

Extracts (grouped by year) from documentation prepared for Nicola Sturgeon (over the period of time since becoming First Minister) including briefing and key lines insofar as relating to freedom of information legislation and the Scottish Information Commissioner's review into the Scottish Government's culture and practice regarding freedom of information.

Duplicatory material has generally been excluded with section 30(b)(i) applied to a limited amount of information.

2014**EXTENDING FOI TO OTHER BODIES PROVIDING PUBLIC SERVICES**

The Commissioner also used the Holyrood conference to call for FOI legislation to be extended to cover other bodies delivering public services – she particularly suggested housing associations should be covered. Lord Wallace also criticised the SG for failing to act enough on this, although the former administration had not brought forward any orders under section 5 of FOISA pre-2007. In addition to the order which came into force in April 2014 to bring arm's length culture, sport and leisure trusts under FOISA, the Minister for Parliamentary Business informed the Holyrood conference that the SG will be consulting in the spring on proposals for a further order extending coverage. He also said that we would want to take account of the Commissioner's special report on extension of coverage (due around 22 January 2015) before confirming our proposals.

2015**EXTENDING FOI TO OTHER BODIES PROVIDING PUBLIC SERVICES**

The Commissioner laid a Special Report on 16 January 2015 calling for FOI legislation to be extended to cover other bodies delivering public services – she particularly suggested housing associations and private prisons should be covered immediately. The Liberal Democrats have also criticised the SG for failing to act enough on this, although the former administration had not brought forward any orders under section 5 of FOISA pre-2007. In addition to the order which came into force in April 2014 to bring arm's length culture, sport and leisure trusts under FOISA, the Minister for Parliamentary Business informed the Holyrood conference in December 2014 that the SG will be consulting in the spring on proposals for a further order extending coverage. The SG has confirmed that we will consider the Commissioner's special report before confirming our proposals. The Petitions Committee is also currently considering a petition calling for housing associations to be subject to FOISA.

THE SUPREME COURT JUDGEMENT AND THE IMPLICATIONS FOR SCOTLAND

On 26 March the Supreme Court determined that the former Attorney General Dominic Grieve had not been entitled to veto the Upper Tribunal's decision that certain letters from Prince Charles needed to be released. The 'advocacy' correspondence in the letters will therefore need to be released. FOISA and the Environmental Information (Scotland) Regulations (EIRs) have similar, but more restricted, veto provisions to those in the equivalent UK legislation, but the veto has never been used in Scotland.

EXTENDING FOI TO OTHER BODIES PROVIDING PUBLIC SERVICES

The SG will soon be consulting on proposals for a further order extending coverage to private prisons, secure children's homes and grant-aided and independent special schools. The Commissioner is calling for housing associations to also be covered, but the SG feels this should be considered further once the Scottish Social Housing Charter is reviewed. There was criticism in the Scotsman and Daily Record at the weekend that the SG has not gone far enough in covering ALEOs, although in fact the vast majority are already covered by FOISA as they are wholly owned by public bodies. The articles, based on a Campaign for FOI press release, also criticised the failure of some culture, leisure and sport ALEOs to respond to requests on time – this is a matter for the Commissioner though and not the SG.

- We are consulting on proposals to extend coverage of FOISA to bodies such as private prisons and independent special schools. On housing associations, we did not include them in our proposals, but will of course take account of responses to the consultation in deciding whether they should be covered in future.
- Consultation on proposals to extend coverage of FOISA to bodies such as private prisons and independent special schools has concluded with a formal response anticipated towards the end of the year.
- Consultation on proposals to extend coverage of FOISA to bodies such as private prisons and independent special schools has concluded and we expect to lay a draft order towards the end of the year.
- We did not include housing associations in our current [consultation] proposals, but have taken account of views expressed by tenants and MSPs in particular. We will consult next year with a view to extending FOI coverage to RSLs.

2016

- The order extending coverage of FOISA to bodies including private prisons and providers of secure accommodation for children has been approved by Parliament and comes into effect on 1 September, further extending the scope of Scotland's FOI legislation. Consultation on regulations providing flexibility for certain types of school in responding to information requests over school holiday periods will commence shortly.
- Consultation on regulations providing flexibility for certain types of school in responding to information requests over school holiday periods concluded on 3 May. We anticipate responding to the consultation shortly. We will consult later this year with a view to extending FOI coverage to Registered Social Landlords.
- An order further extending coverage of the Freedom of Information (Scotland) Act to include private prisons, providers of secure accommodation for children, and certain types of school (grant-aided and independent special schools) came into effect on 1 September.
- Following consultation, the Scottish Government has laid an order varying FOI response timescales for grant-aided and independent special schools to take into account school holiday periods (while emphasising the statutory duty to reply 'promptly'). Subject to Parliamentary approval the 'Time for Compliance' Regulations will come into effect on 1 December.

- Following consultation, an order varying FOI response timescales for grant-aided and independent special schools to take into account school holiday periods will come into effect on 1 December. At the same time, changes to the related Code of Practice will emphasise the statutory duty to reply to requests 'promptly'.

2017

- Scotland has the most open and far-reaching freedom of information laws in the UK.
- 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.
- On 21 June, the Scottish Parliament passed (a) motion...that the Parliament agrees to undertake post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002
- It is not for Government to tell Committees of this Parliament how to conduct their business or what business to conduct but if any committee decides now is the right time to review the FOI legislation then we would welcome that and would be fully cooperative.

Scotland already has the most open and far-reaching freedom of information laws in the UK and this Government has a track record of building on that

- We have brought within the scope of FOI numerous organisations that deliver public services, including local authority arm's-length trusts and private prison contractors.
- Our 2013 FOI amendment Act improved the legislation by strengthening the ability to prosecute for an offence.
- We have consulted on extending coverage of FOI to registered social landlords and will respond to that in the autumn.
- In the (21 June) debate, Mr Fitzpatrick...on post-legislative scrutiny took the line that that is a matter for the Parliament
- The Commissioner has subsequently written to Mr FitzPatrick confirming that he will explore how, given his independent role and statutory powers, he can carry out further intervention into SG's wider FOI practice, including media complaints.
- The Commissioner has subsequently written to Mr FitzPatrick confirming that he will explore how, given his independent role and statutory powers, he can carry out further intervention. This new intervention will include a consideration of the issues of culture and practice raised in the journalists' letter [of 31 May 2017] and the debate on the Parliamentary Motion.
- The Scottish Government is currently consulting on a draft order extending coverage of Freedom of Information legislation to Registered Social Landlords.
- We will continue to engage with the Commissioner as the intervention process develops.

