

Legal Brief



Coronavirus (Scotland) Act 2020

Scotland only country so far to use COVID-19 as justification to water down Freedom of Information laws setting concerning precedent.

The Coronavirus (Scotland) Bill, as passed last week, contains far-reaching amendments to the operation of vital Freedom of Information (FOI) laws in Scotland on a temporary basis during the ongoing crisis; in particular, the timescales that will apply to public bodies in responding to such requests. In this update brief, we provide a summary of the key legal changes, which have been highly contentious and with limited debate. Indeed, given the emergency of the situation, the bill was passed in a single day through the emergency procedure in the Scottish Parliament arguably leaving inadequate opportunity for scrutiny to uphold fundamental democratic rights.



Annaïg Nicol

Legal Intern,
Environmental
Rights & Governance



Susan Shaw

Managing Partner,
Living Law
Solicitor

contact@livinglaw.co.uk

Coronavirus (Scotland) Bill, 1st of April 2020

As an insight into the challenges and culture barriers we often face in protecting the environment, it may be interesting to highlight the following updates from the Scottish Parliament on Wednesday of last week (1 April). They may usefully illustrate the culture and priority being attached to transparency agendas by the Government in Scotland.

Research to date suggests that Scotland is the only country to have sought to use the current emergency to limit its domestic transparency laws in this blanket way. Perhaps of greater concern, the original proposals tabled by the Government were even more draconian (see below). It is important to remember that transparency laws are designed to help Governments reach sound decisions, even in challenging contexts, and this change has already raised questions about the underlying motivations for such. In this brief, we explain the key legal changes and updated guidelines from the Scottish Information Commissioner. The question remains whether they can genuinely be said to be necessary and proportionate to the exigencies of the current situation.

In **summary**, during this emergency:-

- **The maximum timescale within which Scottish public authorities will be required to respond to requests is being extended from 20 to 60 working days;**
- **The maximum timescale within which Scottish public authorities must respond to requests that it review its initial handling of an FOI request is being extended from 20 to 60 working days.**

Public authorities will still be required (on paper anyway) to comply “promptly”. However, out of office replies from public authorities last week might raise concerns already that a different practice is set to emerge during this “lock-down” period.

In reality, environmental campaigners, civil society and public interest lawyers know only too well how difficult it can be to get Scottish public authorities to live up to their transparency obligations at the best of times. Information is sometimes (intentionally) not recorded, or we require to drag authorities through the process of request for internal review and, thereafter, to the Scottish Information Commissioner directly to gain access to vital information in the public interest. This can already be a lengthy process. And, of course, transparency requirements are often undermined with the passage of time.

The Bill also gives Ministers the power to extend the FOI response periods by up to **40 additional** working days, in certain circumstances. Safeguards have at least now been created so that the Scottish Information Commissioner must be consulted in relation to any use of this power. Moreover, the power cannot be used to extend response times for Ministers themselves. The provisions in the Bill (now Act) are due to expire on **30 September 2020** but may be extended.

There is wide recognition of the unprecedented challenges posed by COVID-19 for Governments across the world at this time. No-one could credibly deny otherwise. All public authorities are having to adjust to remote working etc, which understandably impacts on service delivery and limitations on access to any paper files etc (we might expect the exception, rather than rule, in today's world however). Routine business will, of course, understandably take longer than it might otherwise and it may be challenging to receive inputs from all relevant officers within public authorities in normal timescales. However, **these changes apply blanketly and well beyond emergency and front-line workers who are most under pressure currently. The periods for response are also universally changed. On any view they fundamentally change the landscape for transparency and accountability in Scotland and have done so using the emergency legislation procedure. Therefore, with exceedingly limited opportunity for scrutiny.** These changes are moreover being made at a time where legitimate public scrutiny is perhaps even more important than ever.

As the Scottish Information Commissioner itself highlighted last week,

“while pressure on public authorities may well be substantial at this time and in the weeks and months ahead, equally the legitimate public interest in decisions made during this time is significant.”

We agree fully with the Commissioner in this respect. Concerns that these changes are **neither necessary or proportionate** to the situation at hand and will have potentially wide-ranging impacts thus seem to be justified. Interestingly, **no such changes have been deemed necessary in the UK-wide emergency legislation passed earlier this month.**¹ Both the UK Information Commissioner and the Scottish Information Commissioner had already adopted clear policy positions in the face of the emergency and issued guidance accordingly that they would be sympathetic to authorities struggling to comply with the deadlines as a consequence of COVID-19.²

¹ See Coronavirus Act (c. 7) available here: <https://services.parliament.uk/bills/2019-21/coronavirus.html>

² See Scottish Information commissioner, Statement on the impact of the Covid-19 virus on FOI timescales available here: <http://www.itspublicknowledge.info/home/News/20200313.aspx> and Information

A number of civil society organisations working specifically on transparency have understandably voiced their dismay already about these changes and highlighted that COVID-19 shouldn't be allowed to act as an excuse or greenlight for blanket non-compliance with transparency requirements.³ However, due to the current make-up of the Scottish Parliament, last week the opposition parties sought to win concessions to the excessive proposals originally tabled by the Scottish Government; as opposed to rejecting them outright and then being voted down.⁴

Impacts for Our Work

We want to reassure our clients and partners that our work and projects for the protection of Nature continue to advance at pace remotely notwithstanding the crisis, while at the same time being sensitive to the pressures on public authorities. Dealing with the crisis is understandably the first priority for Governments across the world at this time. However, we will continue to use the power of the law and legal analysis to advocate along with others for Governments to emerge from this latest crisis and promote recovery from COVID-19 in a way which builds a more inclusive, sustainable and resilient world for people and planet. After the crisis, there will be a chance to adopt new biodiversity strategies and laws that can show lessons learned from past mistakes – the importance of our relationship with the natural world and of the environmental rule of law to deliver harmony with Nature.

