

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.

FOI Unit has been liaising with People Directorate and SGLD and we will provide tailored advice to the different groups of people selected for interview. In the meantime, if any copy recipients would like to discuss, please do not hesitate to call me.

Regards

[redacted]

Dear **[redacted]**

Thank you for our phone call this morning. As you know, we hope to conclude the assessment phase of the intervention by the end of May if at all possible. We're now ready to give you the interview schedule. I appreciate that diaries are already very busy and it is going to be challenging to fit everything in. I've attached a **rough** outline of our availability over the next month to assist you and colleagues.

We'd be grateful if you could arrange a 45 minute interview for Daren with each of the following people please:

John Swinney, MSP	Deputy First Minister and Cabinet Secretary for Education and Skills
Shona Robison, MSP	Cabinet Secretary for Health and Sport
Fiona Hyslop, MSP	Cabinet Secretary for Culture, Tourism and External Affairs
Keith Brown, MSP	Cabinet Secretary for the Economy, Jobs and Fair Work
Liz Lloyd	First Minister's Chief of Staff
Davie Hutchison	Special Adviser
Colin McAllister	Special Adviser
Stewart Maxwell	Special Adviser
Stuart Nicolson	Special Adviser
[redacted]	Special Advisers' Office

Daren will be accompanied by George Will or Paul Mutch and he would be pleased if someone from the FOI Unit is in attendance.

Margaret and I will conduct additional interviews.

We'd both like to interview you and **[redacted]** together. I suggest we allow two hours for this as I expect we'll have a lot to talk about.

I plan to interview a number of officials (Margaret will help out where I can't):

- **[redacted]**, in his capacity as a former member of the FOI Unit (for one hour).
- individual Directors or Deputy Directors (names to be confirmed, 45 minutes for each interview)
- a small group of case handlers (names to be confirmed, one hour)
- a small group of reviewers (names to be confirmed, one hour)

I'll be accompanied by a colleague. In all cases, I'd be pleased if someone from the FOI Unit is in attendance.

I hope your meetings with Daren go well today and look forward to catching up soon.

Best wishes

Sarah

Sarah Hutchison
Head of Policy and Information

Scottish Information Commissioner

Kinburn Castle, Doubledykes Road
St Andrews, KY16 9DS

Tel: 01334 464621

Fax: 01334 464611

Email: shutchison@itspublicknowledge.info

Web: www.itspublicknowledge.info

Twitter: [@FOIScotland](https://twitter.com/FOIScotland)

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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: RE: FOI - intervention by Scottish Information Commissioner - interview with DFM - information about individual cases

[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 | Tel: 0131 244 [redacted] | Mob: [redacted] | Email: DFMCSE@gov.scot

From: [redacted]

Sent: 10 May 2018 16:43

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

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

Further to my email at 1604, I have searched the casefiles for the three cases in question. I have identified the undernoted documents that were sent to DFM for comment and responses to them.

Happy to discuss.

[redacted]

Undernote

[FOI/16/02132](#)

At request stage, two documents appear to be relevant:

- Submission to DFM seeking clearance for draft response to request (attachment 1)
- Response from DFM (attachment 2)

On review, the response appears to have been dealt with by special advisers without being sent for Ministerial clearance.

It does not appear that Ministerial clearance was sought in relation to the appeal.

However, a submission was put up, for information only, noting the outcome of the appeal (attachment 3).

[FOI/17/01769](#)

At request stage, three documents appear to be relevant:

- Submission to DFM seeking clearance for draft response to request (attachment 4)
- Response from DFM (attachment 5)
- Response from MfPB (attachment 6)

From the file, it does not appear that clearance was sought for the review response or in relation to the appeal.

[FOI/17/01247](#)

At the request stage, two documents appear to be relevant:

- Submission to DFM seeking clearance for draft response to request (attachment 7)
- Response from DFM (contained within email chain – **[redacted]** email on 30 June 2017 at 1158) (attachment 8)

On review, the response appears to have been dealt with by special advisers without being sent for Ministerial clearance.

