

**From:** [Nicolson S \(Stuart\) Special Adviser](#)  
**To:** [Redacted] [Minister for Parliamentary Business](#)  
**Cc:** [Cabinet Secretary for Finance and the Constitution](#); [Redacted] [News Desk](#); [Corporate Communications](#); [Redacted]  
[Redacted] [Lloyd E \(Elizabeth\)](#); [McAllister C \(Colin\)](#); [Ingebrigtsen R \(Ross\)](#); [Redacted] [FoI SpAds PO](#); [Permanent Secretary](#);  
[Redacted] [Davidson I \(Ian\) \(CUKR\)](#); [Redacted] [Thomson KAL \(Ken\)](#); [Rogers DA \(David\) \(Strategy and Constitution Director\)](#); [Redacted]  
**Subject:** RE: LINES TO CLEAR Journalists letter re FOIs  
**Date:** 01 June 2017 09:54:24

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Thanks – SG comment seems to be up now.

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**From:** [Redacted]  
**Sent:** 01 June 2017 09:47  
**To:** [Redacted] [Minister for Parliamentary Business](#)  
**Cc:** [Cabinet Secretary for Finance and the Constitution](#); [Redacted] ; [News Desk](#); [Corporate Communications](#);  
[Redacted] ; [Redacted]; [Lloyd E \(Elizabeth\)](#); [McAllister C \(Colin\)](#); [Ingebrigtsen R \(Ross\)](#); [Redacted] ; [FoI SpAds PO](#);  
[Permanent Secretary](#); [Redacted] ; [Nicolson S \(Stuart\) Special Adviser](#); [Redacted] ; [Davidson I \(Ian\) \(CUKR\)](#);  
[Redacted] ; [Thomson KAL \(Ken\)](#); [Rogers DA \(David\) \(Strategy and Constitution Director\)](#); [Redacted]  
**Subject:** RE: LINES TO CLEAR Journalists letter re FOIs

[Redacted]

There is also an article in [the Ferret](#).

[Redacted]  
Scottish Government  
St Andrew's House, Edinburgh, EH1 3DG  
[Redacted] | [Redacted]

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**From:** [Redacted]  
**Sent:** 01 June 2017 09:32  
**To:** [Minister for Parliamentary Business](#)  
**Cc:** [Cabinet Secretary for Finance and the Constitution](#); [Redacted] ; [News Desk](#); [Corporate Communications](#);  
[Redacted] ; [Lloyd E \(Elizabeth\)](#); [McAllister C \(Colin\)](#); [Ingebrigtsen R \(Ross\)](#); [Redacted] ; [FoI SpAds PO](#); [Permanent Secretary](#);  
[Redacted] ; [Nicolson S \(Stuart\) Special Adviser](#); [Redacted] ; [Davidson I \(Ian\) \(CUKR\)](#); [Redacted] ;  
[Thomson KAL \(Ken\)](#); [Rogers DA \(David\) \(Strategy and Constitution Director\)](#); [Redacted]  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

Resending to add [Redacted] for Open Government Partnership interests.

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**From:** [Redacted]  
**Sent:** 01 June 2017 09:31  
**To:** [Minister for Parliamentary Business](#)  
**Cc:** [Cabinet Secretary for Finance and the Constitution](#); [Redacted] ; [News Desk](#); [Corporate Communications](#);  
[Redacted] ; [Lloyd E \(Elizabeth\)](#); [McAllister C \(Colin\)](#); [Ingebrigtsen R \(Ross\)](#); [Redacted] ; [FoI SpAds PO](#); [Permanent Secretary](#);  
[Redacted] ; [Nicolson S \(Stuart\) Special Adviser](#); [Redacted] ; [Davidson I \(Ian\) \(CUKR\)](#); [Redacted] ;  
[Thomson KAL \(Ken\)](#); [Rogers DA \(David\) \(Strategy and Constitution Director\)](#)  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

[Redacted]

Cc'ing yesterday's copy list for awareness.

Mr FitzPatrick may wish to be aware that the open letter by journalists criticising SG FOI request

handling (and by association wider openness) has now been published.

It is available via the CommonSpace website:

<https://www.commonspace.scot/articles/11068/journalists-unite-open-letter-damning-scottish-government-handling-foi-requests>

[Redacted]

**From:** [Redacted] **On Behalf Of** Minister for Parliamentary Business  
**Sent:** 12 June 2017 15:01  
**To:** [Redacted]  
Minister for Parliamentary Business;  
**Subject:** FW: Briefing for debate on Freedom of information tomorrow

[Redacted],

To Note - Neil Findlay has sent on the attached briefing to all MSPs.

**[Redacted]**

Assistant Private Secretary/Minister for Parliamentary Business  
Scottish Parliament

: [Redacted]

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**\*\*\* PLEASE READ DISCLAIMER \*\*\***

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## Freedom of Information debate briefing

### **The Freedom of Information (Scotland) Act 2002**

The Freedom of Information (Scotland) Act 2002 (or "FOISA") came into force on 1 January 2005. Under FOISA, a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. This right is subject to certain conditions and exemptions, which are set out in the Act. FOISA is enforced and promoted by the Scottish Information Commissioner.

**Motion Number: S5M-05946**

**Lodged By: Neil Findlay**

**Date Lodged: 01/06/2017**

**Title: Leading Journalists Criticise the Scottish Government over FOISA**

#### **Motion Text:**

*That the Parliament notes with great concern the letter from what it understands are 23 prominent Scottish journalists to the selection panel for the appointment of the Scottish Information Commissioner, which was published on 1 June 2017 by The Ferret and Common Space and details what they argue are the failures of the Scottish Government and its agencies in relation to the Freedom Of Information (Scotland) Act 2002 (FOISA); understands that it suggests that the application of FOISA by ministers and officials is questionable at best and, at worst, implies a culture and practice of secrecy and cover up, including, it believes, through routinely avoiding sharing information, often through not recording or taking minutes of meetings that are attended by ministers or senior civil servants; considers that this flies in the face of what it sees as the Scottish Government's much-vaunted assessment of itself as open and transparent, including through the Open Government Partnership Scottish National Action Plan and its role as one of 15 pioneer members of the Open Government Partnership's inaugural International Subnational Government Programme and legislation such as the Public Records (Scotland) 2011 Act; understands that the Scottish Government introduced its Record Management Plan to comply with the 2011 Act; notes the view that the journalists' criticism of FOISA shows that it is time to have a review of whether the legislation remains robust or has been diminished, whether it should be extended and strengthened and whether elements of it are still appropriate, such as the level set for the cost exemption, whereby the Scottish Government may refuse to provide information if the cost of doing so exceeds £600, a figure that hasn't been updated since FOISA came into force, and further notes the view that, by doing so, this would ensure that the people in Lothian and across the country who use their freedom of information rights could be confident that FOISA would be improved and applied in a way that was consistent with the spirit intended when the law was established.*

- **Letter Sent by Journalists**

*Dear interview panel members:*

*We are a group of newspaper, online and broadcast journalists who routinely use freedom of information legislation in our reporting and research, and we are writing to you to raise live concerns we have about current practice and experience trying to use that legislation, particularly with respect to the Scottish Government and its agencies.*

*The freedom of information laws and procedures which came into force in Scotland through the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations has led to a major improvement in government transparency, setting strong standards for openness and accountability.*

*In the last few years, however, we have become increasingly concerned about the way in which the legislation is being interpreted and implemented. We would be grateful if these concerns could be taken into account during the process to appoint a new Scottish Information Commissioner.*

*We have recent examples of:*

- 1.) information requests being repeatedly delayed significantly beyond the 20 working day deadline without clear justification or warning;*
- 2.) emails asking for an update on answering requests in cases of delays beyond the legal deadline being routinely ignored by officials;*
- 3.) officials delaying responses for so long that the initial requests only get answered under internal review, making it impossible for journalists to ask for incomplete replies to be internally reviewed again. This leaves them facing further longer delays by appealing to the Scottish Information Commissioner;*
- 4.) Scottish government officials taking control of requests to other government agencies without the consent of the applicant;*
- 5.) requests being blocked or refused for tenuous reasons;*
- 6.) requests being screened for potential political damage by special advisers and of responses to individual journalists being routinely handled by special advisers.*

*Some of these experiences raise questions of whether information requests by journalists are being treated and managed differently, even though the legislation requires all requests to be handled equally and without favour or prejudice. We suspect there have been cuts in the resources and time being made available by the civil service for handling freedom of information requests.*

*We are increasingly told the information we are seeking is not held where ministerial meetings with other bodies or individuals to discuss government policy are said to be informal, minutes are not taken, and records are not kept. Correspondence and reports that should be available seem not to exist. This raises the question of whether Scottish ministers and civil servants now have a practice of not recording information that would previously have been recorded.*

*The Scottish government has described itself as a **beacon of transparency** under the Open Government Partnership and says it is committed to becoming more open, accountable and responsive.*

*We believe our experiences put that commitment under great doubt. Rosemary Agnew, the most recent Scottish Information Commissioner, has consistently raised her concerns about the Scottish government's handling of information requests both in her decisions on individual appeals and also in her annual reports.*

***Ms Agnew set out her concerns** before leaving her post, telling one interviewer the performance of ministers in dealing with FoI requests had been "totally unacceptable", and in her "**end of term**" **report** to the Scottish parliament on 28 April, where she said public authorities now put greater emphasis on what not to disclose than on what ought to be released.*

*We believe there are now grounds for a review of the Scottish government's treatment of and policies for dealing with freedom of information requests, and would urge the Scottish government to address these concerns by immediately acting within the spirit and letter of Scotland's freedom of information legislation.*

*We believe that review should also look closely at the question of whether the legislation should include a duty to record on government officials, advisers and ministers, particularly when meeting with outside bodies, individuals or lobbyists to discuss government policy.*

*This open letter will be published online by the Ferret and CommonSpace on Thursday 1 June.*

*Yours, the undersigned*

- **In March this year the Campaign for Freedom of Information in Scotland (CFoIS) has called for an inquiry into the delivery of information rights in Scotland.**

In a submission to the Scottish Parliament's Independent Commission on Parliamentary Reform they said:

*CFoIS says the inquiry should focus on delivering openness across the public services, as well as the practical delivery of the Freedom of Information (Scotland) Act 2002 (FoISA) and the Environmental Information (Scotland) Regulations 2004. Evidence should be sought from those with experience of trying to access information to make a realistic assessment of what changes are needed in culture, law and practice.*

*Carole Ewart, Convener of the CFoIS said:*

*"The Scottish Parliament passed freedom of information legislation 15 years ago, so it is timely to have a review of whether the right remains robust or has been diminished. Case decisions and anecdotal evidence suggest there are problems with levels of organisational openness, failures to respond within deadlines, and the increasing number of organisations that deliver public services but which operate outside the scrutiny afforded by FoISA."*

*CFoIS recognises that the drive for openness in the Parliament and across the 10,000 organisations that it funds and scrutinises, comes from founding principles, especially that the Parliament should be 'open, accessible and accountable'. As access to information is a human right, we need an audit of whether our legislation is fit for purpose. This should include, recent jurisprudence of the European Court of Human Rights, interpreting the International Covenant on Civil and Political Rights to fit Scotland and learning from the work of the UN Special Rapporteur on Access to Information.*

*Given the popularity of enforceable access to information rights with the public in Scotland, it is right that the Scottish Parliament listens and ensures that the right remains robust.*

*The CFoIS is currently carrying out its own research into access to information and further findings will be made to the Independent Commission and the public as they become available.*

- **Concerns and need for a Review into the practice of FOISA**

Freedom of Information legislation was intent on creating a more open and transparent system of governing in Scotland. It is a vital tool in ensuring the Scottish Government and other public authorities in Scotland are accountable to the people they serve.

The recent letter from 23 prominent Scottish Journalists and the recent calls for an inquiry into the application of FOISA raise very serious concerns about the culture within the Scottish Government

and other public authorities across in Scotland in relation to how they handle requests for information from people using FOISA.

The descriptions from Scottish Journalists of their experiences when using FOI is alarming and flies in the face of why the FOISA was legislated for in the first place.

Particularly alarming is the suggestion that no records, no notes nor minutes are taken at meetings attended by Scottish Government Ministers and /or senior civil servants.

MSPs and constituents have evidence of similar responses where no notes or minutes are taken or published.

## **Public Records Act (2011)**

### **About the Public Records (Scotland) Act 2011**

The Public Records (Scotland) Act 2011 (the Act) came into force on the 1st January 2013, and requires The Scottish Government to submit a records management plan (RMP) to be agreed by the Keeper of the Records of Scotland.

In the introduction of the Scottish Government's Record Management Plan; it is said,

*The Scottish Government recognises that its records are an important public asset and are a key resource in the effective operation, policy making and accountability of the Scottish Government. Like any asset, records require careful management*

In terms of the objectives the Scottish Government states:

### **Objectives**

*Records contain information that is a unique and invaluable resource and an important operational asset. A systematic approach to the management of the Scottish Government's records is essential to protect and preserve records as evidence of our actions.*

*The aim of this policy is to define a framework for managing the Scottish Government's records to ensure that we:*

- *Create and capture accurate, authentic and reliable records*
- *Maintain records to meet the Government's business needs*
- *Dispose of records that are no longer required in an appropriate manner*
- *Protect vital records*
- *Conform to any legal and statutory requirements relating to record keeping*
- *Comply with government directives*

## **The Scottish Government Open Government Partnership Scottish Action Plan**

### **The Scottish Government proclaim that:**

*Scottish Government and Scottish Civil Society share the values of Open Government which aim to foster openness, transparency and citizen participation. This is Scotland's first Open Government National Action Plan. It has been developed jointly by the Scottish Government and the Scottish Civil Society Network with the Open Government Partnership (OGP).*

*In April 2016 Scotland was selected by the OGP as one of 15 Pioneer governments around the world to join a programme to bring new leadership and innovation into the OGP at all levels of government. This Scottish Plan sets out how we will use the opportunity of being Pioneers to improve the lives of people living in Scotland, to learn from others and to share our experience of Open Government.*

*We will work together to promote and implement this plan because we believe Open Government reforms can secure lasting change in the way government and society operate, transferring power to people and communities and ensuring decisions are made in the best interests of all.*

*This Scottish Plan recognises that and reflects our priorities. It builds both on the Open Government reforms that are already underway in Scotland and on collaborative work with the governments of Wales, Northern Ireland and the UK, and their civil society networks, to develop a shared approach to Open Government.*

*This plan recognises the shifting relationship between citizen and state. We will work to ensure that government at all levels is responsive to the needs of all of our people and we are able to make a significant move towards co-creating a more open and transparent Scotland where people have confidence in their future.*

For further information please see <http://www.gov.scot/Publications/2016/12/2667>

From: [Redacted]

Sent: 13 June 2017 12:33

To: Minister for Parliamentary Business

Cc: Cabinet Secretary for Finance and the Constitution; DG Strategy and Operations; Rogers DA (David)

(Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted] ; McFarlane J (John);

Corporate Communications; Communications DFM & Education; Communications Economy

Subject: Motion on FOISA - June 2017 (final)

[Redacted]

To see latest version of briefing pack - incorporating Mr Fitzpatrick's amendments.