2018

- On 13 December, the Commissioner issued an invitation to the signatories of the journalists' letter to provide further evidence to frame the assessment phase of the intervention.
- FOISA is one of five Acts shortlisted by the Public Audit and Post-legislative Scrutiny Committee for detailed scrutiny.
- We are fully engaging with the Commissioner as part of his intervention process – which is in effect independent scrutiny of SG's FOI performance.
- In November, the Commissioner announced that he would undertake a further intervention. On 2 February he wrote to Mr FitzPatrick confirming this will consider all aspects of handling requests from journalists (including SPADs).
- The Minister for Parliamentary Business has met the Commissioner and has confirmed we will co-operate fully with his new intervention.
- The intervention formally started on 28 February. [NB later revised to 6 March]
- Scottish Government staff are working with the Commissioner's office on the intervention to consider our processes for handling requests from journalists.
- The intervention formally started on 6 March.
- Consultation on a draft order extending FOI to Registered Social Landlords concluded on 7 March. We anticipate responding to the consultation in late spring.
- The Public Audit and Post-legislative Scrutiny Committee held a formal public meeting on 22 March to help inform discussion about scrutiny. The Committee agreed to await the recommendations made by the Commissioner on his intervention relating to the Scottish Government's compliance with FOI legislation before agreeing its further action.
- The intervention started on 6 March and is expected to report at the end of May.
- On 8 May, speaking at an FOI conference, the Commissioner suggested that the First Minister's power to overrule ('veto') decisions of the Commissioner if the information in question is of 'exceptional sensitivity' could be removed. The Commissioner's comments were reported in the Sunday Herald on 13 May.
- The power to override – or veto – a decision of the Commissioner has never been used in Scotland – unlike by successive UK Governments under UK FOI legislation.
- We will fully engage with the Public Audit and Post-legislative Scrutiny Committee if they choose to undertake post legislative scrutiny of Scotland's FOI Act.
- We are considering a draft order extending FOI to Registered Social Landlords.
- He [the Commissioner] had expected to report at the end of May, but now expects to do so on Tuesday 12 June [*Not for disclosure - Scottish Government to receive the draft for fact-checking on 6 June*]

13 June - the Scottish Information Commissioner published his Intervention Report addressing concerns raised about SG FOI handling processes by journalists in an open letter to Parliament in May 2017 and following a motion passed by Parliament in June 2017 condemning the SG's FOI performance. The intervention also considered issues of FOI culture and practice in the SG.

The Report noted recent positive developments but recommended that we:

- review in detail our clearance procedures to make the process clearer, particularly in relation to roles and resolution of disagreements
- consider our quality assurance arrangements, including whether it is proportionate for this function to be carried out by special advisers
- stop treating certain classes of requesters (journalists, MSPs and political researchers) differently
- improve record-keeping so that case files contain a full record about how a request has been handled
- review our case handling system to develop a larger core group of trained, experienced case handlers, and improve training records
- improve performance reporting, in particular around clearance timescales
- review our handling of reviews to reduce as far as practicable the risk to impartiality caused by individuals being involved in the original decision and in its review

We have three months to produce a draft action plan for the Commissioner's approval addressing his recommendations.

- We accept the Commissioner's recommendations and will produce a draft action plan by the Commissioner's 13 September deadline.
- We will publish our action plan once it has been agreed with the Commissioner.
- The report highlights good practice as well as processes and procedures requiring improvement.

We have taken immediate steps to implement the Commissioner's recommendation that we stop treating different classes of requester differently

- We have updated internal guidance to make it clear all requests be considered and cleared according to the information requested - not the type of requester.
- We have also updated our external guidance to reflect this, as part of our commitment to openness and transparency

20 June – the Scottish Parliament agreed to an amended Labour Party Motion noting the findings of the Scottish Information Commissioner's Intervention Report, the Scottish Government's acceptance of the Commissioner's recommendations and publication of an action plan, and the SG's commitment to consult on further extension of coverage. The

motion as lodged called for an independent review of both FOI handling and the recording of information from meetings. A Scottish Government amendment, supported by the Scottish Liberal Democrats, removed this call and instead committed the Scottish Government to consult on proposals to further extend the coverage of FOISA.

18 June – Scottish Liberal Democrats issued a news release calling for the extension of FOISA to private companies delivering public sector services.

- We will consult on proposals for further extension, for example to companies providing services on behalf of the public sector, in due course.
- We will bring forward an order extending FOI to Registered Social Landlords in this session of parliament

13 September - As required in his intervention report of 13 June, we submitted to the Scottish Information Commissioner a draft action plan, aimed at addressing his recommendations for improving our FOI case-handling.

9 October - The Commissioner replied to our draft action plan. While he identified 3 points for minor revision, he welcomed our positive comments and ongoing support, and stated he was content with the majority of the proposed actions. He also formally ended the first intervention due to the significant improvement in our performance.

The Commissioner has welcomed the Scottish Government's draft action plan

- He has asked the Scottish Government to consider a point of clarification on the role of Ministers and Special Advisers in sensitive cases. We are doing so.
- (subsequently) We have done so - and have sent him an updated plan, as requested.
- 30 October - Updated action plan, with requested revisions, submitted to the Commissioner. We expect this version will be accepted by the Commissioner.

8 November - The Scottish Information Commissioner has agreed (subject to one further, minor amendment) our updated action plan on his intervention, submitted on 30 October. The plan has been published on the Scottish Government website.

- We submitted a revised draft, addressing the Commissioner's comments, on 30 October – and this was agreed by the Commissioner on 8 November.
- We have published the plan on the Scottish Government website and will now work with the Commissioner on its implementation.
- He agreed our updated plan, subject to one minor revision, on 8 November, and this has now been published on the Scottish Government website.
- We will now work with the Commissioner on its implementation.

Programme for Government: Advice on Policy Proposal to Extend the Freedom of Information (Scotland) Act 2002 (FOISA) to private companies that run public services

Briefing – First Minister

Commitment – Background

FOISA provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and Government, to local authorities, NHS boards, higher and further education bodies, doctors and dental practitioners.

The Scottish Government takes an incremental approach to extending coverage of FOISA – which has previously been extended to organisations such as certain arm's length bodies, private prison contractors and grant-aided and independent special schools.

There has been longstanding pressure from organisations including the Campaign for Freedom of Information in Scotland and Unison Scotland to ensure that FOISA fully takes into account the changing nature of public service delivery and that coverage includes organisations providing outsourced services – and generally 'follows the public pound'.

Similarly, the Scottish Information Commissioner has raised concerns about diminishing rights to access information and the failure to use the powers within FOISA to designate bodies as public service delivery models have changed. The Commissioner has previously recommended the development of a policy requiring automatic consideration of migration of existing rights and duties under FOISA to bodies taking over the delivery of functions and services on behalf of, or instead of, public authorities.

The Commissioner has also undertaken research (provided by Ipsos MORI) which has identified strong support for FOISA to apply to bodies such as local authority trusts providing, among other things, care services and private sector companies contracted to build and maintain schools and NHS hospitals. Research also found strong support for coverage to be on the basis of public funding and if the body delivering the service used to be state-owned, such as railways and energy.

