Scottish Government Intervention

Interim Progress Report

10 September 2020

Scottish Information Commissioner

Contents

Glossary and abbreviations

Term used	Explanation
FOI	Freedom of Information
FOISA	Freedom of Information (Scotland) Act 2002
EIRs	Environmental Information (Scotland) Regulations 2004
MiCase	The Scottish Government's new FOI case management system
Section 60 Code	Scottish Ministers' Code of Practice on the discharge of functions under FOISA and the EIRs

Introduction

This is my second report on the progress made by the Scottish Government in relation to its freedom of information (FOI) improvement action plan[1], which was prepared in response to the recommendations contained in my Intervention Report of June 2018[2].

This intervention was launched in November 2017, with the purpose of examining, assessing and improving elements of the Scottish Government's FOI performance. It followed concerns raised by a number of journalists in a May 2017 letter to the Scottish Parliamentary Corporate Body, and by the Scottish Parliament itself in a debate (Motion S5M-06126) on 21 June 2017.

The Scottish Parliament has asked me, via Motion S5M-12861, to publish annually a report on the government's implementation of its FOI improvement action plan. This report responds to that request and provides review and comment relating to progress made in relation to each of the seven recommendations contained in my June 2018 Intervention Report.

This report relates principally to the period between 1 April 2019 and 31 May 2020. This means that, while the main focus of the report is on the period prior to the Covid-19 pandemic, it does also consider the Scottish Government's performance during the first few months following the arrival of Covid-19 in the UK. It should be stressed, however, that this period impacted by the Covid-19 pandemic will be more fully assessed in a future progress report, when a fuller picture becomes available.

In the preparation of this report, I had originally planned to carry out a second on-site assessment of Scottish Government FOI practice, in order to consider in detail the extent to which the measures introduced through the Scottish Government's action plan were influencing real-world improvement in the day-to-day handling of information requests. However, the unprecedented events of recent months - including the closure of premises and the introduction of lockdown measures - have meant this has not been possible.

It is, however, my intention to undertake this work in early 2021, as soon as it is safe and practicable to do so, and when the Scottish Government has had a reasonable period of time to stabilise its processes and practices, enabling a more meaningful analysis. A further progress report will therefore follow this second assessment.

This subsequent report will then inform my decision about whether the intervention can be closed, or whether additional remedial action is required.

Daren Fitzhenry
Scottish Information Commissioner
10 September 2020

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[1] Scottish Government FOI Improvement Action Plan: www.gov.scot/publications/foi-improvement-project
[2] www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?lID=11760&sID=11121

Intervention status report

1.   The recommendations contained in my Intervention Report of June 2018 can be briefly summarised as follows:

(i)   **Clearance procedures**
A detailed review of clearance procedures should be undertaken to formalise and clarify roles and responsibilities, and ensure that reasons for decisions are appropriately recorded.

(ii)   **Quality assurance**
Procedures should ensure that poor decisions are identified and recurrences prevented. Consideration should be given as to whether staff within directorates or agencies can carry out quality assurance.

(iii)   **Clearance of media requests**
The practice of subjecting requests from the media, MSPs and political researchers to different procedures based on the nature of the requester should be ended.

(iv)   **Case file records management**
Record-keeping should be improved to ensure that case files contain a full record of documentation in relation to each request.

(v)   **Case-handling**
Systems should be reviewed with a view to developing a core group of trained case-handlers. FOI training should be reassessed, ensuring that accessible training records are maintained.

(vi)   **Monitoring FOI requests**
FOI tracking systems should enable the monitoring of clearance timescales, and should support the monitoring of performance. Monitoring should take place at both Executive Team and directorate level.

(vii)   **Reviews**
Procedures should be reviewed to remove, as far as practicable, the risk of individual staff members being involved in decision-making at both request and review stage.

2.   Below, I provide a report of progress made by the Scottish Government in relation to each of these recommendations.

Recommendation 1: Clearance procedures

3.   My June 2018 Intervention Report made a number of recommendations in relation to the clearance of information request responses by the Scottish Government. These were informed by the findings of my first on-site assessment, which found that clearance procedures lacked detail, while also lacking clarity around individual roles and responsibilities.

4.   I recommended that the Scottish Government undertake a detailed review of clearance procedures to address a number of concerns. This included six sub-recommendations, which are summarised as follows:

    (i)   The role of all individuals involved in the clearance of information requests should be clarified. (Recommendation 1(i))

    (ii)   The system which determines which cases require clearance, and who is responsible for providing clearance, should be formalised and clarified. (Recommendation 1(ii))

    (iii)   The procedures to be followed when a case-handler receives special adviser advice should be clarified. Should disagreements arise, the Scottish Government's FOI unit should have a role in providing specialist advice. (Recommendation 1(iii))

    (iv)   Clear rules should be introduced for the recording of decisions on information requests, including the detailed rationale for the decision, and clear justification for any departures from specialist advice. (Recommendation 1(iv))

    (v)   The role of the Communications Team should be clarified. (Recommendation 1(v))

    (vi)   The inconsistency between target timelines and the duty to respond promptly should be addressed. (Recommendation 1(vi))

Progress on the recommendations

5.   As noted in my July 2019 Progress Report, the Scottish Government prepared an Action Plan in response to my Intervention Report, which contained a range of actions intended to address my recommendations. In relation to Recommendation 1, this included a commitment to bring forward a revised case management process, setting out clearance processes and criteria for decision-making, and specifying the roles of all involved.

