

# Intervention Report

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**Scottish Government**

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**13 June 2018**



Scottish Information  
Commissioner

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## Glossary and abbreviations

<b>Term used</b>	<b>Explanation</b>
<b>Codes of Practice</b>	The Scottish Ministers' Codes of Practice made under sections 60 and 61 of FOISA
<b>The Commissioner</b>	Daren Fitzhenry, the Scottish Information Commissioner, appointed under section 42 of FOISA
<b>DG</b>	Director General
<b>FOI</b>	Freedom of information; requests under both FOISA and the EIRs
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>FOI Unit</b>	The Scottish Government Unit responsible for FOI compliance and policy
<b>The EIRs</b>	Environmental Information (Scotland) Regulations 2004
<b>The Section 60 Code of Practice</b>	Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs
<b>Scottish Government/SG</b>	The Scottish Ministers – as the Scottish public authority designated for the purposes of FOISA in Schedule 1, Part 1 of FOISA and for the purposes of the EIRs in definition (a)(i) of “Scottish public authority” in regulation 2 of the EIRs
<b>SpAd</b>	Special adviser

# Executive summary

## Introduction

1. This report sets out the findings of the assessment phase of my intervention into the Scottish Government's performance in, and policies for, dealing with requests for information under FOISA and the EIRs<sup>1</sup>. In particular, the report considers the handling of information requests made by journalists.

## Main findings

2. In relation to the seven questions posed in the intervention, I have reached the following findings:
  - (i) *What is the role of special advisers in the request-handling process? Where request-handling departs from the Scottish Government's procedures, is there any detriment to the requester's entitlement to information?*

Beyond passing references to special advisers playing a role in the clearance process, policy and guidance is remarkably silent on what their role in this process actually is. This leads to lack of clarity about their role. My findings set out in detail the various roles actually played by special advisers in the process. Notably these do not include any decision-making power. The issue of "detriment" to requesters' entitlement to information is considered in the findings below, particularly in relation to delays, reduction in entitlement and use of tenuous reasons to refuse requests.

- (ii) *Does the Scottish Government treat and manage requests from journalists differently compared to requests made by other people?*

Journalists, together with MSPs and political researchers, are expressly made subject to a different process for clearance than other requester groups. This is inconsistent with the applicant-blind principle of FOI legislation. Their requests are almost invariably subjected to an additional layer of clearance which is likely to delay the consideration of the case.

- (iii) *Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?*

There was evidence that, in 2015/16 (one of three periods examined), media requesters were significantly less likely to receive information, compared to other requesters.

Since 2016/17, the outcomes of media requests have been broadly similar to other requests, but the responses are still issued later. While on average responses to media requests are now made within 20 working days, such requests wait an average of two days longer than other requests for a response. 25% of responses to media requests are issued late, compared to 21% for other requester types.

- (iv) *Is there any evidence of deliberate delays in responses to some information requests, e.g. to requests from journalists or requests about internal policy-making?*

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<sup>1</sup> My intervention is carried out under my Enforcement Policy  
<http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Enforcement.aspx>

The proportion of late responses and failures to respond was considerably higher for journalists, particularly in 2015/16 and 2016/17.

In a number of 2016 and 2017 cases I observed unjustifiable, significant delays and disregard for the statutory timescales.

Given the paucity of information in case files I did not find evidence of *deliberate* delay, except in one case where the response was postponed until publication and a handling plan were finalised.

Over the past year delay in journalists' cases has reduced dramatically as a result of recent initiatives, following the earlier intervention.

- (v) *Are internal request-handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Section 60 Code of Practice<sup>2</sup>?*

I have identified a number of areas where changes are required for consistency with both the letter and spirit of FOI law and the Scottish Ministers' Section 60 Code. In particular, the practice of referring all media requests for clearance is contrary to the spirit of FOI legislation.

- (vi) *Is there evidence of a practice of requests being blocked or refused for tenuous reasons?*

From the cases examined, while I may have disagreed with a number of the conclusions, I could find no evidence of improper motives in the application of exemptions. I was concerned to find that in 2016/17 the number of original decisions in journalists' cases which were overturned or partially upheld on review was considerably higher than the norm. However, in 2017/18, the percentage of successful reviews in journalists' cases had significantly reduced and the difference between journalists' cases and the norm had narrowed considerably.

- (vii) *Specifically, where the requested information is politically sensitive, are requests handled in a different way (not under the usual procedures)? If so, to what extent is this detrimental to the requester's entitlement?*

I found that sensitive requests are handled in a different way insofar as they are subject to additional clearance processes. The above findings about delays, reduction in entitlement and use of tenuous reasons are therefore equally relevant, albeit that politically sensitive requests are subject to that regime by virtue of the information requested rather than the person who requested the information.

## **Additional Findings**

3. In the process of investigating the above seven issues, I noted a number of improvements recently made by the Scottish Government, but also identified several areas of poor practice which still require to be addressed. These included:

- inadequate records management;

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<sup>2</sup> <https://beta.gov.scot/publications/foi-eir-section-60-code-of-practice/FOI%20-%20section%2060%20code%20of%20practice.pdf?inline=true>

- inadequate recording of the reasons for decisions in case files, particularly in relation to the application of exemptions;
- lack of clarity over the process of request handling;
- insufficient levels of experience and training among case-handlers and reviewers;
- lack of clarity across the authority about the role of special advisers in request handling.

## Recommendations

4. I recommend that the Scottish Government:

- undertakes a detailed review of its clearance procedures and addresses a number of specific shortcomings in its existing procedures;
- examine the procedures to ensure review cases are analysed to identify any areas where poor initial decisions are being made and there is a system in place to prevent recurrence of failures;
- investigates whether the task of quality assurance of cases not decided by Ministers ought, more appropriately, to be carried out by staff within Directorates or Executive Agencies;
- ends its practice of treating journalists, MSPs and political researchers differently when processing requests for information because of who or what they are;
- takes action to improve the case file record-keeping of case-handlers, so that case files contain a full record of internal correspondence concerning the handling of a request;
- ensures that case-handlers and reviewers have sufficient knowledge and training to enable them to respond to requests appropriately;
- reviews its current procedures for allocating case managers with a view to developing a larger core group of trained and experienced personnel, examining the lessons of successful Directorates and Agencies;
- improves its FOI performance monitoring processes; and
- reappraises its internal review procedures to remove so far as practicable the risk of impartiality caused by the same individuals being involved in both the original decision and the review.

5. I require the Scottish Government to develop a draft action plan to address the recommendations set out in this report. I require the Scottish Government to produce the draft action plan for my approval by **13 September 2018**.

# Background

## Media and Parliamentary background

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6. On 31 May 2017, a group of journalists sent an open letter<sup>3</sup> to the Scottish Parliamentary Corporate Body selection panel for the appointment of the new Scottish Information Commissioner.
7. The letter expressed a number of concerns about the Scottish Government's handling of FOI requests, in particular, those made by journalists. The concerns included:
  - (i) disregard for the statutory timescales for responding to requests and deliberate delaying tactics;
  - (ii) Scottish Government taking control of requests to Agencies without the consent of the applicant;
  - (iii) requests being blocked or refused for tenuous reasons;
  - (iv) requests from journalists being routinely handled by special advisers and screened for potential political damage;
  - (v) reductions in resources and time for handling FOI requests; and
  - (vi) the non-recording of meetings, particularly with outside bodies, individuals or lobbyists to discuss government policy.
8. Scottish Parliamentary Motion S5M-06126<sup>4</sup> was subsequently laid on 19 June 2017. The motion and amendment<sup>5</sup> were debated and agreed on 21 June 2017. The motion condemned the Scottish Government's poor performance in responding to freedom of information requests; called for an independent inquiry into the way that it deals with these; and agreed to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. It also welcomed commitments by the Scottish Government to adopt a policy of proactively publishing all material released under FOI to ensure that it is as widely available as possible.
9. The Motion was silent as to who was to conduct such an inquiry, other than to state that it was to be independent. However, following the Motion, the Standards, Procedures and Public Appointments Committee "*agreed that the Scottish Information Commissioner may be an appropriate independent person*" to undertake the inquiry. Given the nature of the concerns raised in the journalists' letter and subsequent Parliamentary Debate and Motion, my independent role, and having regard to my statutory functions and powers, I determined that I would carry out an intervention into the Scottish Government's FOI practice in order to address those concerns.

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<sup>3</sup> <https://www.commonspace.scot/articles/11072/journalists-open-letter-freedom-information-policy-scotland>

<sup>4</sup> <http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-06126&ResultsPerPage=10>

<sup>5</sup> <http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-06126.1&ResultsPerPage=10>



10. Following a scoping phase, which included an invitation to the signatories to the journalists' letter to provide a more detailed picture of their experiences and examples, I wrote to the Minister for Parliamentary Business on 2 February 2018<sup>6</sup>, setting out the terms and scope of my intervention. This is discussed in more detail in the Scope and Objectives section of this report.
11. As was set out in my letter of 15 November 2017<sup>7</sup> to the Minister for Parliamentary Business, my functions and powers do not extend to considering or determining what information Ministers (or any other public authority) ought to record about meetings with outside interests. Therefore, that aspect of the concerns raised by the journalists cannot be considered in this intervention.

## **Statutory basis for intervention**

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12. Section 43(1) of FOISA requires me to promote the following of good practice by Scottish public authorities. This includes any and all aspects of an authority's compliance with FOISA and the EIRs and with the Codes of Practice issued by the Scottish Ministers in relation to the handling of FOI requests and records management.
13. Under section 43(3) of FOISA, I have the power to assess whether a Scottish public authority is following good practice. This can include working with an authority on an informal basis, through to issuing practice recommendations under section 44(1) of FOISA where there has been a failure to comply with a Code of Practice. If practice continues to fail to conform, and the failure constitutes a failure to comply with Part 1 of FOISA or with the EIRs, I may issue an enforcement notice under section 51 of FOISA. Failure to comply with an enforcement notice can be treated as contempt of court.