[Redacted]

[Redacted]

**Motion. Leading Journalists Criticise the Scottish Government over FOISA. Briefing – Joe FitzPatrick**

**13 June 2016 – Scottish Parliament, Debating Chamber**

<b>What</b>	Debate on a Members' Business Motion criticising Scottish Government FOI performance and approach to openness and transparency in general
<b>Where</b>	Scottish Parliament, Debating Chamber
<b>When and who</b>	13 June. Neil Findlay will open the debate. Those wishing to speak then have the opportunity to do so. As Minister, you will have 7 minutes to make a closing statement. While the total debate time is 45 minutes, depending on numbers wishing to speak an <i>additional 15 minutes</i> can be added.
<b>Lead officials (tbc)</b>	[Redacted], FOI Unit, Tel. [Redacted] [Redacted], FOI Unit, Tel. [Redacted] [Redacted], FOI Unit, Tel. [Redacted] [Redacted], Ingage, Tel. [Redacted]
<b>Annexes</b>	What is in the briefing pack:  <b>Annex A:</b> Closing statement <b>Annex B:</b> Text of Motion <b>Annex C:</b> Journalists' Open Letter [Redacted] <b>Annex E:</b> Response to CFoIS Agenda for Action [Redacted] <b>Annex I:</b> Comparative Table (UK/Scottish FOI legislation) <b>Annex J:</b> 6 Principles of FOI <b>Annex K:</b> Additional background

## **Closing Statement**

I am pleased to speak in this debate and thank Neil Findlay for bringing it to the Chamber. It allows me to address some of the points in the motion and highlight this Government's achievements in its efforts to build a culture of openness and transparency across Scotland.

As a country we can be proud of our record on Freedom of Information. In her Special Report published in April the former Scottish Information Commissioner stated that since the introduction of the Freedom of Information (Scotland) Act 2002, Scotland has put itself ahead of the international field.

Our Public Records legislation demands high standards of authorities in responsible records management.

And internationally, the Open Government Partnership has recognised our commitment to openness, transparency and citizen participation.

## **Freedom of Information performance**

I of course recognise that our performance in terms of responding to Freedom of Information requests on time is not good enough. I can assure members that we are engaging with the Scottish Information Commissioner to meet the high standards that are, quite rightly, expected of us.

Over the years, the volume of requests has increased steadily with over 2,000 now being received annually. Even so, a record 1,674 responses were issued on time in 2015 and 1,557 in 2016. This compares to 684 responses issued on time in the last full year of the previous administration in 2006.

In recent months the numbers of requests made to the Scottish Government has spiked dramatically. We received 777 requests in the first quarter of 2017 compared to 524 requests in the first quarter of 2016. By early April we had received more requests in 2017 than we received in the whole of 2007.

With the best will in the world, this will inevitably put strain on resources.

With 76% of responses being issued on time in 2016, compared to the 61% achieved under the last full year of the previous administration, performance is better but not good enough and as I've said we are working to improve it.

## **Freedom of Information policy**

We seek to keep our Freedom of Information legislation up-to-date through incremental change – to ensure it operates effectively for both applicants and public authorities.

The 2013 Amendment Act improved a strengthened the legislation. It also paved the way for the lifespans of key exemptions to be reduced from 30 to 15 years – the shortest in the UK. Giving Journalists in Scotland access to information such as Cabinet Minutes much earlier than their London based counterparts.

This Government has also extended coverage of the Act to numerous organisations delivering public services – including local authority arm’s length trusts and private prison contractors – a power never used by the previous administration. The 2013 Act also ensures that new public bodies such as the Scottish Fiscal Commission are subject to FOISA from day one.

### **Comparison with UK legislation**

Scotland’s Freedom of Information legislation is widely recognised as being stronger than that of the UK. There is no open ended timescale for responding to requests where the public interest is considered.

The UK Act also contains far more wide-ranging ‘veto’ powers than our Act – powers that have never been used here but have repeatedly been used by Westminster Governments. For example, minutes of key cabinet meetings in the run up to the Iraq war and minutes of the Cabinet Sub-Committee on Devolution prior to the setting up of this Parliament.

Today's motion refers to the need to update the cost limit of £600. I would point out that the maximum chargeable rate of £15 per hour has also remained the same. This means that the cost limit has much the same effect now as it did in 2005, i.e. a request can be refused only if it requires more than 40 hours work.

Again, Scottish legislation compares favourably with the rest of the UK - where the 'cost limit' can be applied after far fewer hours of work where while the cost limit can be upto £600, costs are calculated at £25 per hour so can be refused even it requires only 24 hours work almost half of the time allowed in Scotland.

Finally, in comparing UK and Scottish FOI practice, I note that on latest reporting data published by the Cabinet Office, the UK Government releases information in response to 63% of requests where it holds relevant information.

The comparative figure in Scotland is 85%.

## **Proactive publication**

Scotland's Act also places greater emphasis on proactive publication duties. We are committed to proactively publishing information wherever possible and will continue to look for opportunities to do this.

For example, we regularly publish information on Ministerial engagements, travel and gifts – along with a raft of Government spend data.

More widely, our Open Data Strategy helps to ensure that Scotland meets international standards of publication.

## **Journalists' Letter**

I of course note the concerns expressed by the journalists referred to in the motion.

Journalists exercise a central role in an open and accountable democratic society. All information

requests are handled in accordance with our guidance – which is in the public domain.

If journalists are dissatisfied with any aspect of request or review handling, like any other requester, there is a clear route of appeal to the Scottish Information Commissioner.

The Scottish Information Commissioner's intervention concerning our performance, in terms of timeliness, demonstrates the strength of our legislation in this respect.

## **Recording Information**

The motion also refers to Ministerial meetings not being minuted or recorded. I can assure members that the Scottish Government fully complies with all records management policies – including those set out in the Scottish Ministerial Code.

The Code is clear in that formal meetings should be recorded - setting out the reasons for the meeting, the names of those attending and the interests represented.

*[If needed re Charlotte Street Partners: As already noted, formal meetings with CSP were recorded in compliance with the Code and other guidance. Details of these meetings were included in the regular proactive publication of Ministerial events and engagements. In the last 2 years, we have received over 30 requests for information regarding meetings with Charlotte Street Partners. Other than a few requests which exceeded the cost limit, we have released the requested information in accordance with our obligations under FOISA, except where we did not have the information or were already publishing it].*

A monthly list of engagements carried out by all Ministers is published proactively, something which never happened under the previous Labour/LibDem coalition.

*[If needed: Mr Findlay may wish to take the opportunity to confirm that his party recorded every single Ministerial engagement when in power.]*

## **Public Records (Scotland) Act**

Indeed, I believe the management of public records is something that Scotland can be rightly proud of.

The Scottish Government regards effective records management as key to ensuring that the public have confidence that public authorities are operating as efficiently and openly as possible.

Scotland's Public Records Act 2011 seeks to achieve exactly that. The legislation helps authorities safeguard and prioritise public records as a guarantor of the rights of Scottish citizens.

## **Lobbying Act**

Yesterday, I signed the first Commencement Order of Scotland's Lobbying (Scotland) Act, paving the way for preparations for the Lobbying Register to go live in January.

The purpose of the Lobbying Act is to increase public transparency by establishing a register to contain details relating to lobbying by paid consultants and in-house lobbyists with Members and Ministers.

Much of that data is already in the public domain in relation to Ministers but in a parliament of minorities it is even more important that transparency is extended to other members of this Parliament.

## **Open Government Partnership**

Our Lobbying Act, Public Records Act and Freedom of Information Act are legislation this Parliament can be

proud of and are cornerstones of openness and transparency in Scotland.

And internationally, our approach and commitment to openness and transparency has earned Scotland recognition by the Open Government Partnership. Last year Scotland was selected as one of 15 Pioneer governments to bring new leadership and innovation into the Open Government Partnership.

I'm sure everyone in the Chamber welcomes this.

In December, I launched our National Action Plan. It sets out several demanding commitments. These include increased financial transparency – explaining how public finances work; empowering communities to influence budget priorities and increasing citizen participation in local democracy.

All of these commitments are underpinned by our Digital and Data Strategies which seek to transform the delivery of our public services.

Our membership of the Open Government Partnership allows us to share learning with other administrations and civil society from around the world, on our journey to become the most open and transparent government Scotland has seen.

## **Conclusion**

In conclusion, I confirm our commitment to improving our FOI performance – and working in conjunction with the Scottish Information Commissioner to achieve this. As first set out in 2007, we support Freedom of Information as an essential part of open democratic government and responsive public services.

We are proud of our commitment to be Scotland's most open and accessible government ever and through legislation, best practice and wider civic engagement will continue to drive this ambition forward.

Word count 1,375

## Text of Motion

That the Parliament notes with great concern the letter from whom it understands are 23 prominent Scottish journalists to the selection panel for the appointment of the Scottish Information Commissioner, which was published on 1 June 2017 by The Ferret and Common Space and details what they argue are the failures of the Scottish Government and its agencies in relation to the Freedom of Information (Scotland) Act 2002 (FOISA); understands that it suggests that the application of FOISA by ministers and officials is questionable at best and, at worst, implies a culture and practice of secrecy and cover up, including, it believes, through routinely avoiding sharing information, often through not recording or taking minutes of meetings that are attended by ministers or senior civil servants; considers that this flies in the face of what it sees as the Scottish Government's much-vaunted assessment of itself as open and transparent, including through the Open Government Partnership Scottish National Action Plan and its role as one of 15 pioneer members of the Open Government Partnership's inaugural International Subnational Government Programme and legislation such as the Public Records (Scotland) Act 2011; understands that the Scottish Government introduced its Record Management Plan to comply with the 2011 Act; notes the view that the journalists' criticism of FOISA shows that it is time to have a review of whether the legislation remains robust or has been diminished, whether it should be extended and strengthened and whether elements of it are still appropriate, such as the level set for the cost exemption, whereby the Scottish Government may refuse to provide information if the cost of doing so exceeds £600, a figure that hasn't been updated since FOISA came into force, and further notes the view that, by doing so, this would ensure that people in Lothian and across the country who use their freedom of information rights could be confident that FOISA would be improved and applied in a way that was consistent with the spirit intended when the law was established.

## Text of Journalists' Open Letter

Journalists across Scottish media titles – including CommonSpace – unite to raise concerns about handling of Freedom of Information requests

OPEN LETTER to the Scottish Parliament selection panel for the Scottish Information Commissioner appointment:

Ken MacIntosh MSP, Presiding Officer  
Clare Adamson MSP  
Margaret Mitchell MSP  
David Stewart MSP  
Andy Wightman MSP

cc: Derek Mackay, Cabinet Secretary Finance and the Constitution  
Leslie Evans, Permanent Secretary at the Scottish Government  
Margaret Keyse, acting Scottish Information Commissioner

Dear interview panel members:

We are a group of newspaper, online and broadcast journalists who routinely use freedom of information legislation in our reporting and research, and we are writing to you to raise live concerns we have about current practice and experience trying to use that legislation, particularly with respect to the Scottish Government and its agencies.

The freedom of information laws and procedures which came into force in Scotland through the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations has led to a major improvement in government transparency, setting strong standards for openness and accountability.

In the last few years, however, we have become increasingly concerned about the way in which the legislation is being interpreted and implemented. We would be grateful if these concerns could be taken into account during the process to appoint a new Scottish Information Commissioner.

We have recent examples of:

- 1.) information requests being repeatedly delayed significantly beyond the 20 working day deadline without clear justification or warning;
- 2.) emails asking for an update on answering requests in cases of delays beyond the legal deadline being routinely ignored by officials;
- 3.) officials delaying responses for so long that the initial requests only get answered under internal review, making it impossible for journalists to ask for incomplete replies to be internally reviewed again. This leaves them facing further longer delays by appealing to the Scottish Information Commissioner;
- 4.) Scottish government officials taking control of requests to other government agencies without the consent of the applicant;
- 5.) requests being blocked or refused for tenuous reasons;

6.) requests being screened for potential political damage by special advisers and of responses to individual journalists being routinely handled by special advisers.

Some of these experiences raise questions of whether information requests by journalists are being treated and managed differently, even though the legislation requires all requests to be handled equally and without favour or prejudice. We suspect there have been cuts in the resources and time being made available by the civil service for handling freedom of information requests.

We are increasingly told the information we are seeking is not held where ministerial meetings with other bodies or individuals to discuss government policy are said to be informal, minutes are not taken, and records are not kept. Correspondence and reports that should be available seem not to exist. This raises the question of whether Scottish ministers and civil servants now have a practice of not recording information that would previously have been recorded.

The Scottish government has described itself as a beacon of transparency under the Open Government Partnership and says it is committed to becoming more open, accountable and responsive.

We believe our experiences put that commitment under great doubt. Rosemary Agnew, the most recent Scottish Information Commissioner, has consistently raised her concerns about the Scottish government's handling of information requests both in her decisions on individual appeals and also in her annual reports.

Ms Agnew set out her concerns before leaving her post, telling one interviewer the performance of ministers in dealing with FoI requests had been "totally unacceptable", and in her "end of term" report to the Scottish parliament on 28 April, where she said public authorities now put greater emphasis on what not to disclose than on what ought to be released.

We believe there are now grounds for a review of the Scottish government's treatment of and policies for dealing with freedom of information requests, and would urge the Scottish government to address these concerns by immediately acting within the spirit and letter of Scotland's freedom of information legislation.

We believe that review should also look closely at the question of whether the legislation should include a duty to record on government officials, advisers and ministers, particularly when meeting with outside bodies, individuals or lobbyists to discuss government policy.

This open letter will be published online by the Ferret and CommonSpace on Thursday 1 June.

