

**From:** Nicolson S (Stuart) Special Adviser  
**Sent:** 01 June 2017 09:54  
**To:** [redacted]; [redacted]; Minister for Parliamentary Business <MinisterPB@gov.scot>  
**Cc:** Cabinet Secretary for Finance and the Constitution <CabSecFC@gov.scot>; [redacted]; News Desk <Newsdesk@gov.scot>; Corporate Communications <CorporateCommunications@gov.scot>; [redacted]; [redacted]; Booth J (John) <John.Booth@gov.scot>; Lloyd E (Elizabeth) <Elizabeth.Lloyd@gov.scot>; McAllister C (Colin) <Colin.McAllister@gov.scot>; Ingebrigtsen R (Ross) <Ross.Ingebrigtsen@gov.scot>; [redacted]; FoI SpAds PO <FoI.SpAdsPO@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; [redacted]; [redacted]; Davidson I (Ian) (CUKR) <Ian.Davidson2@gov.scot>; [redacted]; [redacted]; [redacted]; Thomson KAL (Ken) <Ken.Thomson@gov.scot>; Rogers DA (David) (Strategy and Constitution Director) <David.Rogers@gov.scot>; [redacted]  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

Thanks – SG comment seems to be up now.

**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]; Booth J (John); 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]; [redacted]; [redacted]; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [redacted]  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

I have complained about the lack of a SG line in this copy – given it was sent within two hours and prior to the journalist's stated deadline – and been assured the copy will be updated as soon as possible.

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

[redacted]  
Newsdesk manager  
Scottish Government  
St Andrew's House, Edinburgh, EH1 3DG  
0131 244 [redacted] | [redacted]

**From:** [redacted]  
**Sent:** 01 June 2017 09:32  
**To:** Minister for Parliamentary Business  
**Cc:** Cabinet Secretary for Finance and the Constitution; MacLarty L (Leanna); News Desk; Corporate [redacted]  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

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

**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]; [redacted]; Booth J (John); 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]; [redacted]; [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]

[redacted – out of scope]

[redacted – out of scope]

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]**; **[redacted]**;

**[redacted]**; **[redacted]**; **[redacted]**; **[redacted]**; **[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.

Included are comments on the journalists email circulated at 11.45 (new annex F).

For awareness, I also attach a briefing we've been made aware of from the Campaign for Freedom of Information in Scotland ahead of today's debate (the Campaign's points are variously dealt with in the speech/briefing).

**[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 made 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 <b>Annex D:</b> Responses to concerns in Open Letter <b>Annex E:</b> Response to CFoIS Agenda for Action <b>Annex F:</b> Responses to specific complaints from journalists <b>Annex G:</b> Guidance on recording of information <b>Annex H:</b> [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

Billy Briggs, Fiona Davidson, Rob Edwards, Peter Geoghegan, Rachel Hamada and Layla-Roxanne Hill (The Ferret)

Angela Haggerty, Nathanael Williams, David Jamieson and Michael Gray (CommonSpace)

Severin Carrell (The Guardian)

James McEnaney (freelance)

Daniel Sanderson (The Times)

Andrew Picken (Sunday Post)

Chris Diamond on behalf of the BBC NUJ chapel

Bernard Ponsonby on behalf of the STV NUJ chapel

David Clegg (Daily Record)

Michael Blackley (Daily Mail Scotland)

Paul Hutcheon (Sunday Herald)

Tom Gordon (The Herald)

Kieran Andrews (The Courier)

Simon Johnson (The Telegraph)

Ian Dunn (Scottish Catholic Observer)

## Responses to concerns in Open Letter

1) Information requests being repeatedly delayed significantly beyond the 20 working day deadline without clear justification or warning;

A) When they know that they are not going to be able to issue the response to an FOI request by the deadline, officials routinely send a holding response to notify the requester of the delay and, where possible, we give an indication of when we expect to be able to respond.

2) Emails asking for an update on answering requests in cases of delays beyond the legal deadline being routinely ignored by officials;

A) Officials do not routinely ignore e-mails. The Scottish Government receives many thousands of e-mails every day, so it is possible that an e-mail may occasionally be overlooked or not answered as soon as we would like.

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;

A) There is certainly no policy of delaying responses so that requests only get answered at review stage. As I have already said, we take our responsibility for FOI seriously, and we answer the large majority of requests on time and in full.

When a requester has asked for a review because their initial request was not answered by the deadline, the Scottish Information Commissioner takes the view that the Scottish Government should not have the opportunity to review its response if the requester wasn't happy with it. Instead, the Commissioner said that the requester should be able to go straight to appeal. In the Commissioner's view, removing the ability to have a second review avoids a potential cause of further delay and enables the requester to get a final decision more quickly.

4) Scottish government officials taking control of requests to other government agencies without the consent of the applicant;

A) This is simply not true. The Scottish Government does not take control of requests to other government bodies. In any case, the FOI Act does not allow requests to be transferred from one public authority to another, with or without the consent of the applicant.

