



Scottish Information

Commissioner

*it's public knowledge*

Our Ref: 201702106

Mr Tavish Scott MSP  
The Scottish Parliament  
Edinburgh  
EH99 1SP

14 February 2018

Dear Mr Scott

Thank you for your letter of 8 February setting out your concerns about the involvement of ministers and special advisers in the processing of information requests, and specifically drawing my attention to a number of relevant documents recently obtained through FOI by Mr James McEnaney.

As detailed in my letter of 2 February 2018 to the Minister for Parliamentary Business, I have commenced an intervention to assess the Scottish Government's FOI performance in light of the serious concerns raised in the journalists' letter of 31 May 2017 to the Scottish Parliamentary Corporate Body and in the Scottish Parliament's debate on Motion S5M-06126. Where any of its practices are found to be deficient, the intervention will require the Scottish Government to remedy any identified breach of FOI law, and meet the minimum standards of good practice. The assessment phase of the intervention will focus on a number of questions, numbers 5, 6 and 7 of which are directly relevant to your concerns:

"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?"

To assist with framing accurately the assessment phase of my intervention to ensure it focused on the right things I asked the signatories to the journalists' letter to submit further information about their concerns, with examples where possible. Mr McEnaney was one of a number of journalists who kindly responded last month to that call for submissions, and he has kept my office updated as to developments in those cases. I can therefore reassure you that I am aware of the cases you refer to; and indeed, as you point out in your letter, the documents were made available to Mr McEnaney after the involvement of my office in his appeal.

Daren Fitzhenry, Scottish Information Commissioner

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Reaching robust conclusions on the above intervention questions will require a thorough examination of a large sample of cases. In assessing the Scottish Government's practices, one of the workstrands of the intervention is the 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. It will not surprise you that the cases referred to in your letter will be included in the list of cases to be examined, and will receive my attention under section 43(3) of FOISA. In my letter of 2 February to the Minister for Parliamentary Business, available at <http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx> I made clear that the sample will also 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"). The intervention will objectively and independently assess all of the evidence collated to first of all identify and then address deficiencies in practice. Its purpose must therefore be distinguished from an appeal under section 47 of FOISA against a refusal to provide information.

In relation to your questions about the specific cases (as opposed to a consideration of performance and the addressing of any areas of concern), I note that the Scottish Government has published releases of information since June 2017 which may enable you to obtain the information you are interested in. Alternatively, the appropriate vehicle to obtain the answers to the questions you pose may be for you to seek the information from the Scottish Ministers by way of an information request. As you'll know, once an authority has disclosed information in response to an FOI request, it is considered to be in the public domain (and cannot be withheld in response to subsequent requests for it). Of course, if you are dissatisfied with the response to that request and any review, you may appeal the case to me.

I hope this is of assistance.

Yours sincerely



**Daren Fitzhenry**  
**Scottish Information Commissioner**