

# Scottish Government Intervention Progress Report

12 October 2023



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

# Introduction

This is the last report on my intervention to improve Scottish Government performance and practice that I issue, as my term as Scottish Information Commissioner will conclude shortly after its publication.

This intervention launched in November 2017, and was initiated in response to concerns raised by journalists and in the Scottish Parliament about various elements of the Scottish Government's practice in relation to FOI request-handling.

I had initially anticipated that my final report on this piece of work would be to announce the successful conclusion of the intervention but, unfortunately, the Scottish Government's improvement activity has not yet reached the point where this work can be appropriately concluded.

There have been times during the lifespan of the intervention where we have neared this point. Back in March 2020, for example, we were extremely close to the resolution of the intervention following significant improvements having been made including, at that time, sustained high levels of on-time request performance and work that had been achieved to establish a trained and supported network of experienced FOI case-handlers.

However, as with many other things, the impact of the pandemic substantially impacted and disrupted the Scottish Government's improvement activity and, until recently, the organisation was showing limited signs that its FOI function was recovering effectively from that disruption.

In recent months, however, and following my raising of specific concerns at a senior level within the Scottish Government in May 2023, we are now seeing encouraging signs of a turnaround in performance, with on-time performance improving significantly, the organisation's historic backlog of late requests being eliminated, and a range of new measures introduced to monitor, assess and improve performance. Alongside this, there are further areas where attention is yet required, most significantly in relation to compliance with records management procedures and the restoration of an effective network of FOI staff.

This report then, is one that tells two stories. In the first, I examine the Scottish Government's FOI activity between 1 July 2022 and 31 March 2023, and the issues of concern that informed my May 2023 meeting with Scottish Government officials.

Then, secondly, I will examine a further period of Scottish Government activity, from 1 May to 9 September 2023. This period examines the early impact of a range of measures introduced by the Scottish Government in response to my May meeting.

While, then, it is disappointing that my final report on this intervention does not herald the conclusion of this work, I am cautiously optimistic that the Scottish Government is now on the right track to work towards that conclusion. While there is still work to be done –and particularly so in some key areas – I am hopeful that the current senior-level focus and commitment towards FOI improvement will drive this work forward.

Ultimately, however, the responsibility for steering this work to conclusion will be handed to my successor as Commissioner, David Hamilton, but I look forward to observing the successful resolution of the intervention from afar in the not-too-distant future.

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

# Executive Summary

I anticipated that this 2023 Progress Report would mark the end of the Assessment and Monitoring phase of my intervention into the Scottish Government's FOI performance. However, as detailed within this Report, following the analysis of monthly monitoring data, I became concerned with a deterioration in FOI performance between 1 July 2022 to 31 March 2023 (Phase 1 of this Progress Report), particularly towards the end of that period. There was also evidence of a significant backlog of cases which had built up.

In May 2023, I raised my concerns directly with the Permanent Secretary and senior officials. Following this meeting, the Scottish Government initiated urgent work to address both the backlog and wider performance issues. I considered it appropriate to evaluate the impact of this work in a second phase of assessment (Phase 2), the findings from which are included within this 2023 Progress Report.

While there have been significant, measurable improvements following the urgent action taken by the Scottish Government, some issues remain to be addressed.

My 2023 Progress Report is very much a report of two halves, with progress and performance during Phase 1 raising significant concerns on a wide range of issues, including: a deterioration in on-time FOI performance levels; an increased average response time for FOI requests and reviews (particularly where the case was marked 'sensitive'); a failure to urgently progress a significant number of 'late' cases, resulting in a backlog of historic late requests; significant variance in the FOI knowledge of case-handlers, reviewers and approvers; and widespread failure to comply with internal records management requirements leading, in some instances, to ambiguity surrounding the role of Special Advisors in the decision-making process.

However, following the raising of my concerns in May 2023, a number of improvement measures were swiftly put in place by the Scottish Government, resulting in the rapid resolution of the historic backlog and a significant improvement in on-time request and review performance.

While it is still early days in the implementation of these measures, I am cautiously optimistic that a number of my concerns may now, at last, be being effectively tackled.

However, there remain a number of concerns which have not to date been fully addressed and resolved through these improvement measures, for example, standards of compliance with internal records management procedures and the degree of FOI experience and expertise of those involved in the request-handling process. There is, accordingly, additional action required to ensure that the progress recently demonstrated can be sustained and the remaining issues addressed.

With this in mind, I set out below the key recommendations that are both retained and expanded on for a further period of monitoring:

## **Recommendation 1: Clearance Procedures**

It is clear from the information in this report, that there remain concerns in this area and therefore the recommendations made in my 2022 Progress Report still stand.

In addition, I recommend that the Scottish Government ensure that, in circumstances where a case is not considered appropriate for Ministerial approval, the appropriate final approval at official level is enshrined in the process and in practice, in accordance with internal request-handling procedures.

As with my 2022 Progress Report, I recommend that the Scottish Government should consider the impact of the anonymous recording of special adviser views on organisational transparency and the efficiency of internal processes.

### **Recommendation 2: Quality assurance**

Following the publication of my 2022 Progress Report, the Scottish Government took steps to introduce monitoring, which is now in place and ongoing. As a result, I consider that this recommendation from my 2022 Progress Report has now been met.

### **Recommendation 3: Case file records management**

FOI record-keeping practices across the Scottish Government remain one of the most significant, if not the most significant, persistent and recurring issues identified. Although I identified some signs of improvement, significant issues remain. Consequently, the recommendations made in my 2022 Progress Report still stand.

In addition, it is recommended that where special adviser advice or comment is obtained, as well as it and the rationale behind it being recorded, the name of the relevant specialist adviser (or advisers) should be recorded.

### **Recommendation 4: Case handling**

I am of the view that both case-handling recommendations made in my 2022 Progress Report should continue to be monitored and assessed, and I would urge the Scottish Government to direct particular focus towards developing, up-skilling and supporting a smaller but more experienced core network of case-handlers across the organization, as was established and developed in March 2020.

### **Recommendation 5: Monitoring FOI requests**

Again, I am of the view, that the recommendations made in my 2022 Progress Report should continue to be monitored and assessed, in order that the early progress made in this area in recent months be sustained through the longer term and embedded into the normal business activity of the Scottish Government

# Background

1. My ongoing intervention to support improvements in the Scottish Government's FOI practice and performance was initially 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 response to a Scottish Parliamentary debate on Motion S5M-06126 (as amended by Motion S5M-06126.1) on 21 June 2017.
2. 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).
3. This 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
4. The intervention currently remains within its Implementation and Monitoring Phase.
5. I had initially anticipated that the Implementation and Monitoring phase would be completed during 2019/20 as the Scottish Government completed the implementation of its 2018 FOI Action Plan. Indeed, by the end of 2019/20, the Scottish Government had made significant progress in relation to a number of key elements of its Action Plan and was regularly achieving high levels of compliance with FOI timescales.
6. However, and as noted in my 2020 and 2022 Progress Reports<sup>1</sup>, disruptions within the Scottish Government which had their origin in the response to the Covid-19 pandemic - including substantial disruption to the Action Plan's network of trained FOI personnel - have meant that I have not been able to move the intervention on to its final Review Phase.
7. This Report, therefore, represents a continued monitoring of the Scottish Government's progress on the implementation of its FOI improvement plan.
8. My intervention into the Scottish Government's FOI practice and performance is guided by seven underlying intervention questions. These questions were informed by the concerns raised in the 2017 letter from journalists and the subsequent parliamentary debate, and can be set out 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?**

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<sup>1</sup> Available at: [www.itspublicknowledge.info/scottish-government-intervention](http://www.itspublicknowledge.info/scottish-government-intervention)



- (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?**
9. My June 2018 Intervention Report made seven **Recommendations** to improve Scottish Government FOI practice and Performance. These 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.