It may help if I explain that the Scottish Government and its agencies\* are one public authority for the purposes of the FOI Act. A recent Decision [No. 002/2016] from the Scottish Information Commissioner accepted this and agreed that the Government is

entitled to decide whether staff in one of its agencies or in the core Scottish Government is best placed to answer a request. Our FOI requests are generally answered by whoever has the main part of the information which has been requested.

- \* Accountant in Bankruptcy
- Disclosure Scotland
- Education Scotland
- Scottish Prison Service
- Scottish Public Pensions Agency
- Student Awards Agency for Scotland
- Transport Scotland

5) Requests being blocked or refused for tenuous reasons;

A) The FOI Act only allows us to withhold information where an exemption applies, or there is some other valid reason for refusal such as the Scottish Government doesn't have the information, or complying with the request would exceed the upper cost limit. The Government applies these provisions of the Act rigorously but it is inevitable that in some cases the applicant will not agree with our decision. That is why applicants have the right to request an internal review and then to appeal to the Scottish Information Commissioner. The Commissioner's decision is final and the Scottish Government always complies with those decisions.

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

A) As our guidance explains, Special Advisers do not screen FOI requests or responses. Nor do they handle responses – responses are always prepared by Scottish Government officials. Special Advisers sometimes provide comments on draft responses, as do other officials who have knowledge of, or an interest in, the information which has been requested.

## Response to CFoIS Agenda for Action

1. Accept that the right to access information is a human right.

*I acknowledge this is a developing area of case law. We consider the ECHR to be complementary to existing domestic access to information law - a protection against organisations imposing arbitrary barriers preventing access to information. And more broadly, all Scottish legislation must comply with the ECHR.*

2. Restore the public's right to access information to at least its 2005 status eg restore FoI rights to 15,000 housing association tenants whose homes were owned by local authorities in 2005.

*Schedule 1 of the Act has been revised on numerous occasions as new bodies have been created (and others dissolved). The Act has also been extended to a variety of organisations undertaking functions of a public nature. Returning to 2005 coverage would remove all these progressive changes. Separately, consultation has taken place on extending the Act to RSLs. I anticipate formally responding to the consultation in the autumn.*

3. Restore the operation of the Scottish Public Information Forum to enable effective engagement with stakeholders, and to maintain and develop an enforceable right to access information which meets the public's expectations.

*SPIF is not itself a Government body – but one of many practitioner networks. Due to lack of interest – including from the Campaign for Freedom of Information in Scotland – the Forum did not meet for some years. However, I note SPIF has now been re-established. While unable to attend May's meeting, Scottish Government officials regularly attend numerous FOI stakeholder and practitioner events.*

4. Extend the right to access information to reflect changes in public service delivery in Scotland e.g. to voluntary organisations and RSLs.

*We take an incremental approach to extending the Act – allowing for statutory consultation and consideration of all relevant issues. The Act has been extended to a range of organisations including certain arm's length trusts, private prison contractors and independent special schools.*

5. Undertake an audit of all arms-length external organisations (ALEOs) and catalogue their functions, to enable informed decision making about the coverage and operation of FoISA.

*While there are no plans for such an audit we are happy to consider the case for extending the Act to ALEOs (in addition to those already covered) as part of our incremental approach to extending coverage.*

6. Quickly extend the coverage of FoISA to all known ALEOs not already included, all public-sector organisations and others delivering services of a public nature.

*As noted above, we take an incremental approach to extending the Act – allowing for statutory consultation and consultation of all relevant issues – including function.*

7. Agree it is the function delivered that requires FoISA coverage. Adopting this principle will ensure consistency in the coverage of FoISA.

*As set out in the legislation, function is critical in any decision on whether the Act can be extended to an organisation.*

8. Maintain the principle that FoISA obligations apply equally to all organisations covered [noting criticism of Time for Compliance Regulations introducing a two-tier approach].

*All organisations subject to FOISA must comply with the terms of the legislation. The Time for Compliance Regulations are a pragmatic response to issues raised during consultation on extending FOISA to schools and address concerns raised about responding to requests when schools are closed during holiday periods. Parallel revisions to the Code of Practice emphasise the importance of all authorities responding promptly and grant-aided and independent special schools should still seek to respond to requests during school holidays if appropriate staff are available. In essence, we need to ensure legislation works – for both requestor and authority.*

9. Reject any introduction of a new category of ‘core’ public organisations as a way of diluting the effectiveness of FoISA.

*The Act is extended on the basis of ‘function’ – as set out in the legislation.*

10. Review the operation of FoISA to ensure our enforceable right to access information remains effective in delivering open, transparent and accountable government and public services.

