

**CFoIS**

**Promoting the Right to Information in Scotland**

**The Coronavirus (Scotland) Bill - Commentary on FoI Implications**

**Overview**

The Campaign for Freedom of Information in Scotland (CFoIS) acknowledges and applauds the hard work and dedication of Scotland’s public sector workers generally and specifically during this national emergency. CFoIS recognises the right of all staff to be safe when they are at work during the COVID-19 pandemic.

The Coronavirus (Scotland) Bill[[1]](#endnote-1) was introduced to manage the impact of this emergency on all our lives. The legal changes form part of wider measures on the functioning of public bodies in Scotland but CFoIS will confine its analysis to those parts drafted to amend The Freedom of Information (Scotland) Act 2002 (FoISA). CFoIS believes the Bill must be recalibrated to restore balance to the delivery of FoI rights and duties. CFoIS set out our reasons in this MSP briefing to emphasise that the public’s right to know can be protected and remain strong whilst giving public bodies the flexibility to target staff in critical areas such as health and social care.

The published Bill proposes to allow a public body up to five months to respond to a simple freedom of information request and another five months to carry out an internal review of its original decision. CFoIS believes this timeframe is excessive and will negatively impact on public trust, on organisational openness and transparency. The Bill is out of step with the popularity of FoI: in 2017 independent polling for the Scottish Information Commissioner revealed that 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.[[2]](#endnote-2)

The Scottish Government’s proposals introduce a lengthy response time for information requests in the lead up to, during and after the Scottish elections scheduled for May 2021. CFoIS believes this potentially undermines democratic debate and may prevent the public accessing official information so they can form an opinion. Participating in fair elections and forming an opinion are human rights contained in the European Convention on Human Rights (ECHR).

**Existing Problems**

FoISA is currently the subject of post-legislative scrutiny by the Public Audit and

Post Legislative Scrutiny Committee of the Scottish Parliament. Scrutiny was prompted by a unanimous motion at the Scottish Parliament on 21st June 2017 which in turn was prompted by a letter of complaint signed by journalists and repeated criticism from organisations such as CFoIS. Therefore, the current system needs reformed. Furthermore, the Scottish Government’s performance on FoISA delivery is still subject to enforcement action by the Commissioner as set out in correspondence dated 2nd February 2018.[[3]](#endnote-3) There are other operational concerns: the Scottish Information Commissioner reported in 2019 that his office carried out 251 formal ‘interventions’, an increase of 17 in one year, due to practice issues.[[4]](#endnote-4)

The public’s use of FoI rights continues to grow and there is also evidence that more requestors are dissatisfied with the responses they receive so they complain to the Commissioner: there were 83,963 reported requests for information in 2018/19, up 8.3% from 2017/18; appeals to the Commissioner rose by 0.7% in 2018/19.

**Alternative Approach**

The Bill’s proposals were published without any consultation, despite CFoIS convening the Scottish Public Information Forum (SPIF) whose role is incorporated in the Scottish Government’s Six FoI principles published in 2007: “We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum." [[5]](#endnote-5)

Conversely FoI campaigners globally have been working collaboratively on a

sensible and pragmatic approach for public bodies given the huge pressures to

deliver at the frontline as well as at the administrative level. The constraints and practical obstacles are obvious so we accept there will be delays or perhaps even holds on requests. A proportionate response would include:

* Those designated public bodies that are especially burdened should be included in a list within the Bill and the measures be limited to them. This approach is consistent with FoISA which names the bodies covered.
* Limits on rights need to be justified by the facts. Any change in the maximum response time needs to be reasonable in all the circumstances. There are over 10,000 designated public authorities in Scotland and for many, the current timescales may still be doable and reputationally desirable.
* Requests related to the coronavirus crisis should have priority and be answered within existing deadlines and the deadline for the rest can be longer when there are good reasons for the delay such as requests that require physical processing but that’s impossible with so many public offices closed and staff working from home.
* FoISA already contains a number of ways in which information requests can be refused including cost ceilings and rules on vexatious requests and the public as well as designated bodies can be reminded of these.
* A number of public authorities are functioning to tackle the pandemic, they have the information related to the pandemic, so they are able to pro-actively publish it avoiding the need for FoI requests in the first place. This should be an obligation contained in the Bill.
* Making changes to delivery of FoISA that provides continuity and certainty in the practice and enjoyment of rights.