## 2022 Progress Report Recommendations

10. My 2022 Progress Report further updated my Recommendations, following a detailed review of Scottish Government case-handling practice and performance. These updated recommendations noted my satisfaction at that time that Recommendation (iii) (clearance of

media requests) and Recommendation (vii) (reviews) had, from the evidence available, been appropriately addressed.

11. In relation to the remainder, my 2022 Progress Report made the following further specific recommendations:

### **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.

### **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.

### **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.

### **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.

### **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.
12. I will comment on the Scottish Government's progress against these outstanding recommendations in this Progress Report.

# Methodology

13. As set out in my introduction above, in my monthly assessment of the Scottish Government's FOI performance I have, over the past year, become increasingly concerned about a lack of improvement - indeed deterioration - in the percentage of requests and reviews responded to on time. Additionally, I became aware of a growing backlog of older cases.
14. My concerns were raised directly with the Permanent Secretary and senior officials in the Scottish Government in May 2023. Following this meeting, the Scottish Government initiated urgent work to address both the backlog and wider performance issues. This work includes a number of improvements which this report will consider later.
15. Accordingly, the timeframes which are considered for this assessment differ from previous assessments. In addition to the originally planned assessment for the period of 1 July 2022 to 31 March 2023, I considered it important to assess the early impact of the work initiated by the Scottish Government in May 2023 to address my concerns. An additional brief assessment period of 1 May 2023 to 9 September 2023 has therefore been conducted to capture the initial impact of those changes.
16. My current assessment therefore involves an assessment of Scottish Government FOI performance across two distinct phases of activity.

## Phase 1 Review: 1 July 2022 to 31 March 2023

17. The first phase covers the period between 1 July 2022 and 31 March 2023. This phase examines Scottish Government activity across a nine-month period following my 2022 Progress Report, which was issued in May 2022.
18. The information examined as part of the Phase 1 review included:
  - (i) **Examination of data held in the Scottish Government's Content Management System (CMS)**

This comprised data relating to the handling of the 4,997 FOI and EIR requests and reviews recorded over the Phase 1 period.
  - (ii) **Examination of Scottish Government monthly performance data submissions**

This comprised data relating to performance against FOI timescales supplied as part of the intervention across the Phase 1 period.
  - (iii) **A manual review of 20 individual case files**

Comprising a manual review of case files to examine specific issues in relation to request handling. For the 2023 assessment report, this manual review was focussed specifically on 'late' cases – i.e. those which significantly exceeded the standard statutory timescale of 20-working days for a response set out in FOI law.

The focus on 'late' cases (rather than selecting cases from across the request-handling spectrum) was undertaken to support the identification of factors which contribute to the late issue of FOI responses, and support the Scottish Government to address and resolve these issues. For the purpose of case selection, 'late' cases were defined as those which took 30-working days or longer to respond to (i.e. avoiding 'near-miss' cases).

The 20 'late' cases were drawn from across the review period, and featured a cross-

section of both requester type and subject matter. Cases were selected from those which were triaged by the Scottish Government's FOI Unit as both 'sensitive' (and therefore considered to require Special Adviser review and Ministerial review approval) and 'routine' (considered to be appropriate for approval by officials within a Scottish Government directorate).

Cases were also selected from those directorates assessed as being 'challenged' and those which did not fall into this assessment. 'Challenged' directorates were defined as those receiving 50 or more requests over the review period, while responding to fewer than 80% of those within FOI timescales.

The 20 cases selected for manual review therefore comprised:

- 5 late 'routine' cases from 'challenged' directorates
- 5 late 'routine' cases from 'other' directorates
- 5 late 'sensitive' cases from 'challenged' directorates
- 5 late 'sensitive' cases from 'other' directorates.

## Phase 2 Review: 1 May 2023 to 9 September 2023

### *Phase 2: Background*

19. As stated above, during the period under which the initial review of Phase 1 data was underway, during our monthly intervention monitoring, it was identified that the Scottish Government was managing a substantial historic backlog of unresolved FOI cases.
20. Following further investigation, it was reported that this backlog sat at 88 cases during week-commencing 6 May 2023. The existence of this historic backlog - and the associated delays experienced in a large number of these cases - was clearly of significant concern.
21. In addition to this, ongoing monthly reporting had highlighted other concerns regarding the Scottish Government's FOI performance and ongoing commitment towards FOI improvement. This included an average on-time request performance across 2022/23 of 85%, and an average on-time review performance over the same period of 67%.
22. These figures fell substantially short of the targets agreed with the Scottish Government for the intervention of 95% for both requests and reviews, and represented a significant decline from the pre-pandemic period of this intervention, where on-time request performance across 2019/20 had improved to 95% and review performance to 90%.
23. As a result of the identification of the historic backlog and wider concerns around falling performance, commitment and progress, I met with the Permanent Secretary and senior officials in the Scottish Government, to discuss my concerns and require the resolution of these issues as an immediate and urgent priority.
24. Following this meeting, the Scottish Government committed to undertake a number of measures to address the issues highlighted. These measures included:
  - (i) **The reduction of the backlog of historic legacy cases**  
Bringing this to a 'close to zero' level by the end of June 2023

- (ii) **The introduction of weekly tracking of FOI performance at Director General level**  
To introduce greater accountability and flexibility into the system, enabling request ‘spikes’ around particular issues to be more readily addressed
- (iii) **The introduction of a two-level reporting system**  
With data extracted and analysed from both the CMS and a manually-checked FOI tracker system, to assess and improve the reliability of reporting systems
- (iv) **The introduction of a 5-working day target for the allocation of all cases**  
Accompanied by a target to clear by day ten, with senior intervention where this is not possible
- (v) **The cascading of FOI compliance messaging by Ministers and senior officials**
- (vi) **The integration of the FOI Improvement Programme within the Scottish Government’s Corporate Transformation Portfolio**
- (vii) **The relocation of the Scottish Government’s FOI Unit**  
The FOI Unit would be moved from the Constitution Directorate to the Directorate of Communications and Ministerial Support

## ***Phase 2: Methodology***

25. As a result of the measures introduced by the Scottish Government to improve and enhance FOI performance in response to the concerns raised, a degree of additional analysis of available data was undertaken.