6.   The Scottish Government published its Criteria for Decision-Making, a key document stemming from the Action Plan, in February 2019. The Criteria for Decision-Making contained a range of measures to address my recommendations, including:

    (i)   Triage and allocation of all information requests by the Scottish Government's FOI Unit according to published criteria.

    (ii)   Decisions to be taken by officials of appropriate seniority, with only requests assessed as sensitive or exceptionally complex decided by Ministers. Variations from this approach to be recorded in the case file.

    (iii)   Requests to be allocated to trained case-handlers, whose responsibilities include identifying information, drafting the response and keeping appropriate records. Responses submitted to an appropriate-level decision-maker for approval.

(iv)   Any communication issues to be managed as a parallel process which does not delay or influence the FOI response.

(v)   Established processes to resolve disputes between parties involved in case-handling.

7.   As my July 2019 Progress Report noted, the request-handling process set out in the Criteria for Decision-Making provided a strong foundation for the fulfilment of my recommendations on clearance.

8.   In the period between 1 April 2019 and 31 March 2020, the Scottish Government worked to roll out its new request-handling process. Given the wide-ranging nature of the changes - which introduced new processes, roles and responsibilities for staff across the organisation - the Scottish Government took an incremental approach to this roll-out. It piloted, tested and adjusted elements within individual directorates, before moving on to introduce the refined changes to additional directorates or groups of directorates.

9.   Notable progress made over the period included:

(i)   *Triage*

(a)   A key component of the triage process involves the Scottish Government's FOI Unit assessing requests against a set of published criteria to determine whether the information requested is likely to be sensitive and/or exceptionally complex in nature. Only requests which meet these criteria are decided by Ministers, with all other decisions to be taken by officials of appropriate seniority.

(b)   Testing of the triage process was initiated in May 2019 within a pilot directorate. By December 2019, triage had been progressively rolled out to all Scottish Government core directorates, with triage support also being provided to a small number of additional Scottish Government agencies in receipt of comparatively high request volumes. Triage processes have been reviewed and refined throughout the roll-out period, informed by developing experience.

(c)   By March 2020 the impact of these changes could clearly be seen, with an internal Scottish Government report finding that responses to triaged cases were issued on time in 98% of cases where new case-handling models were in place.

(ii)   *Case-handling*

(a)   In 2017, when my intervention into Scottish Government FOI performance was launched, more than 1,000 individuals across the Scottish Government were involved in FOI case-handling, with more than half responsible for responding to just one information request a year. This inevitably led to challenges in achieving a consistent and appropriate standard of FOI response across the organisation.

(b)   Through its new process - and in line with my recommendations - the Scottish Government has moved towards a smaller group of trained and experienced core case-handlers, located within individual directorates.

(c)   Work began to identify and train this core group in June 2019. My office was consulted on the development of training resources, and training was developed and refined throughout the year, informed by Scottish Government staff surveys, focus groups and interviews. By March 2020, the Scottish Government reported that more than 280 individual case-handlers had been identified and trained in FOI and EIR core skills.

(d) In March 2020 the Scottish Government also reported that it was in the final stages of preparing new internal guidance for FOI and EIR case-handlers, while separate guidance had either been produced, or was in production, for other groups involved in the request-handling process (recognising the need for specific guidance targeted at individual roles in the FOI process). This included the development of specific guidance for:

- Ministers

- Officials with FOI decision-making responsibility

- Officials conducting FOI reviews

- Designated case-handlers

(iii) **Improvement workshops**

(a) In addition to the development of training materials and resources for key staff, the Scottish Government's FOI Unit has developed and held case-handling improvement workshops within individual directorates, designed to inform improvement in response to specific challenges. This approach recognised that FOI challenges may differ from directorate to directorate, influenced by e.g. the volume or nature of the requests received, the manner in which information is held, or the resources available.

(b) By December 2019, the Scottish Government reported that 36 improvement workshops had been held across the organisation, with directorates in receipt of improvement workshops including Transport Scotland, the Directorate for Economic Development, the Directorate for External Affairs, the Directorate of Agriculture and Rural Economy, along with all directorates named in my July 2019 Progress Report as displaying disappointing or declining performance[3].

(iv) **FOI Network**

(a) Also of note is the Scottish Government's establishment of an internal FOI Network group, building on the successful model of groups currently operating in other areas of the public sector, which are supported by my staff. A key benefit of these groups is that they enable staff working in FOI to discuss experiences, resolve challenges and share good practice, with the aim of improving the FOI performance for the benefit of both requesters and authorities.

(b) The Scottish Government initiated its own internal FOI Network in February 2019, with more than 50 members of staff from across the organisation participating. A further five Network Group meetings were held across 2019/20, with staff from my office attending meetings to provide updates, direct participants towards appropriate guidance and resources, and provide relevant information and advice.

(c) Networking amongst case-handlers has been further supported through the use of the social networking service Yammer to support internal FOI networking, and

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[3] See July 2019 Progress Report, paragraphs 61-62

further share good practice and learning[4]. The Scottish Government report that this resource has been actively used, with increases in membership, active users and posted messages across 2019/20.

(v) ***Communications Team***

    (a) The role of communications staff in request-handling was referenced in my June 2018 Intervention Report, and recommendation (1)(v) specifically advised that the role of the Communications Team should be clarified. This arose from ambiguities in Scottish Government FOI procedures regarding these roles.