On appeal, three documents appear to be relevant:

- Submission to DFM seeking clearance for draft appeal response (attachment 9)
- Appeal schedule (attachment 10)
- Response from DFM (attachment 11)

Subsequently Private Office wrote to Tavish Scott MSP in connection with this case (attachment 12).

[redacted] | Freedom of Information Unit

T: (0131) 244 **[redacted]** | M: **[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]**; **[redacted]**

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

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.

Please find attached a minute setting out the individual cases that the Commissioner wishes to discuss with DFM, together with an assessment by the FOI Unit of the matters that the Commissioner may raise. **[redacted]** has asked me to send the minute to you this afternoon, as we understand that DFM wishes to have early sight of it.

[redacted] has just been in touch to advise that DFM also wishes to see any documents that were sent to him for comment and responses to them in relation to these cases. I will begin to extract them from eRDM now and provide an update on timescales by 4.30.

Happy to discuss.

[redacted]

[redacted] | Freedom of Information Unit

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

T: (0131) 244 [redacted] | M: [redacted]

Deputy First Minister and Cabinet Secretary for Education and Skills

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002
INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH
GOVERNMENT FOI PRACTICE
INFORMATION ABOUT INDIVIDUAL CASES

Introduction

1. To advise you that, as part of his interview with you, the Scottish Information Commissioner wishes to discuss a specific FOI case that you were involved in.
2. To provide our assessment of the matters that the Commissioner may wish to discuss, based on the information contained in the case file and the FOI tracker.

Background

3. The Commissioner has noted that, unless interviewees have the opportunity to refresh their memories, they are unlikely to recall the detail of their involvement in an individual FOI case. You are being given advance notice so that you can remind yourself of your involvement with the case in question before being interviewed with the Commissioner.
4. In this minute, we provide:
 - (a) details of the case to enable you to identify it
 - (b) a brief factual summary of the main events in the handling of the case
 - (c) our assessment of the potential matters that the Commissioner may wish to discuss with you
5. We must emphasise that the Commissioner has not indicated to us the matters that he wishes to discuss. What follows is our assessment, based on the case file and the FOI tracker. Our knowledge of the case is limited to what has been recorded in those places. The Commissioner may raise entirely different matters about the case with you.
6. If the Commissioner wishes to discuss more than one case with you, we have provided the information mentioned in paragraph 4 in relation to each case.

FOI/16/02132

Details of the case

Name of requester	James McEnaney
Date of request	20 December 2016
Directorate	Procurement and Commercial
Lead official	[redacted]
Stage concluded	Appeal (decision notice issued)

Factual summary of main events

7. Mr McEnaney made a request in December 2016 for the names of each individual or organisation to bid for the National Improvement Framework Standardised Assessments tender, the bid documents from the chosen supplier, the evaluation of the top three bids and the expected final cost of the standardised testing system.

8. The request was handled by Procurement colleagues, who liaised with colleagues in Learning Directorate (as the policy area for whom the tender was conducted). They required to consult the chosen supplier, which sought extensive redactions to protect its commercial interests. The case handler made focused redactions as a result. A draft response was sent to special advisers on 18 January 2017. The response was due to be sent to the requester by 23 January, but as no response was forthcoming from special advisers a holding response was sent on 24 January.

9. On 30 January, the case handler was advised that special advisers wished to have a draft risk register withheld or heavily redacted. Following discussions with FOI Unit, the case handler concluded that it could be redacted in part and a revised response was prepared on 1 February. It then appears that the policy team had further discussions with special advisers which resulted in the draft risk register being entirely removed in a further draft response on 3 February.

10. It appears that special advisers were ultimately content with the draft response on or about 8 February, and the policy team sent you a minute seeking clearance that day. Your private office responded that you were content with the response on 15 February. On 16 February, the policy area circulated the response together with media lines and asked for comments by noon on 17 February. It was subsequently issued to the requester at around 4.45 pm on 17 February.

11. Mr McEnaney then requested a review on 20 February. He complained about the delay in issuing the response, certain matters that had been treated as outwith the scope of the response, and the application of exemptions – particularly in relation to the draft risk register.