26. The information examined as part of the Phase 2 review included:

- (i) **Examination of data on the clearing of the Scottish Government’s backlog of overdue cases**
- (ii) **Examination of Scottish Government monthly performance data**  
This comprised data relating to performance against FOI timescales supplied as part of the intervention over the Phase 2 period
- (iii) **A manual review of 5 individual case files**  
A small sample of five case files were selected for review from those cases issued after the measures outlined above had begun to take effect.

The five cases selected were drawn from across five separate directorates, with those directorates drawn from distinct Director General ‘families’ within the Scottish Government (there are eight such ‘families’ in total)<sup>2</sup>.

Directorates were selected from those that reported receiving the most FOI requests during the Phase 1 period (1 July 2022 to 31 March 2023).

The Scottish Government was asked to provide the first case issued after 21 July 2023 for each of the five named directorates.

27. The findings from this review activity is set out in the following sections of this report.

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<sup>2</sup> See: [www.gov.scot/about/how-government-is-run/civil-service/](http://www.gov.scot/about/how-government-is-run/civil-service/)

# Phase 1: 1 July 2022 to 31 March 2023

## Phase 1 Review: Analysis of Scottish Government FOI case-handling data

28. The Scottish Government supplied my office with data held in its CMS system across the Phase 1 assessment period (1 July 2022 to 31 March 2023) for the purpose of this assessment.
29. This comprised data on the handling of 4,997 FOI and EIR requests and reviews over the assessment period.
30. A wide range of data relating to requests was provided within the dataset, including, for example:
  - (i) Responsible directorate
  - (ii) Request type (e.g. FOI or EIR; initial request or request for review)
  - (iii) Case status (e.g. withdrawn, completed, completed but overdue)
  - (iv) Case sensitivity (sensitive or routine)
  - (v) Requester type
  - (vi) Response outcome (e.g. full release, partial release, no release)
  - (vii) Case timescale (the number of working days from creation to completion).
31. During the preparation of my previous report in 2022, the Scottish Government was asked to manually review a 224-case sub-sample of requests, in order to ensure that both case sensitivity and case timescale was accurately reflected. This followed concerns having been raised in discussions with the Scottish Government that the data available from the CMS relating these two criteria at that time was unreliable.
32. In preparing this Progress Report, the Scottish Government was asked to comment on the reliability and accuracy of data available from the Phase 1 CMS dataset, with a particular focus on case sensitivity and case timescale data.
33. In its response, the Scottish Government confirmed that the CMS dataset was now significantly more reliable than that available in 2022, as a result of improved data-management within the Scottish Government and technical changes which had been made to the system.
34. The Scottish Government therefore confirmed that case timescale data was broadly accurate, with any errors in the data likely to be small in number, e.g. as a result of a small number of circumstances where any relevant stopping of the FOI 'clock' has not been recorded correctly in the CMS.
35. In relation to case sensitivity, the Scottish Government reported that the data contained should be accurate in the majority of cases, although a small proportion of errors may be present. For example, the Scottish Government reported that it had, in past analysis, identified a small number of incidences where changes in the assessment of sensitivity were not recorded on the system.

36. Having considered the Scottish Government’s explanation and the statistics provided to us, we agreed that the data available from the CMS could be considered to be broadly reliable in this regard. The decision was therefore made to base our analysis on the full data download for the 2023 Progress Report, rather than the manually-reviewed sub-sample of cases (which formed the basis of the bulk of the analysis in this area in 2022). It was considered that the benefits of assessing a full dataset of 4,997 cases, which was now considered to be broadly reliable, outweighed those of assessing a significantly smaller sub-sample of manually-reviewed cases
37. The aforementioned comments relating to the quality of the data should, however, be borne in mind when considering the findings below. It should also be noted that, where data is compared against previous years, 2022 data may be drawn from the manually-reviewed sub-sample, as opposed to from across an entire dataset. Where data is drawn from different sources in this way, it is noted below.

### Average response times

38. Under FOI law, Scottish public bodies face a statutory duty to respond to FOI and EIR requests within 20-working days. The EIRs allow request timescales to be extended by a further 20-working days in some circumstances, where the information covered by the request is both complex and voluminous.

*Background: 2018 Intervention Report findings*

39. My June 2018 Intervention Report, which initially considered the experience of journalists when requesting information against that of all those requesting information, reported the following average working day timescales for these two groups:

**2018 Report: Average response time (working days)**

*Data source: Scottish Government FOI Tracker*

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

40. Analysis of the data available at that time therefore (which was extracted from the Scottish Government’s ‘FOI Tracker’, a precursor to the current CMS), found that the average response time for requesters across the dataset was 18-working days in 2017/18. The average time for media requesters had been reduced to 19-working days by 2017/18 from 27-working days the previous year, supported by intervention work undertaken by my office to improve compliance with FOI timescales.

*Background: 2022 Progress Report findings*

41. My 2022 Progress Report undertook analysis of the manually-reviewed 224-case sub-sample, as a result of the unreliability of data within the CMS at this time. The 2022 Progress Report reported the following from within this sub-sample:



## 2022 Report: Average response time (working days)

Data source: 2022 CMS sub-sample

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	-

42. While average response had fallen significantly prior the pandemic, and sat at 20-working days or below for all requester categories, response times rose significantly for all categories following the outbreak of the pandemic across 2020/21. As acknowledged in my 2022 Progress Report, the impact of the pandemic affected FOI performance in a number of ways, including through office closures, staff absences, significant organisational disruption and a period of crisis management.

### 2023 Phase 1 Analysis

43. For the 2023 Phase 1 analysis, we considered completed cases from across the Scottish Government's CMS dataset, between the review period of 1 July 2022 to 31 March 2023.
44. Analysis of this data found the following:

## 2023 Report: Average response time (working days)

Data source: CMS full dataset

Type	No. of completed cases 1 July 2022 to 31 March 2023	Average response time (working days) 1 July 2022 to 31 March 2023
All	4237	27
<b>Requester type</b>		
<i>Elected representative</i>	55	23
<i>Individual</i>	2585	27
<i>Media</i>	640	32
<i>Organisation</i>	539	20
<i>Other</i>	14	21
<i>Researcher</i>	369	36
<i>Solicitor</i>	35	25

45. The available data, therefore, shows that average case-handling timescales increased even further beyond the FOI statutory time limit of 20-working days over the Phase 1 period, rather than falling as the organisation recovered from the initial disruptive impact of the pandemic. The average response time for all requester categories within the dataset sat at 27-working days, with no requester categories showing an average timescale below 20-working days,

and some categories, including the media and researchers, facing significantly longer average case-handling timescales.