    (b) The Scottish Government's Action Plan and its Criteria for Decision-Making set out to provide this clarification, making clear that the role of communications staff is restricted to acting as the point of contact for communications with journalists, and developing press lines or handling plans in parallel with FOI clearance. It stresses that any parallel communications activity must not be allowed to delay, impede or influence FOI responses.

    (c) This clarification has been actively communicated at a number of FOI awareness events for communications staff.

(vi) ***Internal communications***

    (a) Finally, I note that the Scottish Government has prepared and published a range of internal communications regarding its FOI improvement work, with the aim of maintaining and developing staff awareness of, and support for, FOI improvement. This has included regular intranet updates on project messages and developments, communications designed to reduce the risk of timescales being missed due to staff leave or office closure over holiday periods and an organisation-wide campaign promoting the message that FOI is a responsibility that all staff share which launched in February 2020.

10. Having reviewed the work undertaken, it is clear that, between April 2019 and March 2020, the Scottish Government made a significant effort to address the issues highlighted in my June 2018 Intervention Report. I note, for example, the substantial work undertaken by the Scottish Government's FOI Unit, which, alongside the provision of triage and advice, has included the development of procedures, guidance, training materials and resources.

11. I also note that there is evidence of a collaborative effort across the Scottish Government to address issues raised in my June 2018 Intervention Report, not least the inclusion of FOI on the Scottish Government's Corporate Risk Register for the first time, and evidence of proactive engagement at a Ministerial level.

12. There is evidence that, prior to the impact of the Covid-19 pandemic, these measures were beginning to bear fruit. This includes improvement in the Scottish Government's compliance with statutory timescales and reductions in the number of FOI review requests received and appeals made (discussed in later sections of this report).

13. I am aware, however, that differences can exist between process and practice. It will only be through a further on-site assessment involving detailed consideration of individual cases that I will be able to assess whether the various actions have in practice addressed the full range

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[4] Internal Scottish Government guidance makes clear that content posted on this and other social networking sites should be searched, as appropriate, when responding to information requests

of concerns around clearance which informed recommendations 1(i) to 1(vii) of my June 2018 Intervention Report. As noted above, I intend to undertake this assessment early in 2021, when circumstances allow. This assessment will also allow me to consider the extent to which issues arising from the roll-out of the MiCase records management system (discussed further under Recommendation 4 below) are impacting on the ability to record appropriate information on FOI decision-making (Recommendation 1(iv)).

14. I am also extremely mindful of the risk that the progress made through the FOI improvement work to date may be halted or even lost as the Scottish Government responds to the Covid-19 pandemic.

15. As with many organisations, the pandemic has had a significant and substantial impact on the work of the Scottish Government. Towards end of March 2020, the Scottish Government took the decision to prioritise available resource towards its pandemic response. As office closures took hold and staff disruptions were felt, elements of FOI improvement work such as training and the development of resources were paused.

16. Work affected includes:

   • Delay to the issue of guidance for case-handlers and reviewers (although some work on this has been carried out)

   • Significant disruption to the established network of FOI case-handlers and reviewers as a result of emergency changes to Scottish Government structure, and the redeployment of staff across the organisation to Covid-19 support roles

   • The suspension of meetings of the internal FOI Network

   • Delay to the programme of FOI training and events (although, again, some work on this has been carried out).

17. This disruption has had a substantial impact on the progression of FOI improvement work. It is nevertheless recognised that during this period some work has been undertaken to progress this programme. Alongside ongoing work to triage cases and provide casework advice, this has included further work being done on the development of guidance materials for case-handlers and reviewers, and the piloting of online training workshops for novice case-handlers, with the first of these being held on 28 July 2020.

18. The Scottish Government has also advised that preliminary discussions have taken place on the restarting of the other elements of FOI improvement activity. While I am mindful of the significant challenges faced by the organisation and note the improvement work that has continued, it is important that this work is given sufficient priority and resource. It is also appreciated that due to the structural changes within the Scottish Government it may be necessary for procedures and training to be altered to reflect those changes. I have indicated that my office will be happy to consider and comment on any such alterations, as we have throughout the work done to date.

Recommendation 2: Quality assurance

19. My June 2018 Intervention Report queried the extent of the role played by special advisers in checking responses for accuracy and quality before issue, and in particular whether such quality assurance needed to be carried out by special advisers in such a wide range of cases. I recommended that:

(i)   The Scottish Government examine its procedures to ensure there is analysis of review cases to identify any areas where poor initial decisions are being made, and put in place a system which prevents recurrence of such failures. (Recommendation 2(i))

(ii)   The Scottish Government investigate whether the quality assurance of cases not decided by Ministers should be carried out by staff within directorates or executive agencies. (Recommendation 2(ii))

Progress on the recommendations

20.   In relation to recommendation 2(i), the Scottish Government's FOI Unit has developed a bi-monthly report on learning points emerging from reviews to ensure relevant actions are taken and lessons learned. Lessons and learning points are also shared with case-handlers during the Scottish Government's FOI Network Group meetings, in order to reduce the likelihood of errors or issues being repeated.

21.   For recommendation 2(ii), the Scottish Government introduced a quality assurance process as part of its Criteria for Decision-Making. This makes it clear that routine requests for information (i.e. those which are not classed as being sensitive or exceptionally complex) should receive quality assurance from officials, not special advisers. The Criteria state that:

      "*Where cases are not assessed as requiring a Ministerial decision, Special Advisers will have no involvement (beyond offering a view during the FOI Unit's triage assessment, or where the FOI Unit reassesses the sensitivity of the case) unless they are the holders of the information requested or the request relates to them directly*".