[redacted – section 29(1)(a)]

Motion

This new commitment to consult on extending coverage arises from the amended motion (see **Annex**) agreed by the Scottish Parliament on 20 June that the Scottish Government should consult on proposals to further extend coverage of Scotland's freedom of information legislation, for example, to companies providing services on behalf of the public sector.

The Scottish Government amendment, which included the commitment to consult on proposals to further extend coverage, secured the support of the Liberal Democrats. The original (Labour Party) Motion, if agreed, would have included the call for an independent review of both FOI handling and the recording of information from meetings.

Consultation

Extension of coverage of FOISA is subject to statutory consultation with those to whom the order relates, their representatives and other interested parties as appropriate. Consultation in respect of companies providing services on behalf of the public sector (as set out in the Motion of 20 July) is anticipated for the end of this year. Subject to Parliamentary process, any resulting order is unlikely to come into effect until at least 2020 (in part, to allow bodies to prepare for designation).

Briefing on wider options for consideration for designation is being prepared and should be with the Minister for Parliamentary Business and Veterans for the end of recess. Further proposals for extension may therefore be developed from these options.

National Outcomes

The commitment in part aligns with National Outcome 7 (empowering communities) and National Outcome 9 (in respect to openness).

Financial considerations

The financial impact – on both the affected bodies and, potentially, the Scottish Information Commissioner, will be assessed as part of the consultation (business impact) exercise. Experience to date has shown that the actual impact of FOISA is not significant (though preparatory work for the relevant bodies is key).

Funding for the Commissioner's office is provided by the Scottish Parliament Corporate Body. The business impact on the Commissioner of extending coverage is dependent on the number of bodies involved. In respect of the extension of FOISA to registered social landlords (approx. 240 bodies) the Commissioner has projected additional staffing costs of £143,000 per annum and set up costs of £12,000 in the first year.

By convention, in circumstances where there is a change of function (such as extending coverage to more bodies) the Scottish Government will pay any 'set up' and year one costs (though this can extend beyond year one).

While, potentially, designation of private companies results in information requests being made directly to the company in question rather than the contracting public authority, in practice we would expect any reduction in requests (and therefore savings) to the authority to be negligible.

Legislation

Section 5 of FOISA contains the order-making power to designate certain bodies as public authorities for the purposes of FOISA (subject to affirmative procedure). We would not anticipate laying an order, following consultation, until the second half of 2019.

Management and Delivery

There is a statutory duty to consult on proposals to extend coverage. In the event of an order being laid it is likely that considerable lead in time (9-12 months) would be allowed for prior to commencement in order for bodies to prepare for coverage.

While as part of the consultation process consideration might be given to non-legislative alternatives (a voluntary Code of Practice or changes to contractual terms and conditions) it is anticipated that the most effective way of fulfilling the commitment is by means of a section 5 order.

Staff and Resources

Existing staff and resource are sufficient to deliver this commitment.

Risks

FOISA can be extended to bodies that carry out functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

While, on balance, presentational and financial risks would be assessed as low, to a considerable extent this is dependent on the precise terms (and breadth) of the order in defining 'function' and 'service'.

What constitutes a 'function of a public nature' is not defined in the legislation and may be disputed by the bodies proposed for coverage. Equally, determining whether a service is a function of an authority may also prove contentious.

In addition to the terms of the order, organisations potentially becoming subject to FOISA are likely to raise concerns about the administrative and financial impact of designation (contractors potentially suggesting that they may not tender for public sector contracts if subject to FOISA).

Actual risks will be assessed as part of consultation and should be mitigated by training prior to designation. Experience to date shows that designation in practice has less actual impact than anticipated on bodies brought within scope.

[Redacted – section 38(1)(b)]

FOI Unit

X [Redacted]

Text of Motion S5M-12861 (SG amended text including commitment to consult in bold).

That the Parliament notes the concerns raised on Scottish Government transparency in the intervention report from the Scottish Information Commissioner; notes the key findings that the Scottish Government's FoI policies and procedures are not clear enough regarding the role of special advisers in responding to FoI requests; believes that the Scottish Government takes longer to respond to journalists' FoI requests than other requests; considers that **response times for journalists' FoI requests have improved but can improve further; notes that the Scottish Government has accepted the commissioner's recommendations in full and will develop an action plan as required by the commissioner to be published in September 2018; welcomes the proposed extension of FoI law to registered social landlords; agrees that the Scottish Government should consult on proposals to further extend coverage of Scotland's freedom of information legislation, for example, to companies providing services on behalf of the public sector,** and further calls on the Scottish Information Commissioner to make public the report on the government's implementation of the action plan when approved annually.

Freedom of Information

Intervention into SG FOI Culture and Practice

The Scottish Information Commissioner launched an intervention in response to an open letter sent from journalists on 31 May 2017 to the Scottish Parliament and the subsequent motion calling for an independent inquiry into our FOI culture and practice.

The subsequent report, containing the Commissioner's recommendations for areas in which he considers we have room to improve, was published on 13 June 2018 and contained 7 high level recommendations for improvement.

On 13 September, as required by the Commissioner, we submitted a draft action plan, aimed at addressing his recommendations for improving our FOI case-handling.

The Commissioner has subsequently responded to our draft action plan requiring us to make a small number of revisions. We will do so by the deadline of 30 October.

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[redacted – section
38(1)(b)]
FOI Unit

31 August 2018

Minister for Parliamentary Business and Veterans

SCOTTISH INFORMATION COMMISSIONER DRAFT ACTION PLAN

Purpose

1. To seek your agreement for formal submission of the Scottish Government's Draft Action Plan to the Scottish Information Commissioner, in response to his Intervention Report.

Priority

2. **Urgent.** The Commissioner requires the Scottish Government to submit its Draft Action Plan by 13 September 2018.

Background

3. You are aware of the background to the Intervention Report, which the Commissioner submitted to your predecessor Mr FitzPatrick on 13 June 2018; for ease of reference, an overview is set out at **Annex A**. The Commissioner's recommendations require improvement across seven key themes in our FOI handling: clearance; quality assurance; clearance of media requests; case file records management; allocation to case handlers and training; monitoring; and ensuring impartial reviews.

4. In your recent engagement with the Directors' Network on 23 August 2018, you emphasised that Ministers have accepted the recommendations in full and that the Scottish Government must have a credible set of actions prepared for the Commissioner's consideration. You further noted that the Commissioner will continue to monitor and review implementation, with further enforcement action remaining a possibility, with a risk of further reputational damage. It is essential, therefore, that the Commissioner and the public have confidence that we are taking proper steps aimed at addressing the recommendations.

