

# Scottish Government Intervention Progress Report

17 May 2022



Scottish Information  
Commissioner

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# Glossary and abbreviations

<b>Term used</b>	<b>Explanation</b>
<b>FOI</b>	Freedom of Information
<b>FOI Act</b>	Freedom of Information (Scotland) Act 2002
<b>EIRs</b>	Environmental Information (Scotland) Regulations 2004
<b>Section 60 Code of Practice</b>	Scottish Ministers' Code of Practice on the discharge of functions under the FOI Act and the EIRs
<b>FOI Unit</b>	The specialist unit within the Scottish Government which leads on FOI
<b>CMS</b>	The Scottish Government's new Case Management System
<b>FOI Tracker</b>	The precursor to the Scottish Government's new CMS
<b>Criteria for Decision-Making</b>	Internal Scottish Government document which sets out an organisational-wide framework for FOI decision-making
<b>SpAd</b>	Special adviser
<b>eRDM</b>	Electronic Records and Documents Management

# Introduction

My intervention to support improvement in the Scottish Government's FOI practice was launched in November 2017. It followed concerns being raised by a number of journalists in a May 2017 letter to the Scottish Parliamentary Corporate Body, and by Members of the Scottish Parliament in a subsequent debate on 21 June 2017 (Motion S5M-06126).

In June 2018 I published an Intervention Report detailing the findings from my investigation into these concerns. I was subsequently asked by the Scottish Parliament, via Motion S5M-12861, to publish an annual report on the Scottish Government's progress in relation to the implementation of its FOI improvement Action Plan. This is my third report in response to that request.

While I had originally planned to publish this progress report in September 2021, issues relating to the provision of reliable data to inform my assessment, logistical challenges arising from the requirement to undertake the assessment remotely, and a high workload across my office have contributed to a delay in reporting.

This report principally examines Scottish Government FOI practice over a two-year period, from 1 April 2019 to 31 March 2021. This period followed the introduction of the Scottish Government's Action Plan (approved in November 2018), and enables the analysis of two full years' worth of data and activity following its introduction.

While my two previous progress reports were informed by an examination of the changes made to internal Scottish Government processes and the analysis of statistical data on compliance with FOI timescales, this report mirrors the work undertaken during my initial assessment of Scottish Government performance in 2018. As a result, it has principally been informed by an in-depth assessment of Scottish Government FOI case-handling, to examine how updates to processes and procedures, introduced via the Action Plan, have been implemented in practice.

I had originally hoped to conduct this assessment on Scottish Government premises. However, the restrictions imposed by the pandemic meant this was not possible. Instead, my staff undertook a desk-based assessment of Scottish Government case files, accessing details of files remotely. This information was considered alongside a range of other data, including statistical information provided by the Scottish Government.

This methodology was not without its challenges and, as noted, these contributed to a delay in the production of this report. Nevertheless, I am pleased now to present the report and findings from this phase of my intervention activity.

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

# Executive Summary

1. The findings of my current assessment activity present a mixed picture of the Scottish Government's progress towards sustained improvement in FOI practice and performance.
2. There are a number of areas where there is evidence of significant improvements having been made, and of elements of the new processes impacting positively on organisational practice and culture. These include, for example, evidence of the ending of the 'two-stream' approach to request handling based on the nature of the requester; an increased understanding across the organisation of FOI processes and procedures (along with individual roles within those processes); evidence of an increasing profile of the FOI Unit's role within the organisation and a recognition of the expertise it provides; and, prior to the pandemic at least, evidence of improvement against FOI timescales.
3. However, my assessment also found a number of areas where performance and practice fell short. This includes substantial problems in the organisation's ability to track, monitor and report on (and therefore improve) FOI performance; issues with organisational compliance with the revised clearance procedures; disruption to the newly-established network of FOI case-handlers; and evidence of significant delays and organisational 'bottlenecks' in some areas.
4. I also found evidence of significant and systemic failures to comply with case file records management requirements with the effect that, for many of the cases examined, it was not possible to fully assess how a case had been handled, who had been involved in case handling, or why particular decisions were taken. This issue is highlighted frequently throughout this report.
5. While the disruption caused by the pandemic has been a contributory factor in some of these issues (including disruptions to staff resource and delays in responding), other factors - such as organisational compliance with internal procedures and issues with monitoring and reporting - are clearly wider concerns which require to be urgently addressed.
6. Additional action is therefore now required to ensure that the progress made in relation to FOI performance prior to the outbreak of the pandemic can be restored and revitalised.
7. With this in mind, I provide the following comments on, and updates to, the seven recommendations made in my June 2018 Intervention Report, to support the Scottish Government as it continues this vital improvement work.

## Recommendation 1: Clearance Procedures

- (i) I recommend that the Scottish Government address current gaps that exist between agreed procedures (as set out in its Criteria for Decision-Making) and organisational practice. In doing so, the Scottish Government should address the high proportion of cases marked as 'routine' (and therefore suitable for official review) which are nevertheless passed to special advisers / Ministers.
- (ii) I recommend that the Scottish Government address the delays and bottlenecks identified in this report - including those involving special advisers - in order to prevent delays of the kind discussed in this report recurring in future.
- (iii) I recommend that the Scottish Government continue to invest in the experience and expertise of its FOI Unit, supporting development of the status, profile and reputation

of the Unit, to enable its guidance to steer, shape and support good practice in request-handling in future.

## **Recommendation 2: Quality assurance**

- (i) It is recommended that the Scottish Government prioritise the reintroduction of reporting on learning from FOI reviews, to minimise the risk of common errors being repeated, and ensure that learning on key issues is shared widely across the organisation.

## **Recommendation 3: Clearance of media requests**

As set out in this report, it is my view that the Scottish Government's previous practice of treating requests differently based on the nature of the requester, rather than the nature of the request, has been addressed and resolved.

I therefore have no further recommendations to make in relation to this aspect of my intervention. However, I note the importance of the effective logging of key information - including data relating to case sensitivity, case outcome and response timescales - in ensuring that this issue can be effectively monitored and assessed by the Scottish Government in future.

## **Recommendation 4: Case file records management**

- (i) I strongly recommend that the Scottish Government undertake urgent work to improve FOI record-keeping practices across the organisation, given the significant and sustained shortfalls in this area identified throughout this report. In doing so, the Scottish Government should align day-to-day request-handling practice with the requirements set out in the Criteria for Decision-Making, the Section 60 Code of Practice, and other associated guidance. The Scottish Government should take steps to improve, for example, the recording of special adviser advice, the rationale for any decisions by Ministers, and the reasons for any divergence with specialist FOI Unit advice.
- (ii) As part of its review, the Scottish Government should consider whether current record management requirements and case handling systems can be more closely aligned and integrated, in order to support the effective and efficient recording of appropriate information.

## **Recommendation 5: Case handling**

- (i) I strongly recommend that the Scottish Government restore the network of trained FOI case-handling staff, to ensure that the benefits from the progress made in this area during 2019/20 can be recovered and maintained.
- (ii) I also recommend Scottish Government implement a clear and swift decision-making process regarding the allocation of cases to individual directorates in situations where case ownership is disputed or delayed.

## **Recommendation 6: Monitoring FOI requests**

- (i) Flowing on from earlier recommendations, I strongly recommend that the Scottish Government take immediate steps to improve and enhance its own capacity for the tracking, monitoring and reporting of FOI performance, in order to address the numerous and significant issues highlighted throughout this report.

- (ii) I recommend that the Scottish Government take immediate steps to identify cases which have exceeded the maximum FOI response timescale, and ensure that swift and escalated action can be taken to bring cases to a prompt resolution.
- (iii) As noted in my previous Interim Reports, I recommend that the Scottish Government's Executive Team consider the introduction of Key Performance Indicators in relation to the time taken to respond to FOI requests, for both routine and sensitive / exceptionally complex cases.

## **Recommendation 7: Reviews**

From the information examined during this assessment I am satisfied that the recommendations made in my June 2018 intervention report – i.e. that the Scottish Government review its procedures to remove, as far as possible, any related risk to impartiality - have been satisfactorily addressed. I therefore have no further recommendations in relation to Reviews at this time.

# Background

8. My intervention to support improvements in the Scottish Government's FOI practice and performance was launched in response to concerns raised by a number of journalists in a letter to the Scottish Parliamentary Corporate Body of 31 May 2017 and in the Scottish Parliament's debate on Motion S5M-06126 (as amended by Motion S5M-06126.1) on 21 June 2017.
9. Further information on the background to the intervention, along with details of the activity and reporting to date, are available at [www.itspublicknowledge.info/scottish-government-intervention](http://www.itspublicknowledge.info/scottish-government-intervention).
10. My intervention consists of five distinct phases of activity:
  - (i) Scoping Phase (completed in February 2018)
  - (ii) Assessment Phase (completed in June 2018)
  - (iii) Action Plan Phase (completed in November 2018)
  - (iv) Implementation and Monitoring Phase
  - (v) Review Phase
11. The intervention is currently in the Implementation and Monitoring Phase.
12. This Report has been informed by a detailed assessment of Scottish Government FOI practice through the inspection of individual case files. Originally, I had intended to carry out this work as part of my final Review Phase. However, and as reported in my September 2020 Progress Report<sup>1</sup>, the reallocation of trained FOI personnel and other factors linked to the pandemic severely disrupted the Scottish Government's progress on delivering FOI improvement.
13. As a result, I have taken the decision to undertake a second assessment as part of the Implementation and Monitoring Phase, in order to enable a detailed consideration of current progress against the Scottish Government's Action Plan to be made, and to inform next steps.
14. The assessment work described in this report examines the extent to which the Scottish Government's Action Plan has worked in practice, and the extent to which the principles set out in the Action Plan, and the corresponding FOI guidance and procedures, are being followed in the day-to-day management of FOI.
15. In doing so, the report considers the seven **Intervention Questions** which guided my June 2018 Intervention Report, and considers progress in relation to the seven **Recommendations** arising from that report.
16. The **Intervention Questions** which underpin my current intervention activity with the Scottish Government were set out in the June 2018 Intervention Report as follows:
  - (i) **What is the role of special advisers in the request-handling process?**

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<sup>1</sup> Available at: [www.itspublicknowledge.info/sgintervention](http://www.itspublicknowledge.info/sgintervention).



- (ii) **Is the Scottish Government managing requests from journalists differently compared to requests made by other people?**
- (iii) **Where there are differences, do they reduce or restrict journalists' entitlement to information?**
- (iv) **Is there evidence of deliberate delays in responses to some information requests?**
- (v) **Are internal request-handling procedures consistent with FOI law and the Section 60 Code of Practice?**
- (vi) **Is there evidence of a practice of requests being blocked or refused for tenuous reasons?**
- (vii) **Where requested information is politically sensitive, are requests handled in a different way? If so, to what extent is this detrimental to the requester's entitlement?**

17. The seven **Recommendations** contained in my June 2018 Intervention Report can be 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.

# Methodology

18. My current assessment reviewed Scottish Government FOI performance between 1 April 2019 and 31 March 2021.
19. This period followed the initial implementation of the Scottish Government's Action Plan (approved in November 2018), while also allowing for the analysis of two full years of data and activity.
20. The range of data which informed my intervention is set out below.

## Review of information held by the Commissioner

21. A review was undertaken of the appeals I received involving the Scottish Ministers over the assessment period. Non-compliance issues identified in the investigation of appeals were considered and assessed.
22. This work helped inform the selection of individual cases for detailed review.

## Scottish Government FOI case-handling data

23. In April 2021 the Scottish Government was asked to provide FOI tracking data for all open FOI and EIR cases across the assessment period, in order to inform my assessment of request patterns and trends across the period, and support the identification of individual cases for inspection.
24. This request led to a prolonged period of discussion, during which the Scottish Government struggled to provide reliable data to inform my assessment over a period of six months. During this period, various versions of the available data was supplied to my office, with a series of issues identified in relation to the reliability, accuracy and usability of that data. The issues identified included (but were not limited to):
  - (i) **Data being held in two distinct information sources, with data often not being directly comparable**

Data was held in both the Scottish Government's new Case Management System (CMS) and its predecessor (for FOI requests), the FOI Tracker. While the CMS held data for all FOI and EIR requests received during 2020/21, it did not hold all data on all FOI cases from 2019/20. Issues were identified between the compatibility and comparability of data held across the two sources.
  - (ii) **Unreliable data on FOI timescales**

It was reported that the 'case completed' data recorded in the new CMS did not necessarily reflect the date of an FOI response (and could not be retrospectively adjusted), meaning that any reliable assessment of compliance with FOI timescales was not available from the CMS.
  - (iii) **Unreliable data relating to the 'sensitivity' of cases**

While the CMS enabled recording of whether a case is 'sensitive', it was found that CMS 'sensitivity' markings often did not reflect the final classification of individual cases.
  - (iv) **Key data unavailable in a reliable or comparable format**

This included data on whether a case had been passed to special advisers or Ministers for review, whether a decision had been amended following any review, or

whether communications staff had been involved in request handling. We also found a lack of clarity in the logging of response and review outcomes, with e.g. the CMS containing approximately 50 distinct outcome categorisations. In addition, we also experienced variations in the fields available, or data contained within available fields, in different versions of the data we received.