22.   This process is reflected and reinforced in the Scottish Government's Triage Process Map, introduced in May 2019. The Triage Process Map underpins the triage work carried out by the FOI Unit. The process map makes clear that, where the sensitivity or complexity of a case is initially unclear (e.g. without consideration of the nature or extent of the information held) case-handlers are required to liaise further with the FOI Unit once information is identified, to support an objective assessment of the case.

23.   In considering the recommendations made in my June 2018 Intervention Report, the Scottish Government has recognised that too many cases historically have been passed to Ministers for clearance, and that this should correctly be addressed. It has cautioned, however, that staff may initially err on the side of caution when assessing cases as sensitive (or complex) until confidence in the system grows. As a result, it notes that performance improvements emerging from these revised procedures may increase gradually over time, as new processes bed in and confidence in new roles and responsibilities develop.

24.   While I recognise that there may be a bedding-in period for new processes, I would expect this period to be relatively short, even bearing in mind the impact of the Covid-19 pandemic, not least as a result of the robustness and clarity contained within the Scottish Government's new procedures and the concentration of triage in a small specialist unit. It is, however, important that appropriate targeted training is provided for request-handling at all levels, from Ministers to official decision-makers to case-handlers, and, while the disruption of recent months will inevitably cause challenges, I would hope that the measures introduced to date will support a rapid normalisation of the new procedures.

25.   In terms of assessing the 'real-world' impact of changes, I would again stress that my 2021 onsite assessment will enable my staff to undertake a detailed analysis of individual cases, in

order to consider the extent to which cases are being effectively triaged, and whether cases are subsequently being quality assured at the appropriate level in the organisation.

26. I also note that one of the recommendations emerging from the Scottish Government's own reporting on the progress of its FOI improvement work includes a recommendation that the Scottish Government's Executive Team should consider whether internal Key Performance Indicators should be introduced in relation to the time taken to respond to both routine and sensitive / exceptionally complex cases. I would urge that the Scottish Government give serious consideration to this recommendation, in order to ensure that a focus on FOI performance is maintained, both in response to the Covid-19 pandemic, and as work moves beyond the initial project phase towards embedding FOI improvement measures as 'normal business'. This is of particular importance given the current range of high profile organisational priorities, not least Covid-19, which may inadvertently lead to Ministerial focus shifting from FOI performance.

27. Transparency, openness and accountability play a significant role in maintaining public trust, and it is essential that benefits arising from improvement work done to date are not lost, e.g. as a result of a perception amongst staff that priorities have changed.

Recommendation 3: Clearance of media requests

28. My June 2018 Intervention Report set out that it is wrong for requests from a class of requesters - such as journalists, MSPs or political researchers - to be treated differently solely because of who the requester is. Recommendation 3 called for the ending of this practice. In making this recommendation, I noted that a clearance system based on the sensitivity of information requested and/or the complexity of the case may be appropriate, but that this should always be predicated on the nature of the **request**, rather than the **requester.**

Progress on the recommendation

29. In response to this recommendation, the Scottish Government committed to adopt a common process for handling requests, with cases referred for clearance based solely on the sensitivity and/or complexity of the requested information, rather than the occupation of the requester. Indeed, though it is unfortunate that the issue rose at all, it is recognised that the Scottish Government took immediate steps to implement this commitment on receipt of my June 2018 Intervention Report.

30. This principle is embedded throughout the material subsequently produced by the Scottish Government, not least in the Scottish Government's Action Plan, its Criteria for Decision-Making, its Triage Process Map, and the guidance and training materials developed for staff across the organisation. The 'principles underpinning request handling' set out in the Criteria for Decision-Making, for example, state that:

"We will treat requests equally, regardless of their identity or type – that is, in a way that is 'applicant neutral'"

31. Ultimately, however, it is only through an assessment of individual cases that the effectiveness of this measure in real-world request-handling can be fully considered and assessed.

32. From the appeals I receive, it can be seen that some issues of concern still arise from time to time in cases involving journalists and political researchers. These include concerns around

late responses to requests, or concerns relating to the quality of the searches undertaken to locate information. However, such concerns also feature on occasion in appeals from other requester categories, and there is currently no clear evidence that any such issues have been unduly influenced by the identity of the requester.

33. Exploring this issue further will be a key focus of my 2021 on-site assessment work.

Recommendation 4: Case file records management

34. I recommended that the Scottish Government take action to improve record-keeping, to ensure that case files contain a full record of internal correspondence around the handling of information requests. This should include a record of searches, decisions made, the rationale for decisions, meetings held, advice sought and received, and all relevant correspondence or communications with applicants, officials, special advisers or third parties.

Progress on the recommendation

35. The Scottish Government committed to address this recommendation through the introduction of a new case management and tracking system (MiCase), and through elements of the actions for Recommendation 1. The aim is to ensure that a full and appropriate record of the handling of each request is properly recorded in the case file.

36. The new MiCase system was designed with the intention of automating record-keeping, enabling relevant documentation to be automatically saved into the case file.

37. In addition, record-management principles are embedded throughout new case-handling procedures, with the Criteria for Decision-Making for example, making clear that that:

(i)   The rationale for seeking Ministerial decisions on disclosure will be recorded in the case file.

(ii)   FOI/EIR submission templates will be used to seek Ministerial decisions, setting out why it is considered appropriate. FOI advice that has been provided should also be recorded.