The Action Plan

5. The FOI Unit has now completed its detailed analysis of the SIC recommendations and carried out an options appraisal to consider the actions most likely to achieve the greatest impact and developed a draft Action Plan (attached at **Annex B**). The Action Plan responds to the Commissioner's recommendations and creates a framework for sustained, continuous improvement, addressing the underlying weaknesses in our current arrangements and equipping us to cope with the sustained increase in volume and complexity of cases. It will bring our measurable

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performance and practice into much closer alignment with our aspirations for openness and transparency.

6. The key recommendations that require a change to our approach are 1 (case-handling) and 5 (clearance). These are closely linked. Our actions in these areas will streamline and clarify arrangements as required by the Commissioner. Together with the actions identified on staff training and development and local management and audit, these will in turn deliver improvements against recommendations 2 (quality assurance), 3 (media requests) and 7 (reviews). Recommendations 4 and 6 (improved record-keeping and case-tracking) will largely be delivered through implementation of the new MiCase system and the eRDM upgrade, both scheduled to commence before the end of the year.

7. In summary, the key changes proposed in the Draft Action Plan are that:

- We establish a body of designated case handlers at an appropriate organisational level, usually Directorate, receiving appropriate training and dealing with cases on a regular basis.
- Nominated senior staff (Band C or SCS), appropriately trained, will provide assurance and clear all requests.
- Directors will be required to assess, monitor and certify that arrangements are in place to ensure caseload is being dealt with by competent practitioners.
- Criteria will be developed to define sensitive or exceptionally complex cases.
- A new FOI Unit receiving process will undertake an initial triage assessment.
- Guidance will be prepared that sets out explicitly the roles of all staff involved in FOI.
- Cases identified as sensitive or exceptionally complex will, after clearance, be referred to SPADs and Ministers for comment.
- Case handling procedures will enable Ministers or Special Advisers to intervene early to identify sensitive cases requiring comment.
- The FOI Unit's role in providing expert corporate advice to support decision-making will be formally set out.
- A new statement of compliance will be introduced to ensure recording of rationale for decisions in handling FOI and EIR requests.
- A training package tailored to support staff in the specific roles of case-handler, reviewer and approver to build FOI experience and capability will be developed.
- A new case management system will be introduced through MiCase

8. Given the importance of recommendations 1 and 5 in addressing the wider set of recommendations, more detailed discussion of each proposal is attached at **Annexes C and D**. An improvement driver diagram is attached at **Annex E**.

9. The plan, which is also currently with the Executive Team for consideration, has been tested with key staff from the FOI champions network and, in line with your commitment to ensure they are fully involved, we will continue to work with staff in implementing the proposals. We are similarly in discussion with SPADs to ensure that their views and experiences continue to shape the proposals and approach to implementation. We have, as you know, worked closely with the Commissioner's

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office in developing the plan and we are confident that the Commissioner will broadly accept the proposals as an appropriate response to his recommendations.

10. As noted above, in developing the Action Plan the FOI Unit have undertaken an options appraisal and discussed this with key stakeholders, In considering options we have been clear that the changes must address the performance issues underlying the Commissioner's recommendations, that the recommendations must be addressed comprehensively and the proposed actions should be SMART. The Commissioner has accepted that there will be a balance in the actions between those involving firm outputs and those where further developmental work is required. In guiding us he has indicated that in every case he will expect a firm commitment to and timetable for implementation.

11. We have also been mindful of the backdrop of the on-going sustained improvement in performance and wider pressures on the organisation. As outlined below, our judgement is that the substantial corporate actions proposed and the improvements on procedure, together with a strengthening of local management and accountability, is the right way forward rather than a more fundamental shift of responsibilities, such as to a fully centralised model.

12. In assessing options we have also considered the following factors:

- The nature of the issue i.e. whether there is a deficiency in procedure, or guidance or in practice and what kind of action is required
- How the issue is dealt with elsewhere and what might SG learn from that practice
- What improvements have we already achieved and how can we build on these
- What are the likely options for addressing the issue, and considering timing, affordability, practicability and policy impacts, which are likely to have the most substantive impact, most quickly and over time

13. It is evident from both the Commissioner's assessment and the FOI Unit's own analysis that the current delivery model is not sufficiently robust in terms of compliance or quality; in short, it relies upon too many people with too little oversight and too little expertise to handle requests. In 2017, for example, from a caseload of 3050 requests, we had 1014 case handlers, and only 3.75% of them dealt with 10 or more requests – and 54% dealt with only one request that year. The Commissioner found issues with knowledge, training and experience throughout his assessment, and questioned why quality assurance of responses fell to Special Advisers.

14. The FOI Unit considers that the system for allocating cases to case handlers is central to delivering the sustained improvement required. Benchmarking with public authorities with similar caseloads and/or business requirements strongly indicates that centralised handling of FOI requests would support improved performance and quality, and facilitate training and development more closely targeted to roles in the FOI process.

15. Adopting a fully centralised model, with all requests dealt with in FOI Unit by a dedicated team of case-handlers, would require upwards of 20 dedicated case-handlers, based on current caseloads and 2012 estimates of the resource cost of FOI

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handling (which are probably understated, given the increasing complexity of requests). Answering all requests centrally would still require input from business areas and may lose valuable policy knowledge. Therefore a part-centralised model is proposed, where the FOI Unit carries out initial assessment and allocates requests to designated, trained case handlers, and continues to support case handlers with advice throughout the process.

16. In addition, the Commissioner is concerned about roles and responsibilities and transparency in decision-making. The Action Plan will ensure that all involved in FOI handling will be better supported by a revised clearance process, including a mandated process to ensure an audit trail of decision-making, guidance setting out the roles and responsibilities, and clarifying the criteria for identifying exceptional cases, on an applicant blind basis, where Ministerial comments should be sought.

17. The FOI Unit will introduce a revised training programme designed to support case handlers, reviewers and approvers, and will identify learning points from our casework to enhance future decision-making.

18. Work is on-going to fully assess the delivery implications of the proposed actions. The implications for the FOI Unit have been assessed and we are confident these can be absorbed in the substantially enhanced unit. The proposed changes in procedure and through MiCase will lead to significantly streamlined and more efficient arrangements and we are confident will over time reduce the burden on the organisation; the substantive technical work and costs associated with the development and implementation of MiCase are within current budgetary provision. We are working closely with Learning colleagues to determine the most cost-effective way of delivering the packages required. There will undoubtedly also be modest opportunity costs in mandating skills training and development and practice requirements. We are also considering what mitigating action may be required in order to ensure that performance does not unduly dip in the transition to MiCase.

Next steps

19. Once the Commissioner has formally approved the Action Plan, a project team will be established to ensure implementation. The FOI Unit is currently working with Communications on an internal communications and behaviour change strategy to support delivery and influence cultural change.

20. A new FOI Network, building on the existing network of local FOI champions, will be established to engage case handlers going forward, share best practice and seek views on the implementation of key changes to processes, guidance and training.