Yours, the undersigned

[Redacted]

## Comparative Table (UK/Scottish FOI legislation)

	UK: Freedom of Information Act 2000 (FOIA)	Scotland: Freedom of Information Act 2002 (FOISA)
Response times	FOIA allows authorities unlimited time beyond the 20 working day deadline to respond to a request where they need to apply the public interest test.	FOISA imposes absolute 20 working day deadline for authorities to respond to a request for information – <b>clear time limit for authority to respond.</b>
Harm test	In applying exemptions subject to the harm test, authorities must show disclosure would simply 'prejudice' specified interest.	In applying exemptions subject to the harm test, authorities must show disclosure would 'substantially prejudice' specified interest – <b>sets a higher standard to reach.</b>
Reviews	No specific provision in Act for internal review of response to FOI request. Referred to in Code of Practice but no time limit set.	Act includes specific provisions for internal review of response to FOI request, with absolute 20 working day time limit – <b>clear process for requesting review and time limit for authority to respond.</b>
Override of Commissioner decisions ('veto')	Wide-ranging power to issue a certificate overriding a decision of the Commissioner.	A certificate overriding a decision of the Commissioner can only be issued where certain exemptions have been applied – <b>applies in very limited circumstances.</b>
Settlement	No provision for settlement by Commissioner in the Act	Act provides for Commissioner to attempt to effect a settlement instead of reaching a Decision.
Neither confirm nor deny	Neither-confirm-nor-deny provision can be used where virtually any exemption would otherwise apply.	Neither-confirm-nor-deny provision can be used only where a far more limited range of exemptions would otherwise apply.
Public affairs exemption	Subjective test applied to 'effective conduct of public affairs' down to 'reasonable opinion of a qualified person'	Objective test applied to 'effective conduct of public affairs' – <b>objective not subjective, sets a standard higher when applying exemption.</b>
Cost limit	Cost limit of £600 for central government, £450 for all other public authorities, calculate cost limit at £25 per hour.	Cost limit of £600 for all public authorities, calculate cost at maximum £15 per hour – <b>higher cost limit, applies to all covered by FOISA, makes it harder for authorities to withhold under cost.</b>

## **The Scottish Government's Six Principles Of FOI**

### **The Scottish Government:**

**1. Supports Freedom of Information as an essential part of open democratic government and responsive public services.**

[Redacted]

**2. Operates within the Freedom of Information (Scotland) Act 2002 rather than propose significant changes to it, but adjusts the regime where it is necessary and sensible to do so.**

**3. Publishes information proactively wherever possible.**

[Redacted]

**4. Maintains the exemptions set out in the Act in particular to protect "private space" for Ministers and others to consider advice and reach decisions.**

[Redacted]

**5. Maintains effective relationships with the Scottish Information Commissioner and other key stakeholders.**

[Redacted]

**6. Creates and shares information thoughtfully with regard to the principles above.**

[Redacted]

**From:** [Redacted] **On Behalf Of** Minister for Parliamentary Business

**Sent:** 01 June 2017 15:25

**To:** [Redacted] ; Davidson I (Ian) (CUKR); [Redacted] ; Minister for Parliamentary Business

**Cc:** Cabinet Secretary for Finance and the Constitution; [Redacted] ; News Desk; Corporate Communications; [Redacted] ; Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [Redacted] ; FoI SpAds PO; Permanent Secretary; [Redacted] ; Nicolson S (Stuart) Special Adviser; [Redacted] ; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [Redacted]

**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

Ian / [Redacted]

Mr FitzPatrick has noted the emails [Redacted]

thanks

[Redacted]

[Redacted] Acting Private Secretary to Minister for Parliamentary Business | T4.21, Scottish Parliament | [Redacted] | [Redacted]

**From:** [Redacted]

**Sent:** 01 June 2017 13:06

**To:** Davidson I (Ian) (CUKR); [Redacted] ; Minister for Parliamentary Business

**Cc:** Cabinet Secretary for Finance and the Constitution; [Redacted] ; News Desk; Corporate Communications; [Redacted] ; Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [Redacted] ; FoI SpAds PO; Permanent Secretary; [Redacted] ; Nicolson S (Stuart) Special Adviser; [Redacted] ; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [Redacted]

**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

Thanks Ian – I think a discussion on this would be useful, let me know when it would work for you.

I agree on a discussion with Journalists, it was also a proposal that emerged from the FOI conference earlier in the year – so I would be happy to help make it happen [Redacted]

[Redacted]

[Redacted] | [Open Government](#) | [Ingage](#) | [Local Government and Communities](#)

Scottish Government | 3-H North Victoria Quay | EH6 6QQ

m | [Redacted] T | [Redacted] e | [\[Redacted\]](#)

**From:** Davidson I (Ian) (CUKR)

**Sent:** 01 June 2017 12:57

**To:** [Redacted] ; Minister for Parliamentary Business

**Cc:** Cabinet Secretary for Finance and the Constitution; [Redacted] ; News Desk; Corporate Communications; [Redacted] ; Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [Redacted] ; FoI SpAds PO; Permanent Secretary; [Redacted] ; Nicolson S (Stuart) Special Adviser; [Redacted] ; [Redacted] Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [Redacted]

**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

[Redacted]

Thank you for these comments

[Redacted]

I'd be happy to discuss this further.

Ian

IAN DAVIDSON  
Constitution & UK Relations Division  
Scottish Government  
2W.02B St Andrews House

[Redacted]

[Redacted]

**From:** [Redacted]

**Sent:** 01 June 2017 11:32

**To:** [Redacted] ; Minister for Parliamentary Business

**Cc:** Cabinet Secretary for Finance and the Constitution; [Redacted] ; News Desk; Corporate Communications; [Redacted] ; Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [Redacted]; FoI SpAds PO; Permanent Secretary; [Redacted] ; Nicolson S (Stuart) Special Adviser; [Redacted] ; Davidson I (Ian) (CUKR); [Redacted] ; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [Redacted]

**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

[Redacted] , thanks for copying me into the lines on this. [Redacted]

[Redacted]

[Redacted] | Open Government | Ingage | Local Government and Communities  
Scottish Government | 3-H North Victoria Quay | EH6 6QQ  
m | [Redacted] T | [Redacted] e | [Redacted]

**From:** [Redacted]  
**Sent:** 02 February 2018 16:37  
**To:** [Redacted] ; Corporate Communications  
**Cc:** Permanent Secretary; DG Constitution and External Affairs; Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; [Redacted]  
**Subject:** FW: Letter from Scottish Information Commissioner

[Redacted]

As discussed, the Scottish Information Commissioner has today written to Mr FitzPatrick setting out his approach to the assessment phase of his intervention into SG practice in dealing with FOI requests (letter attached).

This intervention was prompted by concerns raised in an open letter on 31 May from journalists to the Scottish Parliamentary Corporate Body and in the Scottish Parliament's debate on Motion S5M-06126 (as amended by Motion S5M-06126) on 21 June 2017 and the Commissioner is doing so under the power to examine the Scottish Government's FOI performance, conferred by section 43(3) of the Freedom of Information (Scotland) Act 2002: *The Commissioner may assess whether a Scottish public authority is following good practice.*

[Redacted]

[Redacted]  
[Redacted]

**From:** Sarah Hutchison [Redacted]  
**Sent:** 02 February 2018 13:50  
**To:** Minister for Parliamentary Business  
**Cc:** Davidson I (Ian) (CUKR); [Redacted]  
**Subject:** Letter from Scottish Information Commissioner

Dear Minister

Please find attached a letter from Daren Fitzhenry, in which he confirms the scope of his intervention into the Scottish Government's FOI performance and the methodology required.

As you will see, I have copied Ian Davidson and [Redacted] in to this email for information.

Best wishes

Sarah

**Sarah Hutchison**  
**Head of Policy and Information**

---

**Scottish Information Commissioner**  
Kinburn Castle, Doubledykes Road  
St Andrews, KY16 9DS



Scottish Information  
Commissioner

*It's public knowledge*

**Our Ref:**

**Your Ref:**

Joe FitzPatrick MSP  
Minister for Parliamentary Business  
The Scottish Parliament  
Edinburgh  
EH99 1SP

2 February 2018

Dear Minister

### **Intervention assessment phase**

Thank you for your letter of 19 December, acknowledging my letter of 11 December where I alerted you to the invitation to signatories to the journalists' letter to the Scottish Parliamentary Corporate Body on 31 May to provide further information. As you know, I asked them to submit further information about their concerns, with examples where possible, relating to the Scottish Government's freedom of information (FOI) performance. This was to assist with framing accurately the assessment phase of my intervention to ensure it focuses on the right things.

In mid-January I received four detailed submissions from signatories, referencing experiences that led to their concerns. The submissions align closely with the assessment questions I had set out in the invitation and provide helpful indications about the methodology required. I can now confirm that my intervention will:

1. Assess the Scottish Government's FOI performance in light of serious concerns raised in the letter to the Scottish Parliamentary Corporate Body and in the Scottish Parliament's debate on Motion S5M-06126 (as amended by Motion S5M-06126) on 21 June 2017, and
2. Where any of its practices are found to be deficient, require the Scottish Government to:
  - a. remedy any identified breach of FOI law, and
  - b. meet the minimum standards of good practice in the Ministers' Section 60 Code of Practice.

The assessment phase will focus on the following questions:

1. Does the Scottish Government treat and manage requests from journalists differently, compared to requests made by other people?

2. Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?
3. 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?
4. Are internal request handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Code of Practice?
5. 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?
6. Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
7. 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 can also advise that the approach I intend to adopt to the assessment phase of the intervention will be as follows:

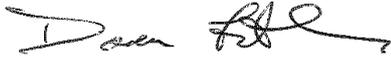
1. Examination of the Scottish Government FOI tracking system to identify an appropriate sample of requests and requests for review. This will require two of my staff to work on site with the support of your FOI staff. The sample of cases will include cases that required clearance by Special Advisers and/or Ministers and cases where the response was made considerably later than 20 working days (including cases in any "backlog").
2. Inspection of case handling records for each request and request for review within the sample, including internal correspondence about those cases.
3. Inspection of case handling records for requests and requests for review in the cases included in the journalists' submissions, including internal correspondence about those cases.
4. Liaison with your FOI staff to obtain statistics and samples of reviews, including numbers of reviews which overturned the original decision.
5. I may also require access to other information about FOI practice, for example, FOI training records for decision makers and their key advisers and wider statistical information.
6. Following on from these initial inquiries, I may also wish to interview staff and officeholders involved in the FOI process.
7. I will also examine information in cases already considered by my office as appropriate, including application case files, non-compliance reports, decisions round-ups, and information obtained in the current intervention.

As you know, I am making this intervention under my Enforcement Policy, which sets out how I use my powers, as Scottish Information Commissioner. In this case, the relevant power to examine the Scottish Government's FOI performance is section 43(3) of the Freedom of Information (Scotland) Act 2002. You may be reassured that I consider section 45 (confidentiality of information obtained by or furnished to Commissioner) applies in this case. You may also wish to note that my power

under section 50(1)(b) to issue Information Notices also applies, although I fully expect that it will not be required.

As previously discussed, there is a strong public interest in providing as much information about the progress of this intervention as possible. I know you share this view. For this reason, I intend to publish this letter on my website. I will also publish a summary of the submissions shortly on my website and will let you know when it is available.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daren Fitzhenry', with a stylized flourish at the end.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

---

From: [Redacted]

Sent: 12 February 2018 15:52

To: Minister for Parliamentary Business

Cc: DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); [Redacted] ; Corporate Communications; News Desk

Subject: RE: FOI Performance - Scottish Information Commissioner Intervention

[Redacted]

I will proceed as Mr FitzPatrick asks and will provide a note of the meeting as soon as possible.

[Redacted]

---

From: [Redacted] On Behalf Of Minister for Parliamentary Business

Sent: 12 February 2018 12:05

To: [Redacted]; Minister for Parliamentary Business

Cc: DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); [Redacted]; Corporate Communications; News Desk

Subject: RE: FOI Performance - Scottish Information Commissioner Intervention

[Redacted]

As discussed, Mr FitzPatrick has asked for you to proceed so we can insure we are co-operating constructively with the Commissioner's office. He has asked for a note of the meeting which took place with Ken Thomson, we will also send a calendar request for a meeting next week with you both to discuss progress.

thanks

[Redacted]

[Redacted] |Acting Private Secretary to Minister for Parliamentary Business|T4.21, Scottish Parliament|

---

From: [Redacted]

Sent: 09 February 2018 17:37

To: Minister for Parliamentary Business

Cc: DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); [Redacted]; Corporate Communications; News Desk

Subject: FOI Performance - Scottish Information Commissioner Intervention

PS/ Minister for Parliamentary Business

I attach a short minute outlining the next phase of the Scottish Information Commissioner's intervention plus, for ease of reference, a copy of the Commissioner's letter of 2 February.

Mr FitzPatrick will note that the minute indicates that on Wednesday, the Commissioner suggested that his office would contact the FOI Unit after 20 February to obtain copies of our FOI policy documents. Despite this, I have just received the attached email, making this request. We will begin pulling this together next week - it is essentially all held on our sharepoint site.

**[Redacted]**

**OFFICIAL**

From: **[Redacted]**  
FOI Unit  
9 February 2018

Minister for Parliamentary Business

**FOI PERFORMANCE - SCOTTISH INFORMATION COMMISSIONER INTERVENTION**

**Purpose**

1. To provide you with a brief update on the next phase of the Scottish Information Commissioner's intervention following his letter of 2 February.

**Priority**

2. Routine.

**Background**

3. In your monthly updates on our performance in meeting our 85% performance target as part of the current intervention, you have noted that the Scottish Information Commissioner planned to review the position what further action, if any, he would take at the end of the year. You have also highlighted that, given the slight drop in performance in November, we should expect the intervention to be stepped up in some way.

4. The Commissioner confirmed in November that, following the Parliamentary motion in June, calling for an independent inquiry into how SG deals with journalists' FOI requests, he would carry out of a further intervention into our wider FOI practice, including considering the issues of culture and practice raised in the journalists' open letter of 31 May to Parliament that was central to the June debate. He wrote to the signatories on 11 December, seeking further information about their concerns.

5. The Commissioner's letter to you of 2 February (attached separately), confirms that 4 of the signatories provided detailed submissions about their concerns and the new intervention will move to an assessment phase that will focus on whether our case handling processes for journalists differ from those used for requests by others and whether any differences are detrimental to journalists' rights to information.

6. The letter sets out the approach he will take to assessing our processes. Ken Thomson and I met the Commissioner on Wednesday 7 February and discussed the new intervention phase. The Commissioner indicated that they would contact the FOI Unit after 20 February to obtain copies of our FOI policy documents and towards the end of February would be in touch to arrange for their staff to work with the FOI Unit to identify an appropriate sample of requests from our case tracker.

**Conclusion**

7. You are invited to note that the Commissioner will engage directly with the FOI Unit, who will co-ordinate activity going forward.

