with its duties under 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.
- Many Scottish public authorities, such as Health Boards, local authorities, GPs and pharmacies, are in the front line of responding to the coronavirus outbreak, and so will be experiencing an unprecedented demand for their services.
- Other authorities, including central government, are 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

Policy objectives:

- The policy objective is 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.
- The Bill makes three main changes to the law:
 - it extends the deadline for responding to requests and reviews from 20 working days to 60 working days
 - it enables authorities to extend the 60 working day period by up to 40 working days in carefully defined circumstances
 - it enables the Commissioner to take into account the effects of dealing with coronavirus on authorities if they do not meet the deadlines
- Ministers will also have the power to specify further circumstances where authorities may extend the 60 working day period, if they consider that doing so will enable authorities to better utilise resources to respond to coronavirus

Necessity and urgency:

- Scottish public authorities are under significant and unprecedented pressure as a consequence of the coronavirus outbreak.
- The existing timescales in FOISA for responding to requests exacerbate that pressure.
- A temporary extension of timescales is necessary to enable authorities to focus their main efforts on responding to the outbreak.
- Urgent action is needed because of the growing strain on authorities, particularly in the healthcare sector.

Consultation:

- Scottish Government officials have been in regular contact with the Commissioner to discuss temporarily extending the timescales in FOISA.
- We have taken the Commissioner's views into account in shaping our proposals.
- 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

Alternative approaches:

- The Scottish Ministers have existing powers to extend the timescales in FOISA by regulations.
- These powers are not adequate because most of the changes that we propose require primary legislation
- Additionally, regulations would be subject to the affirmative procedure, and so could not be made quickly enough to address the pressures faced by authorities

Top Lines to take:

- We absolutely recognise the importance of upholding information rights and the considerable public interest in the release of information at this time.
- We are acutely aware that staff across Scottish public authorities are dealing with an unprecedented emergency.
- That is why we are temporarily extending the statutory timescales in the Freedom of Information Scotland Act 2002.
- These emergency provisions will provide much-needed breathing space for authorities to respond.
- The legislation has a 'sunset clause' to restore the current timescales, once the coronavirus outbreak has passed.

Reactive Q+A – what are the three main possible criticisms:

Why is the Scottish Government restricting access to information when there is such a heightened public interest in understanding how government and other public bodies are dealing with the coronavirus outbreak?

The Scottish Government is not restricting access to information. Individuals will still have a legal right to ask Scottish public authorities, including those at the front line of dealing with the outbreak, for information. Authorities will still have to give information that they hold. They will still have to do so promptly.

These provisions simply recognise that for some authorities, it may not be possible to do so within 20 working days. They give a breathing space for hard-pressed staff in authorities across the country who are coping with unprecedented demands for critical front line services, levels of absence unlike anything seen before, and wholesale restrictions on their ability to access workplaces where information is held.

[redacted - out of scope]

Stakeholder views:

- The Commissioner is not opposed to legislative change
- He has emphasised the significant public interest in accessing information about how decisions are made in connection with the coronavirus outbreak
- He has proposed a number of safeguards to strike a balance between relieving pressure on authorities and protecting information rights
- We are satisfied that the Bill adequately takes the Commissioner's proposals into account

Note on whether there is any connection with the UK Bill i.e. does the policy aim align or diverge from UKG approach?:

- The UK Coronavirus Act does not make similar provision for the Freedom of Information Act 2000.
- Cabinet Office has advised that the UK Government is still considering its options.
- There are no immediate plans for UK emergency legislation, as Parliament has risen for the Easter recess.

Name and contact of dedicated briefing official:

- [REDACTED s38(1)(b)], FOI Unit [REDACTED s38(1)(b)]

FOI extracts from wider briefing on Coronavirus emergency legislation

SCOTTISH CORONAVIRUS BILL

- The Bill will:
 - Extend FOI deadlines

FREEDOM OF INFORMATION

- We absolutely recognise the importance of upholding information rights and the considerable public interest in the release of information at this time.
- However, we are also acutely aware that staff across Scottish public authorities are dealing with an unprecedented emergency.
- That is why we are temporarily extending the statutory timescales in the Freedom of Information Scotland Act 2002.
- The deadline for responding to requests and reviews will now be 60 working days (up from 20) and authorities will be able to extend this period by a further 40 working days in certain circumstances.
- These emergency provisions will provide much-needed breathing space for authorities to respond.
- The Bill's 'sunset clause' will restore current timescales once the outbreak has passed.