## **Intervention process**

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14. Interventions can cover a range of activities, from providing advice and assistance to authorities in relation to good practice to formal enforcement action carried out under my Enforcement Policy. Interventions are appropriate and proportionate and based on robust and accurate evidence, and their ultimate purpose is to identify and remedy failings in FOI practice. The current intervention is a Level 3 intervention, designed to deal with more serious or systemic failings. Indeed, this is the largest and most complex intervention carried out by my office to date. To this end, it will consist of five discrete phases of activity:
  - (i) Scoping Phase - this has already been completed;
  - (ii) Assessment Phase - this Report is the Assessment Phase Report, and it marks the completion of this phase;
  - (iii) Action Plan Phase - where the Scottish Government will produce a draft action plan for my approval to address the recommendations made in this Report;
  - (iv) Implementation and Monitoring Phase of the approved plan; and
  - (v) Review Phase.

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<sup>6</sup> [www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx](http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx)

<sup>7</sup> [www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx](http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx)

## Previous intervention

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15. In January 2017, my predecessor opened an intervention into the Scottish Government's performance in relation to meeting statutory timescales for responding to requests under FOISA and the EIRs.
16. That intervention was triggered by concerns at the number of appeals received by the Commissioner concerning failures to respond to requests.
17. The aim of that intervention was to have the Scottish Government take action to improve performance in relation to meeting statutory timescales.
18. Work on that intervention remains ongoing, as does monitoring of the Scottish Government's performance. While strictly a separate intervention, failures and delays in complying with statutory timelines can often be symptoms of wider performance and procedural issues. Changes and improvements made in response to this earlier intervention may therefore be relevant to the current intervention. Reference to issues noted in that intervention and changes to processes made as a result of it are therefore referred to in this report where relevant.
19. In that earlier intervention, the Scottish Government accepted my predecessor's recommendation that it sign up to performance targets, the first being that, from April 2017, 85% of information request responses and review responses were to be issued within statutory timescales. It was also agreed that these targets were to be achieved by each Directorate, not only by the Scottish Government as a whole, and that the 85% target would be raised to 90% this year and to 95% next year. To monitor this, the Scottish Government sends my office monthly performance reports which we review.
20. It is important to note that, in general terms, there has been a significant improvement in the authority's performance in meeting the statutory timescales over the period of that intervention. Overall Scottish Government performance as reported in monthly reports provided to me has jumped from a lamentable 62% in April 2017 (when we started monitoring performance) to performance of above 85% for each of the first three months of 2018 (above 90% in two of those months). The only three months when performance had dipped below 85% were in April and May 2017, when the process was beginning, and November 2017 when the Scottish Government experienced a significant increase in requests. Indeed, the improvement should be judged against a backdrop of increasing numbers of requests.
21. Performance by individual Directorates has, however, been variable. As may be anticipated, those Directorates and Agencies with high (and increasing) volumes of requests, such as Ministerial Portfolios and Transport Scotland, have struggled to meet 85%, but they have respectively reported recent improvement, or are close to meeting the target. Some Directorates with lower, but still relatively large, numbers of requests report meeting the targets, such as Strategy and Constitution. Surprisingly, some Directorates with very low numbers of requests are often failing to meet the targets, such as Health Performance and Delivery, and DG Coordination Economic Policy Unit (although both have shown some recent improvement). This raises important issues of cultural, procedural and experience differences between the various Directorates.

# Scope and objectives of intervention

## Purpose

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22. The purpose of my intervention is to assess the Scottish Government's FOI performance in light of the concerns raised in the letter of 31 May 2017 to the Scottish Parliamentary Corporate Body and in the Scottish Parliament's debate on Motion S5M-06126 (as amended by Motion S5M-06126.1) on 21 June 2017.
23. This includes establishing the extent to which the Scottish Government is complying with good practice in dealing with requests for information in terms of FOISA and the EIRs and the Section 60 Code of Practice.
24. Where any of its practices are found to be deficient, my intervention will require the Scottish Government to:
  - (i) remedy any identified breach of FOISA and the EIRs, and
  - (ii) meet the minimum standards of good practice in the Section 60 Code of Practice.

## Focus of intervention

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25. Interventions are appropriate and proportionate to the concern(s) identified. My intervention includes a consideration of the issues of FOI culture and practice of the whole of the Scottish Government, as raised in the journalists' letter and the debate in the Scottish Parliament.
26. In particular, the assessment phase has focussed on the following questions:
  - (i) What is the role of special advisers in the request-handling process? Where request-handling departs from the Scottish Government's procedures, is there any detriment to the requester's entitlement to information?
  - (ii) Does the Scottish Government treat and manage requests from journalists differently compared to requests made by other people?
  - (iii) Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?
  - (iv) Is there any evidence of deliberate delays in responses to some information requests, e.g. to requests from journalists or requests about internal policy-making?
  - (v) Are internal request-handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Section 60 Code of Practice?
  - (vi) Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
  - (vii) Specifically, where the requested information is politically sensitive, are requests handled in a different way (not under the usual procedures)? If so, to what extent is this detrimental to the requester's entitlement?

# Assessment methodology

## Introduction

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27. The methodology for the assessment phase of this intervention was informed by:
- the issues raised in the journalists' letter to the Scottish Parliamentary Corporate Body and the Scottish Parliament debate of those issues on 21 June 2017.
  - the responses from signatories to the journalists' letter, to an invitation for further information I extended to them in December 2017. I received four responses to this invitation, providing explanation of their concerns with references to 12 specific cases.
28. In my letter of 2 February 2018 to the Minister for Parliamentary Business, I set out the outline methodology for the assessment phase of this intervention. This section sets out the methodology employed in detail.

## Scottish Government FOI tracking system

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29. On 21 February 2018, the Scottish Government's FOI Unit provided a demonstration of the Scottish Government's FOI tracking database (the "FOI tracker"). This gave a detailed overview of the database and how it relates to the main Scottish Government records system. We viewed how the system is used in practice, alongside the Objective records management system (where individual request records are held) and established the extent of the data available.
30. It is clear that extracting management information from the database is difficult and often requires technical support. We also witnessed frequent stability problems. A new database has been commissioned to replace the current system.
31. Following this meeting, I requested a copy of the full tracking report from the FOI tracker up to 17 December 2017.
32. After some considerable technical difficulties, on 16 March 2018 I received the tracking report for all cases recorded between 25 December 2014 and 17 December 2017.

## Statistical analysis

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33. The tracking report provided data for 7,318 requests recorded within the timeframe.
34. We analysed this data (up to December 2017) by:
- financial year, and
  - the type of requester as categorised (all requests; requests from media; requests not categorised as media)
35. We identified the proportions of requests and requests for review, by financial year and by requester type, for which:

- the response was issued later than the statutory time for compliance<sup>8</sup>;
- information was disclosed in full or in part; where information was withheld in full or where the information was not held by the Scottish Government.

36. We also identified the proportion of responses to requests for review that overturned or partially upheld the original decision.
37. We identified, where possible, the number of requests referred for clearance in each time period and the average response time, including the proportion for which the response was issued later than the statutory time for compliance.

## Observations

38. There were significant gaps in the data entered in the tracker. Where data was absent or unclear, it was excluded from our analysis.
39. The FOI tracker does not capture extensions of time under the EIRs. Consequently, there is the possibility that some responses categorised as “late” were, in fact, EIR requests subject to an extended timeframe. However, the likelihood of any such cases materially impacting on the statistics is very low.
40. The database calculation of “working days” proved unreliable. We accordingly applied a more appropriate formula to calculate response times under FOI legislation.
41. The analysis of referrals for clearance was hampered by the absence of database fields to record dates sent for clearance and responses received. We noted that from January 2016 many case-handlers noted the dates on which cases were referred to special advisers and Ministers, and of when follow up reminders were issued. We counted manually the frequency of these notes to identify a large number of referred cases.

## Inspection of case handling records

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42. The assessment included detailed inspection of 104 individual case records for requests and requests for review. The sample of cases comprised:
- the 12 cases specified in the additional information provided by signatories to the journalists’ letter to the Scottish Parliamentary Corporate Body;
  - 35 additional requests or requests for review from requesters categorised as “media” in the FOI tracker, chosen at random;
  - 57 cases categorised as other requester types in the FOI tracker, including “individuals”, “other”, “MSP”, “researcher” and “academic/student”.

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<sup>8</sup> Statutory timescales for compliance: under section 10(1) of FOISA, authorities must respond to requests for information promptly and within 20 working days after receiving the request. Regulation 5(2) of the EIRs requires authorities to comply with a request as soon as possible and no later than 20 working days after receiving the request. (This timescale can be increased to 40 working days for EIRs cases if the request is complex and voluminous: regulation 7(1)).

Under section 21(1) of FOISA, authorities receiving a request for review must comply promptly and within 20 working days after receiving the request. Similarly, regulation 16(4) of the EIRs requires authorities receiving representations from a requester to notify the requester of the review outcome as soon as possible and no later than 20 working days after receipt of the representations.

43. Within the sample, there were cases that:
- required “clearance” by special advisers and Ministers;
  - received a response outwith the statutory timescales;
  - had been the subject of a request for review and the original decision was overturned;
  - asked for non-sensitive information;
  - involved voluminous information or a number of business areas in the response.
44. The case reviews were undertaken, using a consistent methodology, by two experienced Grade 4 officers on-site over a cumulative period of 16 days. For each case they examined a full print-out of all information in the case record, including internal correspondence, withheld information and the metadata from the FOI tracker.

## **Observations**

45. Case recording practices varied considerably across the sample examined, with some case-handlers retaining little information about the decision to disclose or withhold information.

## **Review of information already held by the Commissioner**

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46. The Investigations Team in my office undertook a similar exercise, again using a consistent methodology, to examine records of case files for the 87 appeals received in 2016 and 2017 concerning the Scottish Government. 24 (28%) of these appeals had been made by journalists.
47. We reviewed non-compliance issues we had noted about Scottish Government practice since 2015 and any lessons learned from decision notices issued since that date in relation to the Scottish Government.

## **Procedures and training records**

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48. My Head of Enforcement reviewed the Scottish Government’s FOI procedures against the Section 60 Code of Practice. This task was made more difficult because guidance on some important aspects of case handling, published on the Scottish Government’s website, was superseded by new guidance available only internally on the Scottish Government’s “SharePoint” intranet site. The FOI Unit undertook an exercise to identify where the changes had been made to provide the most up to date material for the review.
49. There were other issues with the guidance. For example, not all of the guidance was dated or had version control, meaning that it was not automatically clear whether it had been superseded. The guidance was in many different parts, which meant it lacked cohesion. In addition, some of the guidance was contradictory. For example, the table in paragraph 68, which sets out how long each step of the process should take, includes different timescales from a document entitled “Targets for key steps”.
50. We requested records of staff training on FOI. I learned that although there is mandatory e-learning about FOI for all new entrants to the Scottish Government, promoted on the Induction pages of its “Saltire” intranet and links to the e-learning on the FOI SharePoint site, there is not a centrally held record of who has completed the training.