**[Redacted]**  
FOI Unit

9 February 2018

OFFICIAL

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister					X
Deputy First Minister					X
Cabinet Secretaries					X
Ministers					X

Permanent Secretary  
Executive Team  
Directors  
Ian Davidson  
Freedom of Information Unit  
Liz Lloyd  
Stuart Nicolson  
John McFarlane  
**[Redacted]**  
Corporate Comms  
Comms News

## **ANNEX A**

### **FOI PERFORMANCE - SCOTTISH INFORMATION COMMISSIONER INTERVENTION**

#### **COMMISSIONER'S APPROACH**

The Commissioner has set out his approach to the assessment phase of the intervention as follows:

1. Examination of the Scottish Government FOI tracking system to identify an appropriate sample of requests and requests for review. This will require two of my staff to work on site with the support of your FOI staff. The sample of cases will include cases that required clearance by Special Advisers and/or Ministers and cases where the response was made considerably later than 20 working days (including cases in any "backlog").
2. Inspection of case handling records for each request and request for review within the sample, including internal correspondence about those cases.
3. Inspection of case handling records for requests and requests for review in the cases included in the journalists' submissions, including internal correspondence about those cases.
4. Liaison with your FOI staff to obtain statistics and samples of reviews, including numbers of reviews which overturned the original decision.
5. I may also require access to other information about FOI practice, for example, FOI training records for decision makers and their key advisers and wider statistical information.
6. Following on from these initial inquiries, I may also wish to interview staff and officeholders involved in the FOI process.
7. I will also examine information in cases already considered by my office as appropriate, including application case files, non-compliance reports, decisions round-ups, and information obtained in the current intervention.



Scottish Information  
Commissioner

*It's public knowledge*

**Our Ref:**

**Your Ref:**

Joe FitzPatrick MSP  
Minister for Parliamentary Business  
The Scottish Parliament  
Edinburgh  
EH99 1SP

2 February 2018

Dear Minister

### **Intervention assessment phase**

Thank you for your letter of 19 December, acknowledging my letter of 11 December where I alerted you to the invitation to signatories to the journalists' letter to the Scottish Parliamentary Corporate Body on 31 May to provide further information. As you know, I asked them to submit further information about their concerns, with examples where possible, relating to the Scottish Government's freedom of information (FOI) performance. This was to assist with framing accurately the assessment phase of my intervention to ensure it focuses on the right things.

In mid-January I received four detailed submissions from signatories, referencing experiences that led to their concerns. The submissions align closely with the assessment questions I had set out in the invitation and provide helpful indications about the methodology required. I can now confirm that my intervention will:

1. Assess the Scottish Government's FOI performance in light of serious concerns raised in the letter to the Scottish Parliamentary Corporate Body and in the Scottish Parliament's debate on Motion S5M-06126 (as amended by Motion S5M-06126) on 21 June 2017, and
2. Where any of its practices are found to be deficient, require the Scottish Government to:
  - a. remedy any identified breach of FOI law, and
  - b. meet the minimum standards of good practice in the Ministers' Section 60 Code of Practice.

The assessment phase will focus on the following questions:

1. Does the Scottish Government treat and manage requests from journalists differently, compared to requests made by other people?

2. Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?
3. 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?
4. Are internal request handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Code of Practice?
5. 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?
6. Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
7. 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 can also advise that the approach I intend to adopt to the assessment phase of the intervention will be as follows:

1. Examination of the Scottish Government FOI tracking system to identify an appropriate sample of requests and requests for review. This will require two of my staff to work on site with the support of your FOI staff. The sample of cases will include cases that required clearance by Special Advisers and/or Ministers and cases where the response was made considerably later than 20 working days (including cases in any "backlog").
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3. Inspection of case handling records for requests and requests for review in the cases included in the journalists' submissions, including internal correspondence about those cases.
4. Liaison with your FOI staff to obtain statistics and samples of reviews, including numbers of reviews which overturned the original decision.
5. I may also require access to other information about FOI practice, for example, FOI training records for decision makers and their key advisers and wider statistical information.
6. Following on from these initial inquiries, I may also wish to interview staff and officeholders involved in the FOI process.
7. I will also examine information in cases already considered by my office as appropriate, including application case files, non-compliance reports, decisions round-ups, and information obtained in the current intervention.

As you know, I am making this intervention under my Enforcement Policy, which sets out how I use my powers, as Scottish Information Commissioner. In this case, the relevant power to examine the Scottish Government's FOI performance is section 43(3) of the Freedom of Information (Scotland) Act 2002. You may be reassured that I consider section 45 (confidentiality of information obtained by or furnished to Commissioner) applies in this case. You may also wish to note that my power

under section 50(1)(b) to issue Information Notices also applies, although I fully expect that it will not be required.

As previously discussed, there is a strong public interest in providing as much information about the progress of this intervention as possible. I know you share this view. For this reason, I intend to publish this letter on my website. I will also publish a summary of the submissions shortly on my website and will let you know when it is available.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daren Fitzhenry', with a stylized flourish at the end.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

From: Claire Stephen [mailto:cstephen@itspublicknowledge.info]  
Sent: 09 February 2018 16:01  
To: [Redacted]  
Cc: Daren Fitzhenry; Sarah Hutchison  
Subject: Intervention : 201702106  
Importance: High

Mr [Redacted]

Intervention assessment  
Our ref: 201702106

I refer to the Scottish Information Commissioner's intervention looking into the Scottish Ministers handling of requests. The Commissioner's letter of 2 February 2018, addressed to Mr Joe FitzPatrick MSP, sets out our methodology in relation to this intervention.

At this stage, we ask that the Ministers provide the Commissioner with the following FOI (including EIRs) documentation:

1. All internal request handling procedures and policies.
2. Any policies and procedures which sets out who should respond to, or advise on, requests.
3. Any policies and procedures which relate to the handling of requests received from journalists.
4. Any policies and procedures which reference the role of Special Advisers in request handling processes.
5. Any policies and procedures relating to the handling of politically sensitive requests.

I thank you for your assistance in relation to this and look forward to receiving the information detailed above at your earliest convenience.

In addition, we would welcome the opportunity to discuss how the Ministers' statistics relating to request handling are currently collected, collated, monitored and reported. With this in mind, it would be helpful to have a discussion directly with [Redacted] before he leaves post, if at all possible.

Thank you for your help with this.

Claire Stephen  
Freedom of Information Officer

---

Scottish Information Commissioner  
Kinburn Castle, Doubledykes Road  
St Andrews, KY16 9DS

---

From: [Redacted]

Sent: 21 February 2018 15:37

To: Minister for Parliamentary Business; [Redacted]

Cc: DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); [Redacted] ; Corporate Communications; News Desk

Subject: RE: FOI Performance - Scottish Information Commissioner Intervention

PS/Minister for Parliamentary Business

Further to [Redacted] minute of 9 February 2018, I can provide a brief update on the Information Commissioner's intervention into issues of FOI culture and practice, following a meeting between the Commissioner and his team and members of the FOI Unit earlier today.

The purpose of today's meeting was to prepare the ground for the assessment phase of the intervention.

As requested by the Commissioner, the FOI Unit provided a demonstration of the FOI Tracker system to aid their understanding of how requests, reviews and appeals are logged and tracked, the system's link to the Objective ERDM system, and a brief overview of the reports that can be provided (for example, by type of requester).

This will inform the Commissioner's approach during the assessment phase of the intervention, both in terms of analysing the handling of specific requests already flagged up by journalists to the Commissioner, and in identifying an appropriate sample of responses from our database for comparison purposes.

In addition, the FOI team provided a brief overview of the guidance available on the internal SharePoint.

The Commissioner has now confirmed some next steps and timings for the assessment phase of his intervention:

- The Commissioner has asked that his team have access to the FOI Unit from Wednesday 1 March until Friday 9 March to start extracting case information from the FOI Tracker and Objective ERDM system
- Initially his staff will seek information in relation to specific requests using case reference numbers already provided to the Commissioner by journalists. We do not yet know the cases.
- The Commissioner's team will continue to liaise with the FOI Unit to consider how best to identify a dip sample which allows for a meaningful comparison with those cases
- The intervention will focus on FOI case handling since 2015
- The Commissioner has confirmed that detailed assessment of the handling of individual requests is likely to involve interviews with case handlers, Directors, Special Advisers and Ministers as he considers appropriate. Interviewers would be matched to interviewees by level of seniority.

- The Commissioner anticipates that the assessment phase of the intervention will last two to three months before his team focuses on a formal report, recommendations and any action plan, including his plans for following up on progress in meeting the recommendations. Timescales may change, depending on the amount of cases selected for review.

The Minister is invited to note the update on the assessment phase of the Commissioner's intervention.

Regards,

**[Redacted]**

---

**From:** [Redacted]

**Sent:** 28 March 2018 11:57

**To:** Minister for Parliamentary Business

**Cc:** DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McAllister C (Colin); McFarlane J (John); [Redacted]; Booth J (John); [Redacted]; Corporate Communications; News Desk

**Subject:** FOI - Scottish Information Commissioner's Interventions - Update

**PS/Minister for Parliamentary Business**

**I have attached a brief update on the Scottish Information Commissioner's interventions into the Scottish Government's FOI performance, culture and practice.**

**Please do not hesitate to contact me if you require anything further.**

**Kind regards,**

**[Redacted]**

From: [Redacted]  
FOI Unit  
March 2018

Minister for Parliamentary Business

## **SCOTTISH INFORMATION COMMISSIONER'S INTERVENTION INTO SCOTTISH GOVERNMENT PRACTICE: UPDATE**

### **Purpose**

1. To provide you with a brief update on the Scottish Information Commissioner's interventions into FOI performance, culture and practice in the Scottish Government.

### **Priority**

2. Routine.

### **Background**

3. I attach an update on the Commissioner's on-going interventions, the first relating to delays in issuing FOI responses and reviews, and the second concerning wider issues of culture and practice. This reflects a recent presentation by the Commissioner to the Scottish Government Directors' Network as well as the FOI Unit's contacts with him.

### **Progress of Interventions**

4. On the intervention around delays in responding, the Commissioner has advised that monitoring of FOI performance will continue for another six months, as he is not yet satisfied that a sustained, consistent improvement has been achieved across all directorates.

5. The assessment phase of the second intervention into issues of culture and practice is continuing. To date, the Commissioner's team has requested around 50 case files. The Commissioner's team is currently analysing these case files with a view to setting criteria for a further dip sample to facilitate an analysis of any difference in handling requests from journalists compared to members of the public.

### **Conclusion**

6. You are invited to note this update.

[Redacted]  
FOI Unit

March 2018

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister					X
Deputy First Minister					X
Cabinet Secretaries					X
Lord Advocate					X
Solicitor General					X
Ministers					X

Permanent Secretary
Executive Team
Directors
Ian Davidson
Freedom of Information Unit
Liz Lloyd
Stuart Nicolson
Colin McAllister
John McFarlane
[Redacted]
John Booth
[Redacted]
Corporate Comms
Comms News

## **Freedom of Information: Scottish Information Commissioner's intervention into Scottish Government practice: Update for Ministers and senior officials**

### **Introduction**

- The Scottish Government is currently the subject of two interventions by the Scottish Information Commissioner into its FOI performance.
- The first concerns **delays in responding** to FOI requests and reviews. As part of that, the Scottish Government committed to targets of 85% of responses and reviews on time for the intervention period in 2017, 90% in 2018 and 95% by 2020 – and these are applicable to each directorate.
- A second intervention into **wider FOI practice** – including issues of culture and practice raised by journalists in an open letter to the Scottish Parliament last year – has now entered its assessment phase.
- Directors and DDs are being encouraged and supported to improve support for staff in handling FOIs, as appropriate.

### **Commissioner's Role and Enforcement Powers**

- The Commissioner has a quasi-judicial role in that he is the appeal body for FOI requests made to Scottish public authorities, issuing enforceable Decision Notices where he considers it necessary. He monitors authorities' FOI practice and makes interventions to remedy concerns. He is also responsible for the promotion of good practice – of which he considers his enforcement policy is a key part.
- The Commissioner's interventions into turnaround times and culture/practice in the Scottish Government are, respectively, at Levels 2 and 3 of the Commissioner's enforcement policy. If a public authority fails to comply with a Level 3 intervention, the Commissioner can escalate to Level 4, which involves issuing a formal enforcement notice; ultimately, the Commissioner can ask the Court of Session to consider failure to comply with an enforcement notice as a contempt of court.
- The Commissioner has made it clear that he does not wish to see an escalation to Level 4. He has emphasised that during an intervention, it is important to work closely with the public authority to identify what has gone wrong, why it has gone wrong and how to make it better.

### **Update on Level 2 Intervention – Turnaround Times**

- The Commissioner's office continues to receive monthly updates on SG's FOI performance across all Directorates.
- He has noted that there had been an improvement in performance last year, and also a dip later in the year. He was therefore not satisfied that there has

been a sustained improvement that has tackled the root causes of poor performance. In particular, he has observed that some directorates were performing poorly in spite of small numbers of requests and that this may be an issue in itself.

- He has advised that monitoring would continue for a further six months and in a presentation to SG Directors earlier this month that their senior level buy-in was crucial to ensuring that FOI receives the priority it deserves.

### **Level 3 Intervention – Wider FOI Practice: Assessment Phase**

- The assessment phase of the intervention has commenced and involves looking at the concerns expressed from journalists, in the first instance gathering evidence to consider whether they have merit.
- The Commissioner and his team are undertaking site visits at SAH to interrogate the FOI tracker and case files; they are seeking to understand not just what has been done, but why.
- Interviews with individuals may assist in that understanding and the Commissioner confirmed this may involve interviews with staff from Directorates where issues are apparent, and with Directors or Ministers. The FOI Unit will provide advice and support to interviewees as required.
- The Commissioner further observed that as the Scottish Ministers are the public authority in terms of FOISA, Ministerial clearance is to be expected on occasion in relation to the exemptions under the legislation. He has indicated that where he finds evidence that clearance is resulting in significant delays in responding, or indeed delays are resulting from consideration of matters not directly related to the application of exemptions, this may be a matter for his report.

### **Next steps**

- The Level 3 assessment phase continues and the Commissioner has advised that he expects this to be complete by the end of May 2018, and he would publish his recommendations
- The FOI Unit will lead in the preparation of a handling plan and action planning as appropriate
- The assessment phase will be followed by an implementation phase, and a period of monitoring of progress for a minimum of six months.

**FOI Unit  
March 2018**

**From:** [Redacted]

**Sent:** 11 April 2018 09:39

**To:** Minister for Parliamentary Business

**Cc:** DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McAllister C (Colin); McFarlane J (John); [Redacted]; Booth J (John); [Redacted]; Corporate Communications; News Desk

**Subject:** FOI - Scottish Information Commissioner's Interventions - Update

PS/Minister for Parliamentary Business

[Redacted] update of 28 March provided an outline of the Commissioner's level 3 intervention into SG FOI practice and confirmed that this was likely to involve interviews with a range of staff and Ministers.