46. The findings were extremely disappointing and wholly unacceptable. While it should be borne in mind that these findings related to *average* case-handling timescales and that, as shown through monthly reporting (analysed later in this report), the majority of those who request information receive a response *within* statutory timescales, it was nonetheless particularly concerning to find that the average case timescale rose across the Phase 1 period. Indeed, the average timescale across this period of 27-working days was:
  - the highest seen over the lifespan of this intervention to date
  - higher than the 25-working day average across 2020/21, in the immediate aftermath of the pandemic
  - significantly higher than the 17-working day average achieved prior to the pandemic in 2019/20.
47. It was also concerning to find a return to significantly longer case times being experienced by particular requester types, following the ‘flattening out’ of this issue as a result of the FOI improvements made across 2019/20.
48. The average response time data available across the Phase 1 period, therefore, indicates that the initial measures put in place by the Scottish Government to recover from the impact of the pandemic and work towards the restoration of FOI performance to pre-pandemic levels were not effective.
49. As noted earlier in this report, however, the Scottish Government implemented a range of new measures in May 2023, following these specific and clear concerns being raised. I will discuss the initial impact of these specific measures under the Phase 2 analysis later in this report.

## **Sensitive vs Routine cases**

50. The Scottish Government’s FOI request-handling procedures require cases to be ‘triaged’ on receipt, with staff in the FOI unit conducting an initial assessment of whether a case should be classed as ‘sensitive’ or ‘routine’.
51. According to procedures, ‘sensitive’ cases will comprise those considered to be ‘sensitive’ or ‘exceptionally complex’, and will include those which raise matters of highly significant public interest, or which involve complex arguments, raise complex legal points or have complex, overlapping policy interactions to consider. Scottish Government procedures set out that ‘sensitive’ cases should be subject to review by special advisers followed by approval at Ministerial level, while ‘routine’ cases are not generally subject to special adviser review and are approved at official level.
52. Procedures also set out that case sensitivity may be amended during consideration of a case, with sensitivity amendments made by the FOI Unit, and appropriate rationale recorded on file.

## 2023 Phase 1 Analysis

53. 2023 Phase 1 data showed that 10% of cases (491 cases) over the review period were recorded as 'sensitive' within the CMS:

Type	Number of cases	% of cases triaged as 'sensitive'	% of cases triaged as 'routine'
<b>All</b>	4,997	10%	90%
<b>Requester type</b>			
<i>Elected Representative</i>	69	17%	83%
<i>Individual</i>	3065	7%	93%
<i>Media</i>	780	23%	77%
<i>Organisation</i>	596	8%	92%
<i>Other</i>	22	5%	95%
<i>Researcher</i>	421	9%	91%
<i>Solicitor</i>	44	2%	98%

54. The figure of 10% of cases recorded as 'sensitive' represents a significant increase from the data reported in our 2022 Progress Report, where just 3% of the 7,364 cases recorded between 1 April 2019 and 31 March 2021 were recorded as sensitive within the CMS.
55. Our 2022 Progress Report found, however, that a significant proportion of cases which were triaged as 'routine' nevertheless were subject to review by special advisers and approval by Ministers. Indeed, of the 224-case CMS sub-sample which was manually reviewed, the proportion of cases where special adviser and/or Ministerial review was evident from the case metadata rose to 19%.
56. It may, therefore, be the case that the increase in 2023 is accounted for by both a more effective assessment of the case as part of the triage process, and more reliable recording in the CMS system (as reported in paragraph 35 above).
57. It can also be seen from the data above that the proportion of cases classed as 'sensitive' rose for certain requester types, with requests from elected representatives and media requesters more likely to be assigned this classification. This is, however, not wholly surprising, given that there will generally be a greater likelihood that requesters within these two categories will be seeking access to information which might be considered to be 'sensitive' or 'exceptionally complex', given the nature of their democratic role and function.
58. What is clear, however, is that a case being marked as sensitive had, during that 9-month period, a significant impact on the time taken to resolve the case, with the average timescale for the resolution of such cases extending well beyond the timescale of 20-working days set out in the FOI Act. The table below shows data relating to completed FOI and EIR requests handled by the Scottish Government across the Phase 1 period:

Type	No. of completed cases	Average response time (working days) of completed cases	No. of completed cases marked as sensitive	Average response time (working days) of completed cases marked as sensitive
All	4237	27	417	39
<b>Requester type</b>				
<i>Elected representative</i>	55	23	6	56
<i>Individual</i>	2585	27	177	38
<i>Media</i>	640	32	162	42
<i>Organisation</i>	539	20	41	36
<i>Other</i>	14	21	1	25
<i>Researcher</i>	369	36	30	39
<i>Solicitor</i>	35	25	0	-

59. For all requester types, therefore, the average case handling timescale for sensitive cases extended beyond the statutory timescale of 20-working days. For most requester types, the average timescale extended significantly and substantially beyond this period. This represents a wholly unacceptable significant failure of compliance during that 9-month period.
60. Mindful of the fact that the EIRs allow for timescales to be extended in certain circumstances, and particularly that this can be done where the information requested is 'complex and voluminous' (and therefore more likely to be categorised as 'sensitive'), we examined the average timescales in relation to FOI requests only, in order to determine whether EIR timescale extensions may in part be accounting for the significantly elongated time taken to respond to 'sensitive' requests. However, this analysis suggested that any impact from EIR timescale extensions was marginal, with the average response time for sensitive FOI-only cases dropping to 37-working days (from 39 for 'all' requests).
61. It is also important to note that, while a failure to respond within FOI timescales affected a significant and substantial proportion of sensitive requests within the Phase 1 period, it did not affect all requests, and the majority of 'sensitive' cases were responded within FOI timescales. Of the 417 'sensitive' FOI and EIRs cases responded to within the period, for example, FOI timescales were met in 77% of cases. Timescales were, however, exceeded in relation to 23% of sensitive cases (96 cases).
62. In a number of cases, however, the response times recorded were extremely concerning. For example, 29 cases marked as 'sensitive' were recorded as exceeding 100-working days, eight exceeded 200-working days while one exceeded 300-working days. It was clear then, that, once timescales were missed, a number of cases were not responded to for considerable periods of time, significantly driving up the average time taken to respond.
63. We also found that this issue was not restricted to sensitive cases. Indeed, some delays in cases which were **not** marked as 'sensitive' were found to be even worse. Across the 3,820 completed FOI and EIR cases which were not marked as 'sensitive' for example, 140 cases exceeded 100-working days, 75 exceeded 200-working days and 38 exceeded 300-working days. However, delays exceeded even this point, with 12 cases exceeding 400-working days and five exceeding 500-working days – or more than two years – before a response was provided.

64. Such delays clearly lie far, far beyond the bounds of what is acceptable. It is therefore clear that, during the nine months of the Phase 1 period assessed, the Scottish Government's internal procedures relating to not only the processing of those cases marked as 'sensitive' but the processing of all cases were not fit for purpose, and served to seriously disadvantage and delay a significant number of requesters.
65. Indeed, it was the confirmation of the size of the backlog of late requests (which would ordinarily be something which was assessed during our formal annual assessment) that led me in May 2023 to require that immediate steps be taken to resolve these cases. This is discussed further in later sections of this report.

## Responses on time

66. We also examined the proportion of responses issued on time across the Phase 1 dataset. Findings are shown in the table below.