## Interviews

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51. I conducted an extensive programme of individual interviews to improve my understanding of Scottish Government practice when responding to information requests. I was accompanied at each interview by a note-taker from my office. A member of the FOI Unit was also present.
52. I learned more about specific roles in responding to requests and how interviewees feel the procedures work in practice. I invited some interviewees to discuss a small number of the cases which I had reviewed as part of the intervention.

## Interviewees

### *Members of the Scottish Cabinet:*

- John Swinney MSP (Deputy First Minister)
- Shona Robison MSP (Cabinet Secretary for Health and Sport)
- Fiona Hyslop MSP (Cabinet Secretary for Culture, Tourism and External Affairs)
- Keith Brown MSP (Cabinet Secretary for the Economy, Jobs and Fair Work)

### *Special advisers*

- Davie Hutchison
- Liz Lloyd
- Stewart Maxwell
- Colin McAllister
- Stuart Nicolson

### *Officials*

- Graham Black (Director of Marine Scotland) accompanied by another Marine Scotland official
  - Ian Davidson (Head of Constitution and UK Relations)
  - Hugh Gillies (Director of Trunk Roads and Bus Operations, Transport Scotland) accompanied by another Transport Scotland official
  - Robert Williams (Deputy Director for Health Performance and Delivery)
53. My Head of Policy and Information interviewed two groups of more junior staff:
    - case-handlers, i.e. individuals who had responded to requests
    - reviewers, i.e. individuals who had responded to requests for review. Their role is to consider whether the original decision should be upheld or overturned.
  54. In both groups, the participants were drawn from a number of different Directorates. Electronic polling was used to gather anonymised data about participants' levels of FOI knowledge and skills, the advice and support available to them and experience of referring matters for clearance.

55. We also interviewed:

- an FOI Champion from a Directorate
- a member of the Communications Team
- a member of the Special Advisers' Private Office
- current and former senior members of the FOI Unit to explore themes arising from the review of cases and the group interviews.



# Findings – Overview

## Scottish Government FOI processes

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### The FOI Process – general overview

56. Different public authorities use different systems for managing FOI requests. Some use a centralised system, whereby all requests are dealt with by an “FOI Team”. Other are more decentralised, with individual departments taking responsibility for responding to requests.
57. The system used by the Scottish Government lies somewhere between these two. Given the number of information requests received by the Scottish Government each year, requests are allocated to “case-handlers” rather than being dealt with centrally. There are currently over 1,000 case-handlers. There is no standard model within Directorates, reflecting the fact that Directorates are organised differently.
58. In some situations (looked at in detail below), cases are referred to Ministers or to special advisers for “clearance”. However, the case-handlers will normally issue the response.

### The role of the FOI Unit

59. Staff in the FOI Unit viewed the Unit’s role as one of providing an internal service to support officials and, consequently, to help the public. It provides practical help and broadens engagement in the value of FOI across the organisation.
60. The FOI Unit is presently examining the support provided to the Scottish Government and how best to resource it. The Unit provides a general support service and also clears all reviews. The FOI Unit is well used: in a straw poll conducted during the interviews, six out of the seven case-handlers and seven out of the eight reviewers interviewed had asked the FOI Unit for advice on handling a request. Two of the seven case-handlers said they would ask the FOI Unit if they needed advice on a request, two said they would ask a manager, but again seven of the eight reviewers interviewed said they would be most likely to contact the FOI Unit if they needed advice on a request.
61. From the examination of case files, it was apparent that the FOI Unit provides consistently good and accurate advice on the interpretation of requests, application of exemptions and the applicability of other provisions of FOISA and the EIRs.

### The Clearance Process – overview of findings

#### *Background*

62. The need to review FOI responses before issue is recognised as good practice in the management of requests. Paragraph 9.7 of the Section 60 Code states:

*“It is good practice for authorities to check responses for accuracy and quality before they are issued. The arrangements an authority puts in place should be proportionate to its need and different arrangements may be introduced depending on the nature, complexity and/or sensitivity of a request.*

*Authorities are expected to put in place measures to achieve both consistency and rigour in their responses to requests and requests for review.”*

### *Scottish Government Procedures*

63. The requirement to obtain “clearance” for certain types of FOI response is a central part of the Scottish Government’s request-handling procedures.
64. The Scottish Government’s internal guidance ‘FOI and EIR Requests – Guidance on Clearance Processes’ sets out that “*comments from special advisers and clearance from Ministers*” is required in a range of circumstances. The guidance states:
- (i) *Requests from journalists, MSPs, political researchers or other high profile requesters where the information requested may be used in the media or in Parliament – these should normally be looked at by special advisers and the relevant Cabinet Secretary or Minister.*
- The only exceptions to this are where: the response is very routine and not sensitive (either directing the requester to information already available online or stating we don’t have the information in cases where we couldn’t be expected to have it) or where the request and response are the same as another one which has recently been agreed with special advisers / Ministers*
- [...]
- (ii) *Requests from individuals or others not in the categories above should also be sent for clearance in any cases where the information proposed for release is either considered sensitive or may attract media or Parliamentary scrutiny.*
- (iii) *Requests from individuals or organisations that are not considered sensitive or likely to lead to media interest can be cleared by managers at a local level unless a special adviser or Minister has informed the policy area that they wish to see the draft response*

[...]

*For reviews...when the reviewer is proposing release of further information or other significant modifications to the original response, it should be considered by special advisers and Ministers if the case falls within either categories 1. or 2.*

65. The guidance also advises officials who are unsure whether clearance is required to check with their managers and/or with the special advisers’ office or the relevant Minister’s Private Office. Officials are instructed to allow two weeks for consideration of cases by special advisers and Ministers.
66. The proportion of requests for information which are referred for clearance is high. As a snapshot, in a two-week period from 1 March 2018, of 141 requests for information received, 60% were responded to by officials without reference to Ministers or special advisers, while 40% were sent for clearance, of which 27% were sent to Ministers for a decision.

### *Timescales for clearance*

67. A March 2016 memorandum to Directors reminded staff that initial responses to requests should be drafted by officials within five working days of receipt, in order to build in greater time for review and clearance.
68. This requirement was reiterated in December 2016, in a memorandum to Directors which set out the timeline staff should follow for cases requiring Ministerial sign-off:

<i>Day 1-5</i>	<i>Official drafts response</i>
<i>Day 5-10</i>	<i>Opportunity for draft to be revised / cleared by Deputy Director / Director</i>
<i>Day 10</i>	<i>Deadline for official to send draft to SpAds for comment</i>
<i>Day 10-15</i>	<i>SpAds have five days to comment and then return draft to official</i>
<i>Day 15</i>	<i>Deadline for official to send draft to Ministers for final clearance</i>
<i>Day 15-18</i>	<i>Ministers have three days to give final clearance</i>
<i>Day 18-20</i>	<i>Opportunity for officials / FOI Unit to further revise / finalise</i>
<i>Day 20</i>	<i>Response issued</i>

69. The target timeline for issuing responses on the 20<sup>th</sup> working day is clearly inconsistent with the requirement in FOISA and the EIRs that responses are issued promptly or as soon as possible, and in any event not later than the 20<sup>th</sup> working day.
70. The procedures also contain a full version of this timeline containing slightly different timescales. This is the timeline referred to in paragraph 49.

#### *The clearance process*

71. Although the requirement for clearance is clearly stated in Scottish Government policy and guidance, what is meant by clearance, or what the roles of those involved in the clearance process (namely special advisers and Ministers) are, is not obvious from the documents alone.
72. This lack of clarity is further compounded by the fact that different Ministers and special advisers approach their roles in the process in different ways, from portfolio to portfolio.
73. Some Ministers were content to rely on the judgement of special advisers and officials in determining which requests to consider while others selected cases of interest from within their respective portfolios.
74. The approach taken by special advisers in deciding whether a case should be reviewed by Ministers also differed between portfolios, with this seemingly being influenced by a range of factors, including the complexity or sensitivity of cases, the relationship between special advisers and Ministers, and the special advisers' understanding and awareness of their Minister's current interests and priorities.
75. For one special adviser, for example, it was common practice for all requests for information flagged as requiring clearance to be passed to their Ministers, although this was sometimes done primarily for awareness purposes rather than for formal comment or review. Other special advisers fulfilled a more active filtering role, although the extent of this role varied between individuals. As one special adviser put it: "*There's a wide range of FOI requests. I wouldn't forward on routine ones to Ministers...you make a judgement.*"
76. What is clear, however, is that where a case goes to a Minister for clearance, the Minister is asked to make a decision on the response to the request for information. Whenever such a FOI response is to be reviewed by a Minister, the referral is accompanied by a Ministerial Submission. This summarises the key facts of the case and the approach taken to the consideration of any appropriate tests in FOI law. Where required, Ministers also have access to the full case file.

