

FOI in a time of crisis

Paul Gibbons, aka FOIMan, advises on how FOI should be managed at this time. Paul is Head of the Examination Board for the Practitioner Certificate in Freedom of Information (www.foiqualification.com)

As we read about a virus spreading on the far side of the planet at the start of 2020, many of us will have paid little attention, assuming that news reports were exaggerating its potential impact. Even as the threat grew nearer and anxiety mounted, we had little concept of how it would affect our lives and those of everyone around us. On a professional level, we had no idea what it would mean. That was the case when I was writing my last article for this journal just a few months ago.

Yet now all of us have been profoundly affected by the coronavirus pandemic. Even the most idealistic of practitioners will be finding it hard to focus on their work at present. When many of us have not set foot in an office for over a month, when colleagues are placing their lives on the line, when families are only able to communicate via video links, when many of us know someone who has died or at least been very seriously ill, answering a few freedom of information ('FOI') requests can seem trivial, or worse, generate some anger towards applicants adding pressure to their authority at such a time.

Then there is the practical impact of the current crisis. Practitioners will either be working from home or have been seconded part or full-time to other roles. Requests may not reach them if they are sent by post. It will be difficult to locate information being asked for, and to persuade busy colleagues to pull it together (assuming they even have access to it from wherever they are working). Information governance staff in the NHS and social care context will be busy advising on the many data protection implications of the coronavirus response and ensuring that an army of new and returning staff are aware of their obligations.

With all of this, some will argue that FOI should be forgotten. Indeed some public authorities have issued notices on their websites indicating that FOI has been suspended. Officially though, this isn't the case, and there is an argument that it is exactly at times like these that society needs openness — to help the public understand why difficult decisions are being taken, to reassure that what needs to happen is happening, and perhaps to highlight shortcomings which can then be put right.

What is the right balance and who decides?

In Scotland, the government has sought to assist authorities by amending the Scottish FOI Act. The UK government has elected not to change the Freedom of Information Act ('FOIA') but the Information Commissioner's Office ('ICO') has made clear that it will take the current public health emergency into consideration when it receives complaints. Many public authorities will be in a situation where they feel they have no choice but to prioritise other tasks. The question is how to limit the negative impact on people's rights and the likelihood of regulatory action at a later date.

Changes to the Scottish FOI Act

As the reality of the coronavirus pandemic hit politicians in March, and before their activities were curtailed, the UK government sought to pass emergency legislation to give it the powers to deal with the situation. As always with new legislation, but with greater urgency, various interests sought to lobby the government to address particular issues. For example, the Local Government Association lobbied the UK government and amongst other things asked for FOIA to be suspended by the Coronavirus Bill. In the end, FOIA was left untouched by the legislation when it received Royal Assent just a couple of days later.

The story was different in Scotland though. The Scottish government's Coronavirus (Scotland) Bill contained amendments to the Freedom of Information (Scotland) Act ('FOISA') right from the start. There was vocal opposition to the proposed changes, particularly from the Scottish media. This included an open letter sent from 31 journalists and their colleagues to all MSPs. The Office of the Scottish Information Commissioner ('OSIC') issued a briefing note on the Bill, which warned:

'The provisions set out in this Bill include change to a number of areas which may negatively impact on international perception of Scotland's commitment to transparency and accountability through strong FOI law.'

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A number of amendments to the FOI aspects of the Bill were put forward by opposition MSPs, but none succeeded (though the Presiding Officer — the ‘Speaker’ of the Scottish Parliament — was forced to use his casting vote to tip the scales in the government’s favour such as the scale of opposition). So when the Coronavirus (Scotland) Act became law at the beginning of April, FOISA was duly amended.

‘The FOISA changes — most of which related to the time for compliance with requests — can all be found in schedule 6 part 2 of the Coronavirus Act. Clause 3 extended the 20 working day limit for compliance to 60 working days for most Scottish authorities. The Keeper of Scottish Records could take up to 70 working days to respond to requests for closed records that are transferred to his custody (up from 30 working days). The same limits were applied to internal reviews (which, unlike in FOIA, are a requirement of FOISA).

Controversially, under Clause 5, Scottish ministers were given the ability to extend the deadline further up to a maximum of 40 working days for bodies outside of government where it is deemed necessary to facilitate coronavirus-related activities. In practice, the changes meant that some public authorities could have up to five months to answer a request, with a further five months to consider an internal review. In addition, Clause 6 provided that the Scottish Commissioner could rule that an authority is not in breach if a delay is reasonable in the circumstances and results

from the coronavirus emergency.