*We keep the legislation under review and make incremental changes to it, such as extending coverage, reducing the lifespan of exemptions and strengthening the ability to prosecute for committing an offence. I am not aware of significant demand for far reaching reform of the Act; however, we welcome any proposals aimed at improving the operation of the Act in the interests of both requestors and authorities.*

Introduction of a purpose clause (called for by the Campaign)

*Introducing a purpose clause to FOISA, by definition, would require new legislation. I believe the purpose of FOISA is perfectly clear. As set out at section 1(1) – A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.*

## Responses to specific complaints from journalists

### Rob Edwards, The Ferret

In a decision in March 2017 the then Scottish Information Commissioner, Rosemary Agnew, criticised Scottish ministers for their “poor” approach to freedom of information law. There was “cause for serious concern” in the way the Scottish government handled a request by The Ferret for information about the status of beavers in Scotland, she said. Environmental information rules had been broken, officials delayed responded for five months and failed to provide “reasonable advice and assistance”, she argued. She also described their record-keeping system as “disparate” and “unhelpful”. Further details here: <https://theferret.scot/scottish-ministers-freedom-information-beavers/>

*There isn't time today to discuss the detail of specific cases like this but I am happy to follow this up afterwards.*

\*\*\*\*\*

In a decision in September 2016 the then Scottish Information Commissioner, Rosemary Agnew criticised Scottish ministers for being “unnecessarily pedantic” and taking an “overly narrow interpretation” when they refused to release information on proposed conservation areas for harbour porpoises. She said that the Scottish government had breached environmental information regulations by wrongly saying that it did not hold the information requested, and failed to provide “appropriate advice and assistance.” Further details here: <https://dropping.theferret.scot/freedom-information-porpoises-moray-firth/>

*There isn't time today to discuss the detail of specific cases like this but I am happy to follow this up afterwards.*

\*\*\*\*\*

In an interview with The Ferret in April 2017 just before she stepped down as commissioner, Agnew criticised the behaviour of Scottish ministers on freedom of information as “rude” and “totally unacceptable”. She has given ministers six months to make improvements, and will respond with “the full force of the law” if they fail. “I wouldn't say I'm slapping them yet, but I'm definitely threatening to slap them hard,” she said. Further details here: <https://theferret.scot/information-watchdog-scottish-ministers/>

*As I said earlier, I recognise that our performance in answering requests on time is not good enough and we are working with the Commissioner to meet the standards expected of us.*

**James McEnaney, freelance journalist published by CommonSpace, the National and Daily Record**

In September 2015 I submitted an FOI request to the Scottish government asking them to release the written advice which had informed their decision to introduce a system of national standardised testing in schools. The government refused to release the advice (a decision overturned by the Scottish Information Commissioner) but a subsequent request confirmed that a series of meetings had been held which led to the development of this policy. In the case of one of these meetings, then Cabinet Secretary for Education Angela Constance described it as "extremely helpful and informative." These meetings - of which there were 11 between 14 May 2015 and 26 August 2015 - clearly had a direct impact upon the development of education policy but were, nonetheless, designated as informal and, as a consequence, the government advised that no minutes of the discussions were taken.

<https://www.commonspace.scot/articles/2925/exclusive-the-four-emails-that-led-to-scotgov-s-controversial-standardised-testing-plan>

*There isn't time today to discuss the detail of specific cases like this but I am happy to follow this up afterwards.*

\*\*\*\*\*

In January 2017 I submitted an FOI request to the Scottish government asking them to release details of communications and meetings between the government and the Hometown Foundation, a lobbying organisation seeking to establish 'autonomous schools' in Scotland. I also asked that, where no minutes for such meetings existed, that this be made clear in the government's response. The government released redacted copies of emails between the two parties and also confirmed that two meetings took place: the first involved Cabinet Secretary for Education John Swinney (on 25 October, 2016) and the second involved his special adviser, Colin McAllister (on 21 November, 2016).

These meetings took place during the course of the Scottish Government's school governance review but, once again, the government advised that these meetings were informal and that no minutes had therefore been taken. At the review stage I pointed out that the material released strongly suggested that some sort of written record of the meetings did exist, which the government then conceded was the case. Consequently, a single, brief, handwritten record of the meeting (which links the discussions taking place in the meeting to the ongoing school governance review) was released. The review confirmed that no minutes of either meeting existed.

<https://jmcemedia.wordpress.com/2017/02/11/swinney-in-secret-talks-with-education-lobbyists/>

*There isn't time today to discuss the detail of specific cases like this but I am happy to follow this up afterwards.*

## Severin Carrell, The Guardian

In December 2015, the Scottish government abruptly stopped publishing FOI request responses on its disclosure log on the government website, which makes it far harder for the public and professionals to keep track of those responses which are published after release.

The introduction to that log continues to imply it is still in operation. It says: The government's policy is that where we release information in response to a FOI request we recognise that it will usually be of interest to the wider public in addition to the original applicant.

However, no FOI request response has been published on that log in the last 18 months. Even so, journalists have had experience of the Scottish government on occasion publishing responses to politically sensitive stories in other places on its website since December 2015.

<http://www.gov.scot/About/Information/FOI/Disclosures>

*I am aware of the concerns about the disclosure log. Work is ongoing to resolve this situation as part of the development of the Scottish Government's new website.*

\*\*\*\*\*

The Guardian submitted a series of FOI requests regarding the operations and policy background to the various private finance initiative schemes run by the Scottish Futures Trust on behalf of the Scottish government, its executive agencies and other public bodies, which involve long-term spending commitments worth billions of pounds. Some requests dealt specifically with the SFT's errors in trying to make these schemes "off balance sheet" under EU state procurement rules.