77. In most cases, contentious issues are resolved before they reach Ministers. Cabinet Secretary Shona Robison stated “*issues are normally resolved by the time they [the cases] get to me*”, and this view was also shared by Cabinet Secretary Keith Brown: “*I expect issues to be resolved in line with our FOI obligations before they come to me*”. The process which is followed to reach this stage, and the special advisers’ role in that process are considered later in the detailed findings.
78. While Ministerial clearance is often relatively straight-forward, coming as it does with detailed advice and a recommended course of action, the Ministers interviewed nevertheless stressed their view of the importance of their role.
79. As Cabinet Secretary Fiona Hyslop stated: “*I have responsibility as a Minister for what is issued.*”
80. This view was also expressed by a special adviser: “*You can’t get away from a requirement for Ministers to clear the information. It’s the Minister that’s covered by the Act, and they can’t be in a position where they don’t know what’s going out in their name.*”
81. Cabinet Secretary Shona Robison expressed this as follows: “*Ministers do need to be involved. Ministers are accountable, and will be asked about it. It would feel odd if Ministers were not involved given that they are ultimately the decision maker. There are risks attached, but it is better that we are involved.*”

#### *The role of communications staff in clearance*

82. Our intervention uncovered no evidence – either from our analysis of FOI case files or from our interviews with key staff – of communications staff playing a significant role in the clearance of FOI responses.
83. Scottish Government procedures set out that officials should consult with communications staff about the handling of responses to media and on sensitive topics. The FOI Unit guidance sets out that case-handlers must ensure that they “*agree the response with the Communications Team as soon as possible before the deadline*”. The guidance goes on to clarify that the communication team will review the response and if necessary prepare media lines, and issue responses to journalists. We questioned the rather ambiguous wording of the guidance with the FOI Unit who have agreed that the text is unclear and will be amended to read “*you must ensure that you notify the Communications Team as soon as possible before the deadline.*” It is also intended to remove text from the guidance which sets out that the Communications Team will “review the response”, clarifying that the role is just related to the preparation of media lines, and the issue of responses.
84. Procedures for communications staff also contain guidance on their role in relation to the request, advising that staff should “*bear in mind that FOI responses are constrained by the legislation, so they may need to include lines which are uncomfortable from a [communications] perspective.*” Communications staff are advised to contact the Scottish Government’s FOI Unit if they have concerns about an FOI response, and are reminded that “*we can’t miss the deadline to issue a response on a day which is more convenient from a media handling point of view.*”
85. The minimal role of communications staff in the clearance process was evident during our interviews with staff, where it was clarified by a special adviser that “*a small minority of cases go to the Comms Team...I’ll consider whether lines should be prepared*”, while another stated “*usually coming up with lines is straightforward – a quick two paragraph quote from Comms is developed while the Minister reviews [the response].*” A member of the

communications team confirmed the team's role in the preparation of media lines only and that the team were "*not involved with the Ministers' decision.*"

86. This role was reinforced during our review of case files, which found that communications staff were commonly only referenced in a case file when either they received a request and forwarded it to an official for handling, or where a response was passed to them for issue (FOI responses to journalists are normally sent from the communications team in order to ensure continuity in communications with journalists). Despite the current ambiguous guidance set out above, there was no evidence found of communications staff playing a significant role in the consideration of requests. It is, however, important that policies and guidance are checked and reviewed to clarify that (except in cases where they are the case-handlers) the role of communications staff is restricted to the preparation of media lines and the issue of responses.

#### *The role of the FOI Unit in clearance*

87. The FOI Unit has no formalised role in clearance processes at the initial request stage. They are, however, available for ad hoc consultation in relation to specific issues. Six out of the seven case-handlers interviewed had sought advice from the FOI Unit in relation to an initial request. For special advisers, the FOI Unit staff were consulted in relation to some initial requests, but only in certain cases. As one put it: "*It's only complicated cases, or where there's a difference of opinion between me and the case-handlers*", while another felt that "*the need for their involvement may depend on the quality of the material coming from the case-handlers*". Guidance prepared by the FOI Unit was seen as a key tool for staff when responding to requests, even if the Unit itself had not been consulted directly.
88. The Unit is, however, directly involved in the clearance of reviews. Scottish Government Guidance note "Clearing review response with FOI Unit, Minister(s), etc." sets out that "***all review responses must be cleared with the FOI Unit before they are issued***".

# Detailed Findings

## What role do special advisers play in the request-handling process?

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89. My intervention looked at the role of special advisers in the request-handling process. It also looked at whether request-handling departed from the Scottish Government's procedures and, if so, whether this caused any detriment to the requester's entitlement to information.
90. The Scottish Government's website states that "*special advisers provide advice to the First Minister, Cabinet Secretaries and Ministers across all portfolio areas in the Scottish Government*"<sup>9</sup>. Special advisers are appointed and employed as temporary civil servants within the Scottish Government in accordance with Part 1 of the Constitutional Reform and Governance Act 2010.
91. As outlined at paragraph 64 above, Scottish Government guidance on the clearance process sets out that requests from journalists, MSPs, political researchers or other high-profile requesters, as well as other requests for "sensitive" information "*should normally be looked at by special advisers and the relevant Cabinet Secretary or Minister*". This is also referred to in the guidance as being "*sent for clearance*".
92. Under the heading "issuing the response", the Scottish Government's guidance for staff on handling information requests states that "*Before issuing a response, ensure that the appropriate clearance(s) or comments have been obtained from relevant Minister(s), senior management, special advisers, Communications, other parts of the SG, etc. If you are unsure whether you think a case requires to be cleared by special advisers and/or Ministers please contact the SpAds' office for a steer*".
93. It continues that "*Ministers value the views of special advisers, so you should ensure adequate time is allowed for SpAds to comment on your draft response before sending it*". This was reflected in our interviews with special advisers, with one informing us that "*I know my Ministers. I have a good sense of how they respond to issues. It's the value I add*", while another stressed that "*SpAds are close to their Minister – they know them very well*".
94. Beyond such passing references to special advisers playing a role in the clearance process, policy and guidance is remarkably silent on what their role in this process actually is.
95. With regard to their specific role in practice, interviews revealed that it included:
- (i) checking draft submissions and decision letters for accuracy (including typos and formatting, although much of this is now done by the special advisers' personal secretary office). There was also a consistent view from special advisers that a number of submissions and draft responses sent to them were not of sufficient quality and had to be returned to case-handlers for further work. They viewed a key part of the role as quality control;
  - (ii) ensuring the proper application of FOI law by suggesting what information should be considered to fall within, or outwith, the scope of a request and what exemptions should be applied to information falling within the scope of a request. While acknowledging that they were not the Scottish Government FOI experts, they did state

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<sup>9</sup> <https://beta.gov.scot/publications/special-advisers-february-2018/>

that they had good levels of FOI knowledge and experience which helped improve the submissions to Ministers and consistency of approach;

- (iii) using their knowledge of a wider range of policy areas to raise issues which may be unknown to officials and which may justify the use of an exemption not previously considered. Some indicated that they occasionally receive draft decisions stating that no information falling within the scope of the request is held when they know this to be incorrect. Consequently, the case has to be referred back to the case-handlers for additional work. This can lead to additional delays in responding to the request;
- (iv) providing a filter role in assessing whether Ministers need to “clear” responses, or whether responses can be issued by the Directorate without the need for Ministerial clearance. Special advisers commonly described their role as including an assessment of “*whether or not [the response] needs to go to Ministers*”. One summarised the benefit of special adviser review as follows: “*SpAds add value because we speed the process up. We filter out some cases from Ministerial view, and make sure that the cases that go to Ministers are high quality...It makes their job easier and more efficient and helps Government do its job properly*”;
- (v) providing due diligence for Ministers - “*it gives them confidence and eases their burden*”. It was clear from interviews that Ministers value the role of special advisers in the process. This was expressed by Cabinet Secretary Fiona Hyslop as follows: “*SpAds are part of the process of ensuring that, when a case comes to me, I can be satisfied that any issues are properly dealt with...SpAd involvement means I don’t have to spend time second guessing where there are gaps in the casework*”; and
- (vi) providing cross-departmental insight, e.g. to enable “*a better understanding of how information may relate to policy formulation*”.

96. Staff in the FOI Unit took the view that the purpose of clearance by special advisers and Ministers was to ensure that a response answers the questions in a request within the terms of FOI and that any exemptions were appropriately applied. In their view, clearance was a check and balance which ensured that staff had prepared a correct response. This was felt to be particularly important as there were 1,015 individual case-handlers within the Scottish Government last year.

97. When providing a view on the scope or application of an exemption to a case, special advisers typically view their role as one of review, comment, advice, suggestions and quality assurance, but not as having any responsibility for or powers to give formal “clearance”, or to be prescriptive. They stated that the decision of what is released is the Minister’s (or an official’s if the case does not require Ministerial clearance).

98. A phrase repeated by more than one special adviser I interviewed was that SpAds “*can advise, but can’t instruct*”, with one adding “*Everyone in the civil service knows this*”. This position is consistent with the role set in the Scottish Government’s Code of Practice for Special Advisers<sup>10</sup>, which states that special advisers must not “*exercise any power in relation to the management of any part of the Civil Service, except in relation to another special adviser*”.

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<sup>10</sup> <https://beta.gov.scot/publications/special-advisers-code-of-conduct-and-model-contract/>

99. In a number of interviews with special advisers, I questioned whether case-handlers of a junior grade understand this distinction and asked if they might view special adviser advice as an instruction. Universally I was advised that it was advice/a discussion and most definitely not an instruction. Indeed, I was advised of cases where case-handlers had robustly disagreed with advice. Despite this, it seems to me that there is a risk that some junior officials may mistake such advice as instruction. To this end, clear guidance and procedures setting out the role of special advisers and the procedures to be followed in the event of a disagreement about the disclosure of information are needed.
100. Clarity of the situation is not helped by the general lack of records of interactions between special advisers and case-handlers in the case files. For example, in one case we examined, the case-handlers presented a recommendation for disclosure of much of the information requested. The special adviser expressed the view that much of the information *“should be considered for exemption under section 29(1)(a)”* and went on to say *“Grateful if you could reconsider the information you propose to release...”*. The case-handlers subsequently argued against this approach, suggesting that there was nothing problematic in the withheld information. Following an unrecorded meeting with the special adviser, the information was withheld under section 29(1)(a) of FOISA. The case file also contained internal advice from officials pointing out that information should not be withheld blanket style in the manner that seemed to be suggested by the special adviser. The lack of a clear record of what was discussed only feeds speculation which a clear record could dispel.
101. Special advisers generally stated that they did not “clear” anything (based on the view that “clearance” equated to the making of a decision in a case), with one making the point that *“I don’t clear FOIs. The phrase “clearance” keeps getting used, but SpAds don’t “clear”. I assess whether it needs to go to a Minister”*, while another stressed that *“Ministers are ultimately responsible after all...it is the Ministers who clear”*.
102. However, special advisers are frequently viewed as having a “clearance” role by officials. The inspection of case files showed routine references to “clearance” by special advisers. Our review of both individual case files and the Scottish Government’s FOI Tracker found multiple reference by officials to “clearance” of FOI requests by special advisers. For example, in one case an internal email from the special advisers’ office states *“until [special adviser] has seen and cleared the amended response, I’m afraid they think it is impossible to commit to a date for responding”*. Formal guidance for staff was also ambiguous on this point, with the Scottish Government’s guidance on “Obtaining clearance before issuing a response” advising staff that *“if you are unsure whether you think a case requires to be cleared by special advisers and/or ministers please contact the SpAds’ office for a steer”*, while guidance on “Clearing review responses” sets out that, *“in some cases, the review response will need to be cleared by the relevant Minister(s), senior management, special advisers, other parts of the SG, etc”*.
103. In interview, when asked what would happen if the case-handlers responsible for dealing with the case did not agree with the special adviser’s advice/suggestions, special advisers stated that there would ordinarily be a discussion: *“There’s a bit of to and fro. Sometimes I persuade them, sometimes they persuade me.”* If agreement could not be reached then either the matter would be referred to the FOI Unit or a decision would be left to the Minister to determine. Such situations are, however, clearly rare and we saw only one example of a disagreement being referred to a Minister. There is also no clearly defined process for this.
104. Having examined the evidence in detail, I have found that this reference to “clearance” by special advisers is not intended to be a reference to their making a decision in the case, but



rather to them playing their role in the clearance process. It is the current policy and guidance that has confused the issue by providing insufficient detail on the roles of the various people in that process. The current policies are also deficient in explaining who does what in the clearance process, and what the roles and responsibilities are. Clear processes setting out how to deal with disagreements between officials and special advisers, including reference to the FOI Unit, would also be a considerable improvement. It is important that the process is transparent and that those involved know what their roles and responsibilities are.

