



Scottish Information
Commissioner

It's public knowledge

Our Ref: 96759

Jackie Baillie MSP
Acting Convener
Public Audit and Post-legislative
Scrutiny Committee
Room T 3.60
Scottish Parliament
Edinburgh
EH99 1SP

18 December 2017

Dear Acting Convener

Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA)

Thank you for your letter of 5 December. Please accept my apologies for a rather delayed response.

You asked if I could provide some information about my intervention into the Scottish Government's FOI performance to aid your committee's deliberations on whether to take forward post-legislative scrutiny of FOISA. I trust that the below will be useful:

My intervention is in response to serious concerns raised. It will:

- (i) Assess the Scottish Government's freedom of information (FOI) performance in light of the concerns raised in the journalists' 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
- (ii) 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.

I am currently seeking further information from the signatories to the journalists' letter (responses by 12 January 2018). Subject to any changes following consideration of that further information, the issues which the assessment phase of the intervention will consider are:

Treatment of requests from journalists

- (i) Does the Scottish Government treat and manage requests from journalists differently, compared to requests made by other people?

- (ii) Where there are differences, do they reduce or restrict journalists' entitlement to information, compared to other requesters?

Late responses

- (iii) 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?

Management of requests

- (iv) 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?
- (v) 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?

Refusals

- (vi) Is there evidence of a practice of requests being blocked or refused for tenuous reasons?
- (vii) 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?

As you will see from the above, the sole focus of my intervention is concerned with one Scottish public authority's compliance FOI law¹. I don't foresee any risk of duplication with post-legislative scrutiny of FOISA which would be concerned with the wider operation of the legislation.

If the Committee is minded to proceed with post-legislative scrutiny of FOISA, I would be pleased to offer whatever assistance would be welcomed.

Yours sincerely

Daren Fitzhenry
Scottish Information Commissioner

¹ Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004