The SFT and Scottish government repeatedly failed to respond to information requests on time and then regularly failed to answer requests for an update on progress. They granted themselves extensions to reply deadlines well beyond the 20-day limit under the Freedom of Information Scotland Act without offering any further target reply dates.

The Scottish government also refused to allow a similar request directly to Transport Scotland to be answered by Transport Scotland, and merged the two separate requests into one, which was then controlled by the Scottish government.

The Guardian had to use the internal review procedures to press these bodies to reply, making it then impossible to use that review process to improve on the often incomplete information which was then eventually released. That meant under the FOI(S)A rules, the only way to get an improved and more comprehensive disclosure was to use the full appeals process with the Scottish Information Commissioner, further delaying the answer and shifting the costs burden of doing so onto another public agency.

In contrast, the Office for National Statistics in Newport, Wales, volunteered unsolicited updates when it ran late answering very similar FOI requests on the EU state procurement rules question. Its FOI unit gave me new target dates and replied in good time and in detail to all other requests from the Guardian for further information.

*There isn't time today to discuss the detail of specific cases like these but I am happy to follow this up afterwards.*

*I cannot, however, comment on the SFT's handling of FOI requests made to them because they are a separate authority from the Scottish Government for the purposes of FOI – that is a matter for the Scottish Information Commissioner*

*In relation to the Guardian's request to Transport Scotland, it may help if I explain that the Scottish Government and its agencies\* are one public authority for the purposes of the FOI Act. A recent Decision [No. 002/2016] from the Scottish Information Commissioner accepted this and agreed that the Government is entitled to decide whether staff in one of its agencies or in the core Scottish Government is best placed to answer a request. Our FOI requests are generally answered by whoever has the main part of the information which has been requested.*

*\* Accountant in Bankruptcy  
Disclosure Scotland  
Education Scotland  
Scottish Prison Service  
Scottish Public Pensions Agency  
Student Awards Agency for Scotland  
Transport Scotland*

**Guidance for civil servants about when minutes of meetings, or any other records, should be kept of meetings involving Ministers**

A record should be kept of official meetings that deal with substantive government business. Private Offices should arrange for a record to be taken of meetings with outside interest groups, including lobbyists, that will set out the reasons for the meeting, the names of those attending and the interests represented (see Ministerial Code paragraph 4.22). Specific rules also apply to recording formal and informal discussions held during overseas visits (see Ministerial Code<sup>1</sup> paragraphs 9.14 to 9.16);

We would not generally take minutes of goodwill visits, hospitality events, or courtesy conversations where no policy decisions arise and where it may be sufficient to record within the official diary that the meeting has taken place.

Where a Minister is involved in a meeting, conversation or exchange with external organisations which raises substantive issues relating to Government decisions or contracts, and where no Private Secretary, adviser or official is present, they should inform their Private Office, who will arrange for the basic facts to be recorded (see Ministerial Code paragraph 4.23).

As a general rule, it should be the responsibility of accompanying officials to take an appropriate record of an event with a Minister. Notes of meetings should be agreed through the relevant Private Office and, once agreed, stored by the policy area. In many instances, the Private Secretary will simply record action points quickly after a meeting. This may be in advance or instead of a more substantial minute. Officials will be best placed to record technical matters. In all cases, care should be taken in deciding who to include on distribution and copy lists, with equal care needed in forwarding or passing papers to people who are not on those copy lists.

The appropriate policy or corporate support area (and not Private Office) is responsible for retaining and managing full and accurate official records, in line with records management guidance. Similarly, Cabinet Secretariat will hold the official record of all final Scottish Cabinet documents and decisions. However, Private Offices are responsible for providing policy and corporate colleagues with sufficient material to explain policy decisions, communicate views accurately, and demonstrate Ministerial accountability.

The Ministerial Code paragraphs 9.27 to 9.31, 10.18 and 10.19, provide guidance on contacts with commercial companies and meetings with external groups and the media, respectively.

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<sup>1</sup> Note: the Scottish Ministerial Code is published on the Scottish Government website at: <http://www.gov.scot/Publications/2016/08/1393>

[redacted]

**ISSUE:** Criticism of Scottish Government FOI performance

- The Scottish Information Commissioner has initiated an intervention process because she is concerned about the SG's performance in answering FOI requests on time. As a result we have agreed to a target of 85% of responses on time over the rest of 2017 and to provide monthly performance reports to the Commissioner. If we don't achieve this target, the Commissioner will consider formal enforcement action. We have also agreed to targets of 90% in 2018 and 95% by 2020.
- On 18 May, the Commissioner's office published all correspondence from the Commissioner to the Permanent Secretary about the intervention, in response to an FOI request by Tom Gordon.
- On 25 May, the Commissioner published Scottish public authorities' quarterly FOI performance statistics on her website. These show that the SG responded to 72% of FOI requests on time in Q1 2017.
- On 31 May, 22 journalists sent an open letter to the Scottish parliament selection panel for the Scottish Information Commissioner appointment complaining about delays in responding to their requests, and alleging that information requests by journalists are treated and managed differently.
- A topical PQ from Jamie Greene MSP on 6 June asked what action the SG takes to comply with FOI requests.
- On 13 June, there will be a member's debate in the Parliament on a motion by Neil Findlay MSP asking Parliament to note the journalists' open letter and which then comprehensively criticises the Scottish Government's approach to openness and transparency.
- SG performance compares badly with other Scottish public authorities; SG is ranked 18th out of comparable top 20 and 214th out of 228 which reported performance to the Scottish Information