(iii)   Advice from Special Advisers to Ministers must be recorded. All other comment from Special Advisers whether provided to the FOI Unit, case-handlers or officials must be recorded in the case file.

(iv)   Where Ministers themselves consider they should take the decision on disclosure, the reason should be recorded in the case file. Ministerial decisions should be recorded using the submission template and recorded in the case file.

(v)   Where there is disagreement on the outcome of a case, determinations must be recorded in the case file, including the reason for any departure from FOI Unit specialist advice.

(vi)   Case-handlers must record all comments and contributions received in relation to a case, using the MiCase system, along with the rationale for the approach recommended in their draft response

38. The launch of the Criteria for Decision-Making was accompanied by the launch of mandatory templates, to be used when cases are submitted to Ministers for a decision and for the recording of FOI decisions. A Statement of Compliance has also been developed to support appropriate record-keeping.

39. The Scottish Government has provided reassurance that training of case-handlers has been designed to stress the mandatory requirements for good record-keeping at every stage.

40. The roll-out of the MiCase case management system had originally been planned to coincide with the training of case-handlers in summer 2019, but this was subsequently delayed as technical issues with the system were addressed. The system was fully rolled out to the Scottish Government by the end of December 2019, and to Scottish Government agencies in the first weeks of 2020.

41. It would appear, however, that, in practice, the MiCase system is falling short of the Scottish Government's aspirations in a number of key areas. From a report supplied to my office in July 2020, it would appear that the system currently creates a number of barriers for staff when attempting to follow records management principles contained in the Criteria for Decision-Making. Reported issues include:

    • limitations to the size of documents that can be attached to case files

    • system processes which drive staff towards saving working documents locally, outside the MiCase system

    • the inability to add documentation to files once responses have been issued.

42. Issues have been further compounded by the disruption to the core team of trained case-handlers as a result of Covid-19 redeployment. As a result, the Scottish Government acknowledges that gaps may exist in case records. It also reports that, while updates to the system had been scheduled to address some of these issues, these have currently been postponed in order to ease pressure on Scottish Government systems at the current time.

43. It is clear from the information provided by the Scottish Government that it is currently falling short in relation to its progress on Recommendation 4, as a result of the problems identified within the MiCase system. Just how far short it is falling will only become fully apparent to me through an examination of individual case files during my forthcoming on-site assessment, but it is clear that a system which places barriers on what case handlers can store, and how and when they can store it, will inevitably lead to important omissions. These omissions in any particular case may include information relevant to the appropriate consideration of the individual circumstances of that case.

44. While I acknowledge that the Scottish Government is under significant pressures at the current time, it is my view that measures to address the shortcomings of MiCase should be prioritised at the earliest possible opportunity, in order to ensure that important records are not lost.

Recommendation 5: Case-handling

45. My June 2018 Intervention report recommended that the Scottish Government review its system for allocating case-handlers, with a view to developing a core group of trained and experienced personnel responsible for case-handling (Recommendation 5(i)). I also recommended that the Scottish Government reassessed its FOI training system, and ensured that training records are kept in an accessible format (Recommendation 5(ii)).

Progress on the recommendations

46. The Scottish Government committed to revising its case management process in order to ensure that there were sufficient trained and experienced personnel to handle FOI requests.

It also committed to delivering a new programme of FOI training for staff, with improved and accessible record-keeping on the delivery of training.

47. The Scottish Government's Criteria for Decision-Making specifies the roles of officials at all levels of case-handling, setting out clear internal policies for the management of requests.

48. As noted in my comments on recommendation 1 above, the Scottish Government has undertaken significant work to develop a core group of trained case-handlers across the organisation, with more than 280 individual case-handlers having been identified and trained by March 2020.

49. Case-handlers have been supported by a range of additional structures and resources, including the establishment of an internal FOI Network Group. Additional training and guidance has been developed and circulated for staff responsible for various stages of the FOI process, and, as of March 2020, the Scottish Government had planned a comprehensive 2020 programme of training opportunities and events to support the consolidation and development of core skills.

50. The Scottish Government also prioritised evaluation of the experience of staff involved in the FOI change process, in order to track experience and identify areas for improvement. It has reported that, through this monitoring, staff have indicated they felt more supported and more confident when carrying out FOI work. Continued responsive monitoring of this type will play a role in the ongoing development of a confident and empowered FOI workforce.

51. In addition to training for staff directly involved in FOI request-handling, the Scottish Government has also developed an FOI e-learning package to be completed annually by staff across the organisation. The e-learning package was 'soft launched' in December 2019, with the Scottish Government reporting in July 2020 that 378 staff have completed it to date. A more formal launch was planned once reporting was fully operational, with the intention that reporting would allow proactive 'push notifications' to be sent to staff who had not yet completed the training.

52. The pandemic has, however, significantly impacted the Scottish Government's progress in relation to Recommendation 5 in recent months. The redeployment of staff across the organisation to Covid-19 support roles has significantly disrupted the network of FOI case-handlers, many of whom have been redeployed themselves. In addition, the development of the reporting elements of the e-learning package (and the associated monitoring of completion by staff across the organisation) has been postponed, while the extensive programme of FOI training and events has been scaled back. Some training has been possible, with the FOI Unit piloting an online workshop for novice case-handlers on 28 July 2020.

53. While it is clear that significant work had been done to progress this recommendation by March 2020, it is also clear that this work has since been substantially disrupted as a result of the Covid-19 pandemic response.