Communications handling

21. There is strong public interest in the Scottish Government's handling of Freedom of Information and it is proposed that we publish the action plan proactively once the Commissioner has confirmed his approval. A government initiated PQ may be of assistance and would allow the final action plan to be lodged with SPIce. In addition it should be published on our website. A further commitment to publish progress reports every three months, until the closure of the intervention, may assist

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in providing assurance to our stakeholders that we are committed to delivering the recommendations, and to doing so as openly and transparently as possible. It may also facilitate effective management of requests for information.

Recommendation

22. You are invited to approve submission of the Draft Action Plan at **Annex B** and covering letter, attached at **Annex F**, to the Commissioner.

[redacted – section 38(1)(b)]
Freedom of Information Unit
X45537

31 August 2018

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister		X			
Deputy First Minister					
Cabinet Secretary for Government Business and Constitution		X			
		X			

Permanent Secretary
Ken Thomson
David Rogers
Ian Davidson
John Booth
Liz Lloyd
[redacted – 38(1)(b)]
Freedom of Information Unit

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Annex A

Overview of Scottish Information Commissioner's intervention on Scottish Government FOI practice

1. This is the second intervention by the Commissioner, using his enforcement powers set out in FOISA. The first, launched in March 2017, into our performance in replying on time to requests and reviews, and the second, launched in November 2017, into our processes and practices for handling requests, following complaints by journalists and a critical motion in the Parliament.

2. We have seen a steady increase in performance since the first intervention was launched. While our performance in 2017, with 83% of requests answered on time, fell slightly short of the 85% target, this constituted a significant improvement on the 76% achieved in 2016. Furthermore, in the first 7 months of 2018, against a 90% target, we are responding to around 93% of requests on time - and 90% of the normally more problematic reviews.

3. As a result of our sustained improvement, the Commissioner has indicated informally that he is minded to end the first intervention. However, due to the overlap between processes and performance (and on-going poor performance by a few Directorates), he will expect us to continue providing monthly reports. These have proved a useful tool in improving performance and we agree they should continue.

4. The second intervention followed the debate in the Parliament of 21 June 2017 as a result of which a motion was passed condemning the Scottish Government's performance in responding to FOI requests and, inter alia, calling for an independent inquiry into the way that the Scottish Government dealt with FOI requests. The debate and motion arose in part from an open letter signed by 23 journalists expressing serious concerns about the Scottish Government's handling of media requests.

5. In February 2018 the Commissioner wrote formally outlining the assessment phase of the intervention. The intervention is at Level 3 (of 4) in the Commissioner's published Intervention Procedures. The Commissioner and his staff undertook a detailed review of more than a hundred individual case records and interviewed Ministers, special advisers and civil servants.

6. The Commissioner published his Intervention Report on 13 June 2018. It highlighted a number of areas where changes were required for consistency with both the letter and spirit of FOI law and the Scottish Ministers' Section 60 Code of Practice. In particular, the Commissioner considered the practice of referring all media requests for clearance to be contrary to the spirit of FOI legislation.

7. The Commissioner made a series of recommendations focussing on the clearance process (including the involvement of special advisers), the insufficiency of case file management and decision recording processes, and the varying levels of knowledge and experience of case handlers. In a statement to Parliament on 13 June, Mr FitzPatrick accepted the Commissioner's recommendations in full.

8. On the same day, Mr FitzPatrick approved and we published revised internal and external guidance on the clearance process to address the Commissioner's most

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pressing conclusion. The revised guidance emphasises that clearance is determined by the sensitivity of the information rather than the type of requester.

9. The Scottish Government is now required to produce a draft action plan addressing the recommendations for approval by the Commissioner by 13 September. Once the plan has been approved timescales for compliance with the plan will be agreed, together with a monitoring and review process.

10. The Commissioner noted that failure to produce a satisfactory action plan or agree suitable timescales for compliance may lead to further action in line with his Enforcement Policy.

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**Annex B
SCOTTISH INFORMATION COMMISSIONER DRAFT ACTION PLAN**

COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
Recommendation 1: Clearance procedures Clear, formal, transparent and detailed procedures for the clearance of information requests. Specifying:		
The Scottish Government will bring forward a revised case-management process, setting out clearance processes and criteria for decision-making, and specifying the roles of all those involved.		
(i) the roles of case-handlers, senior managers, special advisers and Ministers	<ul style="list-style-type: none"> • A body of designated case-handlers will be established, based at an appropriate organisational level (usually Directorate) with appropriate training and dealing with cases on a regular basis. • Nominated senior staff (Band C or SCS), appropriately trained, will provide assurance and clear all requests. • Directors will be required to assess, monitor and certify that arrangements are in place to ensure caseload is being dealt with by competent practitioners • Criteria will be developed to define sensitive or exceptionally complex cases. • A new FOI Unit receiving process will undertake an initial triage assessment to identify sensitive or exceptionally complex cases. This process will be subject to confirmation via case handling procedures to enable Ministers or SPADs to intervene early to identify sensitive cases requiring comment. • Cases identified as sensitive or exceptionally complex will, after clearance, be referred to SPADs and Ministers for comment. 	<ul style="list-style-type: none"> • September 2018 - September 2019
(ii) when Ministers' clearance of the response is required and, where it is not required, who should take the decision on the response		
(iii) procedures for case-handlers to respond to special advisers' advice, particularly: <ul style="list-style-type: none"> (a) what they should do when they disagree with the advice, and (b) when they should approach the FOI Unit for advice to Ministers 		

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COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
	<ul style="list-style-type: none"> • FOI Unit role in providing expert corporate advice to support decision-making will be formally set out. • Guidance will be prepared that sets out explicitly the roles of all staff involved in FOI. 	
(iv) clear rules for recording decision-making in request files, including the rationale for the decision and any departures from specialist advice	<p>Improve our record of decisions taken by implementing a new standardised process to capturing relevant information:</p> <ul style="list-style-type: none"> • A mandatory 'statement of compliance' will record actions and decisions at each stage of the case. • A mandatory FOI submission template will record advice, including differences of view in those cases where Ministers require to comment. 	<ul style="list-style-type: none"> • From the introduction of the revised case handling model process.
(v) the role of the Communications Team in information requests	<ul style="list-style-type: none"> • The guidance on roles will be clear that, except in requests relating to their business area, the role of Comms is restricted to developing press lines or handling plans <i>in parallel</i> with clearance. Guidance will be reviewed to ensure it accurately and unambiguously reflects that role. 	<ul style="list-style-type: none"> • September 2018
(vi) a consistent approach to meeting the statutory time for compliance.	<ul style="list-style-type: none"> • The current process map for handling cases is an appropriate and useful tool that has helped to improve SG performance. We will review the detail to ensure it is clear that a reply must be issued promptly and that 20 days is the upper limit, rather than a target. 	<ul style="list-style-type: none"> • October 2018
Recommendation 2: Quality assurance Introduce a quality assurance process to ensure:		
The Scottish Government will take active steps to improve the quality of its case-handling and its replies to FOI requests.		