25. Throughout this process the Scottish Government acknowledged that there were significant limitations to the data available. It reported that these issues were consistent with wider problems being experienced following the introduction of the new CMS.
26. As a result, on 3 August 2021 my office requested that the Scottish Government provide the following:
  - (i) A full download of CMS data from across the two-year assessment period, with data formulated to a refined standard.
  - (ii) A full download of FOI Tracker data from across the two-year assessment period, with data formulated to a refined standard
  - (iii) A manually-reviewed sub-sample of 200 CMS cases.
27. The manually-reviewed sub-sample comprised cases which had been selected by my staff to provide an indicative sample from across the assessment period. The Scottish Government was asked to review the sample to confirm a range of data (where this could be confirmed from wider CMS metadata). Data to be confirmed included FOI timescales; whether the case involved Ministers, special advisers or communication staff; and whether the 'sensitivity' status of the case had been amended.
28. This data was supplied on 24 August 2021. On receipt, it was found that the CMS sub-sample contained 24 cases which had been withdrawn during case-handling (meaning that data relating to those cases would be limited). As a result, a further 24 cases were selected, bringing the total CMS sub-sample to 224 cases.
29. Additional issues were identified with the full CMS dataset supplied on 24 August 2021. Further discussion took place to resolve these issues, with a final, updated CMS dataset supplied on 15 October 2021.
30. In total, the CMS dataset contained data relating to 7,364 cases over the assessment period, while the FOI Tracker contained data relating to 1,894 total cases over the period.
31. The data supplied was subject to analysis, while also being used to help inform the selection of individual cases for detailed manual review.

## **Manual review of individual case files**

32. The Scottish Government was asked to provide access to specific case file records for detailed analysis and review.
33. In total, my staff identified 76 cases for manual review. These were divided into 'Concern' cases and 'Control' cases.
34. 41 'Concern' cases were selected following analysis of a range of sources. Sources included:
  - A review of Commissioner appeal investigations made over the assessment period

- A review of 'late response' cases from the Scottish Government's monthly statistical reports over the assessment period
  - A review of CMS and FOI Tracker data supplied by the Scottish Government.
35. Selected 'Concern' cases principally comprised those where extended delays, protracted review / clearance processes, or deviation from established procedures and FOI good practice was evident (or suggested) from the available data.
36. 35 'Control' cases were selected. 'Control' cases were randomly selected from across the assessment period from cases where the requester type was categorised as either 'individual' (11), 'media' (10), 'elected representative' (7) or 'researcher' (7).
37. Of the 76 cases identified, 71 were subject to detailed review, with five cases not taken forward for review. Cases were not taken forward for the following reasons:
- Case was subject to a live Commissioner appeal (2)
  - Case was duplicated, having been identified from two separate sources (1)
  - Case identified was not the case originally sought (1)
  - The Scottish Government was unable to locate the case from the information supplied (1)
38. Cases were reviewed by my staff via remote access to the documentation from each case file.
39. In total, 1,392 individual documents were remotely reviewed, considered and assessed across the 71 case files.

## Training records

40. Records of training delivered by the Scottish Government across the assessment period was received and reviewed.

## Monthly reporting

41. As part of my intervention the Scottish Government is required to supply monthly reports which detail FOI performance against timescales at both Scottish Government and individual Directorate level.
42. Data for these reports is collected at Directorate level and is subject to extensive manual review and checking, meaning that timescale data within these reports is significantly more reliable than the data available directly via the CMS dataset.
43. These reports were reviewed and assessed as part of this intervention.

# Progress on Intervention Questions

44. This Report considers again the seven **Intervention Questions** which underpin the intervention. The seven questions are as follows:
- (i) **What is the role of special advisers in the request-handling process?**
  - (ii) **Is the Scottish Government managing requests from journalists differently compared to requests made by other people?**
  - (iii) **Where there are differences, do they reduce or restrict journalists' entitlement to information?**
  - (iv) **Is there evidence of deliberate delays in responses to some information requests?**
  - (v) **Are internal request-handling procedures consistent with FOI law and the Section 60 Code of Practice?**
  - (vi) **Is there evidence of a practice of requests being blocked or refused for tenuous reasons?**
  - (vii) **Where requested information is politically sensitive, are requests handled in a different way? If so, to what extent is this detrimental to the requester's entitlement?**

45. I consider each of these questions below.

## **(i) What is the role of special advisers in the request handling process?**

### **Background**

46. When my intervention was launched, one of the issues it set out to explore was the precise role of special advisers in the FOI request-handling process. This stemmed from concerns raised by Scottish journalists in the May 2017 open letter to the Scottish Parliamentary Corporate Body that requests from journalists were being routinely handled by special advisers, and were being screened for potential political damage.
47. The Scottish Government's Code of Conduct for Special Advisers<sup>2</sup> sets out that the role of special advisers includes giving assistance and advice to Ministers and civil servants on any aspect of Scottish Government business and that special advisers can '*review and comment on – but not suppress or supplant – advice being prepared for Ministers by civil servants.*'
48. My June 2018 Intervention Report found that there was a degree of uncertainty within the Scottish Government about the precise role of special advisers in the request handling process, with procedures at that time providing ambiguous and conflicting advice. My 2018 Report also found evidence that a proportion of Scottish Government officials perceived that special advisers had a direct, decision-making role in the 'clearance' of FOI requests.

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<sup>2</sup> [www.gov.scot/publications/special-advisers-code-of-conduct-and-model-contract/](http://www.gov.scot/publications/special-advisers-code-of-conduct-and-model-contract/)

## Findings from the current assessment

49. My findings on this question from the current assessment are presented under four broad headings:

- (i) *The role of special advisers in request handling*
- (ii) *The recording of reasons in cases involving special advisers*
- (iii) *The organisational understanding of the role of special advisers*
- (iv) *The impact on timescales of special adviser involvement*

### *The role of special advisers in request handling*

50. As noted above, my June 2018 Intervention Report found that Scottish Government procedures at that time contained a degree of ambiguity regarding the role of special advisers. The Scottish Government's Criteria for Decision-Making, which arose from the Action Plan that the Scottish Government prepared in response to my 2018 Report, sought to address this ambiguity. It sets out that:

*"Special advisers are not decision makers in handling requests. Their role is to provide comments to the FOI Unit to assist in the objective assessment of cases requiring a Ministerial decision, and to provide comment to case handlers and officials of appropriate seniority before submissions are made to Ministers."*

51. The Criteria for Decision-Making goes on to clarify that *"when 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."*

52. The Criteria for Decision-Making therefore sets out that, in most cases (and unless they are the holders of the information requested or the request relates to them directly), special advisers will have three possible roles in FOI request-handling:

- (i) To assist the FOI Unit in assessing, as part of its 'triage' process, whether a case should be marked as 'sensitive' (and therefore requiring a Ministerial decision).
- (ii) To assist the FOI Unit in any reassessment of sensitivity that may occur as a case progresses.
- (iii) To provide comment, where relevant, in cases requiring a Ministerial decision (i.e. those cases which are marked as 'sensitive').

### Role 1: Assisting with triage assessments of sensitivity

53. In relation to the first of these roles, my manual review found no evidence, in any of the 71 cases reviewed, of special advisers being involved in an initial assessment of the sensitivity classification of a case.

54. Within case files, an assessment of case sensitivity was commonly recorded in the form of a triage note from the FOI Unit, setting out whether the case had been classified as 'routine' or 'sensitive' by the Unit. Where triage notes were available, they generally comprised the only documentation relating to this assessment, and there was no further documentation in any of the cases examined which recorded the views or involvement of a third party; special advisers or otherwise.

55. This will not necessarily mean, of course, that special advisers have played no role in informing triage assessments by the FOI Unit, but we found no documented evidence of this in the 71 cases reviewed.

## Role 2: Assisting with reassessments of sensitivity

56. With regard to the second role of special advisers – providing advice during a reassessment of sensitivity as a case progresses – the Criteria for Decision-Making again formalises this process. It sets out that, where a case-handler considers that an assessment should be changed at any point, *“the case handler should approach the FOI Unit for an objective assessment...special advisers may provide the FOI Unit with views to inform this objective assessment”*.
57. Our manual review of cases again found no documented evidence of special adviser involvement in any reassessment of case sensitivity.
58. It was, however, also clear from case files that, at some level, the reassessment of cases was commonplace. For example, while only five of the cases we manually reviewed were marked as ‘sensitive’ within the CMS, 15 cases were found to be marked as sensitive within case documentation, while case documentation also suggested that 29 featured some form of special adviser involvement.
59. This was also reflected in the FOI Unit’s review of case file metadata for the 224 CMS sub-sample cases. This activity revealed that, while eight cases were marked as ‘sensitive’, file metadata indicated that special advisers were involved in the handling of 34 cases.
60. This suggests that the initial sensitivity status allocated through FOI Unit triage was subject to internal reassessment in a significant proportion of cases<sup>3</sup>. This issue was recognised in our communications with the FOI Unit, which told us that *“while the internal process is that any changes to sensitivity rating should be discussed with the FOI Unit, we strongly suspect that this does not always happen, and that there is a disparity between the number of cases marked as sensitive on the system, and the number being sent to special advisers inviting comment.”* The FOI Unit told us that this concern was being addressed through internal training and communication programmes.
61. While a proportion of cases were subject to reassessment then, the specific rationale for any reassessment was not generally detailed within case files. We also found no evidence within manually-reviewed case files of formal FOI Unit or special adviser involvement in the reassessment of cases. In most of the cases we examined, therefore, decision-making on submitting a ‘routine’ cases for special adviser / Ministerial review appeared to be taken informally, outside of the formal process set out in the Criteria for Decision-Making.

## Role 3: Providing comment in cases requiring a Ministerial decision

62. Whenever special adviser input was evident in case files it was found to be exclusively in relation to the third aspect of their role: where special advisers provided comment as a case neared its conclusion; reviewing and, where relevant, commenting on the case-handler’s approach, normally prior to any Ministerial decision.
63. This role will be discussed further in the following sections.

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<sup>3</sup> Although it cannot be discounted that in some cases the sensitivity was simply not correctly recorded.

### *The recording of reasons in cases involving special advisers*

64. The Criteria for Decision-Making unambiguously sets out that comments from special advisers should be recorded in all cases where these are received, without exception. It is clear from my review of cases, however, that this requirement is not robustly or consistently complied with.
65. While special adviser comments were present in a number of the cases reviewed, we also identified a significant number of cases where special advisers had clearly played a role in request-handling, but there was no direct record of this saved within the case file. Evidence of special adviser involvement was, in some cases, apparent from other file documentation (e.g. case-handler correspondence referencing their involvement) while, in others, CMS metadata showed that the case had been passed to special advisers.
66. There were a number of cases where the absence of special adviser comment came alongside wider record-keeping failures, with several cases containing only the bare minimum of records. Indeed, of the 71 cases which were manually reviewed, 24 case files (34%) contained five documents or fewer. Gaps in record-keeping were not, therefore, restricted to special adviser comments and were evident across a wide range of Scottish Government practice. This broader issue will be addressed later in this report.
67. **Regardless of this, however, it is clear that the requirement to record advice from special advisers in case files is not being followed clearly and consistently, and it is recommended that the Scottish Government take action to ensure compliance in this regard.**
68. One of the responses to my June 2018 Intervention Report was an increased use of a central FOI mailbox for special adviser correspondence on FOI requests, in order to support the tracking and management of special adviser requests for comment, and reduce the likelihood of correspondence being lost or overlooked in the busy mailboxes of individual advisers.
69. A by-product of this approach, however, appears to be an increase in special adviser views being recorded anonymously within casefiles, with special adviser responses, in most cases, being sent from the general special adviser FOI mailbox and framed in a similarly generic manner. This included, for example, the commonly-seen response “*SpAds [special advisers] are content*”, along with “*SpAd advice is as follows...*” or “*SpAds have commented as follows...*”.
70. This approach was common across most of the cases we examined involving special advisers, and there were only a small handful of cases where individual special advisers were identifiable within case correspondence. This situation contrasted with that of Ministers and officials at all other levels, each of whom were transparently identifiable whenever they had a role in the request-handling process.
71. While this practice does not breach FOI law or existing good practice guidance, the Scottish Government should consider the impact of this practice on organisational transparency generally, and the efficiency of internal processes specifically. In cases where FOI requests are reviewed, for example, a lack of clarity regarding the individuals involved in a case may present unnecessary barriers or create unnecessary delays for an organisation as it seeks to provide a prompt response.