54. This organisational disruption, alongside the unrelated transition from FOI improvement work being undertaken as a distinct project towards embedding improvement principles into normal business, means that the progress made is currently at a fragile juncture. I would therefore urge Ministers to explore ways of ensuring that the benefits from this progress can be stabilised and maintained, in order to prevent the advantages of this recent investment in FOI staff resource being undermined or lost.

Recommendation 6: Monitoring FOI requests

55. My June 2018 Intervention Report recommended that:

    (i) The FOI tracking system record the date cases are both sent for, and receive, clearance, in order to allow for the monitoring of clearance timescales (Recommendation 6(i)).

    (ii) The FOI tracking system should enable the authority to effectively monitor its FOI performance (Recommendation 6(ii)).

    (iii) Arrangements are put in place for performance monitoring at both Executive Team and directorate level (Recommendation 6(iii)).

Progress on the recommendations

56. The MiCase case management system is intended to provide real-time monitoring and tracking information, as well as enabling management reporting to senior staff.

57. The system has been designed to track clearance and comments, providing an appropriate audit trail of relevant information, and enabling the effective monitoring of FOI performance.

58. As noted above in my comments on recommendation 4, the introduction of the MiCase system - and therefore its ability to provide real-time monitoring and tracking information and management reports - was initially delayed. The system was, however, rolled out across the Scottish Government in December 2019 (and to agencies in early 2020).

59. The Scottish Government reports that, while the system does, in principle, provide the required reporting functionality, some issues have arisen with the generation of reports which have yet to be fully resolved. As with my comments elsewhere on the roll-out of the MiCase system, I would urge the Scottish Government to address these issues as a priority, so that FOI performance can be fully and effectively tracked and monitored.

60. I would also reiterate here the point made in paragraph 26 above, which noted an internal Scottish Government recommendation that the government's own Executive Team should consider whether Key Performance Indicators should be introduced in relation to the time taken to respond to both routine and sensitive / exceptionally complex cases. I would again urge the Scottish Government to give serious consideration to this recommendation, to support the fulfilment of recommendation 6(ii) of my June 2018 Intervention Report.

Recommendation 7: Reviews

61. I noted that the Scottish Government's review process allowed for staff involved in the original decision to also be involved at review stage, in conflict with the good practice advice contained in the Scottish Ministers' own Section 60 Code of Practice. I recommended that the Scottish Government review its procedures to remove, as far as possible, any related risk to impartiality.

Progress on the recommendations

62. The Scottish Government's Action Plan contains a clear commitment to ensure that reviews would be carried out on an impartial and objective basis. The Scottish Government also noted that its guidance already stated that reviews should, wherever possible, be carried out by staff not involved in the original decision, and that this guidance was generally followed. It

also committed to review the policy and further promote it to staff, with the aim of ensuring practice conforms with the Section 60 Code.

63. During 2019, the Scottish Government developed additional guidance for FOI reviewers, as part of the development of bespoke guidance for staff involved in different elements of the request-handling process. A version of the guidance for reviewers was launched for testing in December 2019.

64. The Scottish Government has also continued to cascade learning points emerging from internal FOI reviews to relevant staff within the organisation, via a bi-monthly publication and the FOI network.

65. However, the Scottish Government reports that, in common with the experience of FOI case-handlers, its established network of FOI reviewers has been disrupted through staff redeployment caused by the pandemic. In line with comments made elsewhere, I strongly recommend that the Scottish Government to ensure that this resource is restored as soon as possible, in order to ensure full compliance with Ministers' own Section 60 Code of Practice.

Compliance with timescales

66. In 2017, prior to the journalists' letter and Parliamentary debates, my predecessor as Commissioner initiated an intervention into the Scottish Government's performance against statutory FOI timescales. This intervention followed an extended period where performance fell significantly below the expected standard. In April 2017, for example, only 63% of Scottish Government requests were responded to within the statutory upper limit of 20 working days.

67. As part of this intervention, the Scottish Government agreed to the following targets for responding to requests and reviews over three years:

    (i)   Year 1 (2017): 85% to be issued within the statutory timescales

    (ii)   Year 2 (2018): 90%

    (iii)   Year 3 (2019): 95%

68. These targets were set for performance by the whole authority **and** individual directorates.

69. This intervention was closed in 2018 following significant timescale improvement having been achieved. However, as failure to meet FOI timelines can often be symptomatic of underlying FOI concerns, I nevertheless required the Scottish Government to continue to submit monthly performance data, in order to support ongoing improvement and the wider intervention into Scottish Government FOI performance.

70. Observations on the statistics submitted between 1 April 2019 and 31 May 2020 (the most recent data available at the time of writing) are provided below.

Requests

71. The Scottish Government has made significant progress in its response within statutory timescales over the period of the two interventions. As noted, in April 2017, only 63% of requests were responded to within statutory timescales. By the close of my intervention into response timescales in 2018, this had risen to 91%.

72. In the period between 1 April 2019 and 31 March 2020, FOI performance against timescales continued to improve, suggesting that the work done across the Scottish Government to improve FOI performance had a significant impact on response timescales over that period.

73. Unfortunately, this improvement has, at least in the short term, not survived the internal Scottish Government structural changes made to deal with the Covid-19 pandemic.