### 2023 Report: % of responses on time

Data source: CMS full dataset

Type	No. of completed cases	% of completed cases recorded as completed (on time)	% of completed cases recorded as completed (overdue)
All	4581	80%	20%
<b>Requester type</b>			
<i>Elected representative</i>	64	69%	31%
<i>Individual</i>	2803	82%	18%
<i>Media</i>	713	71%	29%
<i>Organisation</i>	553	82%	18%
<i>Other</i>	16	88%	13%
<i>Researcher</i>	395	72%	28%
<i>Solicitor</i>	37	84%	16%

67. This data showed that the majority of requests across all requester categories were responded to on-time, with 80% of completed cases across the Phase 1 period recorded as having been completed on-time.
68. There were some variations found between requester categories. While more than two-thirds of requests were responded to on-time across all categories, a higher proportion of requests from elected representatives, the media and researchers were recorded as being overdue on completion.
69. In common with the findings at paragraph 57 above, it appears likely that the nature of the requests received from these requester categories, and the fact that a higher proportion are triaged as 'sensitive' due to the sensitivity or complexity of the request, will be a factor in this outcome.
70. Additional data relating to on-time responses is considered further below.

## Request outcomes

71. We examined case outcomes for FOI and EIR requests across the Phase 1 period, for completed cases marked as either 'Full Release' (the requester received all of the information sought), 'No Release' (the requester received none of the information sought) or

'Partial Release' (the requester received some, but not all, of the information sought). The findings are shown in the table below.

Type	No. of completed cases marked as either Full Release, No Release or Partial Release	% of cases marked as Full Release	% of cases marked as No Release	% of cases marked as Partial Release
<b>All</b>	4,145	53%	22%	24%
<b>Requester type</b>				
<i>Elected Representative</i>	53	47%	34%	19%
<i>Individual</i>	2,525	53%	24%	23%
<i>Media</i>	622	50%	19%	31%
<i>Organisation</i>	535	57%	16%	27%
<i>Other</i>	14	29%	36%	36%
<i>Researcher</i>	362	61%	19%	20%
<i>Solicitor</i>	34	65%	24%	12%

72. It is clear from the above data that, while there was a degree of variation between case outcomes on the basis of requester type, in general case outcomes were broadly consistent, with variations most likely influenced by the specific nature of the information being requested. For most requester types (with the exception of the small and undefined 'other' category), requests were met with a full response in around 50% of cases or more. The likelihood of receiving a 'no release' response for media requesters was slightly lower than that across the dataset as a whole, with media requesters also slightly more likely to receive a partial response than most other groups.
73. This data was broadly consistent with the equivalent data reported in our 2022 Progress Report, where 52% of cases across the 1 April 2019 to 31 March 2021 dataset were met with a full release. One notable difference between these two datasets, however, relates to case outcomes for elected representatives. While 49% of elected representative requests were met with a full release across that period (similar to the data shown above), only 13% of requests were met with no release, compared to 34% above. Data across the current period therefore suggests that the proportion of 'no release' responses issued to elected representatives has increased considerably, although the relatively small number of cases in this category should be borne in mind when this finding is considered.

## Review timescales

74. Under FOI law individuals can request a request where they are unhappy with the response to an FOI or EIR request (including in circumstances where no response has been provided). Where a review is made to a public authority, the organisation will have 20-working days to consider its review and issue a response.

75. Average response times for reviews across the Phase 1 period are shown in the table below:

Type	No. of completed reviews	Average response time (working days) of completed reviews	No. of completed reviews marked as sensitive	Average response time (working days) of completed reviews marked as sensitive
All	344	37	23	82
<b>Requester type</b>				
<i>Elected representative</i>	9	113	6	127
<i>Individual</i>	218	34	7	73
<i>Media</i>	73	37	5	90
<i>Organisation</i>	14	52	1	71
<i>Other</i>	2	19	0	-
<i>Researcher</i>	26	33	4	22
<i>Solicitor</i>	2	50	0	-

76. It can be seen that the average response time for reviews during that nine-month period again significantly exceeded the 20-working day timescale required by FOI law. While the available data once again showed that, in most cases, requests for review were responded to within FOI timescales, the proportion of completed reviews responded to within FOI timescales was only 63% across the Phase 1 reporting period.
77. In addition, there was again evidence of significant and substantial delays, with 32 reviews taking more than 100 days for a response, and four taking more than 200.
78. Once again, the delays experienced by requesters in these circumstances were wholly unacceptable and required to be urgently addressed. Again, the response to this is something which will be examined in the consideration of Phase 2 below.

## Review outcomes

79. Review responses can either uphold the original response, overturn the original response (commonly resulting in the disclosure of some or all of the requested information) or issue a new response in circumstances where no response has been provided to the initial request.
80. The following table details the categorisation and outcome of reviews across the Phase 1 period. Data provided relates to FOI and EIR reviews where those reviews have a specific disclosure outcome ('upheld', 'overturned' or 'new response') recorded in the case file. (The data below therefore excludes five cases which were closed for other reasons (e.g. 'clarification not provided', 'request was vexatious')).

Type	Total number of completed reviews	% request outcome upheld	% request outcome overturned	% New response (no previous response provided)
<b>All</b>	339	62%	22%	16%
<b>Requester type</b>				
<i>Elected representative</i>	9	44%	0%	56%
<i>Individual</i>	214	63%	21%	16%
<i>Media</i>	72	74%	18%	8%
<i>Organisation</i>	14	36%	29%	36%
<i>Other</i>	2	50%	50%	0%
<i>Researcher</i>	26	38%	50%	12%
<i>Solicitor</i>	2	100%	0%	0%

81. This above table shows that most common outcome for FOI reviews was for the request response to be upheld, although initial responses were overturned in approximately one-in-five cases (22%) across the Phase 1 dataset.
82. While there was some variation from this general trend within different requester types, the low number of cases within most requester categories should again be borne in mind when considering this data, and it is not possible to draw any firm conclusions.

### Open backlog cases

83. The Phase 1 dataset also held details of a significant number of open but unresolved late cases, marked as 'in process but overdue' within the case file system. Details are shown in the table below:

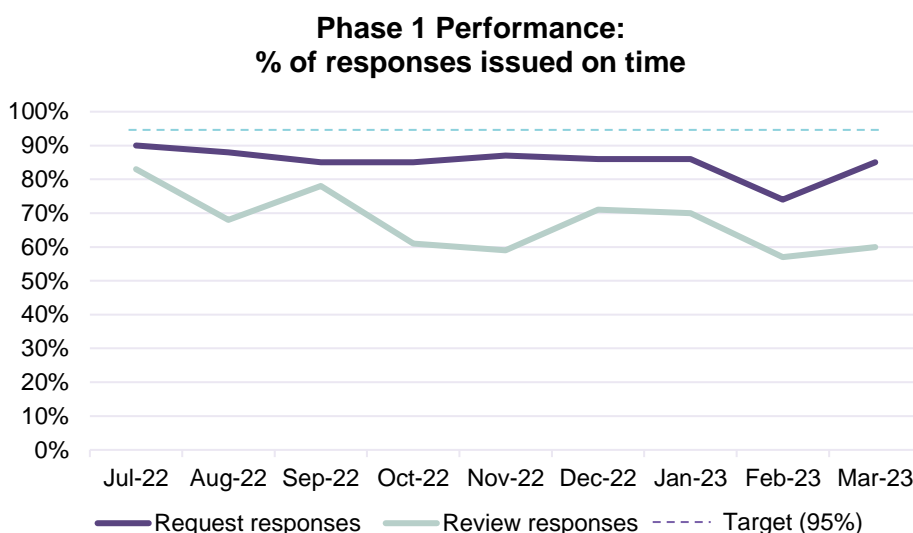
Type	No. of unresolved late requests	Average working days of open but unresolved requests	No. of unresolved late reviews	Average working days of open but unresolved reviews
<b>All</b>	105	84	22	79
<b>Requester type</b>				
<i>Elected representative</i>	0	-	0	-
<i>Individual</i>	48	91	14	73
<i>Media</i>	33	85	5	93
<i>Organisation</i>	15	67	0	-
<i>Other</i>	3	40	0	-
<i>Researcher</i>	5	78	3	78
<i>Solicitor</i>	1	118	0	-

84. There were 127 cases in total which were unresolved late requests within the Phase 1 dataset, with timescales ranging from 24 to 212-working days.
85. The Scottish Government's backlog of open and unresolved late cases will be discussed further in relation to our Phase 2 assessment work.



## Phase 1 Review: Analysis of Scottish Government's Monthly Performance Data

86. Alongside the Phase 1 CMS data summarised above, which was supplied by the Scottish Government to inform this Progress Report, the Scottish Government also supplies my office with ongoing monthly performance reports as part of this intervention.
87. These monthly reports set out the on-time FOI performance of the Scottish Government as a whole, while also enabling this information to be reviewed at directorate level, supporting the identification of surges, blockages and both well- and poorly-performing directorates, in order to support relevant remedial action to be taken, where required.
88. Monthly performance across the Phase 1 period is shown in the chart below.



89. As can be seen from the above chart, monthly performance across the period fell significantly below the 95% target for requests and reviews agreed by the Scottish Government for this intervention.
90. FOI request performance dipped to 74% in February 2023, the lowest point since the height of the pandemic in May 2020, and a full 21 percentage points below the intervention target. Meanwhile, FOI review performance fell even further, with 57% of reviews responded to on time during February 2023, almost 40 percentage points below the target.
91. This ongoing poor performance and the clear sign that the Scottish Government was comprehensively failing to address, respond to and recover from the disruption to FOI performance that began during the pandemic, contributed to my urgent engagement with senior Scottish Government officials in May 2023.
92. The outcomes from this engagement are considered further in later sections of this report.

## Phase 1 Review: manual review of 20 individual case files

93. In addition to the analysis of casefile and performance data over the Phase 1 period, my staff also undertook a manual review of a small sample of individual cases, to enable specific aspects and elements of Scottish Government case handling to be considered in more detail.
94. For the purposes of this 2023 Progress Report, and given that data supplied through the monthly performance reports showed that the Scottish Government was consistently falling significantly short of the 95% on-time target for requests and reviews, our Phase 2 manual review focussed exclusively on late cases.
95. The focus on late cases was undertaken to support the consideration and assessment of the factors contributing to delays in such cases, to help prevent their recurrence. The focus on cases which have been identified as 'late' meant that we expected to find evidence of poor practice, while also recognising that the practice identified in these cases was not necessarily indicative of request practice as a whole.
96. The 20 'late' cases selected were drawn from across the review period, and featured a cross-section of both requester types and subject matters. Cases were selected from those which were triaged by the Scottish Government's FOI Unit as both 'sensitive' (and therefore considered to require both special adviser /Ministerial review and approval) and 'routine' (considered to be appropriate for approval by officials within a Scottish Government directorate).
97. Cases were also selected from those directorates assessed as being 'challenged' and those which did not fall into this assessment. 'Challenged' directorates were defined as those receiving 50 or more requests over the review period, while responding to fewer than 80% of those within FOI timescales.
98. The 20 cases selected for manual review therefore comprised:
- 5 late 'routine' cases from 'challenged' directorates
  - 5 late 'routine' cases from 'other' directorates
  - 5 late 'sensitive' cases from 'challenged directorates
  - 5 late 'sensitive' cases from 'other' directorates.
99. The key findings from this review of cases are discussed under the following broad themes below:
- (i) **Compliance with records management requirements**
  - (ii) **The value of knowledge and expertise in case-handling**
  - (iii) **Delays in responding**
  - (iv) **The role of special advisers**

## Compliance with records management requirements

100. One of the key findings from the manual review of case files which informed my 2022 Progress Report was that there were significant and sustained shortfalls across the organisation in terms of compliance with records management requirements for FOI and EIR request-handling. My 2022 Report recommended that the Scottish Government undertake

urgent work to improve FOI record-keeping practice, aligning day-to-day request-handling practice with the requirements set out in the Scottish Government's Criteria for Decision-Making, the Section 60 Code of Practice, and other associated guidance.

101. My 2022 Report also recommended that the Scottish Government take steps to improve various specific elements of practice where shortfalls were found, and that the Scottish Government should also consider whether current records 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.
102. It is extremely disappointing, therefore, to find that poor compliance with records management procedures and significant gaps in documentation remains the single most unifying feature across the Phase 1 'late' cases examined for my 2023 review.
103. The Scottish Government's Criteria for Decision-Making, which sets out the decision-making processes to be followed when responding to FOI requests, requires that a range of information be recorded in case files. This includes:
  - The rationale for seeking Ministerial decisions on disclosure (where relevant)
  - Submission templates (when Ministerial decisions are sought)
  - A 'statement of compliance' on the case
  - All advice from special advisers (including advice from special advisers to Ministers)
  - Where Ministers consider they should take decisions, the reason for this
  - Where disagreements on outcome arise, determinations on this, including the reason for any departure from FOI Unit advice.
104. The launch of the Criteria for Decision-Making in 2018 was accompanied by mandatory templates, including 'search', 'submission' and 'statement of compliance' templates.
105. Of the 20 cases which were manually reviewed by my office across the Phase 1 review period, 18 were found to have some key elements of case documentation missing from the case file.
106. The nature of these gaps varied, with some case files featuring a reasonably comprehensive overview of request-handling, but with one or two important key documents missing (e.g. statement of compliance, search templates). Other cases, however, were extremely sparsely populated, with little information at all beyond that which was automatically saved by the CMS, leading to serious and substantial omissions. This included, for example, cases with no record of a statement of compliance, no Ministerial submission (in cases sent for Ministerial review / approval), no record of interactions with special advisers and Ministers in relevant cases and even, in some cases, no record of the final response that was issued to the requester.
107. While procedures require that a completed record of searches which have been carried out is recorded in case files, we found these in just nine of the 20 cases reviewed. Similarly, completed statements of compliance, which should be present in all cases, were found in just ten.
108. In nine of the cases examined, case sensitivity appeared to have been amended during the handling of the case from routine (requiring a decision by officials) to 'sensitive' (requiring

special adviser review / Ministerial decision). There was a record of the reasons for that amendment recorded in only six of those nine cases.