12. The reviewer considered that the requester should receive an apology and explanation in relation to the delay, and that certain information which had been excluded as outwith scope should be released. However, he upheld the application of the exemptions. The reviewer sent the draft response to special advisers and on 15 March Colin McAllister advised that he was content (subject to a minor point) and that there was no need for Ministerial clearance. The response was issued timeously on 20 March.

13. Mr McEnaney thereafter appealed to the Commissioner on 30 March, substantially on the same grounds that he had sought a review. The Commissioner informed us on 12 April that the appeal had been validated and set out timescales for responding. Following

engagement with the Commissioner, further information was released to Mr McEnaney on 22 June and 11 July 2017 (including parts of the draft risk register). The Commissioner then issued a decision notice on 26 September 2017.

14. The Commissioner's decision notice was critical of our handling of the request, highlighting the delay in responding and the interpretation of the scope of the request. In particular, the Commissioner criticised the disparity between the original reason given for the delay (internal clearance) and the reason given during the appeal (pressures of work, staff leave).

15. However, following the release of information during the appeal process, the Commissioner found that we had been entitled to rely on the exemptions applied to the rest of the information.

FOI Unit assessment of potential matters for discussion

16. [redacted]

17. [redacted]

18. [redacted]

FOI/17/01247

Details of the case

Name of requester	James McEnaney
Date of request	2 June 2017
Directorate	Learning
Lead official	[redacted]
Stage concluded	Appeal (withdrawn following further release)

Factual summary of main events

19. Mr McEnaney made a request in June 2017 for records of meetings and communications between the Scottish Government and Teach First. He asked four specific questions. Special advisers (Colin McAllister) indicated that they were content on 27 June and the draft response was sent to your office for clearance that day.

20. Your private office responded as follows on 30 June:

“DFM is content for this to go but thinks it would be better to see if we could not release the material relating to Prince Charles or his PS Mark Leishman. He specifically referenced documents 20, 24, 25, 26 as ones he’d prefer were not released.”

21. It appears that documents 20, 24 and 25 were subsequently withheld following application of the section 41(a) exemption (communications with Her Majesty, the Royal Family or the Royal Household). The response to the request was issued timeously.

22. Mr McEnaney then complained on 4 July that the response was incomplete as it did not address all four of the areas properly. He also complained that documents which had been described as “redacted” were instead entirely withheld. These complaints were treated as a request for review, on the advice of the FOI Unit.

23. On review, it became apparent that there had been a number of errors in the handling of the initial request. Two documents which were unreadable were provided on 5 July, together with an explanation about what had been withheld on 7 July.

24. The reviewer concluded that the original decision should be confirmed, but with substantial modifications. A further 17 documents were released. Many had been entirely withheld when requested but were released with redactions instead, following consultation with the Royal Household and Teach First. FOI Unit was extensively involved throughout the review process. The review decision was issued timeously on 31 July.

25. In early September, Mr McEnaney appealed to the Commissioner. The Commissioner’s initial view was that the remaining exemptions cited could not be upheld (except in relation to the personal data of certain individuals). On 30 November, your private office indicated that you were content to release the withheld information ,except for one sentence, to Mr McEnaney. You asked that this be justified on the basis that the procurement exercise was over. Mr McEnaney subsequently withdrew his appeal.

26. Tavish Scott MSP then submitted two written PQs (S5W-15353 and S5W-15344) in April 2018, asking about the involvement of you and of special advisers at the initial request stage.

FOI Unit assessment of potential matters for discussion

27. [redacted]

28. [redacted]

29. [redacted]

FOI/17/01769

Details of the case

Name of requester	James McEnaney
Date of request	26 July 2017
Directorate	Strategy and Constitution
Lead official	[redacted] (has now left SG)
Stage concluded	Appeal (withdrawn following further release)

Factual summary of main events

30. Mr McEnaney made a request on 26 July 2017 for the names and roles of all senior civil servants, special advisers, press officers and Ministers involved in answering a number of his previous FOI requests. He also asked for confirmation of the role each individual had played and whether changes to the responses were made following the intervention of those individuals.

31. The draft response was sent to you and the Minister for Parliamentary Business for clearance on 14 August. On 16 August, you indicated you were content. The individuals concerned were notified that day. The Minister for Parliamentary Business indicated he was content on Monday 21 August but the response was not issued until Thursday 24 August, the final day for a timeous response.