We have now received the attached email from Sarah Hutchison, Head of Policy and Information, setting out the interviews they plan to conduct, with a spreadsheet of their availability over the next 5 weeks. The interviews include named Ministers, Special Advisers and staff. It also confirms they will wish to interview a number of DDs and Directors, and have group discussions with a small number of case handlers and reviewers. They hope to identify individuals in these categories before the end of the week.

The Commissioner will be supported by a member of his staff, who will take a note of each meeting. FOI Unit (or an appropriate substitute) will also attend. I have indicated to Sarah that we would expect to fact-check their notes before they are agreed and I await her response.

Sarah has advised me that the interviews will not be focused on individual cases - they are "absolutely not expecting interviewees to bone up on all their old cases" - but will aim to shed light on our overall processes and try to understand why things are done in a particular way.

You have been consistently clear that SG will co-operate fully with the intervention and it is important, given the ongoing parliamentary and press interest in our FOI performance, that those selected for interview make every effort to make themselves available. FOI Unit will contact individuals to identify suitable interview slots, based on the Commissioner's availability.

[Redacted]

In the meantime, if any copy recipients would like to discuss, please do not hesitate to call me.

Regards

[Redacted]

**From:** [Redacted]

**Sent:** 19 April 2018 10:16

**To:** Minister for Parliamentary Business

**Cc:** DL All Scottish Government Ministers; DL Cabinet Secretaries; Executive Team; Directors (SST); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McAllister C (Colin); McFarlane J (John); [Redacted] Booth J (John); [Redacted] Corporate Communications; News Desk  
**Subject:** FOI - Scottish Information Commissioner's Interventions - Update

**PS/Minister for Parliamentary Business**

Further to my update of 11 April, the Commissioner's office has now sent us the names of 16 case-handlers, from whom they would like us to identify 8-10 who would be available to take part in a group interview. The named staff are: [Redacted]

FOI Unit will start contacting people over the next few days (after first making their DDs and line managers aware) to check their availability and we are in the process of finalising advice.

In the meantime, if any copy recipients would like to discuss, please do not hesitate to call me.

Regards

[Redacted]

Head of FOI Unit

[Redacted]

**From:** [Redacted] On Behalf Of Deputy First Minister and Cabinet Secretary for Education and Skills Sent: 10 May 2018 17:45  
**To:** [Redacted] ; Deputy First Minister and Cabinet Secretary for Education and Skills  
**Subject:** [Redacted]

[Redacted]

Thank you very much for this. It very appreciated.

Kind regards

[Redacted]

[Redacted] Deputy Private Secretary to John Swinney MSP, Deputy First Minister and Cabinet Secretary for Education and Skills | The Scottish Government | Web: [www.gov.scot](http://www.gov.scot) |[Redacted]

**From:** [Redacted]  
**Sent:** 10 May 2018 16:43  
**To:** Deputy First Minister and Cabinet Secretary for Education and Skills  
**Subject:** [Redacted]

[Redacted]

Happy to discuss.

[Redacted]

**From:** [Redacted]

**Sent:** 10 May 2018 16:04

**To:** Deputy First Minister and Cabinet Secretary for Education and Skills

**Cc:** Lloyd E (Elizabeth); McAllister C (Colin); Rogers DA (David) (Strategy and Constitution Director); [Redacted]

**Subject:** [Redacted]

**PS/Deputy First Minister**

**I understand that you have been in touch with [Redacted] this afternoon concerning the arrangements for the Deputy First Minister's forthcoming interview with the Scottish Information Commissioner.**

[Redacted]

**Happy to discuss.**

[Redacted]

[Redacted] | **Head of Policy | Freedom of Information Unit**

**Scottish Government | 2W | St Andrew's House | Regent Road | Edinburgh | EH1 3DG**

[Redacted]

From: [Redacted]

Sent: 11 May 2018 16:14

To: Lloyd E (Elizabeth); Hutchison D (David); McAllister C (Colin); Maxwell S (Stewart) (Special Adviser); Nicolson S (Stuart) Special Adviser

Cc: Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Allison B (Barbara); Somers J (John); [Redacted]; Corporate Communications; Richards N (Nicola); [Redacted]

Subject: FW: FOI: Scottish Information Commissioner's Intervention

Liz, Davie, Colin, Stewart, Stuart

I now attach a minute that sets out the process to be followed for the Commissioner's interviews and the support that will be provided. You will wish to read in conjunction with the Ministerial minute I sent earlier and to which you were copy recipients.

FOI Unit will provide the same information as for Ministers: individual assessments of those cases the Commissioner has suggested he may raise at each interview; a note on how SG operates the FOI process; one on our overall performance, showing our improvement in responding to requests in 2017; and one highlighting the performance in replying to FOI requests of relevant Directorates over the period of the Commissioner's first intervention.

Please do not hesitate to contact me should you have any questions about the attached minute or the process, more broadly.

Regards

[Redacted]

Head of FOI Unit

[Redacted]  
FOI Unit  
11 May 2018

Liz Lloyd  
Davie Hutchison  
Colin McAllister  
Stewart Maxwell  
Stuart Nicolson

## INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH GOVERNMENT FOI PRACTICE: INTERVIEWS BY THE COMMISSIONER

### Purpose

1. As you will be aware, the Scottish Information Commissioner (“the Commissioner”) has requested an interview with you as part of his intervention into the Scottish Government’s FOI practice.
2. This minute provides information about:
  - (a) the background to the intervention
  - (b) the interview process
  - (c) the support that is available throughout the process

### Background

3. My submission of today’s date to Ministers (which was copied to you) sets out the background and the interview process that has been agreed with the Commissioner following consultation with SGLD, People Directorate, Communications, the Permanent Secretary’s office, [Redacted] and Liz Lloyd. People Directorate has made the trade unions aware. While it is not compulsory for anyone to attend an interview, and interviewees will not be on oath, the Scottish Government has confirmed that it will cooperate fully with the intervention.

### The interview process

4. The purpose of interviewing special advisers is to try to understand more clearly how Scottish Government clearance processes for FOI operate, and why things are done in certain ways. The Commissioner is seeking to ascertain whether FOI processes are robust, rather than investigating actions taken by individuals.
5. The Commissioner also wishes to interview the special advisers’ Private Secretary.
6. The Commissioner has requested a 45 minute interview with each of you. The FOI Unit will liaise with the special advisers’ Private Office to arrange suitable times and locations for the interviews. He will be accompanied by a member of his staff. The Commissioner has also requested that a member of the FOI Unit attend each interview. The detailed arrangements are set out in **Annex C** to my submission to Ministers.

7. As requested we have taken advice from HR on the relevance of the [Special Advisers' Code of Conduct](#). As you will be aware, paragraph 8 provides that you are "...bound by the standards of integrity and honesty required of all civil servants as set out in the Civil Service Code." For further information about those standards, see paragraphs 6 to 9 of the Civil Service Code (which is annexed to the Special Advisers' Code). We understand that concerns have been expressed that participating in an interview with the Commissioner might be construed as taking public part in political controversy, contrary to paragraph 14 of the Special Advisers' Code. However, the interview will not take place in public and interviewees are not being asked to speak for the Minister or the Scottish Government – the Commissioner is seeking to understand more clearly how Scottish Government's FOI operate, and why things are done in certain ways. The Commissioner has undertaken not to ascribe quotations in his published report to named individuals other than Ministers.

### **Support**

8. The FOI Unit will provide support around the interview process and what you should expect. If you have any queries about the interview process, please contact us. We will also liaise with the Commissioner on your behalf to resolve any queries, if necessary.

9. Although the Commissioner's focus is on the Scottish Government's overall approach to FOI handling he does intend to discuss individual FOI case with some interviewees. If this applies to you, we will send you a separate minute detailing the cases so that you can remind yourself of your involvement with them. We will also provide you with our assessment of the areas that the Commissioner may wish to discuss, based on the information contained in the case file and in the FOI tracker.

10. We will provide you and Ministers with a summary brief on FOI procedures. If you wish to refresh your memory as to the Scottish Government's FOI procedures in more detail, guidance is available on the [FOI Sharepoint site](#). If you require further assistance with this, please contact the FOI Unit.

11. People Directorate can provide support to you from a wellbeing perspective. You should contact the Senior Staff Team in the first instance if you wish to seek support, and you may access the [Employee Assistance Programme](#).

### **Conclusion**

12. You are invited to note the information in this minute.

**[Redacted]  
FOI Unit**

**11 May 2018**

**OFFICIAL – SENSITIVE**

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness

David Rogers  
Ian Davidson  
Freedom of Information Unit  
Barbara Allison  
John Somers  
[Redacted]  
Corporate Comms  
Nicola Richards  
[Redacted]  
[Redacted]  
Paul Cackette  
Caroline Beattie  
[Redacted]  
[Redacted]  
[Redacted]

From: [Redacted]

Sent: 11 May 2018 15:55

To: Deputy First Minister and Cabinet Secretary for Education and Skills; Cabinet Secretary for Culture, Tourism and External Affairs; Cabinet Secretary for Economy, Jobs and Fair Work; Cabinet Secretary for Health and Sport  
Cc: First Minister; Minister for Parliamentary Business; Minister for Public Health and Sport; Lord Advocate; Somers J (John); Permanent Secretary; Executive Team; Rogers DA (David) (Strategy and Constitution Director); Cackette PH (Paul); Allison B (Barbara); Richards N (Nicola); Davidson I (Ian) (CUKR); Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); Hutchison D (David); Maxwell S (Stewart) (Special Adviser); McAllister C (Colin); [Redacted]; [Redacted]; Beattie C (Caroline); [Redacted] CUKR : Freedom of Information Unit  
Subject: FOI: Scottish Information Commissioner's Intervention

**PS/Deputy First Minister and Cabinet Secretary for Education and Skills**

**PS/Cabinet Secretary for Culture, Tourism and External Affairs**

**PS/Cabinet Secretary for the Economy, Jobs and Fair Work**

**PS/Cabinet Secretary for Health and Sport**

**Following discussions earlier this week with Ministers about the Scottish Information Commissioner's intervention, I attach, as agreed a minute that sets out the process to be followed for these interviews and the support that will be provided.**

**FOI Unit will also provide, separately, notes on how SG operates the FOI process and our overall performance, showing our improvement in responding to requests in 2017. We will also provide a note highlighting the performance in replying to FO I requests of Directorates within your portfolio responsibility over the period of the Commissioner's intervention on our performance.**

**Please do not hesitate to contact me should you have any questions about the attached minute or the process, more broadly.**

**Regards**

**[Redacted]**

**Head of FOI Unit**

[Redacted]  
FOI Unit  
11 May 2018

Deputy First Minister and Cabinet Secretary for Education and Skills  
Cabinet Secretary for Culture, Tourism and External Affairs  
Cabinet Secretary for the Economy, Jobs and Fair Work  
Cabinet Secretary for Health and Sport

## INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH GOVERNMENT FOI PRACTICE: INTERVIEWS BY THE COMMISSIONER

### Purpose

1. You have agreed to be interviewed by the Scottish Information Commissioner (“the Commissioner”) as part of his intervention into the Scottish Government’s FOI practice.
2. This minute provides information about:
  - (a) our discussions with the Commissioner about the interview process
  - (b) proposed support and briefing arrangements
3. It also asks whether you are content with the proposed process and support.

### Background

4. [Redacted] submission of 28 March provided an update on the Commissioner’s two current “interventions” in relation to the Scottish Government’s FOI practice and noted that the Commissioner was expected to seek interviews with Ministers, special advisers and other officials as part of the process. The first intervention relates to delays in issuing FOI responses and reviews (more information is available at **Annex A**). The second concerns wider issues of culture and practice raised by journalists in an open letter to the Scottish Parliament last June. It is the second intervention that forms the subject of these interviews.
5. On 2 February 2018, the Commissioner wrote to the Minister for Parliamentary Business setting out the scope of the second intervention. The Minister for Parliamentary Business met the Commissioner on 21 February 2018 and confirmed that the Scottish Government would cooperate with the second intervention.
6. **Annex B** sets out the Commissioner’s approach to the intervention which will focus on whether the Scottish Government treats requests from journalists differently (and detrimentally) compared to other requesters (extracts in Annex).
7. The Commissioner has used the Scottish Government’s FOI tracker to select a series of individual case files for examination in detail. He has identified a number of people that he wishes to interview. They fall into four broad categories: Ministers, special advisers, members of staff who are to be interviewed individually and members of staff who are to take part in group discussions.
8. The FOI Unit is providing information and support to the people concerned in each of the four categories. We have consulted SGLD, People Directorate, Communications, the Permanent Secretary’s office and special advisers on this advice. People

Directorate has made the trade unions aware. While it is not compulsory for anyone to attend an interview, and interviewees will not be on oath, the Scottish Government has confirmed that it will cooperate fully with the intervention.

**Nature of the Commissioner’s intervention**

9. The Commissioner has published the procedures that he follows when carrying out an intervention. The present intervention into the Scottish Government’s FOI practice is at Level 3 (Level 4 is the most serious).
10. The Commissioner has emphasised that, during an intervention, he aims to work closely with the public authority to identify what, if anything, has gone wrong, why it has gone wrong and identify steps to make it better. He has also made it clear that this intervention is not about singling out or criticising individuals, or examining how individual cases were dealt with. His aim is to improve the Scottish Government’s FOI practice, and an intervention at Level 3 offers the opportunity to work with the Commissioner to achieve that aim.
11. Once the Commissioner has assessed all of the information he has obtained, he will prepare a report containing his recommendations to improve the Scottish Government’s FOI practice. It will be shared with the Scottish Government in draft before it is published. The Scottish Government will be expected to agree an action plan with the Commissioner to implement the recommendations. He will then monitor the implementation of the action plan, potentially for up to a year.
12. If the Commissioner considers that an intervention at Level 3 is ineffective, he would have the option to escalate it to Level 4. At Level 4, the Commissioner’s focus shifts from working with the authority to using the full range of his statutory powers to achieve a resolution to the problem. In particular, he may impose requirements about the improvements that are needed by making an enforcement notice.

**Themes**

13. The Commissioner met the Permanent Secretary last month. Although he was careful to emphasise that it was too early to draw final conclusions, he did identify a number of emerging high-level themes that might need further clarification as the intervention progressed:
  - (a) Do all staff dealing with cases have appropriate understanding of FOI?
  - (b) Does the clearance process/structure contribute to delays?
  - (c) Is there sufficient clarity about the roles of individuals in the process?
  - (d) Do staff understand that FOI decisions should be based strictly on consideration of FOI legislation and exemptions rather than wider policy or presentational matters, and do policies aid or hinder this?