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COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
(i) learning from reviews results in action taken to prevent recurrence	<ul style="list-style-type: none"> • FOI Unit will produce bi-monthly reports from the FOI tracker to identify reviews modifying initial replies, assess any issues and ensure action is taken as necessary to implement lessons learned. • Incorporate mirror reports in MiCase and maintain bi-monthly process. 	<ul style="list-style-type: none"> • October 2018 • September 2018 - January 2019
(ii) quality assurance is undertaken at the appropriate business level	<ul style="list-style-type: none"> • Quality assurance issues in relation to all cases will be included in learning material and incorporated in objectives for appropriately trained senior staff, identified in recommendation 1. 	<ul style="list-style-type: none"> • September 2018 - September 2019
Recommendation 3: Clearance of media requests		
The Scottish Government will adopt a common process for handling requests, based solely on sensitivity or complexity, without reference to the nature of the requester.		
Ensure that cases are referred for clearance on the basis of the complexity of the case and/ or the sensitivity of the requested information, not because of the personal characteristics of the requester.	<p>We will ensure requests are not treated detrimentally due to the nature of requester:</p> <ul style="list-style-type: none"> • Guidance amended to reflect the fact that the process clearance should be based on the sensitivity of the information sought or exceptional complexity of the case, rather than the type of requester. • A behaviour change project has been established, linking to MiCase introduction, and changes to training material will support this going forward. 	<ul style="list-style-type: none"> • Delivered 13 June 2018 • September 2018 - September 2019 (timetable will depend on range of issues to be addressed).
Recommendation 4: Case file records management		
The Scottish Government will address all elements of this recommendation through introduction of a new case management and tracking system (MiCase) which is in final stages of development - and through elements of the processes at recommendation 1.		

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COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
<p>Ensure the handling of each request is properly recorded in the case file, to include:</p> <ul style="list-style-type: none"> • searches carried out • decisions made, including the rationale for the decision • any notes of meetings and internal correspondence where recommendations were changed or exemptions relied on and advice sought from other officials and special advisers. • any discussions with applicants and third parties 	<ul style="list-style-type: none"> • MiCase will automate recordkeeping and automatically save all case documents into eRDM. • The revised clearance process, Statement of Compliance and FOI submission template will also provide assurance around record-keeping and decisions made. • eRDM is also being upgraded to a new interface that will make it quicker and easier to save documents. 	<ul style="list-style-type: none"> • September 2018 - January 2019 for 'beta' rollout, adding further functionality if necessary. • All new cases logged on MiCase from January. Current tracker will remain live for legacy requests until April 2019. • December 2018.
Recommendation 5: Case handling		
The Scottish Government revised case-management process will set out clear roles of all those involved. A new suite of learning products for staff, including targeted training and improved record keeping.		
<p>(i) Review the approach to allocating requests to case handlers to ensure there are sufficient trained and experienced personnel to handle FOI requests</p>	<ul style="list-style-type: none"> • Move to a more centralised case-handling model, focused primarily at Directorate level as identified at recommendation 1. • (As at rec 1) Directors will be responsible for certifying that staff have appropriate levels of training and experience to undertake their role. • FOI Unit to take responsibility for allocation of requests, assessing cases (including initial triage to identify sensitive or exceptionally complex cases) before allocation to reduce avoidable delay, compliance and quality issues. 	<ul style="list-style-type: none"> • September 2018 - September 2019 • September 2018 - September 2019 • January 2019 (end of MiCase rollout)
<p>(ii) Review the FOI training system in the Scottish Government and maintain training records in an accessible format (other than in individual personnel records).</p>	<p>To deliver competent and consistent replies to all requests for information:</p> <ul style="list-style-type: none"> • FOI e-learning package to be completed by all staff annually - to include capacity to issue reminders when training due and maintain an electronic record of completion. 	<ul style="list-style-type: none"> • Part of Digital Transformation Project on SG Learning (timings to be confirmed).

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COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
	<ul style="list-style-type: none"> Develop a training package tailored to support staff in the specific roles of case-handler, reviewer and approver to build FOI experience and capability. Staff will be required to complete training and maintain skills through practice standards (volume of caseload on a 6 monthly basis). Review and streamline existing guidance and migrate the content to Saltire. 	<ul style="list-style-type: none"> To be delivered in conjunction with implementation of the revised case-handling model. Ongoing discussions with Corporate Comms
Recommendation 6: Monitoring FOI requests		
The Scottish Government's MiCase system will provide real-time monitoring and tracking information as well as providing Management Information reports to senior staff.		
(i) Ensure that FOI monitoring information: (a) Includes timescales for clearance (referral and response) (b) Is consistent with the s60 Code of Practice	<ul style="list-style-type: none"> MiCase tracking of clearance/comments, which are saved into eRDM, will provide an audit trail and management information. MiCase reports will be consistent with the s60 Code of Practice. This also links to the proposed Statement of Compliance and FOI Submission template outlined for Recommendation 1 above. 	<ul style="list-style-type: none"> From September 2018. All new cases on MiCase from January 2019.
(ii) Both the Executive Team and individual Directorates should monitor FOI performance.	The SG's revised Balanced Scorecard performance reporting provides: <ul style="list-style-type: none"> 3 monthly rolling totals for each DG, comparing current and previous 3 months (inclusive of a two month overlap). Considered at bi-monthly Corporate Board meetings. Directorate trends in previous 3 months, plus latest report of monthly performance. Discussed at quarterly DG Assurance meetings. 	<ul style="list-style-type: none"> In place. In place.

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COMMISSIONER RECOMMENDATION	PROPOSED OBJECTIVE	TIME LINE
	<ul style="list-style-type: none"> • MiCase includes a dashboard providing real-time information on the status of cases, plus a facility to subscribe to performance reports. • The FOI Unit will engage with MiCase to consider how broader internal reporting, in line with part 2 of the s60 Code, might be achieved. 	<ul style="list-style-type: none"> • From September 2018, fully available after completion of rollout. • After MiCase rollout.
Recommendation 7: Reviews		
The Scottish Government will ensure its reviews are carried out on an impartial and objective basis.		
<p>(i) Reappraise review procedures to reduce the risk that reviewers have had involvement in the handling of the original request.</p>	<ul style="list-style-type: none"> • SG guidance on reviews already states that ‘the reviewer should, where possible, be someone who was not involved in the original decision but has sufficient knowledge of the subject.’ This policy and associated guidance is generally followed across the office, but will be reviewed and promoted through staff communications activity. • New case management process and roles, plus the proposed Statement of Compliance, will improve this further, with the aim of ensuring practice conforms with the s60 Code. 	<ul style="list-style-type: none"> • Partly in place. Complete by November 2018 • September 2018 - September 2019

ANNEX C

Recommendation 1: Clearance

1. The Commissioner found that current SG guidance is deficient in terms of setting out the roles and responsibilities in the clearance process, and that the process should be transparent. The report also highlighted that Scottish Ministers' section 60 Code of Practice states that arrangements should be proportionate and reflect the nature, complexity and/or sensitivity of a request and that authorities are expected to put in place measures to achieve both consistency and rigour in responses to requests and requests for review.