105. The issue of “detriment” to requesters’ entitlement to information will be considered below, particularly in the sections dealing with delays, reduction in entitlement and use of tenuous reasons.

## **Are requests from journalists treated differently?**

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106. My intervention also looked at whether the Scottish Government treats and manages requests from journalists differently compared to requests from other people.
107. It is clear from the Scottish Government’s procedures on request-handling and from the inspection of case files that all media requests (unless the request is very routine) are sent to special advisers (and on many occasions to Ministers) for “clearance”.
108. Internal guidance on FOI and EIR clearance processes set out that clearance is required in a range of circumstances. As outlined at paragraph 64 above, Scottish Government guidance on the clearance process sets out that requests from journalists, MSPs, political researchers or other high-profile requesters, as well as other requests for “sensitive” information “*should normally be looked at by special advisers and the relevant Cabinet Secretary or Minister*”. This is also referred to in the guidance as being “sent for clearance”.
109. The on-site examination of case files found that, in that sample, requests received from the media were almost invariably referred for clearance. I did, however, hear evidence from one Agency which indicated that not all routine and non-sensitive requests made by journalists were referred for clearance.
110. While I received reassurances throughout my interviews that journalists’ requests were dealt with in the same way as requests from any other person, this is clearly not the case. Journalists, together with MSPs and political researchers, are expressly made subject to a different process for clearance than other requester groups. As set out above, their requests are almost invariably subjected to an additional layer of clearance which is likely to delay the consideration of the case. This process is applied because of who/what they are, not what they asked for. This is far from the applicant-blind principle of freedom of information legislation.
111. It may very well be the case that many requests for information from journalists, MSPs and political researchers are for sensitive information, in which case it may be entirely justified that clearance is required at a higher level in the organisation. However, by creating and applying a process based on requester type rather than the nature of the request, not only is the spirit of FOI legislation offended, but trust between those groups mentioned in the policy and the Scottish Government may also be damaged. I have heard criticisms of a two-tier system, and the existing policy simply reinforces such concerns.
112. The internal guidance for staff on handling information requests further states that:

- (i) *If you receive a request from the media ... you must agree the response with the Communications Team as soon as possible before the deadline.*
- (ii) *The Communications Team will:*
  - *review the response and, if necessary, prepare media lines in conjunction with you and the special advisers. This is imperative if the subject matter is topical or sensitive.*
  - *clear the media lines with the relevant DG and Minister, if appropriate and*
  - *where the request is from the media, issue your response to the journalist on your behalf and deal with any ensuing media enquiries.*

113. The on-site inspection of case files did not reveal any evidence of communications staff influencing the content or nature of responses. However, they would potentially offer advice on dealing with any follow-up queries arising after the response had been issued. In practice, all responses to requests from journalists would be issued from communications staff. This did not mean that those staff had decided the case or influenced the content of the response.

114. I am satisfied that the role of communications staff does not extend to shaping or influencing responses to information requests in a way that would adversely affect requesters' entitlement to information.

## **Are the rights of journalists reduced or restricted?**

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115. My intervention also considered, where there were differences between the way the Scottish Government treats requests from journalists and request from other people, whether this reduced or restricted journalists' entitlement to information.

116. It was clear from the journalists' letter, and from the response to my call for evidence, that there were concerns that information requests from journalists are being treated and managed differently, even though the legislation requires all requests to be handled equally and without favour or prejudice. I examined whether the existence of the different procedures highlighted in the previous section led to them being subjected to any detrimental treatment when compared to other requester types. One aspect of this, namely time taken to respond, is considered in detail in the next section.

117. The next issue I examined was whether the process of clearance had a noticeable impact on outcomes: i.e. by being subject to clearance at a higher level, was there a detrimental impact on what was disclosed in response to requests for information?

118. As noted above, the on-site inspection of case files identified a number of cases where requests from journalists were passed to special advisers for "clearance". A number of these case files contained little or no information about the special adviser's involvement, beyond a note that the case had been "cleared" or that the special adviser was "content" with the draft response. Indeed, from interviews it was clear that the greatest number of cases sent through the clearance process were not subject to material change in approach.

119. There were, as would be expected, other cases examined where changes to the approach were taken after the involvement of special advisers and where exemptions were subsequently applied. While there were some specific cases viewed where the advice provided by special advisers may be disagreed with, I did not find any evidence that the involvement of special advisers resulted in any deliberate attempt to reduce the amount of information disclosed to journalists. In individual cases, the appropriate route for dealing with

concerns about how exemptions are applied is by review and ultimately appeal to me. It is only by requesters enforcing their rights in this way that I can make authoritative decisions on particular cases. There is also relatively limited value in reciting such cases in isolation. We have therefore drawn together statistics of the outcomes of requests for information over a three year period, distinguishing between media requesters (journalists) and non-media requesters.

### Request outcomes by requester type

2015/16	Media requests	Requests from all other types of requester
Full disclosure	27%	42%
Refuse	15%	11%
Partial disclosure	30%	25%
Information not held	19%	16%
Invalid request or outcome not recorded	8%	6%

2016/17	Media requests	Requests from all other types of requester
Full disclosure	37%	39%
Refuse	14%	11%
Partial disclosure	27%	23%
Information not held	15%	19%
Invalid request or outcome not recorded	6%	7%

2017/18	Media requests	Requests from all other types of requester
Full disclosure	33%	34%
Refuse	10%	13%
Partial disclosure	35%	27%
Information not held	13%	20%
Invalid request or outcome not recorded	8%	6%

120. As can be seen, in 2015/16 there was a marked difference in the outcome of requests from media requesters compared to requests from other requester types. Media requesters were considerably less likely to receive a full disclosure of the information they had asked for and more likely to receive a refusal. In 2016/17 and 2017/18, the outcomes of media requests were similar to those for non-media requests. Indeed, in 2017/18, the percentage of refusals of requests was lower for journalists than compared with other requester types.
121. This data indicates that two years ago journalists were significantly less likely to receive information compared to requests made by other requester types. The data does not, however, indicate why this may have been the case.
122. Obviously, it is a matter for the Scottish Government, as with any public authority, to decide how it wishes to handle information requests and what internal procedures it requires in order to process requests timeously, provided those procedures comply with FOI law and the Section 60 Code.

123. Except for 2015/16, the statistics do not show journalists to be treated in a materially different way from other requester types, insofar as the likelihood of obtaining full or partial disclosure is concerned. However, given the level of involvement that special advisers have in the handling of many information requests, there is obviously a *perception* that their involvement is disadvantageous to such requests. A transparent system with clear processes and thorough record-keeping of decisions is key to allaying such concerns. I address this in my recommendations below.

## Is there evidence of deliberate delays?

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124. My intervention also looked at whether there was any evidence of responses to some requests (e.g. requests from journalists or requests about internal policy-making) being deliberately delayed.

125. Section 10(1) of FOISA requires authorities to respond to requests for information promptly and within 20 working days after receiving the request. Regulation 5(2) of the EIRs requires authorities to comply with a request as soon as possible and no later than 20 working days after receiving the request. This timescale can be increased to 40 working days for EIR cases if the request is complex and voluminous: regulation 7(1).

126. Section 21(1) of FOISA requires authorities receiving a requirement for review to comply promptly and within 20 working days after receiving the request. Similarly, regulation 16(4) of the EIRs requires authorities receiving representations from a requester to notify the requester of the review outcome as soon as possible and no later than 20 working days after receipt of the representations.

127. The first issue I examined was that of time taken to respond. The following tables provide a statistical comparison of late response rates over a three year period and of average response time in working days over the same period.

### Late responses

	Total requests 2015/16	Late responses and failures to respond (%) 2015/16	Total requests 2016/17	Late responses and failures to respond (%) 2016/17	Total requests 2017/18 (to 17/12/17)	Late responses and failure to respond(%) 2017/18
<b>All</b>	2,131	24%	2,357	30%	2,270	22%
<b>Media</b>	403	40%	406	47%	343	28%
<b>Non-media</b>	1,728	20%	1,951	26%	1,927	21%

### Average response times (working days)

	2015/16	2016/17	2017/18
All	19	21	18
Media	24	27	19
Non-media	18	19	17

128. As can be seen above, the proportion of late responses and failures to respond has been considerably higher for journalists, particularly in 2015/16 and 2016/17. Over the past year,

this has reduced dramatically. This appears to be as a result of both the general improvements made by the Scottish Government in response to my earlier intervention to reduce time generally, and the specific improvements made to the timeliness of special adviser advice and Ministerial clearance. These latter improvements include the FOI Unit's issuing of weekly alerts of requests due, or overdue for response to Ministerial Private Offices, via the Minister for Parliamentary Business, and the introduction and active monitoring of a central special adviser FOI Mailbox administered by the special advisers' Private Office.