### *The organisational understanding of the role of special advisers*

72. As noted earlier, one finding from my June 2018 Intervention Report related to uncertainty amongst Scottish Government officials regarding the role of special advisers in the FOI process, with special advisers frequently viewed as having a decision-making, or 'clearance' role by officials.
73. The Criteria for Decision-Making explicitly sought to address this perception, setting out in clear terms that "*special advisers are not decision makers in handling requests*". The Criteria went on to set out that their role is to "*provide comment to case handlers and officials of appropriate seniority before submissions are made to Ministers*".
74. I am pleased to note that my review of case files has shown evidence of a change in organisational understanding, perception and culture regarding the role of special advisers in the request handling process. While my June 2018 Intervention Report found widespread reference to special advisers having a 'clearance' role in relation to FOI requests, there was a strong sense across the correspondence we reviewed for this report that the role of special advisers was to comment on, rather than 'clear', individual cases.
75. The language used when referring cases to special advisers was framed around the seeking of "comment" or "advice", as opposed to "clearance" or "approval", with special adviser guidance commonly introduced as "suggestions" or "recommendations". There was also evidence of this position being robustly reinforced by the Scottish Government's FOI Unit, with one case-handler who had referenced a need to receive special adviser "clearance" for a request being reminded by FOI Unit staff that special advisers "*provide comments, they do not clear FOIs*".
76. This change in culture was perhaps most evident in cases where case-handlers questioned or disputed the advice received from special advisers. This included one case where a case-handler disagreed with redactions proposed by special advisers; another where a case-handler argued for a wider interpretation of a request to enable helpful contextual information to be provided; and a third where a case-handler disagreed with a special adviser's recommendation that an exemption be applied to specific policy advice. In the first case, the case-handler and special adviser discussed the case and agreed an approach that was largely consistent with the case-handler's preferred strategy while, for the other two cases, the recommendations of the case handler were presented to a Minister alongside the special adviser advice, with the Minister invited to make the final decision. (In both of these cases, Ministers ultimately agreed to the approach proposed by the case-handler.)
77. There were, of course, also cases where special adviser advice was accepted by case-handlers (and subsequently Ministers). This included a case where special adviser advice that additional information was exempt was upheld following an appeal to my office.
78. We also found a small number of cases where special adviser advice appeared to take a broad approach to the application of certain exemptions. However, the correct route for the appropriate investigation of such cases would, of course, be through a direct appeal to my office, and I cannot draw a firm conclusion on any particular case without a full investigation as part of a formal appeal.
79. The key point here, however, is that it is clear from my review that the *language* around the role of special advisers in the FOI process has largely shifted within the Scottish

Government, indicating a shift in organisational understanding and culture in relation to that role.

80. Our case review also found examples of FOI good practice by special advisers, with evidence of special advisers providing constructive advice aimed at supporting case handlers in responding effectively to requests, including practical advice on the appropriate handling of requests, advice on simplifying and clarifying responses to benefit the requester, and advice that information previously proposed for exemption may be appropriate for disclosure.

### *The impact on timescales of special adviser involvement*

81. As outlined elsewhere, the process of obtaining accurate, reliable data on compliance with FOI timescales for the purpose of this report proved to be extremely challenging.
82. Data recorded in the Scottish Government's new CMS relating to timescales was unreliable, so the Scottish Government was asked to review a sub-sample of 224 CMS cases to check and confirm the accuracy of timescale data. As part of this process, the Scottish Government was also asked to highlight cases where special adviser or Ministerial involvement was evident from case metadata.
83. The following table summarises findings in relation to FOI timescales from this review:

**CMS Sub-sample: Time taken to respond**

Type of case	Average response time (working days)
All cases (where timescale data was available)	21
Special adviser involvement recorded in metadata	22
Ministerial involvement recorded in metadata	24

84. This data indicates that cases showing signs of special adviser and / or Ministerial involvement typically took longer for the Scottish Government to process. While the average response time for cases within the CMS sub-sample exceeded the maximum FOI response time at 21 working days, this was exceeded even further for cases involving special advisers (22 working days) or Ministers (24 working days). While the additional delay in average response time was relatively small, it is of concern that additional delays extend beyond the statutory maximum timeframe.
85. We also found a number of clear examples where review by special advisers contributed to significant delays in responding within the case files we manually reviewed. Examples include a case where a late submission to special advisers (one day prior to the due date) contributed to a two-week delay in responding, and a case which was submitted to special advisers in November 2020 (and which was, at that point, already one month overdue) but did not receive comments from a special adviser until almost three months later. In the latter case the case-handler's frustration at this delay was clear, repeatedly contacting special advisers in an attempt to move the case forward and, at one point, seeking to bypass the special adviser process by escalating the case to the Minister "*in the interests of responding as quickly as practically possible*". In this case, the case-handler was informed that Ministers "*won't consider an FOI without SpAd advice*".
86. The lack of information in case files makes it difficult to determine or assess the cause of delays in some cases. One case which sought information on allowing visitors to care homes

in the early stages of the pandemic, for example, was sent to special advisers for comment in August 2020. The case file indicates that comments were subsequently received in March 2021. However, no information in the case file sheds any light on the reason for the delay, and the case file contains neither the email to special advisers nor the response. Indeed, the involvement of special advisers in the delay in this case is only apparent as a result of a comment from the case handler within CMS metadata. This is clearly unacceptable and issues relating to case file records management will be considered in more detail below.

87. Similarly, in another request, which sought information on the discharge of Covid-19 patients to care homes, the Scottish Government took eight months to respond, with the limited information in the case file suggesting that the case sat with special advisers for at least three months.
88. While it is undoubtedly the case that special advisers, in common with staff elsewhere in the Scottish Government and beyond, will have been under significant pressure as a result of the pandemic, delays of this kind are clearly not acceptable. Ultimately, the real-world effect of these delays will have been a substantial delay to the disclosure of information which could have been of significant value to those requesting it.
89. While some delays to response handling in the early days of the pandemic were perhaps inevitable - and indeed were accounted for in the Scottish Parliament's decision to both temporarily extend FOI timescales during April and May 2020 and enable me to excuse delays in certain circumstances - delays of the length and extent seen in some of the cases reviewed clearly went far beyond what could be considered reasonable or acceptable. The concern around such delays is compounded by the substantial and significant public interest in much of the information being requested at that time.
90. **It is strongly recommended that the Scottish Government generally - and special advisers specifically - take steps to learn for the experiences of the pandemic, to prevent bottlenecks and delays arising in similar circumstances in future.**

## **(ii) Are requests from journalists treated differently?**

### **Background**

91. My June 2018 Intervention Report explored the question of whether the Scottish Government manages requests from journalists differently when compared to requests from others. That report found that Scottish Government procedures at the time required that almost all media requests be sent to special advisers (and often to Ministers) for "clearance". By its very nature, this process ensured that requests from journalists - along with those from elected representatives and political researchers - were subject to different handling processes than other groups. This included additional layers of review and clearance, which would frequently delay the issuing of a response.
92. The application of a process based on the nature of the requester, rather than the subject of the request, was found to be in conflict with the 'requester-blind' principle of FOI law.
93. This issue was subsequently addressed in the Scottish Government's Criteria for Decision-Making, which required that the nature of the request be the only consideration when assessing whether or not a Ministerial decision is appropriate in any case. Under this process, only requests which have been objectively assessed by the FOI Unit as 'sensitive' or 'exceptionally complex' (with both of these categories being recorded as 'sensitive' within

the new CMS), should be subject to Ministerial decision<sup>4</sup>. The role of special advisers in this process is limited to assisting in decisions on sensitivity / complexity, and reviewing these cases prior to submission for a Ministerial decision.

94. The Criteria for Decision-Making therefore sought to end the previous 'two-stream' approval process depending on who is seeking information. Under the process set out in the Criteria for Decision-Making, requests from journalists (or MSPs, or political researchers) may still be subject to special adviser / Ministerial review, but where such reviews take place it will arise from nature of the *request*, rather than the nature of the *requester*. Where requesters from these groups ask for information which is not deemed to be sensitive / exceptionally complex, responses will be approved at official, rather than Ministerial, level.
95. Another element considered in my June 2018 Intervention Report in relation the handling of requests from journalists concerned the issue of the role played by communications staff in the handling of requests from journalists, i.e. in terms of whether communications staff had a role in shaping or influencing requests in ways that would adversely impact requester rights.
96. My June 2018 Intervention Report found no evidence that communications staff played a role in influencing or shaping the responses to FOI requests in this way. It did, however, identify one case in that report where a response to an FOI request was delayed while a communications handling plan was developed to accompany the release. My report recommended that the guidance in relation to the role of communications staff in the FOI process be clarified.
97. In response to this issue, Scottish Government's Criteria for Decision-Making set out that the role of communications staff was restricted to "*separate, tandem development of required press lines or handling plans which must be undertaken as a parallel process, and not delay, impede or influence responses to requesters*".

## Findings from the current assessment

98. In assessing the issue of whether requests from journalists were treated differently I considered two questions. These were:
  - (i) Are requests treated differently based on the type of requester?
  - (ii) What is the role of communications staff in request-handling?
99. I consider each of these questions below.

### *Are requests treated differently based on the type of requester?*

100. Data supplied by the Scottish Government for the total CMS caseload indicates that the proportion of cases triaged as 'sensitive' by the FOI Unit on initial assessment was as follows:

Type	Number of cases	% of cases triaged as 'sensitive'	% of cases triaged as 'routine'
All	7,364	3%	97%
<b>Requester type</b>			
<i>Elected Representative</i>	54	11%	89%
<i>Individual</i>	4,340	3%	97%
<i>Media</i>	548	7%	93%

<sup>4</sup> Although see above evidence of cases being dealt with as sensitive without formal reassessment by the FOI unit.

<i>Organisation</i>	710	5%	95%
<i>Other</i>	45	2%	98%
<i>Researcher</i>	545	6%	94%
<i>Solicitor</i>	143	1%	99%
<i>[Uncategorised]</i>	979	0%	100%

101. As can be seen from the data provided, the overwhelming majority of requests received by the Scottish Government were triaged by the FOI Unit as 'routine' (and therefore appropriate for approval by officials, rather than Ministers). This is true of all requester categories with 89% or more requests across all requester types categorised as 'routine' on triage.
102. While the proportion of requests categorised as 'sensitive' was slightly higher for certain categories - including the media, elected representatives and researchers - this is generally to be expected, given the greater likelihood of requesters within these categories seeking access to information which may be considered to be 'sensitive' or 'exceptionally complex'.
103. Of course, and as discussed elsewhere, the data available from the total CMS caseload does not represent the full extent of cases which were ultimately deemed to require Ministerial approval. Data from both the (randomly-selected) CMS sub-sample and our own manual review of files indicates that a significant proportion of cases marked as 'routine' at triage nevertheless went on to be put forward for special adviser review and Ministerial approval (without a change of sensitivity status being recorded within the CMS).
104. The following table shows the number of cases in the CMS sub-sample which were triaged as 'sensitive' on receipt, alongside the number of cases where CMS metadata indicates a special adviser / Ministerial role in the case, by requester type:

<b>Type</b>	<b>Number of cases</b>	<b>Number of cases triaged as 'sensitive'</b>	<b>% of cases triaged as 'sensitive'</b>	<b>Number of cases where special adviser and / or Ministerial review is evident from metadata</b>	<b>% of cases where special adviser and / or Ministerial review is evident from metadata</b>
<b>All</b>	224	8	4%	43	19%
<b><i>Requester type</i></b>					
<i>Elected Representative</i>	6	1	16%	2	33%
<i>Individual</i>	134	5	4%	15	11%
<i>Media</i>	22	0	0%	9	41%
<i>Organisation</i>	13	0	0%	2	15%
<i>Researcher</i>	13	1	8%	3	23%
<i>Solicitor</i>	6	1	16%	1	16%
<i>[Uncategorised]</i>	29	0	0%	11	38%

105. As can be seen from the above table, the proportion of cases where metadata indicated the case was subject to special adviser / Ministerial review was significantly higher than the number of cases marked as 'sensitive' across almost all category types. Although 'requester type' numbers in this sample are too small to enable firm conclusions to be drawn on the organisational-wide experience, it is also the case that a greater proportion of requests within certain categories – including the 'media' category – were subject to special adviser / Ministerial review. The 71 cases which were subject to manual review also told a broadly similar story.
106. A number of points can be drawn from this data. Firstly, and as noted elsewhere in this report, it is very clear that the manner and format in which case data is currently recorded

and stored by the Scottish Government does not allow for any reliable analysis of these issues to be carried out. Indeed, from the data available, it is simply not possible to determine the total number or type of cases subject to special adviser / Ministerial review with any level of accuracy.