ANNEX A – MEASURES IN CORONAVIRUS (SCOTLAND) BILL

Measures to ease pressures on public services, businesses and consumers
31. Temporary adjustment of FOI to allow public bodies to devote additional resources to COVID response

From: Rogers D (David) (Constitution and Cabinet Director) <David.Rogers@gov.scot>

Sent: 31 March 2020 20:26

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

Cc: Minister for Parliamentary Business and Veterans <MinisterPBV@gov.scot>; Minister for Europe and International Development <MinisterEID@gov.scot>; Hynd JS (James) <James.Hynd@gov.scot>; 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>; Crawford E (Ewan) <Ewan.Crawford@gov.scot>

Subject: Emergency Bill: FOI

Mr Russell

copy as above

[redacted - out of scope]

We are instructing possible government amendments as follows:

- [REDACTED s29(1)(a)]
- [REDACTED s29(1)(a)]

“The Scottish Ministers” is as you know the statutory personality for the Scottish Government and includes the prison service, Transport Scotland, Social Security as well as policy functions including health, education etc. We can’t see a practical way of designing a carve-out of “front line services” or topic-specific elements without a great muddle and that would in any case miss the point that covid-related work (and absence/sickness pressures) are being felt across the complete range of range of the Scottish Government’s business.

The FOI provisions in the bill have an important role in sending signals about priorities as well as in reducing burdens. We will need to be clear that taking a different approach for central government does not mean that the Covid-19 effort there – sourcing ventilators, arranging testing, managing the health service and redirecting large parts of the public sector, etc – is less valuable than that of the rest of the public sector. I suggest we also say that although transparency is crucial the reasonable cause exemption provision is essential for managing workload in a way that does not undermine the covid effort.

[redacted - out of scope]:

- [redacted - out of scope]
- [redacted - out of scope]
- [redacted - out of scope]

Finally we have just seen that the Information Commissioner supports the 60 days, but not extendability. Penny and colleagues will provide advice.

David

David Rogers

Director, Constitution and Cabinet | The Scottish Government | 4 N.04, St Andrew's House, Edinburgh, EH1
3DG | T: [REDACTED s38(1)(b)] | E: david.rogers@gov.scot

CORONAVIRUS (SCOTLAND) BILL – FOI PROVISIONS – SCOTTISH GOVERNMENT

“Scottish Ministers” in FOISA includes frontline services including those delivered by Executive Agencies e.g. Scottish Prison Service and Social Security Scotland.

Agencies delivering front line services are legally indistinguishable from the core Directorates of the Scottish Government.

It also means treating hard-pressed staff in our Health and Social Care Directorates – including many seconded NHS staff – less favourably when they too are at the forefront of our national response to coronavirus

However, it is wrong to suppose that the coronavirus response is just about staff working tirelessly to ensure our NHS has what it needs, or to ensure that benefits are paid, or that prisoners are kept in safe conditions.

- Covid-19 affects every part of part of the organisation.
- We have mobilised a 7-day, 2-shift response across government, and made a radical shift towards virtual and digital team-working.
- We shall be working in this way for months.
- At least 50 hubs and teams are now working on Covid-19 simultaneously, with many major policy, operational and staffing decisions being taken every day.

Organisational repurposing – snapshots

- The DG Health and Social area has reformed its whole operations around 3 directorates focused on the COVID response, with 85% of staff estimated to be in new roles
- More than a 100 staff have moved from other areas into just one of these health directorates
- As packages of work are identified teams are repurposed across the organisation in support, for example:
 - On Key Workers - teams from Education and Employability have come together to deliver a single response
 - On Shielding - teams across Children & Families, Housing and Social Justice, Food Standards Scotland and Food and Drink policy are working together with analysts to co-ordinate food supply and the support to the most vulnerable
 - On Testing - teams from health, Citizens Assembly and Procurement are combining capacity.
 - On Field Hospitals – senior staff from International are working with the Chief Nursing Officer

Impact of social distancing and absence

- To comply with social distancing measures SG has moved almost entirely to home working
- Building occupancy rates in our main buildings are down around 97% so there will not be access to photocopiers, printers, physical records and other equipment.

- With school closures many staff are managing caring responsibilities alongside home working
- This allied with assumptions around increases in levels of sickness will have an unpredictable and uneven impact on team capacity. The priority must be to keep critical functions operational and the COVID response fully staffed despite these likely impacts.

FOI Stats

In 2019, Scottish Government's caseload was **3,049 requests** – one third (1004 requests = 33%) were responded to by DG Health and Social Care, Transport Scotland or Social Security Scotland/Directorate for Social Security¹.