**The proposed interview process**

14. The proposed arrangements are set out in **Annex C**.
15. The Commissioner wishes to interview the Deputy First Minister and the Cabinet Secretaries for Culture, Tourism and External Affairs; Economy, Jobs and Fair Work; and Health and Sport.
16. The Commissioner has requested a 45-minute interview with each Minister. The FOI Unit will liaise with the relevant Ministerial Private Offices to arrange suitable times and locations for the interviews.
17. The Commissioner intends to interview Ministers personally. He will be accompanied by a member of his staff. We propose that that a member of the FOI Unit attend each interview along with each Cabinet Secretary's PS.
18. The Commissioner has produced Notes for Interviewees, setting out the process from his perspective. A copy is at **Annex D**.

**Proposed support arrangements**

19. The FOI Unit will provide support around the interview process and will also liaise with the Commissioner to resolve any queries. As part of that, we will provide you with a summary briefing on FOI procedures and performance.
20. The Commissioner has informed the FOI Unit that he intends to discuss individual FOI cases with Mr Swinney, Mr Brown and Ms Robison. We propose to send you each a separate minute detailing the cases so that you can remind yourself of your involvement with them. We will also provide you with our assessment of the areas that the Commissioner may wish to discuss, based on the information contained in the case file and in the FOI tracker. The Commissioner does not intend to discuss any individual cases with Ms Hyslop.

**Recommendation**

21. We recommend that you check that you are content with the proposed process and support.

**[Redacted]  
FOI Unit**

**11 May 2018**

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Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister					X
Minister for Parliamentary Business			X		
Minister for Public Health and Sport					X
Lord Advocate					X

Permanent Secretary Executive Team David Rogers Paul Cackette Barbara Allison Nicky Richards Ian Davidson Freedom of Information Unit Liz Lloyd Stuart Nicolson John McFarlane Davie Hutchison Stewart Maxwell Colin McAllister John Somers [Redacted] [Redacted] Caroline Beattie [Redacted] [Redacted] [Redacted]
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## **Annex A – background**

1. The Commissioner's functions are set out in FOISA. Those include a number of statutory powers to help him discharge his functions. The exercise of his functions is not directed or controlled by the Scottish Ministers or by the Scottish Parliament.

### *The first intervention*

2. The first intervention concerns delays in responding to FOI requests and reviews. As part of that, the Scottish Government committed to targets of 85% of responses and reviews on time for the intervention period in 2017, 90% in 2018 and 95% by 2020 – and these are applicable to each Directorate.
3. We have provided the Commissioner with monthly updates on the Scottish Government's FOI performance across all Directorates throughout the first intervention.
4. The Commissioner has noted that there was an improvement in performance in 2017, followed by a dip at the end of the year. He was therefore not satisfied that there has been a sustained improvement that has tackled the root causes of poor performance. In particular, he has observed that some directorates were performing poorly in spite of small numbers of requests and that this may be an issue in itself.
5. The Commissioner has advised that monitoring would continue for a further six months as a consequence.

### *The second intervention*

6. A second intervention is into wider FOI practice – including issues of culture and practice raised by journalists in an open letter to the Scottish Parliament in June 2017. Further detail is in **Annex B**.

**Annex B – extracts from the Commissioner’s letter of 2 February about the second intervention**

*Questions on which the assessment phase is focusing*

1. Does the Scottish Government treat and manage requests from journalists differently, compared to requests made by other people?
2. Where there are differences, do they reduce or restrict journalists’ entitlement to information, compared to other requesters?
3. 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?
4. Are internal request handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Code of Practice?
5. 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?
6. Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
7. 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?

*The Commissioner’s approach to the assessment phase*

1. Examination of the Scottish Government FOI tracking system to identify an appropriate sample of requests and requests for review. This will require two of my staff to work on site with the support of your FOI staff. The sample of cases will include cases that required clearance by Special Advisers and/or Ministers and cases where the response was made considerably later than 20 working days (including cases in any “backlog”).
2. Inspection of case handling records for each request and request for review within the sample, including internal correspondence about those cases.
3. Inspection of case handling records for requests and requests for review in the cases included in the journalists’ submissions, including internal correspondence about those cases.
4. Liaison with your FOI staff to obtain statistics and samples of reviews, including numbers of reviews which overturned the original decision.
5. I may also require access to other information about FOI practice, for example, FOI training records for decision makers and their key advisers and wider statistical information.
6. Following on from these initial inquiries, I may also wish to interview staff and officeholders involved in the FOI process.
7. I will also examine information in cases already considered by my office as appropriate, including application case files, non-compliance reports, decisions round-ups, and information obtained in the current intervention.

**Annex C – practical arrangements for interviews**

1. Interviews will be conducted by the Commissioner.
2. Interviews will focus on the Scottish Government's FOI process generally, rather than being about individual cases.
3. The Commissioner has identified some specific cases where he expects to ask Ministers (except Ms Hyslop) about their involvement. The FOI Unit is currently reviewing these cases and will provide briefing to remind interviewees of their involvement.
4. A member of the Commissioner's staff will accompany him to take a note of the interview. They will not take a full transcript of the interview. Interviewees will be given 24 hours to consider the meeting note and suggest amendments. This will be extended for interviews falling on a Friday. If interviewees are unable to agree on certain parts of the notes, the Commissioner will record that you disagree that those parts of the notes are accurate.
5. Interviewees are expected to be asked about the FOI process and their role in the specific cases identified. A member of the FOI Unit will be present to support the interviewee, primarily to keep a watching brief, but also to clarify any confusion about FOI processes if necessary.
6. We will expect Ministers to be accompanied by a Private Secretary, who will take notes to be used when checking the Commissioner's note of the interview.
7. The final report will draw from the notes of the interviews where relevant, but the Commissioner does not plan to publish individual interviews. The report may include comments attributed to a specified Minister, if they are considered important. For officials, quotes will be ascribed to their role/rank – eg "a special adviser told us". Comments from staff below SCS, if used, will not be attributed. If any verbatim quotes are to be used in the report, the interviewee will be given the chance to check the quote.
8. Any information that is recorded may be released under FOISA by the Commissioner, subject to consideration of appropriate exemptions.

## Annex D – Commissioner’s Notes for Interviewees

### *What will happen during the interview?*

1. As part of my current intervention into Scottish Government compliance with the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs), I have asked to interview a number of people, including Ministers, Special Advisers and other officials. You are one of the people who have been selected for interview. This document tells you what the purpose of the interview is, how it will be carried out and how the interview will be recorded.
2. The main purpose of the interviews is to improve my understanding of Scottish Government practice when responding to information requests made under FOISA and/or the EIRs. I am also interested in learning more about your specific role in responding to requests and how you feel the procedures work in practice.
3. I have identified a small number of cases which I consider could be useful to discuss with some named individuals during the interviews. The list was shared with the Scottish Government at the end of April. If there are any cases which I would like to discuss with you (again, focussing on practice issues) you will already have been notified of those specific cases so that you have an opportunity to remind yourself about the case before the meeting.
4. You will be interviewed by me and/or by members of my staff. Other members of my staff will also be present to take notes of the interview. You will be notified in advance of the names of my staff who will be present at the interview.
5. A member of the Scottish Government’s FOI Unit will also be present during the interview. I do not expect the interview to be adversarial. However, you are welcome to be accompanied by another individual if you wish to do so.
6. The interview will not be video or audio recorded. A member of my staff will take notes of the key points made during the interview. The notes will not be verbatim, although may contain quotes from you.

### *Agreeing the notes*

7. Wherever possible, a copy of the notes will be agreed with you on the day. If this is not possible, you will be given 24 hours to comment on the notes (longer if the interview takes place on a Friday).
8. If we are unable to agree on certain parts of the notes, we will record that you disagree that those parts of the notes are accurate.

### *The intervention report*

9. At the end of my intervention, I will publish a report containing my recommendations. Information obtained from the interviews will form part of the report.

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10. Naming interviewees: the report will name the individuals interviewed as part of the intervention, including Ministers, Special Advisers and Senior Civil Servants. However, no junior civil servants will be named in the report.
11. I may include selected quotes or extracts from interviews in the report. If I decide to use one of your quotes verbatim, you will be given an opportunity to check the quotation before the report is published.
12. Except in the case of Ministers, I will not attribute a quote or extract from interviews to any named individual in the report. I may, however, attribute such a quote by reference to the person's general role, for example: "a special adviser said ..."; "a senior civil servant stated ..."; or "a caseworker commented ...".

*Privacy*

13. I am a data controller for the purposes of the Data Protection Act 1998 (the DPA 1998) (and subsequent amending legislation).
14. I will comply with the data protection principles in the DPA 1998 (and subsequent amending legislation).
15. I will process your personal data to the extent that the processing is necessary for the exercise of the functions conferred on me by FOISA and the EIRs. These functions include the work on this intervention, which is being carried out under section 43(3) of FOISA (which apply for the purposes of the EIRs by virtue of regulation 18 of the EIRs).
16. A copy of the notes from your interview will be held securely in my case management system. The information will be used only for the purpose of the intervention (see also Transparency section below) and will be securely destroyed one year after the publication of the report.

*Transparency*

17. As well as being a data controller, I am a Scottish public authority for the purposes of FOISA and the EIRs. It is therefore possible that I will receive an information request for the notes of your interview.
18. If I do, I will let you know and will give you the opportunity to comment on whether the notes, or any part of the notes, should be disclosed.
19. The final decision as to whether to disclose information under FOISA or the EIRs will be one for me to make, but your views will be taken into account.

**Document 10**

**From:** [Redacted]

**Sent:** 11 May 2018 16:31

**To:** [Redacted]

**Cc:** [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - group discussions - information and support

Please find attached a minute from the FOI Unit setting out information and support that is available to you in advance of your group discussion with the Scottish Information Commissioner next week.

My colleague [Redacted] has been in touch with each of you to arrange times and locations for the discussions. The Commissioner has asked us to tell you that the group discussions will be conducted by his Head of Policy and Information, Sarah Hutchison. She will be accompanied by Julie Frew, who will take notes.

If you would like to discuss anything in advance of your interview, please do not hesitate to contact the FOI Unit. The minute is copied to your line managers, who have been made aware of these interviews too.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

Case handlers (see Table 1)

Reviewers (see Table 2)

**FREEDOM OF INFORMATION (SCOTLAND) ACT 2002  
INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH  
GOVERNMENT FOI PRACTICE  
GROUP DISCUSSIONS**

**Purpose**

1. To advise you that the Scottish Information Commissioner (“the Commissioner”) has requested that you take part in a group discussion as part of his intervention into the Scottish Government’s FOI practice.
2. To provide you with information about:
  - (a) the background to the intervention
  - (b) the group discussion process
  - (c) the support that is available throughout the process

**Background**

3. The Freedom of Information (Scotland) Act 2002 (“FOISA”) was introduced to give people access to information held by Scottish public authorities. The Act states that any person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This right is subject to certain conditions and exemptions, which are set out in the Act. The Scottish Ministers are a Scottish public authority.
4. The Commissioner is presently carrying out two interventions into the Scottish Government’s FOI practice. The first intervention relates to delays in issuing FOI responses and reviews. The second concerns wider issues of culture and practice raised by journalists in an open letter to the Scottish Parliament last June. It is the second intervention that forms the subject of these discussions. A brief explanation of the Commissioner’s role and his biography is at **Annex A**.
5. On 2 February 2018, the Commissioner wrote to the Minister for Parliamentary Business setting out the scope of the second intervention. The Minister for Parliamentary Business met the Commissioner on 21 February 2018 and confirmed that the Scottish Government would cooperate with the second intervention.
6. **Annex B** also sets out the Commissioner’s approach to the intervention, which will focus on whether the Scottish Government treats requests from journalists differently (and detrimentally) compared to other requesters (extracts in Annex).
7. The Commissioner has used the Scottish Government’s FOI tracker to select a series of individual case files for examination in detail. He has identified a number of people that he

wishes to interview. They fall into four broad categories: Ministers, special advisers, members of staff who are to be interviewed individually and members of staff who are to take part in group discussions.

8. The FOI Unit is providing information and support to the people concerned in each of the four categories. We have consulted SGLD, People Directorate, Communications, the Permanent Secretary's office and special advisers on this advice. People Directorate has made the trade unions aware.

### **The group discussion process**

9. The FOI Unit has been liaising closely with the Commissioner and his staff throughout the intervention. We have discussed the practical arrangements for the group discussions with him in order to provide clarity for everyone involved, and we have taken advice from HR and SGLD. The detailed arrangements are set out in **Annex C**. The Commissioner has produced Notes for Interviewees, setting out the process from his perspective. A copy is at **Annex D**.

10. The FOI Unit has also developed a more detailed understanding of the Commissioner's approach to the intervention as a result of this liaison. The key points to be aware of are that:

- (a) the intervention is considering the Scottish Government's FOI practice
- (b) its purpose is to recommend improvements to processes and culture, and so improve the Scottish Government's FOI practice
- (c) the intervention is not about singling out or criticising individuals, or examining how individual cases were dealt with

11. The Commissioner wishes to hold two group discussions with members of staff. One group will consist of case handlers and the other will consist of reviewers.

12. The purpose of the group discussions is to help the Commissioner to understand the Scottish Government's FOI processes and why things are done the way that they are. The Commissioner is seeking to ascertain whether FOI processes are robust, rather than investigating actions taken by individuals.

13. Each group discussion will last for one hour. The FOI Unit will liaise with members of staff once the times and locations for the discussions have been agreed.

14. Taking part in these discussions is a normal activity which would be expected of civil servants. Your line manager has been asked to release you for the discussion and to ensure that you have time to prepare thoroughly for it.

15. The group discussions will be conducted by a member of the Commissioner's staff: either the Head of Policy and Information (Sarah Hutchison) or the Head of Enforcement (Margaret Keyse). She will be accompanied by another member of the Commissioner's staff. The Commissioner has also requested that a member of the FOI Unit attend each discussion. As noted above, the detailed arrangements are set out in **Annex C**.

16. It is not compulsory to attend a group discussion. However, the Minister for Parliamentary Business has confirmed that we will cooperate fully with the intervention – and a failure to do so would lead to significant public criticism. Attendance is something that we

would normally expect of civil servants, with appropriate support (see paragraphs 18 to 24 below).

17. You will be aware that you are expected to adhere to the core values of integrity, honesty, objectivity and impartiality as set out in the Civil Service Code. Guidance about the Civil Service Code is available on [Saltire](#). Accordingly, you should be honest, open and cooperate fully with the Commissioner.