129. Despite these significant improvements, there is still a noticeable difference in time taken to deal with media, as opposed to non-media, requests. While some of this may be due to the complexity of some of those requests, it is inevitable that higher levels of clearance will add time to any response process.
130. The on-site examination of case files identified numerous instances of delays in the issuing of responses due to delays in obtaining clearance from special advisers. A common feature of these cases was where case-handlers sought updates from special advisers on the progress of the clearance process. These updates were often sought in order to provide advice to requesters who had asked for clarification on when already overdue responses could be expected.
131. In one case, an apparently straightforward request did not elicit a response for three months. The case file contains evidence of a case-handlers expressing mounting frustration with the special adviser's involvement. This includes an email stating "*I am having trouble communicating with the special adviser related to this ... they have not returned my calls or responded to my emails*".
132. Another request was responded to six months after its receipt. The response was that the Government did not hold the information which had been asked for. No substantive explanation was provided to the requester for the delay beyond claiming that it was due to "*an administrative error*". The requester in this case had repeatedly chased up the response. On receipt, the request had been sent to the special adviser and internal reminders sent regularly thereafter. The case tracker system noted that the case was "*still with special adviser*" on seven separate dates. There was nothing in the case file to explain or evidence the reason for the delay.
133. One case file contained a detailed note of interactions with the special advisers' office while the case-handlers awaited clearance of a draft response. In this case, clearance took around two months and the case file detailed the case-handler's increasingly frustrated efforts to elicit a response.
134. In another case, a response was delayed by several months. There was nothing in the case file to explain why this had happened. A note in the tracker system indicated that the handling of the request had been passed between the special adviser and the Communications Team and that both were "working on a handling plan".
135. These cases all relate to 2016 and early 2017. They demonstrate unjustifiable, significant delays, with disregard for the statutory timescales. However, the reasons for those delays are generally not clear from the case files and I have therefore been unable to find, except in one case (see paragraph 137 below) that they were deliberate. What can also be observed from the above statistics, however, is a significant improvement in 2017/18, with the average response time for dealing with media cases reducing to 19 days. Initiatives such as the weekly FOI tracker report and the establishment of a monitored special adviser FOI Mailbox

are undoubtedly beginning to have an impact. While this is a considerable improvement, more work remains to be done to reduce the response rate to a level comparable with non-clearance cases.

136. One special adviser stated “*I don’t think in any of the material you’ve looked at – while you might find inefficiency I don’t think you’ll have come across a case where there was malice in a delay to a journalist*”.
137. Despite not finding any evidence of “*malice*” in causing delays, one case featured a deliberate delay while arrangements were being made to publish the information on the Scottish Government’s website and while a handling plan was being finalised. In this case, the requester asked the Government to carry out a review because it had failed to respond to the request. The review response was also considerably late; during this period, arrangements were still being made for the online publication of information. The case file notes that the online publication of the information and the FOI response were eventually cleared by the First Minister with a request that “*officials agree a comms handling plan with Special Advisers*”. The issuing of the FOI response was then further delayed for a period of nine calendar days while publication and a handling plan were being finalised.
138. Any delay in responding to requests under FOISA or the EIRs beyond 20 working days (40 working days for complex and voluminous EIRs requests) is a breach of the Scottish Government’s statutory duties. Where such delays occur, there will invariably be a suspicion that the delay is deliberate, especially if the request concerns a sensitive topic. This may undermine the public’s faith in the Scottish Government’s compliance with information requests and could result in a consequential diminution in its ability to reduce or minimise risk.

## **Do internal request-handling procedures comply with FOI law and the Code of Practice?**

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139. My intervention looked at whether internal request-handling procedures, particularly those that concern which officials should respond to, or advise on, requests, are consistent with FOI law and the Section 60 Code of Practice.
140. In my view, the practice of referring all media requests for clearance is contrary to the spirit of FOI legislation. In most cases, the identity of a requester should be irrelevant for the purposes of FOISA and an authority should handle requests on the basis that they are applicant, and purpose, blind. The only situations where an applicant’s identity is likely to be relevant are where the request concerns the disclosure of personal data or where consideration is being given to a decision finding the request to be vexatious or repeated under FOISA (or manifestly unreasonable under the EIRs). There is nothing in FOI law or the Section 60 Code of Practice which permits authorities to treat certain groups of requesters less preferentially than others.
141. The examination of case files highlighted some instances where special advisers and Ministers who had been involved in clearing the initial response were also involved in clearing a review response. I am concerned at this practice. This is contrary to the guidance contained in the Scottish Ministers’ Section 60 Code of Practice which provides that the review process should be fair and impartial (paragraph 10.3.3). The Code of Practice also states that it is good practice for the reviewer to be a person who did not respond to or advise on the original request (paragraph 10.3.4). Where the same person is *advising* on the initial response and on a review response, there is likely to be a perception that the review

process is not impartial. I do note, however, that as far as special adviser involvement in reviews is concerned, new procedures are now in place which mean that the same special adviser will not be involved in advising on both the response and review.

142. Further observations about compliance with the Section 60 Code are provided in the Additional Findings section of this report.

## **Are requests blocked or refused for tenuous reasons?**

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143. My intervention also looked at whether there was evidence of a practice of requests being blocked or refused for tenuous reasons. There was a view from journalists that the use of blanket exemptions was widespread and that the scope of requests was sometimes narrowly interpreted.
144. Scottish Government FOI Unit guidance is clear that *“The risk of causing embarrassment, even to Ministers or senior officials, cannot be taken into account when considering whether information can be released, although in such cases it is appropriate to consider a handling strategy for your Communications Team and Ministers if necessary”*.
145. The guidance also states, however, that *“If there are any sensitivities or complexities about the case, it is particularly important to consider whether your Minister should be consulted”*. The system is therefore designed to ensure that not only complex cases, but cases that could risk causing embarrassment, are sent to Ministers.
146. In a number of my interviews with Ministers I questioned how they approach dealing with cases where disclosure may be damaging for them. I was advised that such considerations did not form part of the decision-making. Additionally, there was evidence of a number of cases where the advice given to Ministers at review stage of an information request was different from the advice received in the clearance of the original request, and the Ministers cleared the new decision, even though it contradicted their previous decision.
147. Looking at the advice provided to Ministers, as previously mentioned, records management in case files is sporadic and in many cases the rationale for the decision is not clear from the documents. As an example, in one 2017 case, it was recently reported that documents had been withheld from a response to a request for information after the Deputy First Minister had indicated a preference that certain documents should not be released. The email from his Private Secretary Depute stated that *“DFM is content for this to go but thinks it would be better to see if we could not release the material relating to Prince Charles or his [Private Secretary]... He specifically referenced documents 20, 24, 25, 26 as ones he’d prefer were not released”*.
148. I specifically referred to this case in my interview with the Deputy First Minister and asked him to explain what he meant by the note. He indicated that it was important to read the note in context. It was an interpretation by the private secretary of his request to officials that an apparent exemption, namely the Royal Household exemption in section 41 of FOISA, be properly considered. In response to that request, one of the documents listed was disclosed and the remaining three were judged to be subject to the exemption and withheld from disclosure. Accordingly, while the documents were subsequently disclosed following an appeal to my predecessor, the initial rationale for withholding them was the Royal Household exemption.

149. This emphasises the importance of having detailed and clear notes of decisions, with reference clearly being made to any exemptions considered, and why they are believed to apply.
150. An example of poor record-keeping was noted in one file which contained a draft response proposing the disclosure of certain elements of minutes of meetings. Following the intervention of a special adviser, the contents of all meetings were fully redacted. The special adviser subsequently asked for further information falling within the scope of the request to be removed. No reasons for these redactions were recorded.
151. From the cases examined by my office, while I may have disagreed with a number of the conclusions (where they could be gleaned from the case file), I could find no evidence of improper motives in the application of exemptions. I did, however, note evidence of a number of cases where decisions based on detailed advice which had been considered by special advisers were overturned at review stage or after appeal to my office. While some degree of this would be expected (otherwise review has no function), the number of cases was noticeable. Indeed a "*bugbear*" of Keith Brown, was not getting such cases right first time, and he had noticed "*a period where cases being overturned on review was happening regularly*", a situation he found to be "*less than satisfactory*".
152. In this regard, where exemptions are proposed in sensitive cases, there may be scope for more use of the experts in the FOI Unit to provide advice to help get it right first time.
153. There was an indication in some cases of reliance on exemptions where, although there may have been a legally stateable basis for doing so, the prospects of success, were the case to be reviewed or appealed, were not high.
154. In one such case, a special adviser wished to use an exemption to redact information despite advice from the FOI Unit indicating that the reasons would be "*flimsy*" and if the case was appealed to the Commissioner it was doubtful that the exemption would be upheld. The internal correspondence in this case also indicated that information could be withheld in response to the initial request on that basis, but that the position could be reconsidered should a review be requested. The requester did not ask for a review.
155. While there is sometimes room for disagreement about the strength of a case, and that may have been the case here, the suggestion that a relatively weak case can be used at first and then changed later if necessary is clearly of concern.
156. Both FOISA and the EIRs contain a presumption in favour of disclosure of information - see section 1 of FOISA and regulation 10(2) of the EIRs. This presumption is also recognised in Part 1 of the Section 60 Code of Practice.
157. I have published detailed guidance on the exemptions and exceptions in FOISA and the EIRs. The guidance sets out the statutory tests which must be met before an exemption or exception can be applied. Some of these tests are purely factual, while others will involve more detailed consideration, such as whether disclosure would be likely to cause substantial prejudice.
158. My guidance gives examples of what is, and is not, likely to be acceptable, when considering the application of any exemption/exception. I expect public authorities to take this guidance, and previous decisions, into account.
159. I accept that two individuals might validly come to a different view as to whether an exemption/exception applies. However, if an authority decides to withhold information



despite advice indicating a weak case, I would, given the presumption in favour of disclosure, expect a detailed justification for such a course of action to be recorded in the case file. Without such justification, I cannot see how a proper refusal notice could be issued to the requester; how a proper review could be carried out; or how the Scottish Government could justify its position to me effectively in the event of an appeal.