107. Nevertheless, it is possible to conclude that the changes implemented through the Scottish Government Action Plan and the introduction of the Criteria for Decision-Making are having an impact on organisational practice – despite there being little reliable information on the full extent of that impact.
108. As noted above, my June 2018 Intervention Report found that all media requests (with the exemption of very routine requests) were sent to special advisers, and often Ministers, for review. It is clear from the data reviewed that this practice is no longer followed, with e.g. a significant proportion of media cases (59% from the CMS subsample and almost half of our manually-reviewed sample (11 of 23 cases)) showing no evidence of special adviser or Ministerial involvement (although a lack of case file documentation was a factor in some of the cases examined). For cases in the manually-reviewed sample it was, in most cases where relevant case file documentation was available, nevertheless clear why the case had originally been identified as 'sensitive' or 'extremely complex', in line with the guidance set out in the Criteria for Decision-Making.
109. It was also the case, however, that for 'routine' cases which had subsequently been deemed appropriate for special adviser / Ministerial review, the rationale for that reassessment was generally not recorded in case files.
110. Based on the data available then, the Scottish Government's previous approach of requiring that requests from certain types of requesters be subjected to a separate process appears to have ended. Indeed, the available evidence points towards the organisation assessing the need for special adviser review and / or Ministerial decision-making on a case-by-case basis, informed principally by the nature of the request rather than the type of requester.
111. Poor records management, and failures to follow the procedures have, however, introduced a degree of lack of transparency in the practical application of the new processes, particularly in cases where sensitivity has been increased at some stage after triage. In those cases, it is not possible to conclude whether or not cases are appropriately being re-assessed as 'sensitive' or 'extremely complex'.
112. **It is, therefore, strongly recommended that the Scottish Government take steps to ensure that relevant data can be accurately and reliably recorded, in order to ensure that the organisation is able to monitor its own performance in this important area.**
113. I discuss this issue further in later sections of this report.

#### *What is the role of communications staff in request handling?*

114. My current review of case files found no evidence of any direct role played by communications staff in decision-making around FOI responses, nor any evidence of communications staff shaping or influencing requests.
115. There were, of course, examples of cases where communications staff were asked to prepare press lines to accompany the issue of FOI responses but, in the relatively infrequent cases where there was evidence of this occurring, there was little evidence of delay as a result of this practice, with most responses being issued shortly after (and generally in line with, expected timescales for finalising and issuing a response).

116. However, we did find one case where a response was issued three working days after Ministerial approval had been given, with the case file indicating that communications lines were prepared and revised within that three-day period. (Somewhat ironically, and as a result of the response to this request taking almost a year, the lines developed focused principally on the time taken to respond.) The Scottish Government should take care to ensure that the process set out in the Criteria for Decision-Making to ensure that communications activity does not “*delay, impede or influence responses to requesters*” is followed in all cases.
117. We also found one other case where the involvement of communications staff contributed to an additional one-month delay in a response to a journalist but, in that case, it was very clear from case correspondence that this issue arose as a result of an isolated procedural misunderstanding, rather than any systemic issue or deliberate delay. In that case, the case-handler mistakenly assumed that the response to a request from a journalist would be automatically issued by communications staff following Ministerial approval, only realising after one month that this had not been done.
118. Where issues did arise, however, my review of case files indicated that these were isolated incidents, and I found no evidence of systemic delays as a result of the role of communications staff, nor of communications staff having an improper role in the handling of requests from journalists.

### (iii) Are the rights of journalists reduced or restricted?

#### Background

119. When analysing the outcome of requests, my June 2018 Intervention Report found a marked difference in the outcome of media requesters compared to requests from other requester types in 2015/16, with media requesters in that period considerably less likely to receive a full disclosure of the information they had asked for and more likely to receive a refusal.
120. The 2018 Intervention Report also found, however, that this pattern was not repeated over the two following years, with data from 2016/17 and 2017/18 indicating that outcomes from media requests were similar to those for non-media requests.

#### Findings from the current assessment

121. My current activity examined information held across both the Scottish Government’s new CMS and its predecessor, the FOI Tracker. Data from case outcomes was merged, with the results from this exercise for the two-year assessment period between April 2019 and March 2021 shown in the table below:

Type	No. of cases marked as either Refuse, Release or Partial Release	% of cases marked as Release	% of cases marked as Refuse	% of cases marked as Partial Release
<b>All</b>	6,817	52%	24%	24%
<b>Requester type</b>				
<i>Elected Representative</i>	82	49%	13%	38%
<i>Individual</i>	4,030	54%	25%	21%
<i>Media</i>	572	48%	23%	29%
<i>Organisation</i>	784	49%	20%	31%
<i>Other</i>	68	56%	21%	24%
<i>Researcher</i>	731	44%	29%	27%
<i>Solicitor</i>	174	30%	22%	47%



[Uncategorised]	376	61%	19%	19%
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122. As can be seen from this table, request outcomes for media requesters are broadly similar to those for all requester types, with 48% of media requests being recorded as having had the information provided in full, compared to 52% across the whole dataset. Similarly, 23% of media requests were recorded as being refused in full, compared with 24% across all requester types.
123. As such, the available data suggests that the experience of journalists when requesting information is not markedly different from other requester types, with any significant variations between requester types (e.g. the higher proportion of 'partial release' outcomes for solicitors) most likely to be attributable to the nature of the information being requested, rather than the category of requester.
124. The above data does indicate that elected representatives are more likely to receive a partial refusal as opposed to a full refusal than other groups, but we found no evidence in our review of cases which suggested that the nature of the requester was a significant factor in this outcome as opposed to e.g. the nature of the requested information or the manner in which the request was framed.

#### (iv) Is there evidence of deliberate delays?

##### Background

125. My June 2018 Report also considered whether there was evidence of some requests, including requests from journalists or requests about internal policy-making, being deliberately delayed.
126. That report found that journalists typically experienced longer response times for requests, (although significant improvements had been made following an earlier intervention by my office to support improvement in FOI response times). Data from that report included the following:

##### Average response time (working days)

	2015/16	2016/17	2017/18
<b>All</b>	19	21	18
<b>Media</b>	24	27	19

##### Findings from the current assessment

127. For reasons discussed elsewhere in this report, reliable timescale data is not available for all recorded requests during the period covered by my current assessment. As reported, timescale data recorded in the Scottish Government's new CMS does not accurately reflect the actual time taken to respond to requests, due to issues with the logging and backdating of response times within that system.
128. The Scottish Government was therefore asked to review the randomly-selected sub-sample of 224 CMS cases in order to provide an accurate record of response time for that sub-sample, to enable a degree of analysis of FOI response times to be undertaken. In addition, I also considered the data available from my manual review of case files. Findings in relation to this activity is set out below.

##### *CMS sub-sample findings*



129. While the CMS sub-sample represents only a small proportion (3%) of the total CMS cases recorded over the assessment period, the work done to confirm the accuracy of the timescale data nevertheless ensures that it is the best available data against which compliance with timescales can be assessed.
130. Of the 224 sub-sample cases, there were 194 cases where response time data was available (i.e. excluding cases which were withdrawn / mis-logged). Response time data for these cases over the assessment period between April 2019 and March 2021 is shown in the table below:

**CMS Sub-sample response times: April 2019 - March 2021**

Type	No. of cases	No. of cases over 20-working days	Average response time
<b>All</b>	194	51	21
<b>Requester type</b>			
<i>Elected Representative</i>	6	2	16
<i>Individual</i>	116	30	22
<i>Media</i>	19	5	20
<i>Organisation</i>	12	4	17
<i>Researcher</i>	11	3	24
<i>Solicitor</i>	5	2	20
<i>[Uncategorised]</i>	25	5	18

131. As can be seen from the above table, the average response timescale for the sub-sample data was 21 working days. This average timescale exceeds the statutory response timescale of 20 working days.
132. The average response time for media requesters fell slightly below the total sub-sample average, at 20 working days. While this sample necessarily reflects only a small proportion of total request volumes, it is nevertheless reassuring to see that there is no evidence of journalists experiencing significant delays in response times, when compared with other requester groups. That said, it is also clear that the average response for some groups within the sub-sample - specifically 'individuals' and 'researchers' - took longer.
133. It is recognised, however, that the period covered by the current assessment includes the period from March 2020, when the Scottish Government was significantly impacted by the Covid-19 pandemic. For the Scottish Government, this resulted in office closures, staff absences, significant organisational disruption and a period of crisis management. All of this will, of course, have impacted on its ability to effectively deliver a range of functions. In relation to FOI request-handling, the impact included the redeployment of FOI case-handlers and reductions in FOI Unit capacity; with consequent widespread disruption to staffing, policy knowledge and FOI expertise across the organisation.
134. In order to examine the Scottish Government's pre- and post-pandemic performance against timescales during the assessment period, the sub-sample was divided into cases which were responded to during 2019/20, and those responded to during 2020/21. Timescale data for these cases are shown in the following table:

## CMS Sub-sample: Response times by year

Type	Average response time (working days) 2019/20	Average response time (working days) 2020/21
All	17	25
<b>Requester type</b>		
<i>Elected representative</i>	13	18
<i>Individual</i>	15	25
<i>Media</i>	20	22
<i>Organisation</i>	15	20
<i>Researcher</i>	14	33
<i>Solicitor</i>	18	22
<i>[Uncategorised]</i>	18	-

135. The impact of pandemic-related disruption on response timescales for this sub-sample is evident in the above table, with the average response time for the whole sub-sample rising from 17 working days during 2019/20 to 25 during 2020/21.
136. This disruption is also evident from the monthly statistical data reported to me by the Scottish Government as part of this intervention, which showed that on-time performance across the Scottish Government fell from a reported rate of 95% or above in January to March 2020, to 79% by May 2020 (although that figure had slowly climbed back to 90% by December 2021).
137. I have found nothing, however, in the CMS sub-sample data which might suggest that requests from journalists, or those from any other requester types, were subjected to deliberate delays.

### *Manual review findings*

138. Within the 71 cases which were subject to manual review, more than half (40 cases) experienced a late response. This high proportion is perhaps unsurprising, however, as just over half of the manually-reviewed sample comprised our 'concern' cases, where a late response was a common feature used in the identification and selection of cases.
139. Overdue response times in this group ranged from 21 working days to an extremely concerning 337 working days, with 12 cases each taking more than 100 working days for a response to be issued.
140. In cases where late responses were received, however, I found no evidence of cases being deliberately delayed. (That said, it is worth noting that, in a number of cases, the precise reason for delay was unclear due to significant omissions within the case file. This issue is discussed directly later in this report.)
141. Where responses were delayed, the disruptive impact of the pandemic was clearly a factor in a number of cases. Indeed, several cases examined appeared to have lain dormant for periods while an appropriate 'home' for the case was found, following the redistribution of departmental case-handling staff to pandemic-related duties.
142. Such delays frequently had unfortunate impacts for requesters. In one case, for example, it took more than five months to tell a requester that the medical screening information they sought was already published online.
143. Another case, which related to planning for a second coronavirus wave and sought information likely to be held across a number of directorates, took over six months to be

resolved. This case appears to have been passed between officials over a number of months, while staff within the FOI Unit attempted to identify a case handler to take the request forward. One division informed the FOI Unit that while they “*acknowledge that this case is now overdue...we can no longer accept cases for other areas by default, as our resources are severely limited*”. They went on to report that:

*“We have already taken responsibility for a cross-government backlog of Ministerial and official correspondence cases, which as of this morning stands at over 3700 - 2400 of which are themselves overdue. We are managing this alongside prioritisation of our policy area’s enquiries and FOI requests.”*

144. Although documentation in the case file is limited, it then appeared to be a further five months before an appropriate case owner was found.
145. **To prevent similar delays occurring in future, the Scottish Government should implement a clear and swift decision-making process regarding the allocation of cases to individual directorates in situations where case ownership is disputed or delayed, rather than requiring case ownership to be ‘accepted’ within individual directorates.**
146. In one case, a delay appears to have arisen as a result of the case being ‘batched’ for Ministerial review with a number of similar requests, all of which related to discharges from hospitals to care homes. Most of the batched requests featured information which was being considered for disclosure but, for the case examined, an ‘information not held’ response had been prepared. It appears, from the information available, that the batching of requests in this way is likely to have contributed to a delay in issuing what was, in the case of this request, likely to have been a comparatively straightforward response.
147. It may have been appropriate, in the circumstances of the ‘information not held’ response, for the request to have been downgraded to a ‘routine’ request and cleared accordingly at the official level.
148. As with other cases examined, however, I found no evidence to suggest that any delay was deliberate.