109. Further specific examples of documentation missing from case files included:

- A case where a decision was made to extend the response timescale under the EIRs, with no documentation in the case file setting out the rationale for this.
- A case which involved a disagreement between the case-handler and the FOI Unit on whether clarification was required. The FOI Unit set out its view that the request could be responded to without clarification, but clarification was nevertheless sought. There was no record in the case file that FOI Unit advice had been departed from.
- An apparently straightforward and 'information not held' case, which was categorised as 'routine' but was nevertheless subject to review by special advisers and approval by Ministers, with no record of the rationale for this in the case file, and no direct record of the role of special advisers in the case.

110. In almost all these 'late' cases considered, then, the quality of the documentation contained in the case file fell short of the standard required by the Scottish Government's own procedures. In a number of cases, this standard fell significantly and substantially short, rendering the case file wholly ineffective as a means of documenting or assessing the progress of a case.

111. These circumstances will have far wider consequences than just being a barrier for my office when undertaking intervention monitoring work, they also create significant issues for the Scottish Government itself, in the event of a case being reviewed or appealed. Where a case file does not contain details of the search that was undertaken, the considerations made, the rationale for decisions or even the final response issued, the Scottish Government will have serious and significant challenges in the reconsideration of that case under the FOI review process. A lack of proper documentation will also create significant difficulties for the Scottish Government's own quality assurance monitoring.

112. The appropriate use of such documentation will also assist case-handlers in ensuring that all appropriate steps are taken in the handling of cases, and that relevant consideration is given to key elements of FOI law when responding to requests. This will include, for example, the need to conduct relevant and appropriate searches, the need to consider exemptions on a case-by-case basis, and the need to appropriately consider the public interest (where relevant) before concluding that an FOI exemption or EIRs exception may be applied.

113. As we will see in the next section, gaps in the knowledge and expertise of case-handlers can contribute to significant issues arising in associated areas.

## **The value of knowledge and expertise in case-handling**

114. A second key finding emerging from our manual review of 'late' cases related to the value that experience, knowledge and expertise in FOI brings to a case and, conversely, the problems that a lack of experience, knowledge and expertise - at all levels across the organisation - can bring.

115. We found evidence in a number of cases, for example, where errors and oversights in the interpretation of FOI law, seemingly caused by a lack of knowledge and experience amongst case-handlers and reviewers, led to concerns arising within particular cases. For example, we found:

- A case where an excessive cost refusal under section 12 of the FOI Act was calculated using an inappropriate methodology – i.e. staff time was calculated on the basis of an £18 per hour charge (while the FOI Act's Fees Regulations set a maximum charge of £15 per hour). It also appeared likely, from case correspondence, that the cost estimate calculated had included time for the consideration of whether or not information should be redacted; a practice which is inconsistent with the Fees Regulations. Cost estimates in this case were approved by the senior official reviewing the case without scrutiny or challenge, and no advice or assistance was subsequently provided to the requester how their request might be narrowed so that information may be provided.
- A case where there was no evidence that the public interest test had been considered in relation to redactions made under section 30 of the FOI Act (effective conduct of public affairs). The 'statement of compliance' attached to the case included a 'not applicable' response with regard to the consideration of the public interest in relation to this exemption. There is also no evidence in the case file that the official responsible for reviewing the case queried or challenged this position.
- Cases where those involved in case-handling sought to apply exemptions in a 'blanket' fashion to particular types of documents (e.g. seeking to apply the section 30(b) exemption to all internal memos or policy drafts, regardless of content).

116. We also found examples where practice fell short of good practice in relation to FOI request-handling. This included a case where a routine 'information not held' response in relation to a sensitive subject was 'batched' with other, more substantive cases on the same subject and sent for special adviser review and Ministerial approval. This 'batching' then contributed to significant delays, with this simple 'information not held' response eventually being issued more than three months after the response was initially drafted and circulated.

117. Of particular concern, we also found one case where a request which was already two weeks overdue was subject to a further delay. In that case it was requested that the response, which was cleared for disclosure on a Thursday, be postponed until the following Monday to ensure that "*if there is any follow up, we are in the office to respond*". The response to the request was subsequently issued on the following Tuesday.

118. It is, of course, the case that FOI law requires that all requests are responded to promptly, and within 20-working days of receipt. Public authorities must seek to comply with this requirement in all circumstances. While circumstances may arise, from time-to-time, where the 20-working day timescale is missed, in these circumstances the FOI requirement to respond promptly should be of paramount consideration, and public authorities should seek to ensure that responses are issued as an urgent and immediate priority. It will never, in such circumstances, be appropriate for a response to be delayed simply because it is administratively more convenient for the organisation to do so.

119. While it was clear, therefore, that a lack of awareness, knowledge and understanding around key elements of FOI law and practice caused significant problems in a number of the late cases examined, we also, conversely, saw clear evidence of the value that knowledgeable, confident and conscientious case-handlers, reviewers and advisers can bring to a case.

120. We found evidence in some cases of case-handlers taking a detailed, considered and robust approach to their role, carefully considering requests, conducting full and appropriate searches, working to move stalled cases forward while keeping requesters updated on

delays, challenging interpretations or actions they disagreed with, and taking a rigorous and conscientious approach towards compliance with internal request-handling procedures.

121. We also found some evidence of this at decision-making level, with for example, one case where a decision-maker directed a case-handler to go back to a Ministerial Private Office to seek further information in relation to the case.
122. In keeping with the findings of my 2022 Progress Report, what was also clear was the significant value that staff within the Scottish Government's FOI Unit bring to case-handling in circumstances where they are directly involved in a case. The evidence within case files of the positive and constructive impact that FOI Unit advice can have on a case further underlines the value of staff knowledge and experience in supporting and enabling FOI good practice and improvement.
123. Where cases showed evidence of FOI Unit staff providing advice and guidance, those cases were typically steered towards a more reliable and robust conclusion. Examples of positive interactions by the FOI Unit, where these were evident within case files, included:
  - Challenging, querying and steering case-handler positions and approaches in appropriate circumstances
  - Chasing case progress to support compliance with timescales
  - Providing considered advice on the application of exemptions
  - Advising case-handlers on appropriate redactions, and reminding them to retain unredacted copies in case of FOI review or appeal.
  - Interrogation of (and advice on) cost calculations in a case where a cost refusal was considered.

