

# **Consultation on the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016**

**Scottish Government Response**

**August 2016**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

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## INTRODUCTION AND BACKGROUND TO THE CONSULTATION

The Freedom of Information (Scotland) Act 2002 ('the Act') provides a statutory right of access to information held by Scottish public authorities. The Scottish Government supports freedom of information as an essential part of open democratic government and responsive public services.

As part of its commitment to freedom of information the Scottish Government seeks to keep the legislation under review proposing reform as and when considered necessary. A key element in ensuring Scotland's freedom of information legislation remains effective is in ensuring that coverage of the Act is up-to-date and reflects the changes in the way in which public services are provided.

Following consultation<sup>1</sup>, the Scottish Parliament agreed to extend coverage of the Act to a range of organisations, including grant-aided and independent special schools. These schools became subject to freedom of information legislation from 1 September 2016.

Responses to the consultation raised a number of concerns about the practical and administrative resource implications of extending coverage to these various schools. Specifically, given the statutory requirement to respond to freedom of information requests and reviews within 20 working days, the impact of school holiday periods on the school's ability to comply with this obligation.

For example, the collective response from the grant-aided special schools noted the difficulties of school holiday periods; **Harmeny Education Trust Ltd** requested clarification regarding the definition of 'working day' (the same point being made by **The Royal Blind School** and the **Scottish Council of Independent Schools**) with the **Scottish Centre for Children with Motor Impairments** (SCCMI) noting that due to their 'term-time only structure' complying with a 20 working day deadline would not always be possible.

The Scottish Government therefore decided to consult on proposals varying the period of time by which a response (or review response) must be issued<sup>2</sup>.

This formal response paper follows this consultation exercise.

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<sup>1</sup> <https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/>

<sup>2</sup> <https://consult.scotland.gov.uk/freedom-of-information/time-for-compliance-regulations>

## **CONSULTATION PROPOSALS**

For the purposes of the Freedom of Information (Scotland) Act 2002, state schools come under their respective local authority. It is therefore the local authority that is obliged to comply with the requirements of the Act rather than the individual school.

However, once subject to the requirements of the Act, grant-aided and independent special schools will be separate public authorities responsible for responding to information requests in their own right.

For the reasons referred to above, in spring 2016 the Scottish Government consulted on proposals allowing greater flexibility in response times, specifically for grant-aided and independent special schools.

### **Legislative detail**

Section 10(4) of the Act allows for regulations to be made varying the standard 20 working day response deadline – up to a maximum of having to respond by no later than the 60<sup>th</sup> working day after receipt of a request.

Similarly, section 21(6) of the Act allows for regulations to be made varying the standard 20 working day response deadline for responding to a requirement to review the handling of an information request.

### **Draft regulations**

In accordance with the above powers, the proposed regulations require a response to an information request, or a request for review, within 20 working days but disregarding any working day which is *not* also a school day. A response must still be issued promptly and no later than the 60<sup>th</sup> working day following the date of receipt of an information request (or request for a review). A school day is defined as a day on which a school is ordinarily open to its pupils for the purpose of their school education.

The proposals are intended to allow sufficient time to respond to FOI requests (and reviews) whilst taking into account school holidays. They are designed to take into account both the working arrangements of the schools as well as the interests of a requestor in receiving as effective a response as possible – even if on occasion later than the standard 20 working day timescale.

## CONSULTATION RESPONSES: KEY ISSUES

We received 22 responses to the consultation. While the vast majority were in favour of our proposals a number of issues were raised by respondents which are summarised below.

The responses (where consent has been given to publish) along with the consultation paper are available on the Scottish Government's consultation webpages<sup>3</sup>.

### Views in support of the proposals

Almost half of the responses received, including from the school sector, were fully supportive of our proposals. For example, **Kibble Education and Care Centre** considered the increase to 60 days would alleviate some of the concerns around timeframes and responding to requests within the legal timescale; **Capability Scotland** noted that the extension would allow schools to meet their requirements when requests were submitted before or during holiday periods.

In their response the **Scottish Council of Independent Schools** commented that the proposals took on board the concerns expressed, easing the practical difficulties of responding to requests.

Support also came from the **Scottish Information Commissioner**. While noting the importance of requestors being given information they are entitled to as quickly as possible, the Commissioner acknowledged the practical difficulties for grant-aided and independent special schools of responding to request during the schools holidays. The Commissioner agreed that the time available for responding to requests should be extended in line with the draft regulations.

Other comments noted that the proposals seemed a reasonable response to the issue of response times 'for organisations that operate a term time structure' and that the proposals provided an 'appropriate balance taking into account the variety of constraints which apply during vacation periods'.