As such, we will continue to exercise our environmental information rights responsibly and with particular sensitivity at this time. We await the Commissioner's further guidance and will be monitoring its impacts. That said, our experience is that several EIRs are already outstanding with the Government and agencies where timescales and best practice were not being complied with even prior to the current emergency situation. Therefore, we will

Commissioner's office, ICO's blog on its information rights work available here <https://ico.org.uk/about-the-ico/news-and-events/icos-blog-on-its-information-rights-work/>

³ See for example: Scottish Human Rights Commission, Briefing: Coronavirus (Scotland) Act 2020, 2 April 2020 available here: <http://www.scottishhumanrights.com/news/briefing-coronavirus-scotland-act-2020/> ; Law Society of Scotland, Coronavirus (Scotland) Bill, law Society of Scotland briefing March 2020 available here: <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-201920/coronavirus-scotland-bill/> ; Open Knowledge Foundation, openness is key to UK and Scottish government responses to COVID-19 available here: <https://okfn.org/about/press/releases/openness-key-uk-and-scottish-govt-response-covid-19/>

⁴ More detailed summary of the proposals: <https://theferret.scot/coronavirus-bill-scottish-information-commissioner/> and <http://www.itspublicknowledge.info/home/News/20200401.aspx>

not accept COVID-19 to be used as cover for non-compliance with EIRs for other reasons and continue to highlight instances of any such practices where we suspect them.

Access to environmental information remains a right and a vital part of any democracy – in many instances, these rights are also guaranteed by the case law of the [European Convention on Human Rights](#), as well as the [UNECE Aarhus Convention](#) specifically in respect of environmental information. **It is important to highlight that the FOI provisions in the Coronavirus (Scotland) Bill do not apply to requests for environmental information which fall under the [Environmental Information \(Scotland\) Regulations 2004](#), which stem from, amongst others, international obligations under the [UNECE Aarhus Convention](#). However, the Scottish Information Commissioner has indicated they will be sympathetic to the effects of COVID-19 on response timescales.**

To that extent, we take this opportunity to underscore that in order to protect this fundamental right of information in this and similar times of crisis, the best option for all public authorities remains commitment to the first principle of transparency legislation: namely, active publication and dissemination of environmental information (as required also by regulation 4 of the Environmental Information (Scotland) Regulations).⁵

Meantime, this latest development shows us two things:-

- **The gap between rhetoric and reality and lack of political commitment to transparency may be greater than otherwise understood;**
- **The importance of governance structures to ensure that all Governments live upto their stated policy aspirations.** What would have happened in this scenario without the independence and oversight of the Scottish Information Commissioner to intervene with recommendations to limit the impacts of these proposals? This is a significant lesson for the wider environmental movement in the post-Brexit context: regulators and decision-makers simply cannot be entrusted to regulate themselves especially during times of emergency.

As such, we hope that the Human Rights Leadership Group – whose work has shown much promise for future governance in Scotland, including on the environment –

⁵ Regulation 4 of the Environmental Information (Scotland) Regulations 2004 (EIRs), public authorities have a duty to “... *take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds [...] with a view to the active and systematic dissemination of that information [...] progressively available in electronic form.*”

intervenes to advise of the flaws and shortcomings with the changes that have been made with a view to seeking a re-think by Government with proper debate.

Good governments welcome accountability even in the most challenging of contexts. The current crisis is, in many respects, a resilience test for democracy in an era of challenges posed by ecological breakdown. This crisis is significant, but it is unlikely to be the last. In the fullness of time, the response may thus provide an important benchmark for the future. Scotland has an opportunity now to learn from the response of other countries in this respect.

Find out more:

- 🔗 P. Stephen, “Coronavirus Bill passed at Holyrood”, 1 April 2020, *The Edinburgh report*: <https://www.theedinburghreporter.co.uk/2020/04/coronavirus-bill-passed-at-holyrood/>

- 🔗 “What’s in Scotland’s emergency coronavirus bill?” 2 April 2020, *BBC*: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-52092081>

- 🔗 T. Peterskin, “Scotland ‘first country in the world’ to delay freedom of information access because of coronavirus”, 2 April 2020, <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2120917/scotland-first-country-in-the-world-to-delay-freedom-of-information-access-because-of-coronavirus/>

- 🔗 Scottish Information Commissioner: <http://www.itspublicknowledge.info/home/News/20200402.aspx>

Ms Susan Shaw
Managing Partner
Living Law

Ms Annaig Nicol
Legal Intern
Environmental Rights & Governance

susan@livinglaw.co.uk

DD +44(0)7929 996105

annaig@livinglaw.co.uk

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Founded in 2013, Living Law is a public interest, globally focussed law firm based in Scotland that seeks to advance access to environmental information, public participation and access to environmental justice in line with the UNECE Aarhus Convention and Principle 10 of the Rio Declaration. We advocate for the Environmental Rule of Law to help societies to make managed transitions to societies within Planetary Boundaries. That is, the ecological limits of the Earth system. For more information, you can find a copy of our mission statement on our website www.livinglaw.co.uk



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