### Support

18. As we note above, taking part in a group discussion of this sort is a normal activity which would be expected of civil servants. However, we recognise that, while this is an activity expected of civil servants, it may not be a situation that you have previously encountered. You may therefore wish to seek additional support as part of the process.

19. In the first place, your line manager should ensure that you are released to attend the discussion. They should also make sure that you have adequate time to prepare for it and support you as they would in relation to any other aspect of your role.

20. In addition to this, the FOI Unit will provide support around the discussion process and what you should expect. If you have any queries about it, please contact us. We will also liaise with the Commissioner on your behalf to resolve any queries, if necessary.

21. If you wish to refresh your memory as to the Scottish Government's FOI procedures, detailed guidance is available on the [FOI Sharepoint site](#). If you require further assistance with this, please contact the FOI Unit.

22. People Directorate will also provide support to you from a wellbeing perspective, and in the event that there are any difficulties in you being released to prepare for or attend the discussion. SCS staff should contact the Senior Staff Team in the first instance, and staff in Bands A to C should contact their Professional Advisor. All staff may access the [Employee Assistance Programme](#).

23. As noted in paragraph 8, the trade unions represented in the Council of Scottish Government Unions are aware that these group discussions are taking place. They note that the purpose of the discussions is to assist the Commissioner in ascertaining whether FOI processes are robust, rather than investigating actions taken by individuals. As such, they agree that support provided by the FOI Unit and HR is welcomed and while individuals who are members of trade unions can of course contact representatives for advice, trade union colleagues will not provide representation in individual cases.

24. In certain circumstances, civil servants may request legal representation at public expense under the [civil service management code](#). We do not expect that members of staff will require individual legal representation when taking part in a group discussion with the Commissioner. However, if you wish to make a request, you should submit a request in writing to your line manager. Your line manager will liaise with HR professional advisors and SGLD to provide a response, and where appropriate, secure such support.

**Conclusion**

25. You are invited to note the information in this minute.

**[Redacted]  
FOI Unit**

**11 May 2018**

Table 1 – case handlers

Recipient	Copy recipients
[Redacted]	[Redacted]

Table 2 – reviewers

Recipient	Copy recipients
[Redacted]	[Redacted]

*Other copy recipients*

David Rogers Freedom of Information Unit Nicola Richards [Redacted] [Redacted] Paul Cackette Caroline Beattie [Redacted] [Redacted]
---

**From:** [Redacted]

**Sent:** 11 May 2018 16:32

**To:** [Redacted]

**Cc:** DG Economy; Hunter A (Alan); Allison B (Barbara); Brannen R (Roy); Rogers DA (David) (Strategy and Constitution Director); Somers J (John); [Redacted] ; CUKR : Freedom of Information Unit; Richards N (Nicola); [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - individual interviews - information and support

Please find attached a minute from the FOI Unit setting out information and support that is available to you in advance of your interview with the Scottish Information Commissioner next week.

My colleague [Redacted] has been in touch with each of you to arrange times and locations for interview. The Commissioner has this afternoon informed us that he will be carrying out all of your interviews (it was previously intended that a member of his senior management team would interview most of you). He has also asked us to tell you the name of the member of his staff who will be accompanying him at your interview, as follows:

Date of interview	Note-taker
Tuesday 15 May	Claire Stephen
Wednesday 16 May	Elaine Moffat
Thursday 17 May	Paul Mutch
Friday 18 May	Paul Mutch
Monday 21 May	to be confirmed

If you would like to discuss anything in advance of your interview, please do not hesitate to contact the FOI Unit. The minute is copied to your line managers, who have been made aware of these interviews too.

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | 2W | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

**From:** [Redacted]

**Sent:** 14 May 2018 13:54

**To:** Deputy First Minister and Cabinet Secretary for Education and Skills; Cabinet Secretary for Culture, Tourism and External Affairs; Cabinet Secretary for Economy, Jobs and Fair Work; Cabinet Secretary for Health and Sport

**Cc:** First Minister; Minister for Parliamentary Business; Minister for Public Health and Sport; Lord Advocate; Somers J (John); Permanent Secretary; Executive Team; Rogers DA (David) (Strategy and Constitution Director); [Redacted] CUKR : Freedom of Information Unit

**Subject:** RE: FOI: Scottish Information Commissioner's Intervention

**PS/Deputy First Minister and Cabinet Secretary for Education and Skills**

**PS/Cabinet Secretary for Culture, Tourism and External Affairs**

**PS/Cabinet Secretary for the Economy, Jobs and Fair Work**

**PS/Cabinet Secretary for Health and Sport**

**I attach background briefing for this week's interviews with the Scottish Information Commissioner:**

- **A high-level description of the process followed by SG in responding to FOI requests (including a list of exemptions and a section on the public interest test).**
- **A note on the Commissioner's intervention process, with a focus on level 3 (at which the current intervention into SG practice sits).**
- **A summary of SG performance in replying to FOI requests since 2007, plus data on requesters in the last 3 years.**

**Performance figures for the past year, covering Directorates comprising the main parts of your portfolios will follow.**

**[Redacted] has separately provided to DFMPPO an assessment of those cases the Commissioner may raise with DFM and we are working on similar assessments for other interviewees.**

**Please do not hesitate to contact me should you have any questions.**

**[Redacted]**

## **FREEDOM OF INFORMATION IN THE SCOTTISH GOVERNMENT**

### **FOI basics**

- Any written request for information may be an FOI request.
- Authorities must respond “*promptly; and in any event by not later than the twentieth working day*”.
- There is a duty to provide advice and assistance to applicants.
- A request may be refused if compliance would exceed the upper cost limit (of £600).
- Exemptions can be applied to some types of information (for example, for reasons of national security, personal data, formulation of Scottish Administration policy).
- The legislation promotes the proactive publication of information where possible.

### **SG request handling**

- The Freedom of Information (Scotland) Act (FOISA) sets out that requests for information must be answered promptly, and in any event, within 20 working days.
- Within SG, requests are dealt with by the relevant policy area. The expert knowledge of a subject is essential in assessing the sensitivity of particular issues and whether exemptions apply.
- However, as the named public authority, Scottish Ministers have ultimate responsibility for our FOI response handling. As such, they may clear drafts personally, or delegate that responsibility to officials.
- When a request is received, officials will:
  - find and collate requested information;
  - consider exemptions and the public interest test;
  - draft a response;
  - consult Internally and externally as appropriate;
  - seek advice/clearance from senior managers;
  - where the request is likely to be sensitive or there could be media interest, seek advice from SPADS/Comms; and
  - seek Ministerial clearance.
- If an applicant is dissatisfied with the way their request is dealt with, they can ask us for an internal review, which involves a different member of staff considering whether the original decision should stand in full, in part or be overturned.
- If, following that review, they remain dissatisfied they may then appeal to the Scottish Information Commissioner. The Commissioner’s decision is normally ‘final’ but may be appealed to the Court of Session on a point of law only.

### **Exemptions:**

There are a number of exemptions (table below), covering areas such as development of policy, national security and defence, law enforcement and commercial interests. Most are ‘non-absolute’ and therefore a public interest test has to be carried out to establish whether the information should be released.

If an absolute exemption applies, no public interest test applies - we do not have to release the information.

**The Public Interest test**

FOISA does not define the public interest. However, the Commissioner’s advice is that, where a qualified exemption exists, an authority must consider the competing arguments as to whether the public interest would be better served by disclosure or by withholding the information - in effect carrying out a ‘balancing exercise’ to determine where the public interest lies.

<b>Qualified Exemptions</b>	<b>Absolute Exemptions</b>
27 – Information intended for future publication	Section 25 – Information otherwise accessible
28 – Relations within the United Kingdom	Section 26 – Prohibitions on disclosure
29 – Formulation of Scottish Administration policy etc.	Section 36(2) – Confidentiality
30 – Prejudice to effective conduct of public affairs	Section 37 – Court records, etc.
31 – National security and defence	Section 38(1)(a) – where a requester has asked for their own personal data
32 - International relations	Section 38(1)(b) where disclosure would breach the Data Protection Act.
33 - Commercial interests and the economy	Section 38(1)(c) – Personal census information
34 – Investigations by Scottish public authorities and resulting proceedings	Section 38(1)(d) – A deceased person’s health record
35 – Law enforcement	
36(1) – Confidentiality	
38(1)(b) – Personal information	
39 – Health, safety and the environment	
40 – Audit functions	
41 – Communications with Her Majesty etc. and honours	

# **FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

## **INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH GOVERNMENT FOI PRACTICE**

### **NOTE ON THE INTERVENTION PROCESS**

#### **Introduction**

1. This note explains in detail the intervention process that the Scottish Information Commissioner (“the Commissioner”) is currently carrying out into Scottish Government FOI practice.

#### **Background**

2. The Commissioner is the independent public official responsible for promoting and enforcing Scotland's freedom of information law. He is appointed by Her Majesty the Queen, on the nomination of the Scottish Parliament, and serves for a fixed term of six years. The Commissioner's annual budget is provided by the Scottish Parliamentary Corporate Body.

3. The Commissioner's functions are set out in the Freedom of Information (Scotland) Act 2002 (“FOISA”). He is also given a number of statutory powers to help him discharge his functions. The exercise of his functions is not directed or controlled by the Scottish Ministers or by the Scottish Parliament.

#### **What is an intervention?**

4. The Commissioner's [enforcement policy](#) sets out his approach to enforcing the law on freedom of information in Scotland, including how he promotes good practice by public authorities. Section 43(3) of FOISA provides that the Commissioner may assess whether a Scottish public authority is following good practice, so this is one of his statutory functions.

5. The Commissioner refers to the process where he applies his enforcement policy (including in relation to good practice) as an “intervention”. There are four steps: identifying non-compliance, commissioning the intervention, fact-finding and suggesting (or requiring) action.

6. The current intervention is at the fact-finding, or assessment, phase, as the Commissioner indicated when he wrote to the Minister for Parliamentary Business on 2 February 2018. The planned interviews with Ministers, special advisers and staff form part of the assessment phase. The interviews will help the Commissioner to understand the Scottish Government's FOI practice and to make objective, evidence-based recommendations for improvement.

7. Once the interviews are complete, the Commissioner will consider all of the information he has obtained and prepare a report which will be shared in draft with the Scottish Government before it is published. It will set out his recommendations to improve Scottish Government FOI practice. The Scottish Government will be expected to agree an action plan with the Commissioner to implement the recommendations. He will then monitor the implementation of the action plan, potentially for up to a year.

#### **How do interventions work?**

8. The Commissioner has published the [procedures](#) that he follows when carrying out an intervention. There are four levels at which an intervention can take place, with Level 4 being the most serious. The Commissioner has characterised the levels as follows:

- Level 1: minor failures to follow good practice
- Level 2: ongoing failures by an authority to follow good practice in a specific area of practice
- Level 3: more serious or systemic failings which have been identified where the Commissioner does not consider the issue can be rectified without requiring the authority to put in place an action plan to address the issue
- Level 4: where an authority consistently fails or refuses to comply with FOI legislation or statutory guidance despite previous interventions by the Commissioner

9. The present intervention into Scottish Government FOI practice is at Level 3. While an intervention at Level 3 is a serious matter, interventions at Levels 1 to 3 offer an opportunity to work constructively with the Commissioner to improve FOI practice. He has emphasised that during an intervention, he aims to work closely with the public authority to identify what, if anything, has gone wrong, why it has gone wrong and identify steps to make it better.

10. As the Crown Office and Procurator Fiscal Service acknowledged following their experience of an intervention in 2016:

“We found it extremely helpful to discuss the challenges of dealing with what can be complex requests and were grateful for advice and resources which assisted in refining our processes. We are pleased with the substantial progress made.”

11. Where a public authority does not improve its performance as a result of a Level 3 intervention, the Commissioner may escalate matters to Level 4. At Level 4, the Commissioner’s focus shifts from working with the authority to using the full range of his statutory powers to achieve a resolution to the problem. This could include issuing a statutory practice recommendation or an enforcement notice specifying steps that the authority must take in order to comply with the law.

12. It is not in the Scottish Government’s interests for the Commissioner to escalate this intervention from Level 3 to Level 4. At Level 3, we have the opportunity to agree an action plan with the Commissioner to improve FOI practice. If matters escalate to Level 4, it is more likely that the Commissioner will impose requirements about the improvements that are needed by making an enforcement notice.

13. If a public authority fails to comply with a statutory enforcement notice, the Commissioner may then inform the Court of Session about that failure. The Court then has the power to deal with the authority as if it had committed a contempt of court. The adverse reputational consequences would be severe for any public authority. Indeed, the Commissioner’s annual report for 2016/17 notes that no authority has been referred to the Court since the introduction of FOI in 2005.

**[Redacted]**  
**FOI Unit**

**14 May 2018**

## SG PERFORMANCE IN RESPONDING TO FOI REQUESTS

Year	Number of requests received	Number of requests answered on time	Performance rate
2007	779	475	61%
2008	1260	946	75%
2009	1642	1308	80%
2010	1435	1208	84%
2011	1374	1130	82%
2012	1931	1471	76%
2013	2011	1479	74%
2014	2061	1591	77%
2015	2155	1780	83%
2016	2103	1559	76%
2017	3046	2441	83%

- In 2017, we received 3046 FOI requests - 41% more than our previous record of 2155 in 2015.
- We responded on time to 2441 of these - around 300 more than the requests received in either 2015 or 2016.
- We fell slightly short of our 85% target in 2017, largely due to a huge influx of requests from political researchers towards the end of the year (see requester information below).
- In 2018, our target for responding on time has risen to 90%.
- Despite a minor slip in March, due in part to the bad weather and travel difficulties, we are currently running at just over 92% requests being answered on time (though reviews consistently fall short).
- In 2012, we estimated that the average cost to the Scottish Government of answering a Freedom of Information request was £231 (with a review at £417 and an appeal at £1,250).
- At this level, the estimated cost to SG of answering the 3,046 requests received in 2017 was £703,626.

**From:** [Redacted] On Behalf Of Minister for Parliamentary Business

**Sent:** 14 May 2018 12:19

**To:** [Redacted] Minister for Parliamentary Business

**Cc:** Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted] CUKR : Freedom of Information Unit; Cabinet Secretariat inbox **Subject:** RE:

[Redacted]

Thanks for this, Mr FitzPatrick is content.

[Redacted]

All

After a suggestion from [Redacted], I have squeezed in a line confirming SPADs and staff are also being briefed and receiving FOU Unit support.