160. Another case file contains an email from the case-handlers with the draft response attached stating “*please see below FOI and attached documents which I have amended as requested by [special adviser]*”. It was subsequently pointed out by the FOI Unit that the response was deficient: it had not, as required by FOISA, explained why an exemption applied or considered the associated public interest test. The requester in this case asked for a review; the special adviser was also involved in shaping the review response. During consideration of the review, it was determined that the initial interpretation of the request had been too narrow.
161. One file noted that the case-handlers received “*verbal comments from [special adviser]*” who “*thinks the document should be exempted in full under the formulation or development of government policy*”. The case-handlers subsequently sought advice from the FOI Unit who advised that the suggested exemption would not apply. The majority of the information in this case was subsequently withheld, but later disclosed on review.
162. Due to the noticeable number of such cases in the sample, we carried out some statistical analysis of the issue. From a review of the information provided to me in the FOI Unit’s tracker, recording practices changed in early 2016; prior to this point there was no consistent record of cases referred for clearance.
163. Looking at the 2016/17 figures, it is apparent that the review rate for requests referred for clearance is significantly higher than that for all requests. In 2016/17, 29% of all requests referred for clearance were subject to review, compared to an overall review rate of 10%.
164. In relation to those subject to review, 87% resulted in an overturned or partially upheld outcome for the requester, compared to 64% in relation to all reviews. Notably, in 2017/18 this had considerably narrowed to 55% compared to 47% for all reviews.

	2016/17		2017/18	
	Cleared requests	All requests comparator	Cleared requests	All requests comparator
No. of requests referred for clearance	355		855	
No. of requests subject to review	102		91	
% subject to review	29%	10%	11%	7%
No. overturned/partially upheld/decision reached at review	89		50	
<b>Overtuned or partially overturned at review(%)</b>	87%	64%	55%	47%

165. A number of interviewees made reference to the subjective nature of the public interest test as explaining the different views which were taken. I am not comfortable with the view that the public interest test is purely subjective. It is not simply a “finger in the air” exercise. When carrying out the test, an authority must identify and set out the competing arguments as to how the public interest would be served by disclosure of the information and how it would be served by withholding the information. Having identified the public interest

arguments on each side, the authority must then carry out a balancing exercise to determine where the public interest lies. Where the balance is even, the information should be disclosed.

166. Carrying out the public interest test will involve looking at the content and context of the information and at the likely effect of disclosure. I have published guidance<sup>11</sup> which lists some of the factors which are relevant to considering the public interest both in favour of disclosure of information and in favour of maintaining exemptions/exceptions.
167. Again, I accept that two individuals may validly come to a different conclusion as to where the public interest lies. However, the basis for coming to the conclusion must be recorded. If an authority withholds information on the basis that the public interest test favours withholding, regardless of advice indicating a weak case, I would expect a detailed justification to be recorded in the case file.
168. This underlines the importance of keeping up to date with the decisions of my office, and ensuring that where cases are successfully reviewed or appealed, lessons learned are fed back so that the same mistakes are not repeated. (Indeed, paragraph 10.6.1 of the Scottish Ministers' Section 60 Code makes it clear that it is good practice for authorities to put in place procedures for learning lessons from reviews and ensuring that any recommendations are taken forward to prevent recurrence of any failures.)

## **Are politically sensitive requests handled in a different way?**

169. My intervention looked at requests for politically sensitive information and whether these were handled differently from other requests. If they were handled differently, to what extent was this detrimental to the requester's entitlement?
170. As previously set out, internal Scottish Government guidance on FOI and EIR clearance processes set out that clearance is required in a range of circumstances. This includes "*requests from journalists, MSPs, political researchers or other high profile requesters where the information requested may be used in the media or in Parliament*" and "*requests from individuals or others not in the categories above should also be sent for clearance in any cases where the information proposed for release is either considered sensitive or may attract media or Parliamentary scrutiny.*"
171. While the Scottish Government's procedures on case handling state that requests involving sensitive information should therefore be referred for clearance, there is no clear definition within the procedures of what constitutes "sensitive" information. However, following from discussion of this in interviews, the omission does not seem to cause any real difficulties in practice.
172. Politically sensitive requests are therefore handled in a different way insofar as they are subject to additional clearance processes in the same way that journalists' requests are. The above findings in the sections dealing with delays, reduction in entitlement and use of tenuous reasons are therefore equally relevant, albeit that politically sensitive requests are subject to that regime by virtue of the information requested rather than the person who requested the information.

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<sup>11</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>.

## Additional findings

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### Case File Records

173. The examination of Scottish Government case files revealed significant gaps in the information recorded. In many cases, there was scant information contained in case files; in some there was no documentation whatsoever.
174. Consequently, in many cases examined by my officers it was impossible to ascertain what processes had been followed, what (if any) discussions had taken place, whether advice had been sought and/or received and who had been involved in shaping responses.
175. Scottish Government FOI Guidance on “Saving documents to the casefile” sets out clear rules regarding the documentation to be recorded, setting out that, by the time a case has been concluded, casefiles should contain:
- (i) The original request
  - (ii) Any internal correspondence about the handling of the request
  - (iii) Any schedule created listing the documents reviewed
  - (iv) The response letter that is issued.

Equivalent information should also be added in relation to any review or appeal. Guidance on “Locating the information requested” also adds a requirement to record details of *“all of the searches you have carried out, using the search template”* to this list.

176. Despite this, it is clear that this is not universally followed. Indeed, records of internal correspondence are variable, while schedules of documents and records of searches are rarely included in the case file. This raises issues of the ease of use of the information recording process and the level of training and familiarity of personnel with the process, particularly given that paragraph 6.2.3 of the Scottish Ministers’ Section 60 Code makes it clear that authorities should maintain a record of searches conducted, including details of who carried out the searches and the systems that were checked.
177. In particular, beyond the formal response letters to the requester, it was often unclear what the detailed rationale was for the decision taken, particularly if it required consideration of the serious harm test, or of the public interest test. In some of the case files examined, the Ministerial Submissions which were prepared for Ministers prior to a decision being made were contained in the case file. However, this was unusual, and in most cases examined Ministerial Submissions were not contained in the case file.
178. The Ministerial Submissions were of use in providing background information on a request, along with an analysis of the issues raised by the request and the possible ways of responding, including the possible use of exemptions. As stated, these were not present in all of the case files examined; it is assumed that in relation to all cases sent to Ministers for clearance this was a record-keeping failure, as it was made clear from interviews that a submission would be prepared for any case in which a Ministerial decision was made. The Ministerial Submissions examined were felt to be of a high standard and contained a detailed summary of the case background.
179. As noted elsewhere, paragraph 9.7 of the Scottish Ministers’ Section 60 Code of Practice requires responses to be checked for accuracy and quality before they are issued. It is difficult to imagine how this can be complied with in the absence of a clear rationale being

prepared for the decision taken. In the case of decisions taken by Ministers, this will ordinarily include the Ministerial Submission. In such cases, a record should be routinely retained in case files, not least to assist any review subsequently carried out.

180. In relation to cases which are not decided by Ministers, a system for the recording and retaining of decisions does not currently exist. This is a noticeable absence in the existing processes, and one which is easily remedied, for example by introduction of a pro-forma document. All of the decision-making processes should be followed in any event, but there is currently little evidence, either of it being properly considered, or that it can be checked for quality or rigour. Not only would such a system serve to comply with the requirements of paragraph 9.7 of the Section 60 Code, but it will also ensure that proper consideration is given to application of all elements of tests for any exemptions applied.

## **Experience of Personnel**

181. In interviews with case-handlers and reviewers, it was clear that many of those staff handled very few cases each year. Of the case handling staff interviewed, most (71%) had handled fewer than four information requests in the previous year.

182. It was also apparent from interviews with special advisers and some Deputy Directors that their assessment of the standard of product sent for clearance is that it is variable. The following are some of the comments from special advisers:

*“The quality is now variable, but that’s not to say it’s always good”.*

*“Case-handlers might only deal with one or two FOI cases a year and have a lack of experience ... There may be typos, missing information, incorrect exemptions, or lack of consistency. SpAds get involved to get the material up to scratch.”*

183. It is not surprising that the standard of product is not universally high if those responsible for discharging that role are unfamiliar and inexperienced in those procedures. Those who were more experienced, and more accustomed to request-handling procedures, generally felt more confident about responding to requests.
184. Staff generally were confident about referring to procedures and seeking advice and guidance from the FOI Unit. In this regard it is promising to see the increased resource recently provided to the FOI Unit. As noted elsewhere, 86% of the case-handlers interviewed stated that they had asked the FOI Unit for advice on handling a request. In addition, 29% said that, if they needed advice about a request, they would be most likely to ask the FOI Unit (29% would ask a manager).
185. A striking feature of the interviews was that very few of the staff (and none of the case-handlers interviewed) had received any face to face training on FOI in the last three years. Moreover, when I asked for a list showing what personnel had received FOI training, I was advised that there is not a centrally held record of who has completed the training. Paragraphs 1.1.4, 1.2.4 and 1.3. of the Section 60 Code variously refer to the need for staff to have the appropriate skills, knowledge and training to deal with the task of responding to requests. How can this requirement be met when it is not known what training has been received and when by any particular case-handler?
186. Given the low number of cases handled by individual members of staff and the limited training provided, it would be prudent to establish a system where meaningful refresher training is provided on a more regular basis. Indeed, it may also be appropriate to consider

whether the current decentralised system of case management is sustainable for those Directorates where volumes are too low to grow an experienced cadre of case-handlers.

187. The example of the Directorate of Marine Scotland is instructive. It is a Directorate which has recorded some 141 requests for information in the last year and which has surpassed the target response rates in all but one month. Its performance has not, however, always been so strong. This led to the Directorate conducting a review of its FOI process and of knowledge across the team. It then acted to ensure that all staff had adequate training and that mentoring was available from its FOI champions. FOI is now very much viewed as “part of the day job” by all staff in the Directorate and the time spent reviewing complex or difficult requests has reduced dramatically.
188. It is clear that action is required to address the deficit in knowledge and experience of many case-handlers. While there are a number of experienced case-handlers in the Scottish Government and its Agencies, a system relying on large numbers of insufficiently trained and inexperienced personnel is not efficient, and it is not fair on the individuals put in that position. It is not conducive to building a positive FOI culture, particularly given, as noted during the interview with case-handlers, some feel apprehensive about responding to requests.
189. There is positive evidence that Ministers, Directors and senior management are taking FOI seriously. This top-level buy-in is crucial if there is to be a cultural shift, but training, education, and support for those who come into contact with information requests is also required to achieve that shift throughout the organisation.