## **(v) Do internal request handling procedures comply with FOI law and the Code of Practice?**

### **Background**

149. My June 2018 Report raised two specific concerns regarding the Scottish Government’s compliance with FOI law and the code of practice.
150. The first of these related to the practice of referring all media requests for ‘clearance’ by special advisers / Ministers. The second concern related to the practice of having the same special adviser and / or Minister who had been involved in reviewing / clearing an initial response also involved in a review response, contrary to the guidance in the Scottish Ministers’ Section 60 Code of Practice.

### **Findings from the current assessment**

151. In relation the first concern - the ‘clearance’ of media requests by special advisers / Ministers – I am satisfied that the procedures introduced by the Scottish Government through the Criteria for Decision-Making have brought an end to this practice.

152. In relation to the second concern, and as noted in my June 2018 Report, I am satisfied that the Scottish Government's procedures now require different special advisers to be involved in both the response and review.
153. **I would note, however, that the increasing practice described in paragraphs 69-71 above of anonymising references to special advisers in internal correspondence could hinder the Scottish Government's ability to monitor and assess progress and performance in this area and practice should be revisited to address this.**
154. Further observations about compliance with the Section 60 Code of Practice are made, where appropriate, throughout this report.

## **(vi) Are requests blocked or refused for tenuous reasons?**

### **Background**

155. My June 2018 Report also considered whether there was evidence of requests being blocked or refused for tenuous reasons. This consideration was informed by the view of journalists that the use of blanket exemptions was widespread, and that the scope of requests was sometimes narrowly defined.
156. My June 2018 Intervention Report found no evidence, in the cases examined, of improper motives in the application of exemptions, although there were some cases identified where, for example, the case for the application of certain exemptions was not particularly strong. That report reminded the Scottish Government of the importance of taking the advice contained in my detailed guidance on FOI briefings and my previous decision into account when assessing whether the application of any particular exemption is appropriate, while also highlighting the expert advice available within the Scottish Government's FOI Unit. It also stressed the importance of adequately recording the reasons for decisions within case files.

### **Findings from the current assessment**

157. The appropriate route of challenge for anyone dissatisfied with the handling of an information request by a Scottish public authority will, of course, be the formal appeal process. Indeed, it is only through the detailed consideration of cases in this way that I am able to fully assess the circumstances of any particular case. I would therefore urge anyone who has any concerns about any aspect of an FOI response from a Scottish public authority to bring an appeal to me.
158. Having said that, there nevertheless were some cases examined during my manual review which raised concerns around aspects of the handing of individual requests.
159. In many of the cases examined, there were significant widespread gaps in the information recorded in individual case files, including, commonly, failures to adequately record the reasons for the application of exemptions. Indeed, of the 71 casefiles we manually reviewed, we noted concerns around gaps in documentation in 61 of those cases.
160. While the internal disruption resulting from the pandemic will undoubtedly have placed pressures on staff when responding to requests, it is notable that issues around missing documentation were by no means confined to 2020/21. Indeed, our manual review found that the proportion of cases where gaps in documentation was noted was slightly higher for the 2019/20 period, indicating that this is a broader systemic issue, rather than one which principally arose in response to the challenges caused by the pandemic.

161. One example of such a gap concerned a request for details of special adviser remuneration, including pay banding and range. In advice within the case file, staff from the Scottish Government's FOI Unit set out that the disclosure of pay banding and ranges was normal practice within the Scottish Government and that *"a pay band would not be considered to be personal information"*. The FOI Unit staff member went on to set out that *"I can't see that an exemption would apply to this information"*. Almost two months later, however, a response was issued which withheld all the requested information under the FOI exemption protecting personal information. There was no further documentation setting out the rationale for this approach.
162. While it is possible that there may have been an appropriate rationale for non-disclosure when this information was viewed in context, it is certainly the case that any advice, comment or evidence which informed and supported this conclusion should clearly have been saved within the case file – not least to support the Scottish Government in the event of a request for review or an appeal being made. This requirement is, in fact, clearly set out in the Criteria for Decision-Making, where it is noted that:
- "Where Ministers consider that it is appropriate to depart from the specialist advice of the FOI Unit, then a clear rationale for this should be recorded."*
163. We also identified cases where it appeared that an overly-restrictive interpretation of the request had arguably been taken. One case, for example, concerned a request from a member of the public which sought minutes from cabinet meetings that discussed the issue of 'herd immunity' over a specified period. An 'information not held' response was issued in relation to this part of the request, although internal correspondence indicates that a very technical scientific interpretation of the phrase 'herd immunity' was used when identifying whether or not information was held.
164. In this case, it would appear to have been appropriate for the Scottish Government, at the very least - and in line with its duty to provide advice and assistance - to have checked the requester's understanding of the term used, in order to ensure that the search could appropriately identify any relevant information that was held. As noted in the Section 60 Code of Practice, *"applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek."* This approach would seem particularly relevant in this case given the significant public interest in the issues at the heart of the request. The approach taken by the Scottish Government here was disappointing.
165. A related case, which became the subject of Decision 027/2020 following an appeal to my office, concerned an overly-restrictive definition of the term "analysis" being used when considering a request for information on analysis carried out on Scotland's eligibility for EU Membership. As noted in my Decisions Round-up of February 2020, when interpreting an information request and deciding on its scope, it is important for an authority to *"take a 'plain English' approach, and not limit the scope by interpreting ordinary words too narrowly"*. Information within the case file suggests that targeted training within the Division in question may be appropriate in this case, with an internal note recognising that *"this is not the first time we have raised these issues with the policy area handling the case"*.
166. We also examined one case where an overly broad interpretation of a request raised a concern, although it is unlikely to have impacted on the eventual outcome of the request. In that case, the requester sought access to internal documents relating to the planning for a second coronavirus wave between two dates. A cost refusal was issued following a search

which identified 89,000 documents at an estimated cost of over £66,000 to respond (the FOI Act allows requests which cost more than £600 to respond to be refused).

167. The cost calculation in this case was reached using by a range of search terms, including, for example, *“Covid Contingency Planning”*, *“Winter Planning Covid”* and *“Second Wave Covid”*. Included within that calculation, however, were the results of a search entitled *“Winter Preparedness 2020”*. This search alone returned more than 75,000 documents – 85% of the total number identified. Within that broadly-framed search, it can be assumed, will be a wide range of documentation relating to matters other than Covid - including, for example, planning relating to transport, the environment, fuel supply, non-Covid related health matters, etc. - all of which was factored into the final estimated cost of responding.
168. It appears likely that any documentation relevant to the subject matter of the request would have been caught by the numerous Covid-specific searches which were undertaken (one of which returned more than 12,000 documents, so likely meeting the FOI upper cost limit regardless). The inclusion of this search in cost calculations, therefore, appears to have only had the effect of unnecessarily increasing the (already significant) estimated cost to the authority of responding.
169. Finally, we also examined one case, for example, where it was acknowledged within case file documentation that the arguments in favour of non-disclosure were not particularly strong. That case was subsequently appealed to me where I found, in Decision 175/2019, that the requested information should be disclosed. As noted in my June 2018 Report, where an authority recognises that the case for the application of an exemption is not particularly strong (but is nonetheless stateable), it should carefully consider whether that exemption should be applied at all. Both the FOI Act and the EIRs contain a presumption in favour of the disclosure of information, and exempting information without a robust case for doing so will simply have the effect of unnecessarily delaying the disclosure of information to the requester, while also creating avoidable additional work for the organisation as it undertakes an FOI review and appeal.
170. Indeed, an example of this impact is highlighted in internal correspondence published by the Scottish Government in March 2022, which related to the handling of the case which led to my Decision 144/2021.
171. While this falls outside the period of review for the current intervention report, it is nevertheless instructive to recount it here. In that case, a member of staff within the FOI Unit provided the following comment when sharing Decision 144/2021, which found against the Scottish Ministers, with colleagues: *“Here is the long-awaited decision...unsurprisingly, the Commissioner has not upheld our s.33(1)(b) arguments, as we have been predicting since at least the review stage.”*
172. While it is inevitable that internal differences of opinion or disputes will arise from time to time in relation to the appropriate approach to take in the handling of particular requests, it will, in such circumstances, be important to ensure that decision-making is fully and appropriately informed by good-practice guidance and internal expertise, alongside guidance from the briefings and decisions issued by my office.
173. Failing to take this approach will only lead to circumstances where requesters may be unnecessarily frustrated, the disclosure of information is unnecessarily delayed and the reputation of the organisation is unnecessarily damaged in the eyes of service users and citizens. Indeed, as a member of the public put it in correspondence with my office which referenced this disclosure: *“[This] approach to drawing out FOI appeal cases which they*

*expect to lose is of deep concern. This is wasting your office's time, absorbing resources within the Scottish Government, wasting the time of FOI applicants and delaying important information from entering the public domain."*

174. On the basis of the cases reviewed as part of my current assessment then, it is disappointing to find myself reaching conclusions on this question which broadly echo those arrived at in my 2018 Intervention Report.
175. While I found no evidence of improper motives in the application of exemptions, I did identify a number of cases where aspects of case-handling raised concerns. These included cases which, as summarised above, featured evidence of information being withheld without an appropriately stated rationale, cases where requests appeared to have been either interpreted too broadly or too narrowly to the potential detriment of the requester (and indeed ultimately of the organisation), and many cases where the rationale for decisions taken were not adequately recorded within case files.
176. As with my 2018 Intervention Report, therefore, I find myself again reminding the Scottish Government of the importance of being fully cognisant of the advice and guidance available in all aspects of request handling, to support effective compliance with FOI law. This includes the briefings and decisions produced by my office, but also the advice contained within the Scottish Ministers' own Section 60 Code of Practice on the discharge of functions under FOI law. Indeed, the latter sets out amongst other things that:
- There is a presumption in favour of disclosure under FOI law (Part 1, section 2)
  - Senior managers should ensure that appropriate procedures are established and embedded to ensure staff are adequately trained and supported in carrying out their FOI duties (Part 2, paragraph 1.2.3)
  - Staff with responsibility for responding to FOI requests should have the appropriate skills, knowledge and appropriate level of authority to perform them (Part 2, paragraph 1.2.4)
  - Staff with responsibility for issuing responses should have undertaken appropriate training to ensure that responses meet statutory requirements and the code of practice (Part 2, paragraph 1.3.2)
  - Authorities must provide appropriate advice and assistance to enable applicants to describe clearly the information they require (Part 2, paragraph 5.3)
177. Likewise, I also remind requesters with concerns about any aspect of an FOI response to consider pursuing an FOI review or appeal, to enable individual concerns around elements of request-handling to be fully and appropriately considered in the proper manner.

## **(vii) Are politically sensitive requests handled in a different way?**

### **Background**

178. My June 2018 Intervention Report considered the issue of whether politically sensitive requests were handled in a different way from other requests and, if so, whether this was detrimental to the requester's entitlement.

179. Ultimately, that report concluded that the key issue at the heart of Scottish Government request-processing in this area was the processing of request based on the nature of the requester, rather than the nature of the request.
180. The Criteria for Decision-Making provides examples of characteristics which may define a case as ‘sensitive’ or ‘exceptionally complex’. In doing so, it notes that *“it is important that seeking Ministerial decisions can be justified, because it may introduce a delay in responding to the requester”*. The characteristics provided are:
- *Sensitive cases are those considered to raise matters of highly significant public interest. This may include new areas of policy development or major set piece events, e.g. the Programme for Government or the Budget.*
  - *Exceptionally complex cases are those likely to involve complex arguments or legal points which have not been considered in previous cases, or which involve complex and nuanced public interest arguments. There may be complex, overlapping policy interactions to consider.*

### **Findings from the current assessment**

181. As discussed elsewhere in this report, I am satisfied that the Scottish Government has adequately amended its procedures to support and enable processing of requests based on the nature of the request as opposed to the requester, and that those procedures appear, from the information examined during this assessment, to generally be successful in ensuring that cases identified for special adviser review and / or Ministerial decision-making are selected on this basis. However, as noted elsewhere, I also consider that more work needs to be done by the Scottish Government to ensure that:
- (i) Cases which are reassessed as requiring special adviser review / Ministerial decision-making are appropriately logged and recorded in Scottish Government systems
  - (ii) The reasons for any reassessment are appropriately documented, in accordance with Scottish Government procedures.
182. The recording of case-related information will be discussed in more detail in the next section.