[redacted]

- Scotland has the most open and far-reaching freedom of information laws in the UK. We take our responsibility for FOI seriously and in the large majority of cases we respond on time and in full.
- Our FOI legislation is widely recognised as being robust, and a recently published report from the former Scottish Information Commissioner noted that Scotland was ahead of the international field in this area.
- We are open and transparent about how we deal with cases – all our guidance is in the public domain.
- We are committed to improving response times and are working with the Commissioner to address her concerns, and ensure we continue to provide information in as timely a way as possible, while continuing to look for opportunities to proactively release information
- Performance over recent years (77% on time in 2014, 83% in 2015 and 76% in 2016) is considerably better than the 61% achieved under the last full year of the previous administration.
- The volume of requests has increased steadily. In 2015, the SG received a record 2,155 requests – an increase of 173% since 2007. In 2016, the SG received 2,100 requests, the second-highest total.
- Even so, a record 1,674 responses were issued on time in 2015 and 1,557 in 2016, compared to 684 responses on time in 2006.

- In recent months the numbers have 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

**Record:**

Year	Requests received	Responses on time	Responses with info released	Internal reviews	Appeals
2005	1800	1015 (75%)	69%	241	79
2006	1122	684 (61%)	63%	202	86
2007	779	475 (61%)	58%	187	60
2008	1312	979 (79%)	79%	109	56
2009	1769	1319 (79%)	73%	146	67
2010	1660	1298 (83%)	77%	118	41
2011	1628	1272 (82%)	73%	124	84
2012	1914	1373(75%)	74%	225	105
2013	2012	1364 (72%)	76%	223	123
2014	2061	1477 (76%)	72%	208	68
2015	2155	1675 (82%)	67%	213	53
2016	2100	1557 (76%)	67%	184	28
2017*	777	539 (72.7%)	58%	62	11

\*(1<sup>st</sup> quarter from 1 Jan to 31 Mar)

## Comparative Table (UK/Scottish FOI legislation)

	<b>UK: Freedom of Information Act 2000 (FOIA)</b>	<b>Scotland: Freedom of Information (Scotland) Act 2002 (FOISA)</b>
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 higher standard 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.**

The Freedom of Information (Scotland) Act 2002 provides significant and important rights to access information. We support the Act's underpinning principles by encouraging behaviour which is open, transparent and increases public participation.

#### **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.**

The Act must operate well for both members of the public and Scottish public authorities. We will keep the Act under review by promoting good practice within existing frameworks and considering extending coverage.

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

We will publicly demonstrate our commitment to open government and Freedom of Information by ensuring as much information as possible is made available without having to be asked.

#### **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.**

The Act provides for responsible openness. We will use the exemptions in the Act where appropriate to protect for instance the formulation or development of policy, Ministerial communications, or the uninhibited provision of advice.

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

We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum.

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

To support the effective application of the Act, we create and share information thoughtfully, deliberately and purposefully with a view to upholding the principles above.

## **Additional Background**

### **Magyar Helsinki Bizottsag vs Hungary judgement**

#### **Issue**

A decision in November 2016 of the Grand Chamber of the European Court of Human Rights found that, given the greater recognition now afforded to access to information at the international level, Article 10 ECHR must now be read as containing a free-standing right of access to information.

#### **Top line**

The Scottish Government currently considers the European Convention on Human Rights (ECHR) to be complementary to existing domestic access to information law. The terms of the Grand Chamber decision are currently being considered together with assessment of the impact on current FOI legislation and practice.

### **Scottish Information Commissioner's Special Report**

#### **Issue**

In April, the former Scottish Information Commissioner published a report '*Proactive Publication: time for a rethink*' promoting the advantages of making as much information openly accessible as possible without people having to ask for it.

#### **Top line**

We welcome the Commissioner's report and its recognition of the strength of Scotland's FOI regime. We also support the Commissioner's focus on the importance of proactive publication and will continue to look for opportunities to proactively release information wherever possible.

### **Review of FOISA**

#### **Issue**

Call for a review of the legislation.

#### **Top line**

We keep the legislation under review and make incremental changes to it, such as extending coverage, reducing the lifespan of exemptions and strengthening the ability to prosecute for committing an offence. I am not aware of significant demand for far reaching reform of the Act; however, we welcome any proposals aimed at improving the operation of the Act in the interests of both requestors and authorities.