- **DG Health and Social Care** directorates responded to **279 requests** during 2019, representing **9% of the caseload**
- **Transport Scotland** responded to **579 requests**, representing **19% of the caseload**
- **Social Security Scotland** and the **Directorate for Social Security** responded to 146 requests, representing **4.8% of the caseload**.

In recent years, SG has substantially improved FOI performance with 96% of requests answered on time between July and December 2019, and 97% in January and February 2020.

John Lamont MP – Letter

“Given the current crisis, I thought the attached statement from the Scottish Information Commissioner on the impact of Covid-19 on FOI timescales was astonishing and I am requesting that the rules be relaxed.”

¹ Source: Monthly reports submitted to the Scottish Information Commissioner between January and December 2019

Cabinet Secretary for the Constitution, Europe and External Affairs

**CORONAVIRUS (SCOTLAND) BILL
PROVISIONS RELATING TO FREEDOM OF INFORMATION (SCOTLAND) ACT 2002
POLICY INSTRUCTIONS FOR STAGE 2 AMENDMENTS**

Purpose

1. To provide advice on options for amendments to the FOI provisions in the Coronavirus (Scotland) Bill (Part 2 of schedule 6).
2. To seek your views on which option should be adopted.

Priority

3. *Immediate*. The Stage 2 lodging deadline is 12.30 pm on Wednesday 1 April.

Background

4. The Scottish Conservatives have indicated that they cannot support the provisions in the Bill that modify the Freedom of Information (Scotland) Act 2002 (“FOISA”) insofar as they apply to the Scottish Government. We understand that Mr Russell has proposed that the provisions should accordingly be further modified [REDACTED S29(1)(a)]:

- (a) [REDACTED S29(1)(a)];
- (b) [REDACTED S29(1)(a)].

5. Separately, the Scottish Information Commissioner (“the Commissioner”) has yesterday evening issued a briefing note on the FOI provisions in the Bill to key stakeholders and MSPs with the intention of informing discussion during the Parliamentary passage of the Bill. The Commissioner’s principal concerns relate to the provision enabling authorities to extend the initial period for responding to a request or a review.

6. We have instructed amendments to give effect to Mr Russell’s agreement as set out in paragraph 4 above. However, we have identified further options which would allow the Scottish Ministers to address the Commissioner’s concerns while still giving effect to that agreement.

Discussion

The Commissioner’s concerns

7. The Scottish Information Commissioner’s principal concern about the Bill relates to the provision enabling Scottish public authorities to extend the period of 60 working days by a further period of 40 working days in certain circumstances (paragraph 5 of schedule 6). Two sets of circumstances are set out in the Bill – (a) volume and complexity of the information requested, and (b) overall number of requests that the authority is dealing with.

8. In short, the Commissioner considers that (a) is unnecessary and (b) affords too much discretion to authorities, leading to concerns about misuse. More widely, he suggests that

allowing extensions in this way is not necessary at present, and proposes that the Ministers instead take powers to legislate for this as and when it becomes apparent that it has become necessary to do so.

FOI Unit analysis

9. We think there is force in the Commissioner's criticism of paragraph 5(1)(a): the interaction with the upper cost limit in FOISA had not been fully explored. We are less persuaded by the arguments in respect of paragraph 5(1)(b) – we think that everything highlighted by the Commissioner could appropriately be taken into account under that provision.

10. On balance, we think there is merit in the wider proposal that the Ministers should take powers to legislate for extensions rather than including them in the Bill at this time. The Bill will triple the time available to respond for most authorities (60 working days), and double it for the Scottish Ministers (40 working days). We can see the attraction of taking a power to introduce extensions if it later becomes apparent that the situation is so bad that authorities cannot respond within the 60 working day period. It would also allow time to work with the Commissioner to address his concerns about how broad the discretion should be in balancing the needs of authorities with the information rights of requesters.

Options for amendments

Option 1: amendments to reflect discussion with Conservatives only

11. This option gives effect to Mr Russell's agreement set out in paragraph 4 above. It involves amending the Bill so that [REDACTED S29(1)(a)]

12. This would not address the Commissioner's concerns and as the key stakeholder in this area his views may well prove influential. It may therefore be undesirable not to address his concerns in any way.

Option 2: amendments to reflect agreement with Conservatives and address Commissioner's concerns

13. This option involves amending the Bill so that [REDACTED S29(1)(a)]

14. [REDACTED S29(1)(a)].