# Progress on Recommendations

183. My June 2018 Intervention Report contained seven broad recommendations aimed at supporting improvements in Scottish Government FOI performance. The seven recommendations can be 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.

184. My current assessment considers the progress made in addressing each of these recommendations below.

## Recommendation 1: Clearance procedures

### Background

185. My June 2018 Report found that the Scottish Government's clearance procedures at that time lacked detail, including lacking clarity around individual roles and responsibilities. I recommended that a detailed review of clearance procedures be undertaken. This was supported by six sub-recommendations, which can be 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))

186. In response to these recommendations, the Scottish Government implemented a number of measures, including the development of its improvement Action Plan and its Criteria for Decision-Making.
187. In September 2020 I published an Intervention Progress Report, which identified a range of work that had been undertaken to roll out the new request handling procedures between 1 April 2019 and 31 March 2020. The September 2020 report found that significant effort had been made to address the issues highlighted in my June 2018 report between 1 April 2019 and 31 March 2020, and that this effort had helped drive improvements in the Scottish Government's compliance with FOI timescales over that period.
188. The September 2020 report also found, however, that the pandemic had a significant impact on Scottish Government FOI improvement work from March 2020, with staff disruptions, resource reallocation and office closures leading to the pausing of FOI improvement activity and the disruption of previous improvements made.

### **Findings from the current assessment: Clearance procedures**

189. The Criteria for Decision-Making developed by the Scottish Government created a clear and unambiguous structure for the review and clearance of FOI requests, which addressed the majority of the clearance recommendations set out in my 2018 Report. Through the development of its Criteria for Decision-Making, the Scottish Government clarified the structure of the FOI clearance process for all staff, while setting out the individual roles and responsibilities for those involved in that process, and establishing clear rules for the recording of decisions on information requests.
190. While my current assessment found that there were many key elements introduced by the Criteria for Decision-Making which were working well in practice, we also found several elements which fell short of the standards required.
191. I will consider some of these elements in turn below.

#### ***Elements which are working well***

192. Elements which we found to be generally working well included the initial 'triage' role of the Scottish Government's FOI Unit. While there were certainly issues with cases which had been triaged as 'routine' being subject to later review by special advisers / Ministers, we found that the initial process, whereby all cases are subject to an initial triage classification

by the FOI Unit was working well, and that the majority of cases (but not all) contained a copy of the FOI Unit's initial triage documentation.

193. As noted elsewhere, we also found that initial triage decisions classifying cases as 'sensitive' (and therefore appropriate for special adviser review / Ministerial decision-making) appeared to have been made on the basis of the subject matter of the request, as opposed to the nature of the requester.
194. We also found that special adviser advice, where present in case files, was generally (and correctly) framed as a comment / suggestion for the case handler to consider, rather than an instruction or direction, in line with the requirements of the Criteria for Decision-Making.
195. It was also clear, from the cases examined, that the Scottish Government's FOI Unit plays a valuable role in the FOI and EIR request-handling process.
196. In the cases which were subject to manual review, we found several examples where staff within the FOI Unit had provided detailed and considered advice to support the handling of requests, with clear evidence that this was informed by FOI good practice principles. This included, for example:
  - a case where staff within the Unit queried whether the searches undertaken would be sufficient to identify relevant information and advised carrying out of broader searches;
  - a case where FOI Unit staff argued against information being considered 'out of scope';
  - examples of detailed and robust advice to support accurate assessments of costs;
  - a case where the rationale for the application of an exemption was carefully queried by staff within the Unit;
  - examples of FOI Unit staff clarifying and reinforcing internal roles and procedures under the Criteria for Decision-Making.
197. A further example included one case where FOI Unit staff provided detailed advice on the searches to be carried out in order to respond to a particular request (*"You should ask colleagues to ensure they consider all possible locations where information might be stored, including in eRDM (including restricted files), personal mailboxes, paper files, personal devices, etc."*).
198. Our review therefore found that the Scottish Government's FOI Unit play a key role in the FOI process, providing considered advice to case-handlers and colleagues when called upon to do so. Our analysis of case correspondence also suggested that, when considered against my 2018 assessment, the experience and expertise of the FOI Unit was more widely respected and valued internally within the organisation, with FOI Unit guidance taken seriously by case-handlers and Unit advice commonly (but not always) acted upon.
199. In short, circumstances where interventions by the FOI Unit were evident typically contributed to improved and enhanced case-handling in the cases we examined.
200. It is also worth briefly noting the wider work done by the FOI Unit beyond its role in advising on individual cases, both prior to and during the pandemic phase. This has included work to develop and deliver online training for both existing and new FOI case-handlers following the pandemic-related disruptions to the FOI case-handler staff network; the development of

resources for information sharing; and the preparation and delivery of guidance and training for staff across the organisation.

201. **I strongly recommend that the Scottish Government continue to invest in the experience and expertise of FOI Unit staff, and support the development of the status, profile and reputation of the Unit, to enable its guidance to steer, shape and support good-practice in request-handling in future.**

*Elements which are working less well*

202. There were also elements introduced by the Criteria for Decision-Making which we found were currently working less well in practice.
203. Most significantly, and as detailed extensively throughout this report, we found that, in practice, the measures introduced by the Criteria for Decision-Making to support the recording of decision on information requests, including the detailed rationale for decisions and clear justification for any departures from specialist advice (see Recommendation 1(iv)), were rarely complied with in full.
204. For example, the Criteria for Decision-Making sets out that any request which assessed by the FOI Unit as requiring a Ministerial decision should have the reason for this recorded in the case file. To support this, and to ensure that a relevant and appropriate briefing can be provided to Ministers, an FOI/EIR Submission Template was developed to accompany Ministerial submissions. This template supports the recording a range of helpful information, including the case priority, the case background, the reason for the submission, details of any advice received from the FOI Unit and the recommended course of action.
205. In practice, however, our manual review of records found that FOI/EIR Submission Templates were rarely found within relevant case files. Of the 24 manually-reviewed cases which were identified as being subject to Ministerial review, an FOI/EIR Submission Template was attached to only seven.
206. Issues relating to case file records management are discussed further under Recommendation 4 below. **It is, however, recommended that the Scottish Government take steps to ensure that the rationale for any decisions, including those made by Ministers, are appropriately recorded within the case file, to ensure that such cases can be effectively and appropriately considered, assessed and monitored.**
207. Other concerns identified in relation to decision-making procedures which are discussed elsewhere in this report include:
- The number of cases triaged as 'routine' which are nevertheless subsequently subject to special adviser review / Ministerial decision-making (e.g. see paragraph 60 above).
  - Failures to consult with the FOI Unit (or record details of any such consultation) in cases where the sensitivity of a case is reassessed and special adviser review / Ministerial decision-making is sought (e.g. see paragraph 61 above).
  - Failures to record reasons for decisions including when specialist advice from the FOI Unit is departed from (e.g. see paragraphs 161-162 above).
208. **It is therefore recommended that the Scottish Government address the gaps that exist between the agreed case-handling and decision-making procedures and organisational practice.**

## Recommendation 2: Quality assurance

### Background

209. My June 2018 Intervention Report queried the extent of the role played by special advisers in reviewing responses before issue, and in particular whether quality assurance could be carried out by a wider range of staff across the organisation. 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))
210. In relation to recommendation 2(i), my September 2020 Progress Report noted that the FOI Unit had developed a bi-monthly report on learning points emerging from reviews to ensure action is taken and lessons learned.
211. In relation to recommendation 2(ii), my 2020 Progress Report noted the work done by the Scottish Government in the development of the Criteria for Decision-Making, and the associated procedures and resources. I noted that, while there may be a bedding-in period for the new processes, I would expect that period to be relatively short, even taking account of the impact of the Covid-19 pandemic, due to the robust nature of the procedures and the clarity which they contained. I hoped that this would support a rapid normalisation of the new procedures.

### Findings from the current assessment: Quality assurance

212. With regard recommendation 2(i), I note my findings from the September 2020 Progress Report that the FOI Unit had introduced bi-monthly reporting on learning from reviews to enable action to be taken and lessons learned.
213. This work was subsequently paused for a period as the Scottish Government managed the impact of the pandemic, although occasional reports were issued, including during Summer 2021. The FOI Unit reported that additional pressures arising from increasing case numbers and staff changes subsequently led to the restarting of regular reporting being further delayed.
214. At the time of writing, however, the Scottish Government reports that FOI Unit resources have been expanded, a new team structure has been implemented and training and development is currently underway. The FOI Unit hopes, as a result, to have restarted bi-monthly reporting on learning by Summer 2022.
215. **It is recommended that the Scottish Government prioritise the reintroduction of reporting on learning from FOI reviews, to minimise the risk of common errors being repeated, and ensure that learning on key issues can be shared widely across the organisation.**
216. In relation to recommendation 2(ii), the Scottish Government introduced wide-ranging new procedures with the intention of ensuring that all requests triaged as 'routine' by the Scottish Government's FOI Unit be quality assured by officials of appropriate seniority, as opposed to by Ministers or special advisers.

217. As discussed elsewhere in this report, however, a significant proportion of cases triaged as 'routine' have nevertheless gone on to be subject to review by special advisers and Ministers. As also discussed elsewhere, this activity appears to have taken place without any formal reassessment of the sensitivity of the case by the FOI Unit, as required by the procedures set out in the Criteria for Decision-Making. In addition, the lack of documentation available within many case files means that the rationale for individual reassessments cannot be reliably established and considered.
218. **I therefore repeat the recommendation contained in the previous section that Ministers address gaps that exist between Criteria for Decision-Making procedures and day-to-day practice.**
219. Also, and as discussed in paragraphs 85-89 above, we examined cases where significant bottlenecks and delays arose in the quality assurance process which led, in a number of cases, to substantial and wholly inappropriate delays being experienced by requesters. **As such, it is strongly recommended that the Scottish Government generally, and special advisers specifically, take steps to minimise and prevent the risk of such delays occurring again in future.**

### Recommendation 3: Clearance of media requests

#### Background

220. My June 2018 Intervention Report made clear that it was wrong for requests from a particular type of requester to be treated differently solely because of who the requester is. Recommendation 3 called for the ending of this practice.
221. 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.
222. My September 2020 Progress Report noted that this principle was embedded throughout the revised procedures developed by the Scottish Government, but that it was only through a detailed assessment of individual cases that the effectiveness of this measure could be assessed.

#### Findings from the current assessment: Clearance of media requests

223. The Scottish Government's new Criteria for Decision-Making requires that the nature of the request is the only relevant consideration when assessing whether or not a Ministerial decision is appropriate.
224. As detailed in paragraph 110 above, it is my view that, from the data available to inform this assessment, the Scottish Government's previous practice of treating requests from journalists (or elected representatives, or researchers) differently based on the nature of the requester, rather than the nature of the request can, on the basis of the information available, be said to have ended.
225. As also noted at paragraph 112, it is strongly recommended that the Scottish Government take immediate steps to ensure that relevant data relating to case sensitivity can be reliably recorded, in order to ensure that the organisation is able to monitor and assess its own progress and performance in this key area.
226. This issue is discussed further in relation to *Recommendation 6: Monitoring FOI requests* below.

## Recommendation 4: Case file records management

### Background

227. My June 2018 Intervention Report recommended that the Scottish Government take steps to improve its record-keeping, to ensure that case files contain a full record of internal correspondence on the handling of information requests. I set out that 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.
228. My 2020 Progress Report acknowledged that records management procedures were embedded throughout new case handling procedures, with the Scottish Government's Criteria for Decision-Making requiring that:
- The rationale for seeking Ministerial decisions on disclosure will be recorded in the case file.
  - 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.
  - The case handler should complete a Statement of Compliance before sending their submission to Ministers for a decision.
  - 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.
  - 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.
  - 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.
  - Case-handlers must record all comments and contributions received in relation to a case, along with the rationale for the approach recommended in their draft response.
229. 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.

### Findings from the current assessment: Case file records management

230. As noted throughout this report, my assessment found significant and systemic issues with case file records management. Indeed, from the cases reviewed, it appears that the records management requirements set out in the Criteria for Decision-Making and associated guidance are rarely fully complied with.
231. In the 71 cases we manually reviewed, we recorded that 61 cases (86%) contained gaps in file documentation, while 24 cases (34%) contained five documents or fewer within the case file. We also found that:

- Of the 24 cases which appeared to have been reviewed by Ministers, only 9 contained a completed statement of compliance, or a Ministerial submission form setting out the rationale for seeking a Ministerial decision.
- Only 14 cases (20%) contained a record of the search undertaken to identify information falling within scope.