## Selected Data

Table showing the numbers of requests submitted in the last 3 years by each of the journalists who signed the letter – and % issued on time. 8 of the signatories haven't made a request to the SG within the last 3 years.

<i>Requester</i>	<i>No of reqs</i>	<i>No late</i>	<i>% on time</i>
[redacted]	80	40	50%
[redacted]	0	0	
[redacted]	0	0	
[redacted]	1	1	0%
[redacted]	0	0	
[redacted]	41	21	49%
[redacted]	0	0	
[redacted]	2	1	50%
[redacted]	0	0	
[redacted]	1	0	100%
<b>James McEnaney</b>	20	3	85%
[redacted]	18	5	72%
[redacted]	0	0	
[redacted]	50	22	56%
[redacted]	8	2	75%
[redacted]	0	0	
[redacted]	79	37	53%
[redacted]	10	3	70%
[redacted]	0	0	
[redacted]	30	15	50%
[redacted]	9	5	44%
[redacted]	27	13	52%

### Researcher requests this year (as of 7 June)

[redacted] - 115 requests in 2017 (9.5% of all requests to SG)

[redacted] – 33 requests in 2017

[redacted] – 29 requests in 2017

**Media requests** (% where some or all of the information requested was provided (excluding 'information not held' and invalid requests, and those still in progress):

2014	2015	2016	2017 so far
67%	74%	77%	91%

**Welsh Government** released information in response to 79% of requests (2015 data). Compares to 85% for the **Scottish Government** (2016 data).



## **MSP Briefing for Scottish Parliamentary Debate S5M-05946 on 13<sup>th</sup> June 2017**

The Freedom of Information (Scotland) Act 2002 came into force on 1st January 2005 and after 12 years of operation in a fast-paced environment of technological change and diversification of public service delivery, it is now appropriate to consider reform. The best approach is for a Scottish Parliament Committee Inquiry into the regime's effectiveness in equally delivering an enforceable right to access information, identify what changes to make to ensure the right is returned to its 2005 strength as well as learning from international best practice to make the right robust and fit for purpose in modern Scotland. The Campaign for Freedom of Information in Scotland (CFoIS) urges MSPs to acknowledge the practical and operational issues of concern about FoISA and support the motion on Tuesday 13<sup>th</sup> June. At a time of huge concern about the prevalence and impact of 'fake news' on our democracy and society in general, it is critical to ensure the provenance of information and enable factual information to be easily available to inform the people.

FoISA is supported by the public: an Ipsos MORI omnibus poll in March 2017 for the Office of the Scottish Information Commissioner (OSIC) shows that, at 85%, public awareness of FOI rights in Scotland remains high, 94% agreed ("strongly" or "tend to") that it is important for the public to be able to access information 94% agreed ("strongly" or "tend to") that it is important for the public to be able to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.

CFoIS believes the public's right to see information has three distinct elements:

- Pro-active publication of information - as a matter of routine and analysing requests for information so you publish information the public wants.
- Right to make an information request and receive the information, quickly.
- Ability to enforce the right, which is the power and game changer in Scotland.

CFoIS recognises 'Fol' law operates in parallel with the separate but related 'open data agenda'. Whilst relevant and useful, we should not merge the two: one is about an individual enforceable right; one is about government policy controlling the flow, content and timing of published information. The former empowers people to receive information and the latter permits people to see what is disclosed and when. Therefore, they are quite different concepts.

### **Issues**

CFoIS provides this briefing to inform the MSP's debate and offers positive solutions to ensure access information rights remain robust in our modern democracy.

- 1. Introduce a purpose clause** The Scottish Parliament was established to be 'open, accessible and accountable' and FoISA is a vehicle to deliver on that

commitment. It is important to remember that the content and power of the Environmental Information (Scotland) Regulations is derived from a European Directive rather than being inspired by the Scottish Parliament. For both laws to be effective requires a culture and practice of openness. The culture and practice of openness now needs to be explicit in FoISA to make them a statutory obligation. By introducing a purpose clause to FoISA will make it clear what the Scottish Parliament expects of Ministers, Board Members, CEOs and staff in Scotland's 10,000 public bodies.

- 2. Deliver on promises** Currently our right to know is dependent on which organisation holds the information but people want to use their information right regardless of who is delivering the service funded by the public purse. The categories of organisations that receive public money which are not covered by FoISA include housing associations, all arms-length external organisations (ALEOs)<sup>1</sup>, professional associations undertaking a regulatory function eg the Law Society of Scotland, a strategic function such as CoSLA, and many private companies delivering services of a public nature eg health and social care. This situation has arisen despite promises made to Parliament by the then Deputy First Minister who said in 2002:

*We recognise that companies involved in major PPP/PFI contracts are delivering important public services. I assure members that companies that are involved in contracts of that nature—whether those relate to prisons or to matters such as road maintenance—are the sort of bodies that we want to add to schedule 1 after proper consultation.”* He also pointed out that *“Section 5(5), which requires ministers to consult, does not require us to wait for the appointment of the commissioner before doing so. Once the bill has received royal assent we can begin the consultation process.”*<sup>2</sup>

Some promises have been kept such as privately managed prisons have been covered since 1st September 2016. Promises have been made to include RSLs with the latest being that all would be covered by 1st April 2018 but the Scottish Government has failed to confirm. For simplicity and consistency, FoISA should apply to those organisations and companies delivering public services or services of a public nature. Transparency and openness should be part of doing business with the public sector so, for example, private contractors and voluntary organisations should also be covered by FoISA.