2. In order to address the intervention recommendations, a revised process must clearly set out the roles of case handlers, senior managers, Special Advisers, Comms staff and Ministers, and specify the circumstances in which requests require Ministerial clearance.

3. We consider that we should ultimately aim for a system where all requests are cleared by officials of an appropriate seniority, although a phased approach would be needed pending the development of a body of appropriately trained, experienced staff in line with our proposals to address recommendation 5 on case-handling (Annex D).

4. In this model (which appears broadly in line with the approach in Whitehall), Ministers would normally only comment on cases that were identified as sensitive or exceptionally complex, eg covering a major policy area, where there is high political or press interest, or major set-pieces, such as the Budget or PfG.

[redacted (one page) – section 29(1)(a)]

6. The report also requires procedures for case handlers on receiving Special Adviser advice, particularly in the case of disagreement; and the role for the FOI Unit. It also requires us to develop clear rules for recording decisions, setting out the justification and rationale for departure from specialist advice.

7. It is proposed that a new 'statement of compliance' will record the actions and decisions taken and the reasons for that, and a bespoke FOI submission template will capture all relevant information and advice when seeking Ministerial comment.

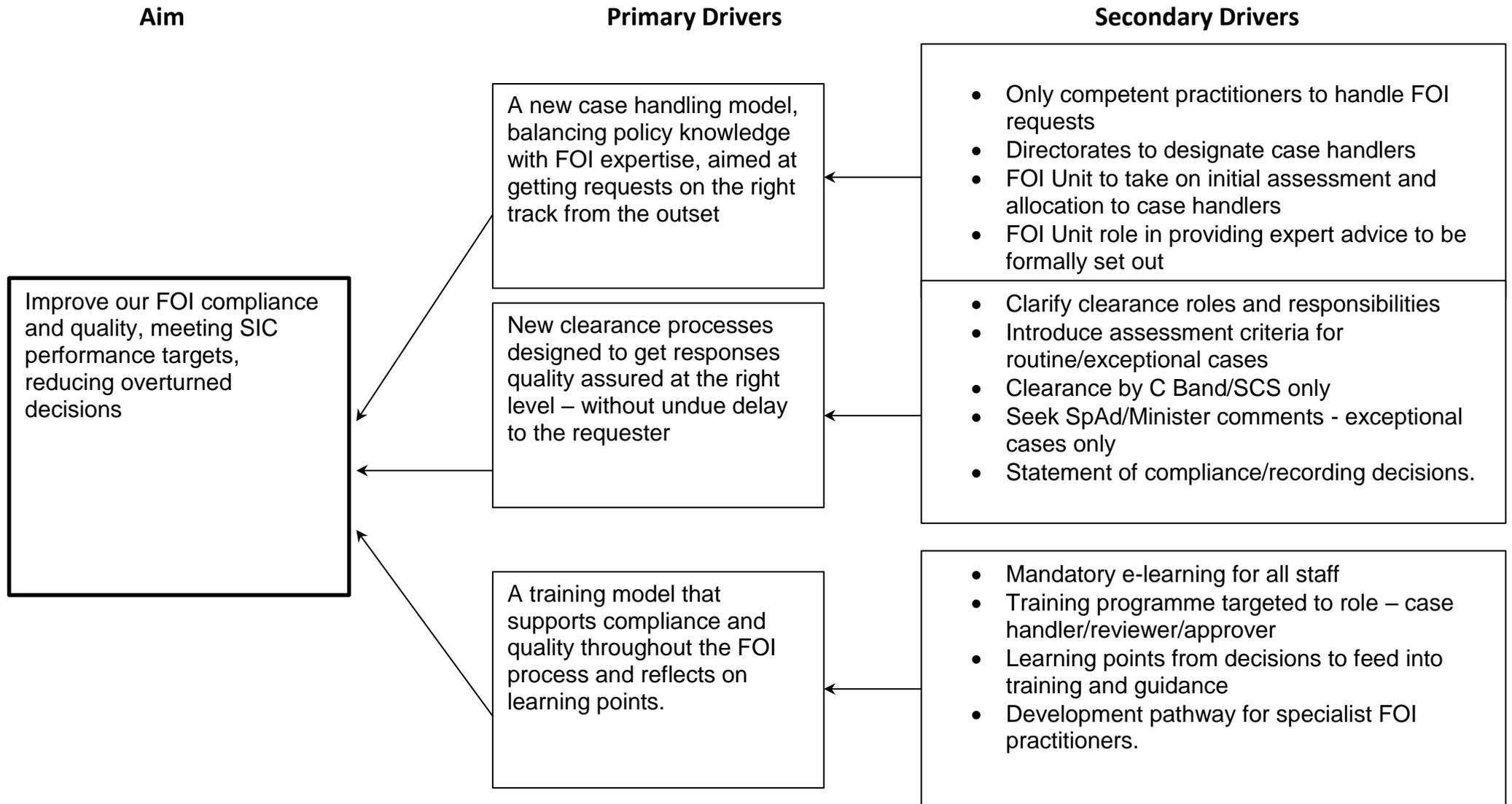
ANNEX D

Recommendation 5: Case handling

1. The SG currently operates a fully devolved model that ensures case-handlers are able to apply their distinct policy knowledge to requests, increasing their ability to identify where relevant information may be held.
2. In 2017, 1,014 staff dealt with 3,050 cases. Within this, only 38 staff dealt with 10 or more cases, meaning 96% of cases are handled by staff with extremely limited or no previous experience of FOI. The Commissioner has expressed concerns about this model and recommended that we develop a core of adequately trained and experienced case-handlers.
3. The FOI Unit has visited a number of high-performing local authorities and Whitehall departments and each use some form of centralised case-handling, some fully centralised and others based on business areas.
4. We have considered a fully centralised model, with all requests dealt with in FOI Unit by a dedicated team of case-handlers. In 2012, a study suggested that the average time spent handling an FOI request in SG was 7 hours. Given an annual caseload of 3,000 (we are on course to exceed that in 2018), that would equate to 568 weeks or 13 full-time staff units¹ working 100% on requests. This makes no allowance for any downtime and does not include handling of reviews or appeals. In fact, it seems likely that upwards of 20 dedicated staff would be required to manage our caseload going forward. Additionally, answering requests would still require input from staff in business areas to identify where relevant information might be held.
5. Partial centralisation, based on business areas (primarily Directorates) may provide a more workable model that meets the Commissioner's recommendation, while retaining an important element of policy knowledge. We consider that Directorates should identify smaller groups of case handlers who would deal with requests and reviews.
6. Directors will be required to assess local FOI business needs, to ensure appropriately trained staff are deployed and to monitor and certify to the effectiveness of local arrangements, including commit to maintaining appropriate levels of trained, experienced staff within their cohort. FOI Unit would advise on the appropriate critical mass of cases that would determine Directorate requirements and provide bespoke training to nominated staff.
7. A Directorate based case-handling model is recommended to address the Commissioner's recommendation, while retaining valuable policy knowledge. Where caseloads merit it, Directorates may wish to 'pool' arrangements or set up dedicated FOI teams or units.
8. FOI Unit will monitor these arrangements, including through an initial implementation period to ensure compliance and thereafter on an annual basis.