A number of responses, particularly from local authorities, while also being supportive of the proposals, were critical that the regulations would not also apply to local authorities - at least to the extent that local authorities were required to respond to requests involving schools' information.

For example, **Comhairle nan Eilean Siar** believed it would be appropriate to extend the proposed allowance to all schools, including those operated by a local authority. The Council noted that, while the obligation to comply with the requirements of the Act lay with the local authority rather than the individual school, the practical reality was that information might be held within a school and that state schools closed down during holidays. The issues arising would therefore be the same as for the grant-aided and independent special schools when responding to a request received

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<sup>3</sup> <https://consult.scotland.gov.uk/freedom-of-information/time-for-compliance-regulations>

shortly before or during the summer holidays. The Council therefore did not consider the distinction to be sustainable.

Other local authorities reflected broadly the same points: **Aberdeenshire Council** noting local authority run schools experience the same compliance difficulties during school holiday periods; **Perth and Kinross Council** commenting that in general, central employees did not have access to information held in schools and, even if they did, are unlikely to know how information was filed or stored. The Council also noted that comparable UK legislation permitted a response within 20 *school* days (or 60 working days if that was shorter).

A further response wondered whether there was scope to allow similar extensions for other public authorities noting that many public authority offices were shut from the end of December through to the beginning of January.

## Views against the proposals

Four responses were critical of the proposed regulations. The **Children and Young People's Commissioner Scotland** set out various reasons for objection:

- the creation of a two-tier system impacting on the most vulnerable children and young people;
- particularly with such schools, the importance as a matter of public interest in accessing relevant matters of expenditure and management information;
- the 20 working day response timescale not posing an unduly administrative burden with request levels unlikely to be unduly onerous;
- it would not be difficult to respond to requests within 20 working days and that no distinction was made for schools in their duty to respond to subject access requests.

The Commissioner also supported delay in implementation to allow for appropriate systems and training to be in place.

**The Campaign for Freedom of Information in Scotland** (CFOIS) identified a range of issues in their response, which was endorsed by **Unite the Union Scotland** and **Unison**.

The CFOIS summarised the key issues as:

- the threat to the established principle of responding to requests within 20 working days and the creation of a two-tier system;
- the fact that schools do not in practice actually close;
- that disabled children who attend grant-aided and independent special schools, and their parent/carers, are being treated less favourably than those attending local authority schools;
- that the response time for information requests relating to the environment will remain at 20 working days as the Scottish Government does not have the power to change the Environmental Information (Scotland) Regulations 2004.

The CFOIS proposed as an alternative solution an amendment to the definition of 'working day' under section 73 of the Act. The CFOIS proposal is to count as a 'working day' for the purposes of the Act 'any day other than a day a grant-aided school and independent special school is verified as being closed during the academic year'. As part of this, an independent verification process on closure would be required to ensure transparency, undertaken, for example, by the Scottish Information Commissioner or Her Majesty's Inspectors or Education Scotland.

## CONCLUSIONS

We note the broad support for these proposals, particularly from organisations most directly affected by the impending requirement of compliance with freedom of information legislation. The Regulations are intended to be a proportionate response to addressing issues specific to schools due to come within scope of the Act as Scottish public authorities in their own right. We also welcome the support of the Scottish Information Commissioner.

We would not agree that the proposals present an ‘extreme measure’ and emphasise that they do not automatically increase the response time to 12 weeks. Indeed, we would not anticipate the Regulations coming into play in more than a small number of cases – primarily for requests received close to or during the extended school summer holiday period.

Further, rather than interpreting the proposals as developing a ‘two-tier’ approach to the legislation, we consider this to be an example of using the built-in flexibility of the Act as originally intended. Indeed, given the concerns expressed by the schools in terms of compliance, it would seem at odds with the policy intention of extending coverage in then making compliance more difficult than necessary when the option of bringing forward Regulations designed for such circumstances is available.

### Local Authority Schools

We note the comments from local authorities, who, while supportive of the proposals, considered the regulations should also apply to them to the extent that they respond to requests involving schools’ information.

In their responses the local authorities highlighted difficulties in accessing school records during holiday periods as well as problems in being able to accurately interpret information particularly in the absence of relevant staff. Indeed, responses from two local authorities acknowledged that council responses concerning their schools were issued late for such reasons.

We acknowledge that, at times, local authorities are likely to experience practical and administrative difficulties in responding to school related information requests, particularly those received over school holiday periods. We are also aware that other legislation, for example, the Pupils’ Educational Records (Scotland) Regulations 2003 makes specific allowance for the term-time working arrangements of schools in requiring responses within *school* days.