Scotland can learn from practice in other countries such as Sudan, where the law expedites the answering of certain information requests. For example, “If the submitted application contains information necessary to protect the life or freedom of an individual, the public institution must submit the information requested immediately to the applicant in a period not exceeding two days from the date of receipt of the application.”[[6]](#endnote-6)

**Amend the Bill**

The main problems with the Bill arise from focusing on the needs of designated bodies at the expense of the rights of requestors. A balance can be struck which is fair. Also, blanket extensions to response times are being introduced which will apply to some designated bodies that are able to reply and meet current timescales and that is un-necessary. Right to information laws allow people to ensure government officials make good decisions even at a time of national emergency. The need to maintain public trust in and enable scrutiny of, public services is critical in helping public services do better as well holding the Government to account in real time and retrospectively. The problems and solutions identified are:

1. There is no rational explanation as to why 60 working days and potentially 100 working days are necessary response times. **Request of MSPs:** The Government should be asked to justify specifically this new timeframe and provide detail on the ‘necessity and urgency’ of its actions on FoI.
2. The public’s right to receive information within 20 working days will change so public bodies can take up to 60 working days with a power to extend the response time by another 40 to 100 working days which is the equivalent of five months. This power applies to all services rather than those ‘under pressure’ due to the pandemic. **Request of MSPs:** Amend Schedule 6, Part 2 Clause 3(1) and 5(1) of the Bill to remove automatic coverage of the response time to all bodies designated under FoISA.
3. Internal reviews of decisions to decline all or part of the information requested may now take much longer - instead of 20 working days the response time can be expanded to 60 working days with a power to extend the response time by another 40 to 100 working days which is the equivalent of five months. **Request of MSPs: Request of MSPs:** Amend Schedule 6, Part 2 Clause 3 (2) and 5(1) of the Bill to maintain the current response time for internal reviews unless the need for an exemption can be established by specific bodies.
4. The Scottish Government is limiting FoI rights initially until 30th September 2020 but potentially first until 31st March and then to 30th September 2021. This coincides with elections to the Scottish Parliament in May 2021 which is often a period of heightened interest for people to make FoI request for ‘official information’ in order to form an opinion. **Request of MSPs:** Amend Part 2, Clause 11 to require any changes to FoISA to automatically expire on 30th September 2020.
5. The Scottish Government is seeking a ‘blank cheque’ power to vary the law and timescales. **Request of MSPs:** Amend Part 2 Clauses 11-15.
6. The legal change will impact on current requests for information that are outstanding as although the Bill comes into force the day after Royal Assent, ‘Scottish Ministers may by regulations make transitional, transitory or saving provision in connection with the coming into force of any provision of this Act’. **Request of MSPs:** Please clarify that this is a retrospective amendment and amendPart 2Clause 16(3) so that current FoI requests are dealt with under the rules operating when the information request was made.
7. The speed of the process denies proper scrutiny and informed commentary: to publish a 72-page Bill one day covering a wide range of topics, accompanied by an 82 page ‘Policy Memorandum’ plus other documents and expecting it to be passed the next day is unreasonable. Journalists, NGOs and the public can make this Bill better if they are given the opportunity to influence. **Request of MSPs:** amend the Bill sothat the provisions relating to amending FoISA are delayed by 7 working days**.**
8. The impact of the Bill is to establish a system of response times and review that confuse and to introduce to the rights framework a series of hurdles over which the requestor has virtually no control. **Request of MSPs:** Amend the Bill to maintain a clear and accessible way to have information requests considered timeously and to receive information in a timely manner. Long delays can make information less useful and reduce transparency and accountability.