[Redacted]

---

**From:** [Redacted]

**Sent:** 14 May 2018 07:33

**To:** Minister for Parliamentary Business

**Cc:** Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted]; CUKR : Freedom of Information Unit; Cabinet Secretariat inbox

**Subject:**

[Redacted]

As discussed, I attach a note covering (i) our improved response rates to FOI requests and (ii) interviews being carried out for the 2nd Commissioner intervention for Mr FitzPatrick's consideration.

[Redacted]

**From:** [Redacted]

**Sent:** 15 May 2018 11:18

**To:** Cabinet Secretary for Economy, Jobs and Fair Work

**Cc:** DG Economy; [Redacted]; Brannen R (Roy); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted]; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Maxwell S (Stewart) (Special Adviser); Somers J (John); [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

**PS/Cabinet Secretary for the Economy, Jobs and Fair Work**

Further to [Redacted] minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with the Cabinet Secretary. I also attach a note highlighting the performance in replying to FOI requests of Directorates within the Cabinet Secretary's portfolio responsibility over the period of the Commissioner's intervention on our performance.

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

**From:** [Redacted]

**Sent:** 15 May 2018 11:01

**To:** Cabinet Secretary for Health and Sport

**Cc:** Minister for Public Health and Sport; DG Health & Social Care; Allison B (Barbara); Scott A (Andrew) Dr (Personal Mailbox); Rogers DA (David) (Strategy and Constitution Director); Rogers DA (David) (Strategy and Constitution Director); [Redacted] Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Hutchison D (David); Somers J (John); [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

PS/Cabinet Secretary for Health and Sport

Further to [Redacted] minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with the Cabinet Secretary. I also attach a note highlighting the performance in replying to FOI requests of Directorates within the Cabinet Secretary's portfolio responsibility over the period of the Commissioner's intervention on our performance.

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

**From:** [Redacted]

**Sent:** 15 May 2018 11:18

**To:** Maxwell S (Stewart) (Special Adviser)

**Cc:** DG Economy; McAllan M (Mary); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted] Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Somers J (John); [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

Stewart,

Further to [Redacted] minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with the you.

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

**From:** [Redacted]

**Sent:** 16 May 2018 13:42

**To:** McAllister C (Colin)

**Cc:** DG Education, Communities & Justice; DG Constitution and External Affairs; DG Scottish Exchequer Mailbox; Robertson FMG (Fiona) (Director of Learning); Rogers DA (David) (Strategy and Constitution Director); Director of Budget and Sustainability; Davidson I (Ian) [Redacted] Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Somers J (John); [Redacted] Cameron DA (Donald)

**Subject:** Commissioner intervention

**Colin**

**On behalf of [Redacted] , please see the attached minute.**

**Thanks**

**[Redacted]**

**FOI Unit**

**From:** [Redacted]

**Sent:** 16 May 2018 23:41

**To:** Hutchison D (David)

**Cc:** DG Health & Social Care; Hunter A (Alan); Director of Population Health; Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted] Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Somers J (John); [Redacted]

**Subject:** FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

Davie,

Further to [Redacted] minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with you.

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

**From: Cabinet Secretary for Culture, Tourism and External Affairs**

**Sent: 16 May 2018 16:54**

**To: [Redacted]**

**Cc: Rogers DA (David) (Strategy and Constitution Director); Pryce JM (Jonathan); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); Somers J (John); Lloyd E (Elizabeth); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; Cameron DA (Donald); Glass G (Gill); CUKR : Freedom of Information Unit**

**Subject: Re: FOI: Scottish Information Commissioner's Intervention**

Thanks [Redacted]

Ms Hyslop has noted

Kind regards

[Redacted]

Sent from my BlackBerry 10 smartphone.

**From: [Redacted]**

**Sent: Tuesday, 15 May 2018 16:06**

**To: Cabinet Secretary for Culture, Tourism and External Affairs; [Redacted]**

**Cc: Rogers DA (David) (Strategy and Constitution Director); Pryce JM (Jonathan); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); Somers J (John); Lloyd E (Elizabeth); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [Redacted] CUKR : Freedom of Information Unit**

**Subject: RE: FOI: Scottish Information Commissioner's Intervention**

[Redacted]

As a brief follow up, it may be worth noting that since early July 2017 we have published information released in response to information requests on the SG website - with publication following as soon as possible after the response is issued.

However, the decision to do this was not of itself aimed at addressing the concerns of journalists but in the interests of wider transparency objectives (and indeed, at the time, produced some negative reaction from journalists).

Thanks

[Redacted]

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**From:** [Redacted]

**Sent:** 15 May 2018 10:14

**To:** Cabinet Secretary for Culture, Tourism and External Affairs; [Redacted]

**Cc:** Rogers DA (David) (Strategy and Constitution Director); Pryce JM (Jonathan); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); Somers J (John); Lloyd E (Elizabeth); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [Redacted] CUKR : Freedom of Information Unit

**Subject:** RE: FOI: Scottish Information Commissioner's Intervention

[Redacted]

The attached information may assist. It contains the Open Letter and the prepared responses (both letter and responses taken from briefing for last June's FOI debates).

There have been no changes in practice. The outcome of the current intervention process will determine what changes we may wish to make – or be required to make by the Scottish Information Commissioner.

[Redacted]

---

**From:** Miceli R (Rebecca) On Behalf Of Cabinet Secretary for Culture, Tourism and External Affairs

**Sent:** 15 May 2018 09:45

**To:** [Redacted] Cabinet Secretary for Culture, Tourism and External Affairs

**Cc:** Rogers DA (David) (Strategy and Constitution Director); Pryce JM (Jonathan); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); Somers J (John); Lloyd E (Elizabeth); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [Redacted] CUKR : Freedom of Information Unit

**Subject:** RE: FOI: Scottish Information Commissioner's Intervention

Thanks [Redacted]

Ms Hyslop has noted and has asked for info about the journalists complaint i.e what it is and are there any practice changes she should be aware of?

Kind regards

[Redacted]

[Redacted] Assistant Private Secretary (Diary)

Office of Fiona Hyslop, Cabinet Secretary for Culture, Tourism and External Affairs

[Redacted]

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**From:** [Redacted]

**Sent:** 14 May 2018 16:53

**To:** Cabinet Secretary for Culture, Tourism and External Affairs

**Cc:** Rogers DA (David) (Strategy and Constitution Director); Pryce JM (Jonathan); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); Somers J (John); Lloyd E (Elizabeth); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [Redacted] CUKR : Freedom of Information Unit

**Subject:** RE: FOI: Scottish Information Commissioner's Intervention

[Redacted]

Thank you.

Please do not hesitate to contact me should Ms Hyslop have any questions.

[Redacted]

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**From:** [Redacted] On Behalf Of Cabinet Secretary for Culture, Tourism and External Affairs

**Sent:** 14 May 2018 14:16

**To:** [Redacted]

**Cc:** Deputy First Minister and Cabinet Secretary for Education and Skills; Cabinet Secretary for Culture, Tourism and External Affairs; Cabinet Secretary for Economy, Jobs and Fair Work; Cabinet Secretary for Health and Sport; First Minister; Minister for Parliamentary Business; Minister for Public Health and Sport; Lord Advocate; Somers J (John); Permanent Secretary; Rogers DA (David) (Strategy and Constitution Director); Cackette PH (Paul); Allison B (Barbara); Richards N (Nicola); Davidson I (Ian) (CUKR); Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McFarlane J (John); Hutchison D (David); Maxwell S (Stewart) (Special Adviser); McAllister C (Colin); Glass G (Gill); Duncan A (Alison); Beattie C (Caroline); Brady G (Gillian); [Redacted] CUKR : Freedom of Information Unit; Cabinet Secretary for Culture, Tourism and External Affairs

**Subject:** FW: FOI: Scottish Information Commissioner's Intervention

[Redacted]

Ms Hyslop has noted.

Regards,

[Redacted]

Assistant Private Secretary (Correspondence)

Office of Fiona Hyslop, Cabinet Secretary for Culture, Tourism and External Affairs

Scottish Government, St Andrew's House, Regent Road, Edinburgh, EH1 3DG | [www.gov.scot](http://www.gov.scot)

From: [Redacted]

Sent: 17 May 2018 15:21

To: [Redacted]

Cc: DG Economy; DG Health & Social Care; Hunter A (Alan); Gillespie G (Gary); McAllan M (Mary); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); [Redacted] Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; Somers J (John); [Redacted]

Subject: FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

[Redacted]

Further to my minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with you.

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

From: [Redacted]

Sent: 17 May 2018 12:38

To: Lloyd E (Elizabeth)

Cc: DG Constitution and External Affairs; DG Organisational Development & Operations; Allison B (Barbara); Rogers DA (David) (Strategy and Constitution Director); Watt K (Karen) (Director for External Affairs); Davidson I (Ian) (CUKR); [Redacted] Bowman K (Katy); Nicolson S (Stuart) Special Adviser; Somers J (John); [Redacted]

Subject: FOI - intervention by Scottish Information Commissioner - interview - information about individual cases

Liz,

Further to [Redacted] minute of 11 May, I attach a minute detailing the individual cases that the Commissioner proposes to discuss with you.

Happy to discuss.

[Redacted]

[Redacted] Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

From: [Redacted]  
Sent: 07 June 2018 16:24  
To: Minister for Parliamentary Business  
Cc: Davidson I (Ian) (CUKR); [Redacted]

Subject: Ministerial statement

[Redacted]

Following request for sight of early draft of statement for next Wednesday, please see attached.

Very much work in progress but views welcome.

Q&A will also be prepared.

[Redacted]

## **Ministerial Statement**

[Redacted]

From: Minister for Parliamentary Business

Sent: 07 June 2018 20:05

To: [Redacted]

Cc: Davidson I (Ian) (CUKR); [Redacted] (FOI); Lloyd E (Elizabeth); [Redacted]; McFarlane J (John)

Subject: FW: Ministerial Statement copy b.docx

[Redacted]

Mr FitzPatrick [Redacted]

Thanks

[Redacted]

Sent with BlackBerry Work ([www.blackberry.com](http://www.blackberry.com))

From: [Redacted] On Behalf Of Minister for Parliamentary Business

Sent: 11 June 2018 14:12

To: [Redacted]; Minister for Parliamentary Business

Cc: Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) [Redacted] Hynd JS (James); Cabinet Secretary for Communities, Social Security and Equalities; Permanent Secretary; Somers J (John)

Subject: RE: Draft note - SIC intervention report

[Redacted]

Apologies for the delay, Mr FitzPatrick is content with this [Redacted] note to update Cabinet tomorrow. thanks

[Redacted]

[Redacted] Private Secretary to Minister for Parliamentary Business|T4.21, Scottish Parliament|Redacted]

All e-mails and attachments sent by a Ministerial Private Office to any other official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments.

Scottish Ministers, Special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

From: [Redacted]

Sent: 07 June 2018 11:28

To: Minister for Parliamentary Business

Cc: Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) [Redacted]

Subject: Draft note - SIC intervention report

PS/Minister for Parliamentary Business

We have prepared a draft note (attached) in relation to the Scottish Information Commissioner's intervention report, which is expected to be published on Tuesday 12 June.

It may need some adjustment as the timings for the Minister's statement become clearer, but we would be grateful for views about whether this is along the right lines.

Happy to discuss.

[Redacted]

[Redacted] Head of Policy | Freedom of Information Unit

Scottish Government | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

From: [Redacted]

Sent: 13 June 2018 17:16

To: DL Cabinet Secretaries; DL All Scottish Government Ministers

Cc: Executive Team; Directors (SST); Rogers DA (David) (Strategy and Constitution Director); Davidson I (Ian) (CUKR); CUKR : Freedom of Information Unit; Lloyd E (Elizabeth); Nicolson S (Stuart) Special Adviser; McAllister C (Colin); McFarlane J (John); [Redacted] Booth J (John); [Redacted]; Corporate Communications; News Desk

Subject: Scottish Information Commissioner: Intervention Report

For information purposes, please see the attached minute concerning the publication today of the Scottish Information Commissioner's Intervention Report.

Regards

[Redacted]

FOI Unit

From: [Redacted]  
FOI Unit  
13 June 2018

First Minister  
Deputy First Minister  
Cabinet Secretaries  
Ministers

## INTERVENTION REPORT BY THE SCOTTISH INFORMATION COMMISSIONER

### Purpose

1. For information, you will wish to be aware of the publication earlier today of an Intervention Report by the Scottish Information Commissioner into the Scottish Government's performance and policies for dealing with request for information under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRs).
2. The report contains a series of recommendations, summarised below and contained in full at the **Annex A** of this minute.
3. The Minister for Parliamentary Business made a statement in the Scottish Parliament earlier today in response to the report.
4. The news release issued earlier today forms **Annex B**.

### Priority

5. Routine.

### Background

6. On 21<sup>st</sup> June 2017, Parliament passed a motion that was critical of the Scottish Government's handling of FOI requests. The motion called for an independent inquiry into the way that the Scottish Government deals with requests and for post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. The Scottish Government supported that motion.
7. On 11 September, the Standards, Procedures and Public Appointments Committee agreed that the Scottish Information Commissioner, who is independent of government and holds extensive statutory powers of regulation and enforcement, might be an appropriate person to undertake an independent inquiry.

### Report findings

8. While noting the positive improvements in performance in the last year – and the range of measures being put in place aimed at embedding effective FOI performance across the Scottish Government, the Commissioner also raises a number of matters of concern.

## OFFICIAL SENSITIVE

9. These primarily relate to the more involved clearance process generally followed in the handling of requests by the media (as well as political researchers), poor record keeping in respect of how individual requests are dealt with and issues around staff training and knowledge.

10. The Commissioner recommends 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.

11. We have accepted the Commissioner's recommendations.

### **Next Steps**

12. Officials will now give full consideration to the Commissioner's recommendations. However, with immediate effect we have updated guidance on the clearance process to emphasise that consideration of the degree of clearance required should be based on the information that is requested, rather than the identity of the requester. This already starts to address recommendation 3.

**OFFICIAL SENSITIVE**

13. The introduction of the MiCase corporate records system anticipated for rollout from August, as well as the upgrade to Objective in the autumn, should in part address recommendations 4 and 6.

14. We are now required to develop a draft action plan to address the recommendation set out in the Commissioner's report by 13 September. Timescales for compliance with the plan will then be agreed with the Commissioner.

**[Redacted]**  
FOI Unit

13 June 2018

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness

Executive Team  
Directors (SST)  
Rogers DA (David) (Strategy and Constitution Director)  
Davidson I (Ian) (CUKR)  
CUKR: Freedom of Information Unit  
Lloyd E (Elizabeth)  
Nicolson S (Stuart) Special Adviser  
McAllister C (Colin)  
McFarlane J (John)  
[Redacted]  
Booth J (John)  
[Redacted]  
Corporate Communications  
News Desk

## Scottish Information Commissioner 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)**