However, we also note that, unlike the intended status of grant-aided and independent special schools, local authority run schools are not separate public authorities for the purposes of freedom of information legislation. Those schools coming within scope of the Act will have responsibility for responding directly to requests – rather than as part of a local authority. In this respect they will operate in similar fashion to the maintained school sector under equivalent UK freedom of information legislation. As such, under regulations similar to those being proposed



here, schools elsewhere in the UK are permitted to respond to information requests in effect in terms of *school* days (again, up to a maximum of 60 working days)<sup>4</sup>.

We are sympathetic to problems encountered by local authorities in handling specific school related information requests. However, over 11 years into the operation of the Act, in the absence of firm evidence of particular difficulty in this regard, we are not persuaded that there is a strong case to propose similar regulations making allowance for the handling of school related requests received by local authorities.

### **Verification Process**

We note the alternative proposal of the Campaign for Freedom of Information in Scotland that section 73 of the Act should be amended (which itself would require primary legislation). The CFOIS proposal, in discounting the days on which the grant-aided and independent special schools are closed during an ‘academic year’ from a calculation of the ‘response time’, would in practice seem to mirror the proposed regulations (assuming the broadest possible definition of academic year).

However, we acknowledge that transparency around ‘verification’ of when a school is recognised as being organisationally closed i.e. a non school day, will be necessary in the interests of clarity and in being able to calculate correct response timescales.

School term dates – and therefore school holidays – are generally known well in advance and we do not consider this to be an issue of difficulty. Moreover, it is not uncommon for schools to be physically closed at holiday periods with administrative staff working term-time only hours. However, there may also be times when a school is open for certain reasons during school holiday periods and, at such times, it may be reasonable to expect schools to process information requests.

We therefore propose to revise the Section 60 Code of Practice, which sets out the ‘best practice’ public authorities are expected to follow, to reflect the existing legislative requirement to respond to information requests ‘promptly’. In addition, in respect of those schools coming within scope of FOISA, we propose to include in the Code the proviso that, if there are staff with the appropriate skills, knowledge and level of authority available in a school it would be good practice to respond to any outstanding FOI requests even if the Regulations could apply.

As the independent regulator, it is for the Scottish Information Commissioner to enforce both the Regulations and the Code of Practice. This will include, if necessary, seeking verification from a school that they were closed and that the Regulations were being correctly applied – and that, in addition, no staff with appropriate skills, knowledge and authority were available.

### **Environmental Information (Scotland) Regulations**

As noted in the responses from the Scottish Information Commissioner and the CFOIS, these proposals will not – and cannot - amend the 20 working day response time for those requests handled in terms of the Environmental Information (Scotland)

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<sup>4</sup> <http://www.legislation.gov.uk/all?title=time%20for%20compliance>

Regulations 2004 (EIRs)<sup>5</sup>. This is due to the EIRs being derived from European law (specifically Directive 2003/4/EC on public access to environmental information). This in turn contrasts with subject access requests made under the Data Protection Act 1998 (reserved legislation) which must be issued within 40 calendar days.

## **Impact Assessments**

As indicated in the consultation paper, comments were invited in respect of the impact assessments prepared as part of the earlier substantive consultation on extension of coverage. Those comments received have been incorporated into revised documentation available, along with related information, on the Scottish Government's Freedom of Information webpages<sup>6</sup>.

We note the concerns about the potential impact of the regulations on those requesting information from the schools – potentially including pupils attending the schools and their families (though freedom of information is a right available to all).

However, in practice, given the low numbers of requests anticipated, we would not expect any significant impact on response timescales for a requestor (other than, potentially, over the extended summer holiday period). Moreover, revising the Code of Practice to highlight promptness as well as it being good practice to respond even if the Regulations apply should help mitigate against undue delays in response.

## **Next steps**

Having considered the various issues raised during this consultation exercise we confirm our intention to bring forward Time for Compliance Regulations varying the request and review response times for grant-aided and independent special schools.

However, in tandem with the Regulations, we also intend to revise the Section 60 Code of Practice. The revised Code will emphasise the requirement to respond promptly, and that, if staff are available outside term times, it would be considered as good practice to respond to requests even if the Regulations apply.

Subject to Parliamentary approval, the Regulations, along with the revised Code of Practice, will come into force on 1 December 2016.

We propose to include assessment of these Regulations (including any equality issues arising) as part of the general review – after one year of operation - of the order extending coverage of the Act due to come into effect on 1 September 2016.

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<sup>5</sup> The 20 working day response time can be extended by a further period of up to 20 working days if the information requested is considered as voluminous and complex.

<sup>6</sup> <http://www.gov.scot/About/Information/FOI/Coverage>



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Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-78652-413-3 (web only)

Published by The Scottish Government, August 2016

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS78191 (08/16)

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