32. On review, Mr McEnaney contended that his third point (whether changes had been made) had not been addressed properly. The reviewer accepted that it could have been more clearly addressed and applied the exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs). The reviewer indicated that releasing the information was not in the public interest as it would inhibit discussions around the drafting of FOI responses in future. The review response was issued as soon as possible, three weeks ahead of the final date for responding.

33. Mr McEnaney then appealed to the Commissioner. He complained about the handling of his request and the application of the section 30(c) exemption, among other points. The FOI Unit concluded that the Commissioner was unconvinced by the application of that exemption and the withheld information was released. The appeal was subsequently withdrawn.

FOI Unit assessment of potential matters for discussion

34. [redacted]

35. [redacted]

Conclusion

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

[redacted]
FOI Unit
[redacted]

10 May 2018

Copy List
Liz Lloyd Colin McAllister David Rogers [redacted] [redacted]

[redacted]

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
[redacted]

11 May 2018

OFFICIAL – SENSITIVE

Table 1 – case handlers

Recipient	Copy recipients
[redacted]	[redacted]; Joe Griffin
[redacted]	[redacted]; Keith Connal
[redacted]	[redacted]; Clare Hicks
[redacted]	[redacted]; John Somers
[redacted]	[redacted]; Trudi Sharp
[redacted]	[redacted]; Gavin Gray
[redacted]	[redacted]; Ian Howie
[redacted]	[redacted]; [redacted]
[redacted]	[redacted]; [redacted]

Table 2 – reviewers

Recipient	Copy recipients
[redacted]	George Burgess
[redacted]	Russell Bain
[redacted]	[redacted]
[redacted]	[redacted]; Andrew Bruce
[redacted]	[redacted]; Robert Williams
[redacted]	Donna Bell
[redacted]	[redacted]; Russell Bain
[redacted]	[redacted]; Andrew Bruce
[redacted]	[redacted]; [redacted]

Other copy recipients

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

Annex A – the Commissioner’s biography, role and senior team members

Daren Fitzhenry, Scottish Information Commissioner



Daren Fitzhenry took up post as Scottish Information Commissioner in October 2017, for a fixed term of six years. Prior to his current role, he was a senior officer in the Royal Air Force Legal Branch, heading up its legal advisory team, with wide-ranging experience in the development, implementation and enforcement of regulatory systems.

As Scottish Information Commissioner, Daren is responsible for the enforcement and promotion of Scotland’s freedom of information laws. This includes handling appeals about the way in which Scottish public authorities respond to information requests, promoting good practice and monitoring and assessing FOI performance.

He is strongly committed to the principles of freedom of information, recognising the significant benefits that FOI brings to society, not least its key role in enabling the public's participation and engagement in the issues which really matter to them.

Sarah Hutchison, Head of Policy and Information

Sarah heads up the Policy and Information Team, which is responsible for: improving FOI practice in public authorities; promoting rights to the public; influencing and supporting cultural change; developing knowledge, expertise and relationships. We also monitor FOI legislation and practical experience of it e.g., by operating the statistics portal and monitoring our intervention procedures. Much of the team's work is project-based, delivering outcomes to contribute to the Commissioner's strategic aims e.g., promoting FOI rights to young people, building the Commissioner's appeal portal, commissioning research around public authority practice or FOI users' experience.

Margaret Keyse, Head of Enforcement

Margaret heads up the Enforcement Team, which manages the investigation of applications for decision made under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, as well as ensuring that public authorities comply with the legislation. She advises the Commissioner on legal issues, as she is the key in-house adviser to the Commissioner on freedom of information.