232. It should be noted that the maintenance of a record of search, where appropriate, is a good practice requirement set out in the Scottish Ministers' Section 60 Code of Practice on the discharge of functions under FOI and the EIRs.
233. We also found that the recording of a range of other information required by the Criteria for Decision-Making, including reasons for decisions, special adviser advice, comments and contributions, case-handling rationales, discussions on disagreements, etc. was commonly absent.
234. Cases which followed the records management requirements set out in the Criteria for Decision-Making and elsewhere were, therefore, the rare exception, rather than the norm. While some case-handlers clearly took a diligent approach to the following of procedure and the appropriate recording of information, significant omissions from case files were persistent and widespread.
235. Consequently, it was, in the majority of cases examined, impossible to fully assess a wide range of information. This included, for example: the extent to which procedures had been followed; the range of individuals involved in request-handling; the advice that had been received; the discussions that had taken place; the reasons for decisions taken.
236. We examined the pattern of records management separately across the two years covered by the assessment, in order to determine whether the impact of the pandemic, and the resultant organisational and resource disruptions, had a disproportionate impact on the recording of file documentation over the review period. Disruptions to staffing, we hypothesized, may have increased the likelihood of inexperienced staff being asked to respond to FOI and EIR requests, while pandemic-related pressures may have contributed to 'corners being cut' in the procedural processing of requests.
237. However, we found little evidence of differences in practice between 2019/20 and 2020/21 in the files reviewed. During 2019/20, for example, 21 of the 23 cases examined (91%) appeared to contain gaps in documentation, while 40 of the 48 cases handled during 2020/21 (83%) were recorded as containing gaps. While I acknowledge that the number of cases we manually reviewed was comparatively small, it nevertheless does not appear, from the information available, that this issue has arisen as a result of the circumstances imposed by the pandemic.
238. The Scottish Government has noted that, for a period following the introduction of the new CMS, there were some problems experienced in saving information to case files which may have contributed to gaps in documentation during this period. On examination, however, this issue did not appear to materially affect those cases involved in our manual review (although it may have affected other cases across the organisation).
239. Regardless, it is clear that the issue of accurate recording of required information in case files continues to be a widespread and systemic issue, and the introduction of new requirements and procedures via the Criteria for Decision-Making and elsewhere appears to have had only a marginal impact on day-to-day record-keeping practices.



240. Indeed, there appears to have been little progress in this area since my June 2018 Intervention Report, where the findings in relation to records management practice were markedly similar.
241. While it is clear that some requirements of the Scottish Government's new procedures have bedded in far more successfully, there has been little shift in record-keeping practices. **I would, therefore, strongly recommend that the Scottish Government take urgent steps to improve compliance.**
242. This is clearly an area where more training and awareness-raising of duties and responsibilities among case-handling staff would be beneficial. It would also be desirable for file documentation to be reviewed as part of the internal process for the approval of requests. Information which is commonly missing, such as that relating to the searches undertaken, the advice received and the reasons for the decision made, will be essential to support an accurate timely and effective response in the event of an internal review request, or an appeal to the Commissioner. For many cases examined, however, any internal reviewer would, at the current time, glean very little of practical value from case file content.
243. **As part of its review, the Scottish Government should consider whether current record management requirements and case handling systems can be more closely aligned and integrated, to support the effective and efficient recording of appropriate information.**

## Recommendation 5: Case handling

### Background

244. 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)). This recommendation was made in response to the finding that more than 1,000 individuals across the Scottish Government were involved in FOI case-handling in a single year, with more than half of these individuals responsible for responding to just one information request.
245. I also recommended that the Scottish Government reassess its FOI training system, and ensure that training records are kept in an accessible format (Recommendation 5(ii)).
246. My September 2020 Progress Report noted that the Scottish Government had undertaken significant work to develop a core group of trained case handlers across the organisation, with more than 280 case-handlers having been identified and trained by March 2020. That report also noted, however, that there had been significant disruption to that core group as a result of the pandemic, due to the redeployment of staff to meet the demands of the pandemic and the scaling back of training events as the organisation worked to address pandemic-related challenges.

### Findings from the current assessment: Case handling

247. A key aim in establishing the network of case-handlers was to support a core group of staff across the Scottish Government to develop and build skills and expertise in FOI and EIR request handling. As noted in my September 2020 Progress Report, significant progress had been made in this area by March 2020, but this newly-established network was subsequently disrupted and dispersed as the organisation responded to the pandemic.

248. To support an analysis of the impact of this disruption on the Scottish Government's network of case-handlers, we examined the cases recorded in the Scottish Government's full CMS dataset over the two-year period covered by the intervention, to assess how many individuals were involved in the handling of requests in each year. The results of this analysis are shown in the following table:

**Number of individual case-handlers recorded in the full CMS dataset**

	2019/20	2020/21
<b>Number of individual case-handlers</b>	340	1,155

249. As can be seen from the above data, there were more than three times as many case-handlers responsible for responding to FOI requests during 2020/21 as there were during 2019/20, when the Scottish Government's case-handler network was established.
250. The disruptive impact of the pandemic was unprecedented, significant and substantial, and it is inevitable that the Scottish Government's network of FOI case-handlers would be affected by that disruption. Nevertheless, it is disappointing to see that the number of individuals responsible for case-handling returned, during 2020/21, to pre-intervention levels, undermining much of the initial good work done in this area.
251. The benefits that a confident, experienced and knowledgeable case-handler brings to a case was strikingly clear from our manual review of cases, with an individual's experience impacting on case-handling in a range of ways: from the standard of the search to the speed of the response; the confidence with which a case is made to colleagues to the quality of the records held in the case-file. While it is clear from the data available for 2020/21 that pockets of expertise continue to exist within the organisation, it is also clear that a far larger proportion of cases have been handled by those with little or no previous experience of FOI.
252. **I therefore strongly recommend that the Scottish Government take immediate steps to restore the FOI case-handling network, to ensure that the benefits from the progress made in this area during 2019/20 can be recovered and maintained.**
253. In relation to recommendation 5(ii) - that the Scottish Government reassess its FOI training system, and ensure that training records are kept in an accessible format - I note that, as set out in my September 2020 Progress Report, significant work has been done to improve and revise the Scottish Government's FOI training system, and maintain appropriate records about the training delivered across the organisation.
254. While the delivery of training to staff was paused during the early months of the pandemic, I note that FOI case-handler training was relaunched online in September 2020, and the Scottish Government has supplied me with details of a range of online training delivered over the period of this assessment, including the delivery of 20 online training sessions to more than 300 members of staff, across a range of directorates, between September 2020 and March 2021.
255. The Scottish Government also shared a copy of its training monitoring spreadsheet, used to monitor and track case-handler training provided to individual directorates across the Scottish Government.

## Recommendation 6: Monitoring FOI requests

### Background

256. 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))

257. My September 2020 Report noted the Scottish Government's assertion that its new CMS was intended to provide real-time monitoring and tracking information, as well as enabling management reporting to senior staff. It also highlighted, however, that some issues had arisen with the generation of reports which, at that point, were being explored. I therefore urged the Scottish Government to address these issues as a priority, to ensure that FOI performance could be effectively tracked and monitored.

### Findings from the current assessment: Monitoring FOI requests

258. It will be clear to anyone reading this report that there are substantial issues with the CMS introduced to record and track case data across the Scottish Government, with regard to the effective monitoring, tracking and reporting of FOI requests.

259. In both preparing for and undertaking this assessment I have encountered significant issues when seeking to obtain reliable information; issues which both contributed to a significant delay in the production of this report, and reduced and restricted the range and reliability of the information available to inform my conclusions.

260. The issues encountered with the data available led to significant challenges in assessing Scottish Government performance as part of this assessment, and required a number of conclusions to be drawn on the basis of various manually-reviewed sub-samples of data, rather than the entire dataset.

261. While I have attempted to ensure that my conclusions are as robust as possible from the various data sources available, this has inevitably placed limitations on the conclusions that can be drawn in relation to Scottish Government performance as a whole.

262. Of course, the issues described above will affect more than my own assessment activity. The Scottish Government's own ability to assess and monitor performance, identify issues and introduce performance improvement measures will also be directly and significantly affected by this situation.

263. If the Scottish Government is unable to analyse and report on its performance in a meaningful way, it will have no way of reliably assessing whether the various systems, process and procedures it has put in place to bring about improvements in its FOI function are working effectively across the organisation.

264. **It is therefore strongly recommended that the Scottish Government take immediate steps to improve and enhance its own capacity for tracking, monitoring and reporting FOI performance.**

265. As set out elsewhere in this report, my assessment also identified a number of individual cases which experienced substantial delays.
266. The CMS sub-sample of 224 cases (for which FOI response timescales had been manually reviewed and, where required, corrected) showed an average FOI response timescale of 21 working days, slightly more than the 20-working day maximum statutory timescale. That sub-sample also revealed, however, that a proportion of cases took significantly longer, with 11 cases taking more than double the statutory timescale, and three cases taking more than 100 working days. The longest case in the subsample took 172 working days – or more than eight months – before a response was issued. Our manually-reviewed sample (selected, in part, where data suggested issues of concern) contained cases which exceeded even this period. That sample contained 12 cases which exceeded 100 working days, three of which exceeded 200, and one which took 337 working days - or more than 16 months - for a response to be issued.
267. Cases examined which experienced significant delays were skewed towards those cases received during 2020/21 when pandemic disruptions will almost certainly have impacted on the Scottish Government's ability to respond timeously. Nevertheless, while some amount of disruption was to be expected – and indeed, was accounted for through the temporary changes made to FOI by coronavirus legislation – delays to the extent described above are unacceptable. Such delays will have significantly disrupted the resolution of issues of importance to the people requesting information. In the cases examined, that included people seeking information on the remuneration of social care workers; information on access to care homes during the pandemic; and information on Covid-19 planning and restrictions. As noted at paragraph 112 above, one case examined came from someone seeking copies of minutes relating to a medical screening programme. After a delay of more than five months, the requester was informed that the minutes sought were available to access online, and had been all along.
268. Issues with the reliability of timescale data within the Scottish Government's CMS have been highlighted above. Regardless of this, however, it is vital that the Scottish Government has systems in place to enable it to both identify those cases which have exceeded the 20-working day timescale, and to take swift and escalated action to bring those cases to a prompt resolution. In no circumstances can delays of the kind highlighted above be considered acceptable. **The Scottish Government should immediately put in place measures to prevent delays of the kind described above occurring in the future.**
269. While I note that the Scottish Government is currently reporting FOI performance at assurance meetings for each Directorate General, my September 2020 Progress Report also recommended that the Scottish Government's Executive Team consider the introduction of Key Performance Indicators in relation to the time taken to respond to FOI requests, for both routine and sensitive / exceptionally complex cases. I repeat this recommendation again here. It is only through the effective monitoring and reporting of request performance that significant improvements are likely to be made, and such a step would send a clear message across the Scottish Government of the vital importance of ensuring that FOI timescales are respected and adhered to.

## Recommendation 7: Reviews

### Background

270. My June 2018 Intervention Report noted that the Scottish Government's review process at the time 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.

271. The Scottish Government's Action Plan contained a clear commitment to ensure that reviews are 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 of Practice.
272. 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. This guidance was launched in December 2019.
273. The Scottish Government also committed to cascade learning emerging from reviews to relevant staff via internal communications and its network of FOI case-handlers.