There were some constraints on these changes. First of all, the OSIC stressed that the ‘long-stop’ deadlines for answering requests have been extended, FOISA still required requests to be answered ‘promptly’. Its latest guidance on ‘Determining the effects of the coronavirus on an authority’s ability to respond to requests’ reminds Scottish authorities that promptly means ‘as soon as possible’, taking into account the resources available and the time required to answer a request. Authorities were encouraged to take a case-by-case approach and to ensure that they could provide evidence of the impact of coronavirus on their ability to answer a specific request promptly if asked. The OSIC noted that not all authorities’ ability to respond is impacted significantly by coronavirus.

Secondly, only FOISA had been amended — time limits under the Environmental Information (Scotland) Regulations were unaffected. The OSIC has indicated that it will deal with any complaints made under the regulations ‘sympathetically’, but it would have no choice but to rule that an authority had failed to respond within the relevant deadline if a valid complaint was received.

On 20th May 2020, the Scottish Parliament passed the Coronavirus (Scotland) (No.2) Act, and — only a matter of weeks after the first Act introduced its controversial amendments — the new Act repealed most of them. The effect is that there are no longer any extensions to the normal time limits in place. The Scottish

Commissioner can continue to take the coronavirus into account when considering a complaint, but must consider the public interest in compliance with the normal deadlines when doing so. Furthermore, Scottish Ministers have gained a new obligation — they must report to MSPs every two months until the 30th September 2020 on performance against FOISA deadlines and the extent of any backlogs.

The UK Information Commissioner’s position

Even regulators have been impacted by the pandemic. Like its Scottish equivalent, the ICO has closed its offices and staff are working from home. A notice on its website warned that correspondence sent by post would not be read or responded to until its office reopened. No decision notices were published between the 17th and 30th March, a longer gap than would normally be the case at this time of year. All of this means that the ICO knows how disruptive the coronavirus is to the business of public authorities. It was quick to put out a message in mid-March via its information rights blog that:

‘We are a reasonable and pragmatic regulator, one that does not operate in isolation from matters of serious public concern. Regarding compliance with information rights work when assessing a complaint brought to us during this period, we will take into account the compelling public interest in the current health emergency.’

This was followed up a month later with a statement and formal policy note on its regulatory approach to FOI and data protection during the current crisis. This again stressed that the ICO ‘will take an empathetic and pragmatic approach’ to the enforcement of FOIA and the Environmental Information Regulations (‘EIRs’) before expanding on this by promising that it will continue to process complaints but seek to minimise contact with authorities; recognise that the response to the pandemic will cause delays to response times, but expect authorities to recognise the public interest in transparency and seek as far as pos-

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sible to continue to comply with their obligations for particularly high-risk or high profile matters; understand that 'extreme circumstances' might mean that FOI services have to be suspended; expect authorities to proactively publish information of importance to their communities; and look to authorities to keep proper records, bearing in mind that this period will be subject to public scrutiny in the future.

According to the Campaign for Freedom of Information, the ICO has told at least one complainant that it is seeking to resolve cases informally where possible, and only to issue decision notices where a complainant wants to appeal the decision to the First-Tier Tribunal. The complainant was also warned that the notice would not be issued until an appropriate time in order to avoid placing an 'undue burden' on public authorities and the FTT.

On the ICO's application, the FTT granted a stay on information rights cases initially on 1st April for 28 days, subsequently extended through to 27th May. This means that any time limits in FOI, EIRs and data protection cases that would have expired during that period have been extended.

Common sense dictates that normal services will not be possible at a time like this, and both regulators have adjusted to the circumstances. The question is what this means for practitioners and the public authorities they serve when it comes to dealing with FOI requests — or indeed choosing not to deal with them.

How should FOI be managed during the coronavirus crisis?

Any practitioner who has worked in the NHS or in organisations that provide social care will know the particular challenge of managing FOI requests in this environment, even in normal circumstances. A hospital's medical director will understandably choose to prioritise their clinical responsibilities over searching through their email for information to answer

an FOI request. The pandemic will only serve to reinforce this choice of priorities, and that's ignoring the many practical reasons why answering requests on time will be more difficult right now.