¹ 3,000 cases at 7hrs each = 21,000 hours. This equals 568 weeks of 37 hours and with staff working 44 weeks a year (52 weeks minus 6 weeks annual leave and 2 weeks public holidays), equals 12.9 FTE.

Annex E FOI Action Plan Driver Diagram



Annex F Draft Letter to the Scottish Information Commissioner

Daren Fitzhenry
Scottish Information Commissioner
[By email]

13 September 2018

Dear Commissioner

INTERVENTION REPORT – SCOTTISH GOVERNMENT DRAFT ACTION PLAN

Thank you for your email of 13 June 2018 to my predecessor Mr FitzPatrick, introducing your Intervention Report.

I welcome the constructive approach you have taken in assisting the Scottish Government to identify improvements to its handling of Freedom of Information requests. I also welcome your acknowledgement of the significant improvements we have already made in our response times following your predecessor's intervention.

As you know the Scottish Government has accepted your recommendations in full and committed to develop a draft action plan to respond to them. I am pleased to now enclose this plan and look forward to an early opportunity to discuss this with you so that we may quickly finalise the plan and move to implementation.

Yours sincerely

Graeme Dey
Minister for Parliamentary Business and Veterans

From: [redacted - section 38(1)(b)]
FOI Unit
13 June 2018

First Minister
Deputy First Minister
Cabinet Secretaries
Ministers

INTERVENTION REPORT BY THE SCOTTISH INFORMATION COMMISSIONER

Purpose

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

Priority

5. Routine.

Background

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

Report findings

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

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

10. The Commissioner recommends that the Scottish Government:

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

11. We have accepted the Commissioner's recommendations.

Next Steps

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

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

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

[Redacted – section 38(1)(b)]
FOI Unit
X45061

13 June 2018

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

Executive Team
Directors (SST)
Rogers DA (David) (Strategy and Constitution Director)
Davidson I (Ian) (CUKR)
CUKR: Freedom of Information Unit
Lloyd E (Elizabeth)
Nicolson S (Stuart) Special Adviser
McAllister C (Colin)
McFarlane J (John)
[redacted – section 38(1)(b)]
Booth J (John)
[redacted – section 38(1)(b)]
Corporate Communications
News Desk

Scottish Information Commissioner Recommendations

Recommendation 1: Clearance procedures

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

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

Recommendation 2: Quality assurance

Linked to this, it was apparent from interviews with special advisers, and from the views of case-handlers and other staff, that a key role of special advisers in considering draft responses to information requests is one of quality assurance. As noted elsewhere, paragraph 9.7 of the Section 60 Code states that it is good practice for authorities to check responses for accuracy and quality before they are issued. I question whether such quality assurance needs to be carried out by individuals at the level of special adviser within the Scottish Government for cases which are not decided by Ministers and whether these arrangements are proportionate.

- (i) I recommend that the Scottish Government examines their procedures to ensure there is analysis of review cases to identify any areas where poor initial decisions are being made and, going forward, there is a system in place to prevent recurrence of failures. **Recommendation 2(i)**
- (ii) I recommend that the Scottish Government investigate whether the task of quality assurance of cases not decided by Ministers ought, more appropriately, to be carried out by staff within Directorates or Executive Agencies. **Recommendation 2(ii)**

Recommendation 3: Clearance of media requests

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

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

Recommendation 4: Case file records management

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

Recommendation 5: Case handling

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

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

Recommendation 5(i)

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

Recommendation 5(ii)

Recommendation 6: Monitoring FOI requests

- (i) To enable monitoring of clearance timescales, I recommend the inclusion in the FOI tracker system of the date each case is sent for clearance and the date the clearance response is received. **Recommendation 6(i)**

- (ii) The FOI tracking system should capture the necessary information and provide an adequate reporting facility to support the authority to monitor its FOI performance (see paragraphs 2.1 of the Section 60 Code: Recording and reporting statistics).

Recommendation 6(ii)

- (iii) FOI performance reporting is an important function of the activities of all senior management teams. In an authority the size of the Scottish Government, I recommend there are arrangements for performance monitoring at both Executive Team and Directorate level. **Recommendation 6(iii)**

Recommendation 7: Reviews

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

News release

Scottish Information Commissioner outlines steps to build on ‘significant improvements’.

The Scottish Government has welcomed a report by the Scottish Information Commissioner into how it handles Freedom of Information (FOI) requests, and will accept the report’s recommendations in full.

Today’s report follows a review into the government’s approach to handling FOI requests from journalists compared with those from other requestors.

In his report, the Scottish Information Commissioner Daren Fitzhenry, highlights ‘significant improvements’ to the government’s FOI performance and sets out seven recommendations to build on recent progress.

Minister for Parliamentary Business Joe Fitzpatrick said:

“Being open and transparent is a priority set out in our current Programme for Government. We welcomed and cooperated fully with the Scottish Information Commissioner’s review and are happy to accept his recommendations in full to support our continued improvement.

“As the report highlights, we have already implemented a number of changes that have resulted in significant improvements to our FOI performance. In the first five months of 2018 we responded to 93% of FOI requests on time, exceeding the 90% target set by the Information Commissioner and a 10% increase on last year. Outside the FOI process, last year the Scottish Government responded to over 5,000 queries from journalists in a matter of hours.

“Whilst the Commissioner makes clear in his assessment that he has found no evidence to substantiate a number of the criticisms that have been made about the Scottish Government’s approach we are determined to learn from this review, to further improve our performance and to further enhance our position as an open government. Working with the Commissioner we will produce an action plan to take forward these recommendations.”

Permanent Secretary to the Scottish Government Leslie Evans said:

“Our staff recognise the crucial role they have to play to ensure the Scottish Government meets our responsibilities under Freedom of Information legislation.

“During the past year we have taken action to ensure improved performance, including allocating additional resources to our FOI unit, intervening early to ensure effective case management, developing a new tracking system and working across every Directorate to address local action. We publish all FOI responses online.

“I look forward to working with the Office of the Scottish Information Commissioner to build on these achievements in implementing the recommendations in the report.”

The Scottish Information Commissioner’s report is available [here](#)¹

1

<http://www.itspubliknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>