### Findings from the current assessment: Reviews

274. It has proven challenging for me to assess patterns in relation to FOI reviews from the data supplied to inform this assessment.
275. When preparing my June 2018 Intervention Report, I was able to consider the proportion of cases which were upheld, overturned, or partially overturned on review, in order to assess the proportion of review cases where a different outcome was reached.
276. In that Report, I found that 10% of 2016/17 cases and 7% of 2017/18 cases were subject to review, and that decisions were either overturned or partially overturned in 64% and 47% of cases respectively.
277. However, the data available on reviews in the Scottish Government's new CMS provides only information on reviews which have been either upheld, or overturned, with any 'partial' responses not separately accounted for. While the data therefore indicates that 7% of cases between April 2019 and March 2021 were subject to review (488 cases), a precise comparison between review outcomes is not available, with CMS logging appearing to assign any 'partially overturned' outcomes to the 'upheld' category. Data available from the entire CMS dataset is shown in the following table:

#### CMS Review Data April 2019 – March 2021

Type	Total number of reviews	Number of completed reviews making decisions on previously considered cases (e.g. excluding withdrawn, abandoned, etc.)	% request outcome upheld	% request outcome overturned
<b>All</b>	488	305	85%	15%
<b>Requester type</b>				
<i>Elected representative</i>	-	3	100%	0%
<i>Individual</i>	-	212	87%	13%
<i>Media</i>	-	46	83%	17%
<i>Organisation</i>	-	15	67%	33%
<i>Other</i>	-	3	100%	0%
<i>Researcher</i>	-	23	83%	17%
<i>Solicitor</i>	-	3	67%	33%

278. More comparable information on this issue is, however, available from the data held in the FOI Tracker (the case logging system which predates the new CMS) and which hold data on 1,894 requests from 2019 which were responded to over the intervention assessment period, 101 of which (5%) were subject to review.
279. As can be seen in the following table, FOI Tracker data shows 45% of review cases resulted in either an 'overturned' or 'partially upheld' (equivalent to 'partially overturned') outcome:

**FOI Tracker Data:**

Type	Total number of reviews	Number of completed reviews making decisions on previously considered cases (e.g. excluding withdrawn, abandoned, etc.)	% decision upheld	% decision overturned	% decision partially upheld
<b>All</b>	101	78	55%	13%	32%
<b>Requester type</b>					
<i>Elected representative</i>	-	2	100%	0%	0%
<i>Individual</i>	-	44	61%	16%	23%
<i>Media</i>	-	6	33%	17%	50%
<i>Organisation</i>	-	11	45%	0%	55%
<i>Researcher</i>	-	13	46%	15%	38%
<i>Solicitor</i>	-	2	50%	0%	50%

280. On the basis of the data available from the FOI Tracker then, it would appear that some form of adjustment to the request outcome is made in just under half of the cases where a review is requested. As noted, however, reliable data across the whole organisation is not available on this issue, due to the limitations within the CMS.
281. In relation to my recommendation on Reviews, however, I found no issues relating to impartiality in the review cases considered as part of this assessment, and I find the work done to address this matter by the Scottish Government to be appropriate. I am therefore satisfied that the recommendations made in my June 2018 intervention report – i.e. that the Scottish Government review its procedures to remove, as far as possible, any related risk to impartiality, have been satisfactorily addressed.

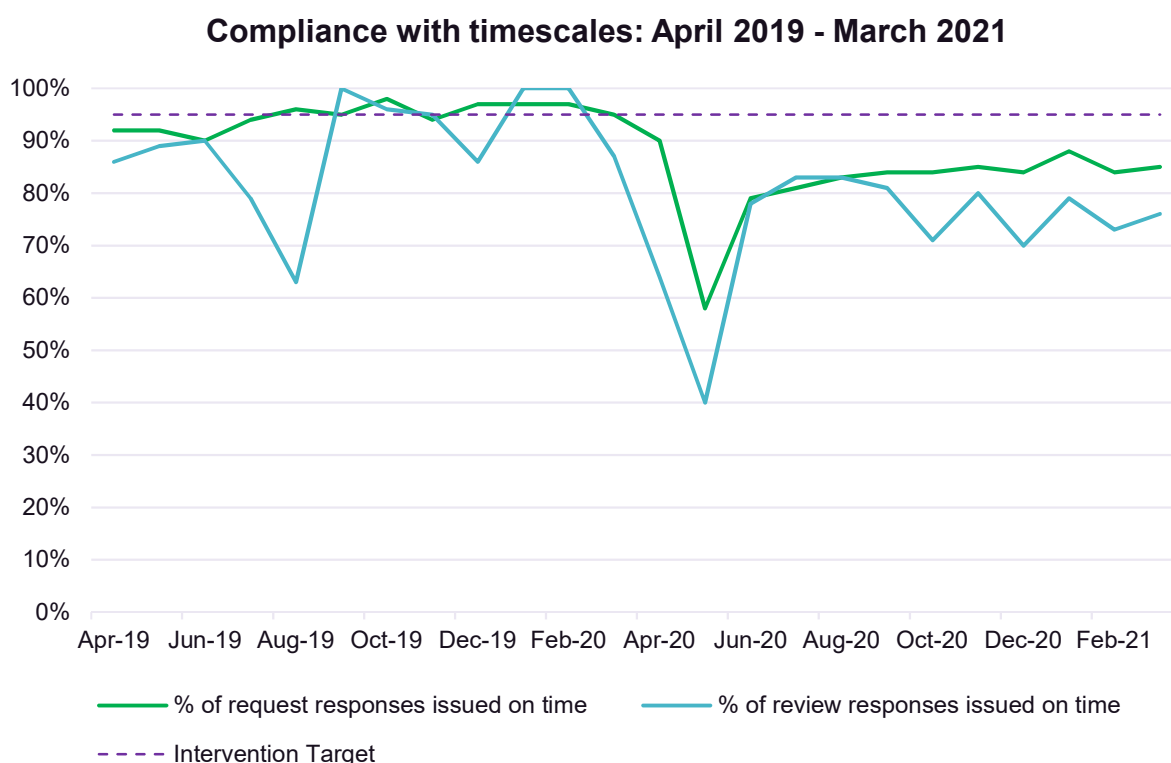


# Compliance with timescales

282. As noted elsewhere in this report, data relating to FOI timescales across the intervention period is not available in a reliable format for the purposes of this assessment.

283. However, a limited amount of data is available in this regard from monthly performance reports produced by the Scottish Government, which are required to be submitted to my office as part of this intervention. These reports, gathered using data recorded within individual directorates, are subject to extensive manual review before submission to ensure the timescale data for on-time and late responses is accurate.

284. On-time request and review responses both across the assessment period and up to the most current data available at the time of preparing this report is shown in the table below.



285. As can be seen from the above table, the Scottish Government achieved the 95% target for FOI 'on-time' responses during seven of the eight months prior to the start of the pandemic in March 2020, (while achieving this target for review performance in five of the six preceding months).

286. Performance, however, fell significantly in the early months of 2020/21 as the impact of the pandemic began to be felt, with performance recovering to an extent following that initial impact.

287. It is worth noting that, in the period beyond that covered by this assessment, performance has improved further, with a 90% 'on-time' response rate achieved for requests in November / December 2021 (although the rate for reviews in that period remained below 80%).

288. While improvements are being made, therefore, the Scottish Government still has some way to go to achieve the 95% on time target for both requests and reviews which has been set by this intervention.

289. It is anticipated that the recommendations outlined in this report will support the Scottish Government to continue to make progress towards the 95% target, while also supporting the Scottish Government to more effectively track and monitor its progress and take appropriate and swift action in relation to cases where response timescales have been missed.



# Conclusions and recommendations

290. Having completed the current assessment activity, it is clear that the findings as a whole present a mixed picture of the Scottish Government's progress towards sustained improvement in FOI practice and performance.
291. There are a number of areas where there is evidence of significant improvements having been made, and of elements of the new processes impacting positively on organisational practice and culture. These include, for example, evidence of the ending of the 'two-stream' approach to request handling based on the nature of the requester; an increased understanding across the organisation of FOI processes and procedures (along with individual roles within those processes); evidence of an increasing profile of the FOI Unit's role within the organisation and a recognition of the expertise it provides; and, prior to the pandemic at least, evidence of improvement against FOI timescales.
292. However, my assessment has also found a number of areas where performance and practice fell short. This includes substantial problems in the Scottish Government's ability to track, monitor and report on (and therefore improve) FOI performance; issues with organisational compliance with the revised clearance procedures; disruption to the newly-established network of FOI case-handlers; and evidence of significant delays and organisational 'bottlenecks' in some areas.
293. I also found evidence of significant and systemic failures to comply with case file records management requirements with the effect that, for many of the cases examined, it was not possible to fully assess how a case had been handled, who had been involved in case handling, or why particular decisions were taken.
294. While the disruption caused by the pandemic has been a contributory factor in some of these issues (including disruptions to staff resource and delays in responding) other factors, such as organisational compliance with internal procedures and issues with monitoring and reporting, are clearly wider concerns which require to be urgently addressed.
295. Additional action is therefore now required to ensure that the progress made in relation to FOI performance prior to the outbreak of the pandemic can be restored and revitalised.
296. With this in mind, I provide the following comments on, and updates to, the seven recommendations made in my June 2018 Intervention Report, to support the Scottish Government as it continues this vital improvement work.

## Recommendation 1: Clearance Procedures

- (i) I recommend that the Scottish Government address current gaps that exist between agreed procedures (as set out in its Criteria for Decision-Making) and organisational practice. In doing so, the Scottish Government should address the high proportion of cases marked as 'routine' (and therefore suitable for official review) which are nevertheless passed to special advisers / Ministers.
- (ii) I recommend that the Scottish Government address the delays and bottlenecks identified in this report - including those involving special advisers - in order to prevent delays of the kind discussed in this report recurring in future.
- (iii) I recommend that the Scottish Government continue to invest in the experience and expertise of its FOI Unit, supporting the development of the status, profile and

reputation of the Unit, to enable its guidance to steer, shape and support good practice in request-handling in future.

## **Recommendation 2: Quality assurance**

- (i) It is recommended that the Scottish Government prioritise the reintroduction of reporting on learning from FOI reviews, to minimise the risk of common errors being repeated, and ensure that learning on key issues is shared widely across the organisation.

## **Recommendation 3: Clearance of media requests**

As noted elsewhere in this report, it is my view that the Scottish Government's previous practice of treating requests differently based on the nature of the requester, rather than the nature of the request, has been addressed and resolved.

I therefore have no further recommendations to make in relation to this aspect of my intervention. However, I note the importance of the effective logging of key information, including data relating to case sensitivity, case outcome and response timescales, in ensuring that this issue can be effectively monitored and assessed by the Scottish Government in future.

## **Recommendation 4: Case file records management**

- (i) I strongly recommend that the Scottish Government undertake urgent work to improve FOI record-keeping practices across the organisation, given the significant and sustained shortfalls in this area identified throughout this report. In doing so, the Scottish Government should align day-to-day request-handling practice with the requirements set out in the Criteria for Decision-Making, the Section 60 Code of Practice, and other associated guidance. The Scottish Government should take steps to improve, for example, the recording of special adviser advice, the rationale for any decisions by Ministers, and the reasons for any divergence with specialist FOI Unit advice.
- (ii) As part of its review, the Scottish Government should consider whether current record management requirements can be more closely aligned and integrated with case handling systems, in order to support the effective and efficient recording of appropriate information.

## **Recommendation 5: Case handling**

- (i) I strongly recommend that the Scottish Government restore the network of trained FOI case-handling staff, to ensure that the benefits from the progress made in this area during 2019/20 can be recovered and maintained.
- (ii) I also recommend Scottish Government implement a clear and swift decision-making process regarding the allocation of cases to individual directorates, in situations where case ownership is disputed or delayed.

## **Recommendation 6: Monitoring FOI requests**

- (i) Flowing on from my earlier recommendations, I strongly recommend that the Scottish Government take immediate steps to improve and enhance its own capacity for the tracking, monitoring and reporting of FOI performance, in order to address the numerous and significant issues highlighted throughout this report.

- (ii) I recommend that the Scottish Government take immediate steps to identify cases which have exceeded the maximum FOI response timescale, and ensure that swift and escalated action can be taken to bring cases to a prompt resolution.
- (iii) As noted in my previous Interim Reports, I recommend that the Scottish Government's Executive Team consider the introduction of Key Performance Indicators in relation to the time taken to respond to FOI requests, for both routine and sensitive / exceptionally complex cases.

## **Recommendation 7: Reviews**

From the information examined during this assessment I am satisfied that the recommendations made in my June 2018 intervention report – i.e. that the Scottish Government review its procedures to remove, as far as possible, any related risk to impartiality – have been satisfactorily addressed. I therefore have no further recommendations in relation to Reviews at this time.

## Next steps

297. In terms of progressing this intervention towards its conclusion, I intend to undertake a further assessment during Spring/Summer 2023, with this work focusing specifically on those areas where the current assessment has found that issues persist. Specifically, then, this assessment will focus on progress in relation to the following areas, as outlined in my Recommendations above:

- Clearance procedures
- Quality assurance
- Case file records management
- Case handling
- Monitoring FOI requests
- Compliance with timescales

298. The scope and scale of this assessment activity will be confirmed following consideration of the progress made by the Scottish Government on improving FOI practice and performance over the course of 2022/23. The subsequent report will be used to inform decision-making about whether the intervention can then be closed.

299. In the meantime, my staff will continue to liaise with and support the Scottish Government as it works to deliver its FOI improvement programme.

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