Some public authorities have published notices on their websites indicating that their FOI services have been suspended. As the ICO notes, this is understandable in some cases. If staff who normally handle FOI requests have been seconded to units responding more directly to the coronavirus, they can't process those requests. If practitioners are themselves taken ill, there may well be no one else to replace them. However, if possible it would be best to avoid suspension. Firstly, from an ethical point of view, any decision to suspend rights ought to be the last resort: people will have legitimate questions about the handling of the crisis and if possible that need should be met. Secondly, suspension of an FOI service does not mean that the public will suspend their use of it. Even when the Scottish government tried to amend FOISA, the changes did not remove the obligation to answer requests eventually. Any requests not answered over the next few months will still be there when the service reopens and will be quickly supplemented by others.

Instead, as both the OSIC and the ICO recommend, a case-by-case approach is best, supported by good record-keeping and a proactive approach to publishing information. The following steps provide an outline of a sensible strategy for managing FOI during this crisis, many of which practitioners have no doubt already adopted.

Warn potential applicants that the service is likely to be disrupted:

Most people will understand that it will be difficult to maintain a normal service at times like these. A notice on the FOI pages of a public authority's website explaining how the service is affected in broad terms will help to manage applicants' expectations and limit complaints over delayed responses. Careful wording of

the notice could even discourage less urgent enquiries. The public will also need to be informed of any changes that will affect their submission of requests — for example, if post cannot be accessed by FOI teams. Automated email acknowledgements should also be updated to alert applicants of potential delays. This could be done by providing a link to the published notice.

Keep the public informed: Publish as much as possible about the authority's reaction to coronavirus and other subjects that it is known are of interest to applicants and the wider public. Even if it isn't always possible to answer individual requests on time, analysis of the subjects asked about can help decide what to publish proactively. It might be worth adding a frequently asked questions page to FOI pages or elsewhere on an authority's website. This is an area where practitioners can work closely with public relations or press office colleagues and can make a contribution to the authority's public messaging at this time.

Triage requests: Remember that even in Scotland, the regulator is reminding authorities to handle requests promptly. In doing so, the OSIC guidance on the coronavirus points to the UK UT case of *John v Information Commissioner and Ofsted* [2014] UKUT 444 (AAC). In that ruling, three factors were identified as being relevant when considering whether a request had been dealt with 'promptly':

- the available resources, bearing in mind the balance between answering requests and carrying out other core business;
- the time required to find relevant information and present it; and
- the time required to ensure that the information is complete.

Some requests can be dealt with straight away, because the relevant staff are available (the 'available resources') and searching for the information will not take much of their time. These should be answered within normal timescales, otherwise

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they are merely adding to the backlog of requests that will need to be answered once the crisis subsides. Other requests will require the attention of staff who are directly involved in the authority's response to the ongoing emergency or who are unavailable for other reasons. The information itself may not be readily accessible — it may be in buildings that staff are not working in during the lockdown. These requests cannot be answered until circumstances change.

Keep records: The ICO policy note stresses the importance of record-keeping. Whilst regulators have indicated that they will be sympathetic when dealing with complaints, they are not giving public authorities a licence to ignore FOI obligations. If they receive valid complaints, they will expect to see evidence of how coronavirus has affected the authority's ability to answer a specific request. This means keeping a note of these considerations:

- how has coronavirus affected the resource available to deal with this request;
- were staff unavailable and why;
- why wasn't it possible to access the information; and

- how much time would have been required to collate and check information within the usual timeframe?

Whilst it will be important to take a case-by-case approach (something stressed by both regulators), some authorities are likely to find that the reasoning can be replicated across many of the requests they receive, so this needn't take long. For example, it is likely that it would be difficult for practitioners in a hospital environment to answer most requests at present for reasons that can be readily articulated. In a local authority the situation will be more complex, with some areas under significant additional pressure and others less so.

Plan for the future: One day — it is to be hoped at any rate — our workplaces will return to relative normality. If practitioners have been unable to answer some or all of the requests received during this time, it is likely that there will be a significant backlog to work through. This can be planned for. Requests should continue to be logged and monitored, and senior managers kept informed of volumes and compliance concerns. In some cases, practitioners will want to be preparing business cases for additional resources to help clear the backlog at the appropriate time.

Training Course — the Role of the FOI Officer

What is the actual job of an FOI Officer? How do you interpret caselaw on FOI? Is there a right way to process FOI requests? Paul Gibbons addresses these issues in the training course, 'Role of the FOI Officer'. Details of the course can be found on the PDP website, www.pdptraining.com

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