Annex B – extracts from the Commissioner’s letter 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 group discussions

1. The group discussions will be conducted by a senior member of the Commissioner's staff (Sarah Hutchison or Margaret Keyse).
2. They will focus on the Scottish Government's FOI process generally, rather than being about individual cases. The Commissioner expects that the group discussions will be discursive in nature.
3. A member of the FOI Unit will be present. Each participant is expected to participate in the group discussion, and our role is to keep a watching brief. However, we can clarify any confusion about Scottish Government processes if necessary.
4. We do not expect that any other person would attend the discussions. Exceptionally, if participants wish to be accompanied by anyone else then they are requested to inform the FOI Unit immediately so that we can liaise with the Commissioner in advance of the discussion.
5. A member of the Commissioner's staff will attend to take a note of the discussions. The note will be general in nature, setting out the key points that have been raised.
6. At the end of the discussion, there will be a recap of the key points. Participants will have the opportunity to suggest amendments or additions.
7. The final report will draw from the notes of the discussions where relevant, but the Commissioner does not plan to publish the notes from the discussions.

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.
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.

OFFICIAL – SENSITIVE

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.

[redacted]
FOI Unit
11 May 2018

Graham Black, Marine Scotland
Robert Williams, Health Performance and Delivery
John Booth, Communications
[redacted], Communications
Mike Baxter, Transport Scotland
Hugh Gillies, Transport Scotland
Ian Davidson, Constitution and UK Relations
[redacted], Civil Law and Legal System
[redacted], Special Advisers
[redacted], FOI Unit
[redacted], FOI Unit

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

Purpose

1. To advise you that 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. To provide you with information about:
 - (a) the background to the intervention
 - (b) the interview 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 interviews. 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 fully 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.

The interview 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 interviews 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 interview a number of individual members of staff, including Directors, Deputy Directors, present and former members of the FOI Unit and **[redacted]**.

12. The purpose of these individual interviews 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.

13. The Commissioner has requested a 45 minute interview with Directors, Deputy Directors and **[redacted]**. Interviews with current and former members of the FOI Unit will be longer. The FOI Unit will liaise with individual members of staff to arrange suitable times and locations for the interviews.

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

15. These interviews 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 interview. As noted above, the detailed arrangements are set out in **Annex C**.

16. It is not compulsory to attend an interview. 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 25 below.

17. You will not be put on oath by the Commissioner for the purposes of the interview. However 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 an interview with the Commissioner 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 interview. They should also make sure that you have adequate time to prepare for your interview 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 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.

21. The Commissioner has informed the FOI Unit that he intends 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.

22. 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.

23. 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 interviews. 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](#).

24. As noted in paragraph 8, the trade unions represented in the Council of Scottish Government Unions are aware that these interviews are taking place. They note that the purpose of the interviews 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 at individual cases.

25. 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 an interview 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

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

[redacted]
FOI Unit
[redacted]

11 May 2018

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

Liz Ditchburn
Alan Hunter
Barbara Allison
Roy Brannen
David Rogers
John Somers
[redacted]
Freedom of Information Unit
Nicola Richards
[redacted]
[redacted]
Paul Cackette
Caroline Beattie
[redacted]
[redacted]

Annex A – the Commissioner’s biography, role and senior team members

Daren Fitzhenry, Scottish Information Commissioner



Daren Fitzhenry took up post as Scottish Information Commissioner in October 2017, for a fixed term of six years. Prior to his current role, he was a senior officer in the Royal Air Force Legal Branch, heading up its legal advisory team, with wide-ranging experience in the development, implementation and enforcement of regulatory systems.

As Scottish Information Commissioner, Daren is responsible for the enforcement and promotion of Scotland’s freedom of information laws. This includes handling appeals about the way in which Scottish public authorities respond to information requests, promoting good practice and monitoring and assessing FOI performance.

He is strongly committed to the principles of freedom of information, recognising the significant benefits that FOI brings to society, not least its key role in enabling the public’s participation and engagement in the issues which really matter to them.

Sarah Hutchison, Head of Policy and Information

Sarah heads up the Policy and Information Team, which is responsible for: improving FOI practice in public authorities; promoting rights to the public; influencing and supporting cultural change; developing knowledge, expertise and relationships. We also monitor FOI legislation and practical experience of it e.g., by operating the statistics portal and monitoring our intervention procedures. Much of the team’s work is project-based, delivering outcomes to contribute to the Commissioner’s strategic aims e.g., promoting FOI rights to young people, building the Commissioner’s appeal portal, commissioning research around public authority practice or FOI users’ experience.