74. The table below shows FOI performance across the Scottish Government as a whole during this period:

2019/20	% of request responses issued on time	2020/21	% of request responses issued on time
April	92%	April	90%[5]
May	92%	May	58%[6]
June	90%		
July	94%		
August	96%		
September	95%		
October	98%		
November	94%		
December	97%		
January	97%		
February	97%		
March	95%		
2019/20 Total	**95%**		

75. As can be seen, performance across 2019/20 as a whole was 95%, meeting the Scottish Government's internal target. I note that performance against timescales was consistently maintained at over 90% across 2019/20, with response rates generally increasing as the measures introduced in response to my June 2018 Intervention Report (and highlighted elsewhere in this progress report) were rolled out across the organisation. Indeed, between August 2019 and March 2020, it is notable that performance dipped below the 95% target on only one occasion.

76. When considering the 2019/20 performance of individual directorates, of the 63 directorates and agencies for whom data was provided, 23 reported a 100% response rate in meeting FOI request timescales across the period. A further 16 directorates reported a response rate of 95% or above, while an additional 11 reported a rate between 85-95%.

77. There were, however, a small number of directorates where performance data during 2019/20 raised specific concerns. These included the Directorate for Early Learning and Childcare Programme (80%), the Directorate for Mental Health (77%) and the Directorate for Social Security (75%). The latter directorate was named as one of the directorates exhibiting declining performance in my July 2019 Progress Report, so it is particularly concerning to see it feature for a second time. However, I note that the directorate faced certain specific challenges during 2019/20, including (as reported to me in July 2019) experiencing a 70% increase in requests at a time when the directorate had doubled in size. I also note that the directorate's performance across the year was impacted by particularly poor performance in the first part of 2019/20, and that, since the introduction of improvement measures in September 2019, performance has improved significantly, with the majority of requests and reviews issued on time in the second half of 2019/20. Care must be taken, however, to ensure that this improvement is sustained.

78. The examination of cases involving under-performing directorates will be a particular area of focus during my 2021 on-site assessment.

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[5] This figure includes cases where timescales were temporarily extended by the Coronavirus (Scotland) Act 2020
[6] As above

79.   It is reassuring to note, however, that a number of other directorates named in my July 2019 progress report demonstrated improved performance in 2019/20. Of particular note is Education Scotland, which reported a 100% 'on-time' response rate to requests (and reviews) during that period.

80.   In general then, there is strong evidence that the various measures undertaken to improve FOI performance impacted positively on FOI response timescales during 2019/20, and I would urge the Scottish Government to maintain a clear focus on its FOI improvement programme, despite current challenges.

81.   These challenges can be seen in the most recent data received from the Scottish Government. This data reveals that that 'on time' responses fell slightly during April 2020, and then significantly during May.

82.   In April 2020, the proportion of requests responded to on time across the Scottish Government dropped to 90%. It should be noted that this figure would have been lower were it not for the impact of the extension of FOI timescales introduced by the Coronavirus (Scotland) Act 2020, which came into force on 7 April 2020. Data reported by the Scottish Government shows that this timescale extension was applied in relation to nine cases during April. This extension was available for use by public authorities for a limited time, the provisions having since been repealed by the Scottish Parliament. (As a result, in most cases, requests received on or after 27 May 2020 must again be responded to within 20 working days).

83.   Data received for May 2020 reveals that only 58% of requests were responded to on time. May 2020 data also includes 16 cases which would have been classed as late were it not for the timescale extension introduced by the Coronavirus (Scotland) Act.

84.   As noted below, responses to review requests have been similarly affected. It is clear, therefore, that the Scottish Government's response to the Covid-19 pandemic has had a significant and severe impact on its performance against FOI timescales.

85.   At a time of crisis such as this, the right to information is more important than ever. It is therefore extremely disappointing to see the extent of the drop in FOI performance. It is crucial that the Scottish Government examine the factors which have contributed to this sharp drop in performance and address them as a matter of urgency.

Reviews

86.   In common with the findings of my July 2019 report, performance when responding to reviews within statutory timescales has been weaker than request performance. While this may in part be due to the comparatively smaller number of review requests received (meaning that individual timescale failures can have a significantly greater impact on overall performance data), it nevertheless continues to highlight a key area where attention is required.

87.   The act of submitting an FOI review demonstrates that an individual requester is, for one reason or another, dissatisfied with the Scottish Government's initial response. Failing to respond to that request for review within the statutory timescales will only serve to exacerbate that dissatisfaction, damaging the relationship between the individual and the institution. Such harm can be easily avoided, and I strongly recommend that the Scottish Government focus attention on review performance within directorates.

88. Overall review performance across the Scottish Government over the period was as follows:

2019/20	% of review responses issued on time	2020/21	% of review responses issued on time
April	86%	April	64%[7]
May	89%	May	43%[8]
June	90%		
July	79%		
August	63%		
September	100%		
October	96%		
November	95%		
December	86%		
January	100%		
February	100%		
March	87%		
2019/20 Total	**89%**		

89. While, at an individual directorate level, review numbers are generally too low to support meaningful analysis, there are nevertheless a number of directorates where data indicated a strong performance in relation to meeting FOI review timescales in 2019/20. These include the Directorate for Communications, Ministerial Support and Facilities, which achieved a 100% response rate over 29 reviews and the Directorate for Environment and Forestry which achieved a 100% response rate over 11 reviews.

90. For the organisation as a whole, however, performance in relation to review timescales remain disappointing, and directorates should note that improvement will only be achieved if all business areas contribute.

