



Scottish Information
Commissioner

it's public knowledge

Our Ref:

Your Ref:

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

2 February 2018

Dear Minister

Intervention assessment phase

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

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

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

The assessment phase will focus on the following questions:

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

2. Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?
3. Is there any evidence of deliberate delays in responses to some information requests e.g., to requests from journalists or requests about internal policy-making?
4. Are internal request handling procedures (particularly those that concern which officials should respond to, or advise on, requests) consistent with FOI law and the Code of Practice?
5. What is the role of Special Advisers in the request handling process? Where request handling departs from the Scottish Government's procedures is there any detriment to the requester's entitlement to information?
6. Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
7. Specifically, where the requested information is politically sensitive, are requests handled in a different way (not under the usual procedures)? If so, to what extent is this detrimental to the requester's entitlement?

I can also advise that the approach I intend to adopt to the assessment phase of the intervention will be as follows:

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

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

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

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

Yours sincerely

Daren Fitzhenry
Scottish Information Commissioner