Margaret Keyse, Head of Enforcement

Margaret heads up the Enforcement Team, which manages the investigation of applications for decision made under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, as well as ensuring that public authorities comply with the legislation. She advises the Commissioner on legal issues, as she is the key in-house adviser to the Commissioner on freedom of information.

Annex B – extracts from the Commissioner’s letter 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 Commissioner (Daren Fitzhenry) or a senior member of his staff (Sarah Hutchison or Margaret Keyse).
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 certain interviewees about their involvement. The FOI Unit is currently reviewing these cases to remind interviewees of their involvement. The interviewees concerned will receive a separate minute.
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. present to support the interviewee, primarily to keep a watching brief, but also to clarify any confusion about FOI processes if necessary.
6. We do not expect that any other person would attend the interviews. Exceptionally, if interviewees wish to be accompanied by anyone else then they are requested to inform the FOI Unit immediately so that we can liaise with the Commissioner in advance 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 an official, if they are considered important. They 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.
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.

OFFICIAL – SENSITIVE

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.

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] note

[redacted]

Thanks for this, Mr FitzPatrick is content.

[redacted]

From: [redacted]
Sent: 14 May 2018 09:33
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: RE: [redacted] note

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 07:50
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: RE: [redacted] note

And now to the correct Minister...

[redacted]

From: [redacted]
Sent: 14 May 2018 07:33
To: Minister for Public Health and Sport
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] note

[redacted]

As discussed, I attach a draft **[redacted]** 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]

[redacted]

Background note [redacted] - Scottish Information Commissioner Interventions

The first intervention concerns delays in responding to FOI requests and reviews. We have committed to each Directorate meeting targets of 85% of responses and reviews on time for the intervention period in 2017, 90% in 2018 and 95% by 2020.

His second intervention, into our FOI culture and practice, following journalists' open letter of 31 May 2017 to the Parliament, entered its assessment phase in March.

This intervention is at Level 3 of his enforcement policy. The focus of a Level 3 intervention is to make recommendations to help an authority improve its processes. If an authority fails to comply, he can escalate to Level 4, which involves issuing a formal enforcement notice.

The Commissioner has emphasised that, during an intervention, it is important to work closely with the public authority and that he does not wish to see an escalation to Level 4. His staff have interrogated the FOI tracker and case files, and the Commissioner will interview individuals who have been involved in the FOI process to assist in that understanding

He has observed that Ministerial clearance in relation to FOISA exemptions may be expected, but where he finds evidence that clearance processes result in significant delays, or that delays result from consideration of matters not directly related to the application of exemptions, this may be a matter for his report.

He has stated publicly that he expects to publish his recommendations by the end of May, and this will be followed by an implementation phase, and then a period of monitoring progress for a minimum of six months.

Speaking Note

On the Commissioner's intervention on our FOI performance, we have made significant improvements, replying to 83% of requests on time during 2017 – up from 76% in 2016 and just short of the 85% target (largely due to a huge influx from political researchers late in the year). Despite continuing large numbers of requests, we have responded in time to around 92% of requests so far in 2018 – just above the 90% target.

The aim of the intervention on our handling of FOI cases is to identify any problems with our processes and recommend ways to address them, not to criticise individuals. The Commissioner will interview the Deputy First Minister and the Cabinet Secretaries for Culture, Tourism & External Affairs, Health & Sport and the Economy, Jobs and Fair Work this week and has identified some specific cases from our FOI tracker where he may ask questions to help him understand our processes more fully.

Ministers have been informed of these cases - briefing is being supplied and Ministers will be accompanied by a PS and a member of the FOI Unit.

A member of the Commissioner's staff will take a note of each meeting and these will be fact-checked before being finalised. The final report - which we will see in draft - is due to publish by the end of May. It may draw from interview notes, though he does not plan to publish actual interviews. Verbatim quotes, if used, will be checked by interviewees before publication. They may be attributed to the relevant Minister.

Some Special Advisers and other officials, including case-handlers and reviewers, will also be interviewed (although any quotes used will not be attributed to individuals). Briefing is being provided and they will also be accompanied by a member of the FOI Unit.