15. This could be presented as a pragmatic approach that shows Ministers have listened to key stakeholders and want to proceed in a way that is proportionate, while ensuring that tools are available should the situation deteriorate and the power to extend becomes necessary. There is some force behind the argument that we should see whether tripling the timescales is sufficient, before allowing authorities five times longer to respond.

Option 3: amendments to reflect agreement with Conservatives while removing the ability to extend entirely

16. As with Option 2, this involves amending the Bill so that [REDACTED S29(1)(a)]

17. [REDACTED S29(1)(a)] This goes beyond what the Commissioner has called for, but has the advantage of simplicity if significant Parliamentary resistance is expected.

Additional fallback concession

18. All three options are intended to deliver what has already been discussed, [REDACTED S29(1)(a)]

19. [REDACTED S29(1)(a)].

Advice

20. In our view, bringing forward amendments which seek to take into account the Commissioner's concerns (Option 2) represents the best way forward. It would show that the Ministers have been responsive to stakeholder concern, while preserving the ability to act if the situation deteriorates. This should in turn minimise Parliamentary criticism if both the concerns of the Conservatives and the Commissioner have been addressed.

21. However, we suggest that any of the options would represent an improvement for all Scottish public authorities (including the Ministers) on the present situation.

Recommendation/Conclusion

22. You are invited to indicate which option you wish to pursue for bringing forward amendments to the FOI provisions in the Bill.

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

1 April 2020

OFFICIAL – SENSITIVE

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Minister for Parliamentary Business and Veterans Minister for Europe and International Development					

David Rogers
 James Hynd
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 Penny Curtis
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 Alison Coull
 [REDACTED S38(1)(b)]
 [REDACTED S38(1)(b)]
 Ian Young
 Michael Anderson
 Jonathan Brown
 [REDACTED S38(1)(b)]
 Ewan Crawford

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Necessity and urgency:

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- Urgent action is needed because of the growing strain on authorities, particularly in the healthcare sector.

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- We have taken the Commissioner's views into account in shaping our proposals.
- 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

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- These powers are not adequate because most of the changes that we propose require primary legislation
- Additionally, regulations would be subject to the affirmative procedure, and so could not be made quickly enough to address the pressures faced by authorities

Top Lines to take:

- We absolutely recognise the importance of upholding information rights and the considerable public interest in the release of information at this time.
- We are acutely aware that staff across Scottish public authorities are dealing with an unprecedented emergency.
- That is why we are temporarily extending the statutory timescales in the Freedom of Information Scotland Act 2002.
- These emergency provisions will provide much-needed breathing space for authorities to respond.
- The legislation has a 'sunset clause' to restore the current timescales, once the coronavirus outbreak has passed.
- We are committed to taking a proportionate approach to these emergency provisions, which is why we are bringing forward Stage 2 amendments to give

effect to the Scottish Information Commissioner's suggestions on extending time periods

Reactive Q+A – what are the three main possible criticisms:

Why is the Scottish Government restricting access to information when there is such a heightened public interest in understanding how government and other public bodies are dealing with the coronavirus outbreak?

The Scottish Government is not restricting access to information. Individuals will still have a legal right to ask Scottish public authorities, including those at the front line of dealing with the outbreak, for information. Authorities will still have to give information that they hold. They will still have to do so promptly.

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Stakeholder views:

Scottish Information Commissioner

- The Commissioner is not opposed to legislative change
- He has emphasised the significant public interest in accessing information about how decisions are made in connection with the coronavirus outbreak
- He has proposed a number of safeguards to strike a balance between relieving pressure on authorities and protecting information rights
- ~~We are satisfied that the Bill adequately takes the Commissioner's proposals into account~~ will bring forward amendments at Stage 2 to reflect his suggestions on extending the period to respond to requests
- These helpful suggestions ensure that the approach in the Bill is proportionate, while ensuring that we can further help authorities if the situation deteriorates

Law Society of Scotland

[Background: the Law Society has questioned whether the Bill applies to ongoing requests and reviews]

- We confirm that the provisions in the Bill will apply to ongoing requests and reviews that Scottish public authorities are currently handling

Note on whether there is any connection with the UK Bill i.e. does the policy aim align or diverge from UKG approach?:

- The UK Coronavirus Act does not make similar provision for the Freedom of Information Act 2000.
- Cabinet Office has advised that the UK Government is still considering its options.
- There are no immediate plans for UK emergency legislation, as Parliament has risen for the Easter recess.

Name and contact of dedicated briefing official:

- [REDACTED s38(1)(b)], FOI Unit [REDACTED s38(1)(b)]