### **Handling of Agency requests for information**

190. One of the issues raised in the journalists’ letter was a suggestion that it was inappropriate that requests to Scottish Government Agencies were handled centrally, rather than by the individual agencies themselves.
191. The Scottish Government and its Executive Agencies are effectively one public authority for the purposes of FOISA. The Explanatory Notes to FOISA confirm that the reference to “Scottish Ministers” in Schedule 1 covers all departments of the Scottish Government, as well as the Agencies. Executive Agencies are not themselves statutory bodies, but operate in accordance with a Framework Document approved by Ministers, which may be reviewed, amended or revoked at any time.
192. Accordingly, the Scottish Government is entitled to handle requests to Agencies either centrally or by passing them to the relevant Executive Agency. My predecessor addressed this issue previously in *Decision 002/2016: Mr Mark Howarth and the Scottish Ministers*<sup>12</sup>.
193. Consequently, I cannot agree that it is inappropriate for requests to Executive Agencies to be handled centrally, rather than by the individual agencies themselves.

### **Deletion of special adviser emails**

194. In March 2018, it was reported<sup>13</sup> that civil servants had been ordered to delete emails from special advisers relating to FOI requests. This was an issue which I wished to examine in more detail.

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<sup>12</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501713.aspx>

195. The rule in question is contained in a document called the “Rules of the Mailbox”. The mailbox in question is the special advisers’ FOI Mailbox. This was created in January 2017 in order to have one central place through which to route special advisers’ correspondence on information requests. This is one of the improvements put in place to reduce the risk of emails going unanswered and deadlines being missed. It is administered by the special advisers’ Private Office. The rule states:

*“Once SpAds have provided final comments on the request keep only the e-mail containing the final comments and the final response letter. Delete everything else immediately....”*

196. It was explained during interviews with the special advisers’ Private Office that this instruction related solely to information contained in the dedicated special adviser FOI Mailbox. The deletion rule was an issue of mailbox management – the mailbox is not the official record of exchanges – the email is sent back to the case-handlers who should record it appropriately in the case file. This means that the rule does not apply to information contained within the request case file. It would be expected that any emails received by the case-handlers from the special adviser mailbox would be filed appropriately in the case file. I am grateful for this clarification and accept this explanation.

## **Improvements made by the Scottish Government in 2017**

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197. I noted a number of improvements made by the Scottish Government since the start of 2017 (in response to the previous intervention) and their positive impact on performance.

198. This included an increase in staff in the FOI Unit which in turn has helped enable increased direct engagement with case-handlers and Directors, identifying issues, or barriers to responding on time, and offering bespoke training to specific business areas.

199. The introduction and management of a dedicated mailbox for FOI referrals to special advisers has allowed better management of special advisers’ FOI caseload and improved response times.

200. A triage process, from May 2017, has supported improved compliance with statutory timescales across Directorates. From this date the FOI Unit has issued weekly alerts of requests due, or overdue for response to:

(i) Directors and Directorates

(ii) Ministerial Private Offices, via the Minister for Parliamentary Business.

201. The FOI Unit contacts case-handlers where there has not been a recent update of progress on open requests in the FOI tracker and offers assistance.

202. In late December 2017, the Head of the FOI Unit contacted Directors personally to highlight cases due for imminent reply, emphasising the importance of adequate cover arrangements for the holiday period. The FOI Unit and Improvement Team have jointly intervened when Directorate performance was below the target, sharing best practice from stronger performing Directorates.

203. The Scottish Government has indicated to me that it is aware of a vulnerability in its practices when there are unplanned absences of members of staff. It has instructed an assessment of its current systems in relation to:

- the sufficiency of existing guidance in responding to FOI requests in the unplanned absence of staff members who are likely to hold relevant information; and
- the steps taken to ensure compliance with guidance, including training.

204. I also note the impending introduction of an improved tracker system for monitoring and recording FOI requests.

205. The FOI Unit is due to produce an improvement plan for its own functions in Autumn 2018.

# Recommendations

I acknowledge that the Scottish Government has taken steps in the last 12 months to improve and monitor its performance in relation to FOI, as set out in the previous section. There is no doubt from our statistical analysis and our examination of the system in action that these changes have already resulted in a number of significant improvements to the Scottish Government's FOI performance. While there remains much to do, I have taken these positive developments into account when considering my own recommendations.

## Recommendation 1: Clearance procedures

The current procedures for the clearance of information requests are unclear and lacking in detail. This makes the role of those involved opaque when it should be transparent. I therefore recommend the Scottish Government undertake a detailed review of the clearance procedures to address:

- (i) the need for the roles of case-handlers, senior managers, special advisers and Ministers to be clearly set out, unpicking the currently nebulous concept of "clearance"  
**Recommendation 1(i)**
- (ii) the formalisation of the system which determines what cases require to be decided by Ministers themselves, so that the system is clear for all, not least the case-handlers. In terms of transparency and increasing public understanding of the process, I recommend that the Scottish Government sets out more clearly the circumstances under which responses require Ministerial clearance as opposed to Ministerial visibility. This should include clear guidance on who the decision-making authority is in the event that the case is not determined by a Minister. **Recommendation 1(ii)**
- (iii) the procedures to be followed by a case-handlers on receiving special adviser advice, particularly in the case of disagreement. This is particularly important in relation to the interpretation of a request, the scope of a request or the application of any exemption(s). Where there are such differences, I suggest there could be a role for the FOI Unit to provide advice to Ministers with a view to getting it right first time.  
**Recommendation 1(iii)**
- (iv) the introduction of clear rules for the recording of decisions in relation to requests for information, setting out the detailed rationale for the decision, showing that they have applied a presumption of disclosure, and providing clear justification and rationale for any departures from specialist advice. **Recommendation 1(iv)**
- (v) the current ambiguous guidance about the role of the Communications Team in the process. **Recommendation 1(v)**
- (vi) the inconsistency of current target timelines with the duty to issue responses promptly.  
**Recommendation 1(vi)**

## Recommendation 2: Quality assurance

Linked to this, it was apparent from interviews with special advisers, and from the views of case-handlers and other staff, that a key role of special advisers in considering draft responses to information requests is one of quality assurance. As noted elsewhere,



paragraph 9.7 of the Section 60 Code states that it is good practice for authorities to check responses for accuracy and quality before they are issued. I question whether such quality assurance needs to be carried out by individuals at the level of special adviser within the Scottish Government for cases which are not decided by Ministers and whether these arrangements are proportionate.

- (i) I recommend that the Scottish Government examines their procedures to ensure there is analysis of review cases to identify any areas where poor initial decisions are being made and, going forward, there is a system in place to prevent recurrence of failures.

**Recommendation 2(i)**

- (ii) I recommend that the Scottish Government investigate whether the task of quality assurance of cases not decided by Ministers ought, more appropriately, to be carried out by staff within Directorates or Executive Agencies.

**Recommendation 2(ii)**

### **Recommendation 3: Clearance of media requests**

Requests made under FOISA and the EIRs are, generally, “applicant blind” and “purpose blind”. It is inherently wrong that a class of requesters is treated differently when processing requests for information solely because of who or what they are. This covers not only journalists, but also MSPs and political researchers.

I strongly recommend that the Scottish Government ends this practice. Of course, this would not prevent a clearance system based on the sensitivity on the information sought and/or the complexity of the case. While such a system may still capture many requests from those groups, it will be based on a consideration of the request and **not** of the person.

### **Recommendation 4: Case file records management**

I recommend that the Scottish Government take action to improve the case file record-keeping of case-handlers, so that case files contain a full record of internal correspondence concerning the handling of a request. This should include a record of searches and decisions made, including the detailed rationale of such decisions. It should also include notes of meetings or correspondence where recommendations were changed or exemptions relied on and advice sought (and received) from other officials and special advisers. It should also, where relevant, and in line with the Section 60 Code (paragraph 6.2.3), record any discussions with applicants and third parties.

### **Recommendation 5: Case handling**

As noted above, the Scottish Government presently utilises over 1,000 staff per annum to respond to information requests. Given the volume of requests received, many of these case-handlers deal with only a handful of cases each year. Issues of knowledge, training and experience were identified throughout the assessment.

- (i) I recommend that the Scottish Government review its system for allocating case-handlers with a view to developing a larger core group of trained and experienced personnel, examining the lessons of successful Directorates and Agencies.

**Recommendation 5(i)**

- (ii) I recommend that the Scottish Government reassess its FOI training system, and ensure that records of the training delivered are kept in an accessible format.

**Recommendation 5(ii)**

## **Recommendation 6: Monitoring FOI requests**

- (i) To enable monitoring of clearance timescales, I recommend the inclusion in the FOI tracker system of the date each case is sent for clearance and the date the clearance response is received. **Recommendation 6(i)**
- (ii) The FOI tracking system should capture the necessary information and provide an adequate reporting facility to support the authority to monitor its FOI performance (see paragraphs 2.1 of the Section 60 Code: Recording and reporting statistics).  
**Recommendation 6(ii)**
- (iii) FOI performance reporting is an important function of the activities of all senior management teams. In an authority the size of the Scottish Government, I recommend there are arrangements for performance monitoring at both Executive Team and Directorate level. **Recommendation 6(iii)**

## **Recommendation 7: Reviews**

It was noted that the current review processes allow for personnel involved in the original decision-making process also to be involved in the review stage. The Section 60 Code of Practice provides that the review process should be fair and impartial (paragraph 10.3.3) and states that it is good practice for the reviewer to be a person who did not respond to or advise on the original request (paragraph 10.3.4). I recommend that the Scottish Government reappraise its procedures to remove so far as practicable the risk to impartiality caused by the same individuals being involved in both processes.

## **Next steps**

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- 2. As noted elsewhere in this report, there are five discrete stages of activity in an intervention:
  - (i) Scoping
  - (ii) Assessment
  - (iii) Action plan
  - (iv) Implementation and monitoring
  - (v) Review phase.
- 3. This report brings the Assessment phase to an end. I now require the Scottish Government to develop a draft action plan to address the recommendations set out in this report in line with phase 3. I require the Scottish Government to produce the draft action plan for my approval by 13 September 2018.
- 4. Once the plan has been approved, I will, in conjunction with the Scottish Government, agree timescales for compliance with the plan, together with a monitoring and review process. The approved plan will be published on my website.
- 5. If the Scottish Government fails to produce a satisfactory draft action plan by 13 September, or agree suitable timescales for compliance with the plan, I may take further action in line with my Enforcement Policy. This may, depending on the circumstances, lead me to issue a practice recommendation under section 44 of FOISA or to issue a formal enforcement notice

under section 51 of FOISA. However, the Scottish Government has shown a positive attitude towards my intervention to date so I do not anticipate that such action will be necessary.

**Scottish Information Commissioner**

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