**Human Rights**

CFoIS disagrees with the Scottish Government’s assertion that ‘no detrimental effects’ on human rights are ‘anticipated’.[[7]](#endnote-7) Article 10 of the ECHR has been ruled togive the right to information in order to form an opinion.[[8]](#endnote-8) The cases have related to requests for information which are in the public interest and that is established by examining: the purpose of the information request; the nature of the information sought; the particular role of the seeker of the information in “receiving and imparting” it to the public; and whether the information was ready and available. Such criteria can be adopted when prioritising answers to existing FoI requests in Scotland.

The Human Rights Act 1998 places duties on those delivering public services and services of a public nature to comply with the ECHR. In addition, the Scotland Act 1998 places duties on public authorities and Scottish Government Ministers to comply with human rights law including UN treaties which the UK has ratified. Compliance is subject to periodic review by the UN and that process is currently underway on the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UN ICCPR sets out the right and the freedom to seek, receive and impart information and ideas …’[[9]](#endnote-9). In General Comment 34 on Article 19 ‘public bodies’ are broadly defined.[[10]](#endnote-10) CFoIS has submitted evidence to the UN Human Rights Committee to assist its scrutiny of Scotland’s compliance with Article 19 and the scheduled meeting to agree the ‘List of Issues Prior to Reporting’ (LOIPR) was scheduled for 24th March but that has understandably been postponed.[[11]](#endnote-11)

**Conclusion**

CFoIS realises that all requests should still be dealt with ‘promptly’ under FoISA, but that has proven impossible to enforce even before the pandemic emergency, which is just one of the many reasons to reform FoISA. CFoIS recognises that the rights and duties within The Environmental Information (Scotland) Regulations 2004’ (EIR(S)s) must still be adhered to and the effect will be to create two tiers of access: ready access to environmental information and slow access to everything else. This creates unfairness.

**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. **For further information contact:** Carole Ewart, CFoIS Convener, [www.cfois.scot/](http://www.cfois.scot/) info@cfois.scot @CFoIScot

1. [https://www.parliament.scot/S5\_Bills/Coronavirus%20(Scotland)%20Bill/SPBill66S052020.pdf](https://www.parliament.scot/S5_Bills/Coronavirus%20%28Scotland%29%20Bill/SPBill66S052020.pdf) [↑](#endnote-ref-1)
2. Scottish Information Commissioner at<http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx> [↑](#endnote-ref-2)
3. Scottish Information Commissioner website at <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx> [↑](#endnote-ref-3)
4. Annual Report and Accounts 2018/2019 pg. 15 at <http://www.itspublicknowledge.info/home/SICReports/AnnualReports.aspx> [↑](#endnote-ref-4)
5. The Scottish Government website at <http://www.gov.scot/About/Information/FOI/6principles> [↑](#endnote-ref-5)
6. More information at <https://www.rti-rating.org/country-data/by-indicator/22/> [↑](#endnote-ref-6)
7. Policy Memorandum para 361 at <https://www.parliament.scot/parliamentarybusiness/Bills/114929.aspx> [↑](#endnote-ref-7)
8. For example, the Grand Chamber decision in the case of on Magyar Helsinki

Bizottság v. Hungary *(*Application no. 18030/11*)* 8th November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30th January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435> [↑](#endnote-ref-8)
9. Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [↑](#endnote-ref-9)
10. ‘General comment No. 34 on Article 19: Freedoms of opinion and expression’, 2011 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en> [↑](#endnote-ref-10)
11. CFoIS website at <https://www.cfois.scot/wp-content/uploads/2020/01/CFoIS-ICCPR-Final-Jan-2020.pdf> [↑](#endnote-ref-11)