- 3. Pro-active publication of information** All along CFoIS has argued that a key impact of FoISA should be that loads more information should be pro-actively published. This would deliver the public's right to know as well as avoid FoI requests in the first place. The idea is simple: that public information should be available online to the public by default, except where there are demonstrated security and privacy risks and harms, or other reasonable and proportionate exemptions that exist under Scots law.
- 4. Operational Monitoring** – Bodies covered by FoISA should be required to evidence compliance with legal duties. This requires enhanced powers for

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<sup>1</sup> The Scottish Charity Regulator reported there are 68 ALEOs that are also charities.

<sup>2</sup> Stage 3 Debate Freedom of Information (Scotland) Bill 24<sup>th</sup> April 2002, columns 8208-8209 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4372&mode=pdf>

the OSIC as well as an integrated approach with the wider regulatory process eg Audit Scotland, Scottish Housing Regulator and the Scottish Charity Regulator. This would address tactics to undermine, omissions as well as prevent avoidance measures regarding legal compliance. Journalists report problems in the delivery of FoISA at a basic level such as failing to respond to requests within the maximum period of 20 working days. UNISON Scotland which represents most FoI staff in public bodies has feedback that they are struggling to cope with demands for information at a time of staffing cuts, particularly in administrative functions. There are also capacity issues in the departments which must provide the information. Staff identify resistance from senior management and poor awareness of FoI amongst some senior colleagues.<sup>3</sup> Systems should be in place to identify what information is produced so it can be pro-actively published, and the amount of newly published information quantified to measure progress. The need for up to date, high quality information to inform the design and delivery of public services has never been greater. In May 2012, the Accounts Commission published a report ‘Using cost information to improve performance: are you getting it right?’ which stressed the importance of quality and authoritative information in leading to better decision making.

5. **Ensure rights remain up to date** – the cost threshold for refusing requests must be increased to account for inflation over the last 12 years. Using the Scottish Government’s own figures, the financial threshold of £600 for refusing requests for information is now worth £785. Requestors are being denied information because of the £185 deficit.
6. **Timeline for Reform** The Scottish Government consultation on whether to add RSLs effective from 1<sup>st</sup> April 2018 did not lead to decisive action and instead a statement has been promised in the Autumn. Importantly RSLs have 148 subsidiaries and CFoIS expects them to be covered too. Such an approach would be consistent with bringing all ALEOs under the scope of FoISA. The Scottish Government will report on its use of Section 5 powers on or before Tuesday 31<sup>st</sup> October 2017, as required by the Freedom of Information (Amendment) Scotland Act 2013<sup>4</sup> and that report will include an indication of any intention to exercise the power in the future. It is essential that the Scottish Parliament is clear about what categories or named bodies it believes should be included under FoISA and for the Scottish Government’s report to result in concrete, progressive action.
7. **Inequality** The ‘Time for Compliance (Scotland) Regulations 2016’ permit a maximum 60-day response time under FoISA to apply to independent and special schools, to accommodate holidays. Breaching the principle of a 20 working day response time was unwelcome and needs to be re-visited. Given that some of the most vulnerable children in Scotland go to these schools, the evaluation of its impact after one year needs to be considered carefully by the Scottish Parliament and we would expect the Regulations to be changed to respect the human rights of children and their families.
8. **Compliance with Human Rights Law** Cases at the European Court of Human Rights, particularly the Grand Chamber decision of *MAGYAR HELSINKI*

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<sup>3</sup> Minute of the Scottish Public Information Forum Meeting 12<sup>th</sup> May 2017

<sup>4</sup> Available at <http://www.legislation.gov.uk/asp/2013/2/2013-05-31>

BIZOTTSÁG v. HUNGARY<sup>5</sup> in November 2016 requires the Scottish Government to check if FoISA complies with the European Convention on Human Rights (ECHR), given its obligations under S57 of the Scotland Act 1998. This has been a developing area as in the case of the Hungarian Civil Liberties Union v. Hungary (2009), the European Court of Human Rights (ECtHR) found a violation of Article 10 and concluded that obstacles to hinder access to information of public interest might discourage the media and other public interest organisations from pursuing their vital role as “public watchdogs”.<sup>6</sup> Human Rights Impact Assessments should be undertaken as well as ‘Business Regulatory Impact Assessments’ on proposals for change.

## Conclusion

Scotland is a comparatively recent convert to FoI with the world’s first freedom of information law happening in Sweden in 1766<sup>7</sup> and since then many countries have adopted legislation such as US FOIA has a 50th Anniversary in 2017 and the Czech Republic adopted legislation in 2000. Many designated bodies in Scotland have delivered their legal obligations effectively but for some progress needs to be made.