91. The recent data received in relation to April and May 2020 further suggests that review performance has been negatively impacted as the Scottish Government responds to the pandemic. Performance in this period fell to 64% of reviews being issued on time during April, and 43% during May. These figures represent a sharp decline from 89% in March 2020, and performance falls significantly short of the 95% target. Indeed, the May 2020 figure is the lowest level reported since May 2017.

92. Progress in relation to FOI reviews will therefore be a key focus of my next onsite assessment.

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[7] This figure includes cases where timescales were temporarily extended by the Coronavirus (Scotland) Act 2020

[8] As above

Conclusion / Next steps

93. It is clear from the information presented above that the Scottish Government made significant progress in relation to its FOI performance in the period between 1 April 2019 and 31 March 2020. Indeed, the Scottish Government's approach towards improving FOI performance over this period is to be commended.

94. However, it also appears that these changes have not, in the short term at least, enabled FOI performance to be sustained during the first months of the Covid-19 pandemic.

95. The initial impact of the work undertaken delivered clear improvements to the Scottish Government's FOI performance during 2019/20. We saw, for example, a sustained improvement in 'on time' responses to FOI requests, with the performance target of 95% being achieved across that year.

96. There is also evidence that FOI improvement work bore fruit in other areas. The number of requests for reviews reported, for example, fell by 29% over the course of a year, from 492 in 2018, to 367 in 2019.

97. The impact of this work was also evident in the appeals made to me. Indeed, my office received 53 appeals from people dissatisfied with Scottish Government / agency FOI responses in 2019/20. This is the lowest number of Scottish Government appeals since FOI was introduced in 2005, and down from a high of 147 in 2011/12. Likewise, my office only received three valid appeals relating to a Scottish Government 'failure to respond' to an information request in 2019/20. This was again the lowest number since we began to record this data, and down from 47 in 2011/12.

98. Data from 2019/20 also highlighted areas where further attention is required. Review performance continued to fall short of the 95% 'on-time' target, while FOI performance in some directorates fell short of the expected standard. I will be exploring these issues further during my 2021 on-site assessment.

99. In general, however, the Scottish Government made significant progress towards delivering FOI improvement over the course of 2019/20. Indeed, had this report been completed a short time earlier, I would now be concluding with a broadly positive assessment.

100. However, the early months of the Covid-19 pandemic had a disruptive impact on all areas of our lives and working practices, and it not surprising that the Scottish Government's FOI improvement work has also been impacted. What is surprising, however, is the extent of this disruption, and the speed of the decline in the Scottish Government's FOI performance during the first part of 2020/21. This decline is extremely concerning, and clearly requires immediate attention.

101. Disruption has arisen across almost all areas of the action plan implementation work. As detailed elsewhere in this report, this has included:

    • Disruption to the established network of FOI case-handlers and reviewers through staff redeployment and structural change

    • A reduction in resource within the Scottish Government's FOI Unit

    • The suspension of the internal FOI Network

    • Delays to the Scottish Government's programme of training and events

- The suspension of work to resolve the significant records management issues which have been identified following the roll out of the MiCase system

- Delays in development work on the organisational-wide e-learning package.

102. As can be seen throughout this report, almost all areas of FOI improvement work have been affected, and the impact of this poses, at present, a significant threat to the success of this project.

103. While it will inevitably be challenging amid current concerns, I urge Ministers to ensure that an increased focus is kept on FOI practice and performance as the organisation moves beyond the first phase of the pandemic response. Significant progress has been made to date as a result of the hard work of staff across the organisation, and there is a genuine concern that the benefits emerging from this work will be largely undone if focus is lost.

104. Progress on FOI performance is at a fragile juncture. While this is principally as a result of the impact of the pandemic and the Scottish Government's response to it, it is also compounded by the current status of the improvement work itself. Prior to the start of the pandemic, the Scottish Government had committed to end the 'project' phase of its FOI improvement work, and move towards establishing new FOI practice models as 'business as usual'. In current circumstances, therefore, it is vital that care is taken in order to ensure that the improvements and procedures put in place to date fully align with the changes which have been made to the structure of the Scottish Government.

105. While challenges undoubtedly exist, it must be acknowledged that it will be far easier for Ministers to divert attention and resources back towards FOI now, rather than attempting to refocus staff at a significantly later date, when momentum has been lost. Failing to do so will also send a dangerous message to staff and the wider public about the perceived importance of openness, transparency and accountability through FOI, at a time when the importance and public benefit arising from such characteristics has never been clearer.

106. Indeed, the importance of doing so was noted by a Scottish Government official during an update meeting with my staff, where it was stressed that: "*cultural change needs to be embedded before we can be confident improvement is sustainable in the long term*". The events of recent months have only served to underline this point.

107. In terms of prioritising attention, and given the issues highlighted in this report, I would urge Ministers to consider directing focus towards the following key areas of concern in the first instance:

- Restore trained FOI staff to key FOI roles

- Implement urgent improvements to the MiCase case management system to ensure FOI record-keeping is robust, appropriate and effective

- Ensure that appropriate training, development and support measures are in place for all staff involved in the handling of requests

- Restore resource within the FOI Unit to ensure that the emerging benefits from new triage, advice and training responsibilities are protected.

108. As noted elsewhere in this report, I would also recommend that Ministers consider whether internal Key Performance Indicators can be introduced in relation to the time taken to respond to both routine and sensitive cases.

109. My office will, of course, be on hand to offer appropriate support and advice as the next phase of FOI improvement work progresses.