According to the Scottish Government “The Act is widely recognised as playing a significant part in making Scotland a more open, transparent and accountable society”<sup>8</sup>. However, that progress will only be sustained if FoISA is amended to force more bodies to comply with freedom of information requests, for the law on processing and answering requests to be respected and for legal enforcement to be undertaken fairly and publicly to address failings and to serve as an example to other public authorities about the importance of legal compliance which also enhances organizational reputation.

One indication about the sinking of importance of FoISA is the Scottish Government’s abandonment of the Scottish Public Information Forum (SPIF). SPIF is included in the Scottish Government’s six FoI principles, published in 2007<sup>9</sup>, to maintain effective relationships with key stakeholders but had not met since 2010. CFoIS, with a grant from UNISON, reconvened SPIF in May 2017 as we understand stakeholder engagement provides a realistic assessment of what the challenges are for the public sector and the experiences of requestors. SPIF enables contacts to be made, the sharing of good practice, peer support and enables those who are newly covered by FoISA to learn from experienced officials. Due to the level of interest and attendance, the next meeting will be held at 2pm in GCVS on 28<sup>th</sup> September 2017, International Right to Know Day, and all MSPs are invited to attend and participate.

**For further information:** Carole Ewart, Convener CFoIS [cfoiscot@gmail.com](mailto:cfoiscot@gmail.com)

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<sup>5</sup> For further information on the decision issued on 8<sup>th</sup> November 2016 see <http://www.ijrcenter.org/2016/11/15/ecthr-government-obligated-to-impart-information-beneficial-to-public/>

<sup>6</sup> Judgment by the European Court of Human Rights (Second Section), case of Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05 of 14 April 2009

<sup>7</sup> The Freedom of Printing Act.13 Sweden’s new majority party in 1766 wanted to see the documents that the previous government had kept secret. ‘Thoughts on Civil Liberty’ by Peter Forsskal <http://www.peterforsskal.com/>

<sup>8</sup> ‘Freedom of Information legislation to be strengthened’ Scottish Govt News Release 31/05/2012

<sup>9</sup> Available at <http://www.gov.scot/About/Information/FOI/6principles>

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

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

**To:** Grove D (Doreen); Davidson I (Ian) (CUKR); [redacted]; Minister for Parliamentary Business

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

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

Ian / [redacted]

Mr FitzPatrick has noted the emails on this issue and has asked that we do not engage further with journalists other than issuing a response to the open letter.

thanks

[redacted]

[redacted] | Acting Private Secretary to Minister for Parliamentary Business | T4.21,  
Scottish Parliament | 0131 244 [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]; [redacted]; [redacted]; Booth J (John); Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [redacted]; FoI SpAds PO; Permanent Secretary; [redacted]; Nicolson S (Stuart) Special Adviser; [redacted]; [redacted]; [redacted]; [redacted]; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director); [redacted]; [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. I think a broader based discussion than the signatories to the open letter could potentially generate a more positive discussion than might otherwise happen. Working with the OGP network we could facilitate that.

[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]; [redacted]; Minister for Parliamentary Business

**Cc:** Cabinet Secretary for Finance and the Constitution; [redacted]; News Desk; Corporate Communications; [redacted]; [redacted]; [redacted]; Booth J (John); Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); [redacted]; FoI SpAds PO; Permanent Secretary;

**[redacted]**; Nicolson S (Stuart) Special Adviser; **[redacted]**; **[redacted]**; **[redacted]**;  
**[redacted]**; Thomson KAL (Ken); Rogers DA (David) (Strategy and Constitution Director);  
**[redacted]**; **[redacted]**  
**Subject:** RE: LINES TO CLEAR - Journalists letter re FOIs

**[redacted]**

Thank you for these comments. Whilst I recognise the points you are making I would not reach quite the same conclusions.

**[redacted]**

I'd be happy to discuss this further.

Ian

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

0131 244 **[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]**; **[redacted]**; **[redacted]**; Booth J (John); Lloyd E (Elizabeth); McAllister C (Colin); Ingebrigtsen R (Ross); **[redacted]**; FoI SpAds PO; Permanent Secretary; **[redacted]**; Nicolson S (Stuart) Special Adviser; **[redacted]**; **[redacted]**; **[redacted]**; **[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.*

He has indicated that, as is standard practice, the letter will be published on his website, although it does not appear to be there yet. Given this concerns journalists' complaints, it may generate interest once it is published.

I don't think we need to say much, given this is just the Commissioner explaining the next stage in the process, with which we will, of course, co-operate. My fist stab at a line:

Minister for Parliamentary Business, Joe FitzPatrick, said "I have been consistently clear that the Commissioner is the most appropriate person to undertake an independent inquiry of this nature. I will consider the Commissioner's letter carefully and the Scottish Government will co-operate fully with his intervention."

[redacted]

**From:** Sarah Hutchison [<mailto:shutchison@itspublicknowledge.info>]

**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**

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**Scottish Information Commissioner**

Kinburn Castle, Doubledykes Road  
St Andrews, KY16 9DS

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