## Delays in responding

124. My manual review of case files for this Report focused on a review of 'late' cases. In that respect it is inevitable that a delay in response will feature in most cases (although we did find that three cases examined had CMS-recorded timescales which fell beyond 20-working days for other reasons – two involving clarification requests and a third involving the application of an EIRs extension).
125. However, what was clearly evident from most of the late cases examined was a seeming lack of urgency around the progression of cases once the 20-working day timescale had been breached. While there were a small number of examples where case-handlers or officials actively sought to move cases on, the absence of such actions in many other cases was indicative of a general approach to the progression of these cases.
126. It appeared common, in many cases, that once the 20-working day deadline had been missed, a 'laissez-faire' approach was taken, with requests being responded to when the organisation subsequently felt ready to do so, with no clear sense of urgency around the need to resolve a case which had exceeded statutory timescales, nor any recognition of the ongoing statutory duty to respond promptly.
127. Indeed, as noted above, we saw an example in one case where a late response which had been approved for disclosure was further delayed to ensure staff were available at the time of disclosure, should any follow-up enquiry be received.

128. The existence of this approach to the handling of late requests is further evidenced by the backlog of historic late cases which are discussed elsewhere in this report, where cases with a lifespan of upwards of 100, 200, 300 and even 400-working days were found.
129. An approach to request-handling of this kind is clearly and fundamentally unacceptable, and serves to significantly frustrate and disrupt those seeking information, while also risking the development of an organisational culture which shows little regard for statutory response times under FOI - or the wider rights they support - once the initial deadline has been breached.
130. I am, however, pleased to note that there are early signs of improvement in this regard following the May 2023 actions introduced by the Scottish Government, and I would urge the Scottish Government to retain focus on this area across the coming months and beyond, so that the cultural approach to FOI compliance that was beginning to take root across the Government during its 2019/20 FOI improvement work can be restored, revitalised and enhanced.
131. I will discuss these recent signs of improvement during Phase 2 of my assessment below.

## The role of special advisers

132. It was also the case that special advisers played a role in delays in some (but not all) of the late cases examined. While the need for special adviser review and Ministerial decision in sensitive cases was a factor in the delay of many cases, it was clearly, as noted above, not the only factor contributing to delays.
133. In total, 11 of the 20 cases examined showed evidence of special adviser input into case handling, while sparsely-populated case files meant that the involvement of special advisers was unclear in a further three cases.
134. Of these 11 cases, eight were categorised as 'sensitive' in the CMS (and therefore designated for special adviser review and Ministerial approval under Scottish Government procedures) while three were categorised as 'routine' (where procedures require review and approval to be undertaken by officials). Of the eight 'sensitive cases', seven had their categorisation upgraded from 'routine' to 'sensitive' during the request-handling process.
135. There was a record of reasons for this status change recorded in four of the seven cases, while the remaining three had no clear record of the rationale recorded.
136. We also saw evidence of the special adviser role contributing to delays in cases we examined. In one case, for example, a request which had been categorised as 'routine' was passed to special advisers prior to release, following a notification from the FOI Unit that "*SpAds [special advisers] would like to be made aware of the response before issuing. Please note: this is about making SpAds aware of your response only and you should not delay the issuing of your response on time.*"
137. Following approval at official level, the case in question was forwarded to special advisers two days before the response deadline. While the FOI Unit had made clear that the response should be copied to special advisers for information purposes only, there nevertheless followed a two-week period during which comment from special advisers were chased by the case-handler, and special advisers queried elements of the response and proposed changes in relation to other elements. This response was subsequently issued some 17-working days late.

138. In another case, a response (which was again initially categorised as ‘routine’ but which was upgraded due to media interest in the subject matter) sat for review with special advisers for a number of weeks while being repeatedly chased by the case-handling team. The draft response eventually had to be re-sent to the special advisers’ office one month later, the initial submission having apparently been misplaced.
139. Comments from special advisers which proposed changes to the draft response was a common feature in the cases examined. Seven of the 11 cases which were subject to special adviser review led to proposals to remove or redact information being made. It was also the case that appropriate rationale for these changes was not always provided. In one case, for example, special advisers highlighted three paragraphs for redaction under section 30(b)(ii) of the FOI Act (the effective conduct of public affairs) but provided no accompanying rationale setting out why the information should be considered to be exempt. In another, special advisers proposed the removal of information from the scope of the request, again without any clear rationale for this being recorded in the case file. In this second case, it is notable that staff from the FOI Unit sought to challenge these removals.
140. In a further case, we saw substantial delays arise following the submission of a case to special advisers, with advisers subsequently suggesting that a substantial amount of information should be removed from the response for being ‘out of scope’ of the request, while other documents be exempted in their entirety under the FOI exemptions relating to the effective conduct of public affairs. In this case, staff within the FOI Unit who were working on the case sought to challenge a number of these conclusions, arguing e.g. that certain information presented as being out of scope should be considered to fall in scope, or that information contained in certain documents did not meet the tests needed for an exemption to apply. The response to this case was eventually issued more than 100-working days after release.
141. We did find one case where special advisers advised providing more information in response to a request. In that case, a cost refusal which had been marked as routine was nevertheless sent to special advisers for review (with no documentation in the case file setting out why this case was subject to special adviser review). Nevertheless, in this case, special advisers did recommend that an additional link to published information be provided to the requester.
142. Under Scottish Government request-handling procedures the designation of a request as ‘sensitive’ means that it will be subject to special adviser review, followed by Ministerial approval. In relation to the role of special advisers, the Scottish Government’s Criteria for Decision-Making 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. Their comments will be recorded in case files.”*
143. The Criteria for Decision-Making goes on to note:
- “Where cases are not assessed as requiring a Ministerial decision, Special Advisers will have no involvement (beyond offering a view during the FOI Unit’s triage assessment, or where the FOI Unit reassesses the sensitivity of the case) unless they are the holders of the information requested or the request relates to them directly.”*



144. As noted above, eight of the 11 cases subject to special adviser review were designated in the CMS as 'sensitive', while a further three cases were designated in the CMS as 'routine' but were nevertheless subject to special adviser review.
145. Of the 11 cases which were confirmed to have been subject to special adviser review then, only five cases went on to be submitted for Ministerial approval. In the majority of the remainder, special advisers informed the case handler that the response did not require to be submitted to Ministers, and responses were subsequently issued. Unfortunately, in these cases, potentially due to appropriate record keeping, it was not clear whether the case then went to a decision-maker for a formal decision before issue, or whether the response from the special advisers was deemed to be authorisation for the decision to be sent by the caseworker.
146. In such cases, therefore, and particular where cases are categorised as 'sensitive' (and therefore subject to a Ministerial, rather than an official, decision-making process) there appears to be a significant risk that special advisers may be perceived to be - and may even, in some cases effectively be filling the role of - the decision-makers in the process. Indeed, it was not clear from case files, in most cases where sensitive cases were subject to special adviser review only, where else this decision-making role rested, and final responses were commonly issued shortly after the special adviser response was provided, with no sign of subsequent review or approval by senior officials. This is particularly concerning as it is an issue which the clear categorisation of cases was meant to address, so that there was always a clear decision-maker, and that if a case was no longer considered sensitive, an official would be appointed as the decision-maker.
147. Such practices - which were not evident in any significant degree during my 2022 assessment activity - create risks in relation to the integrity of the Scottish Government's decision-making process, and the wider perception of the role and function of key staff within that process. The Scottish Government would be advised, therefore, to ensure that, in circumstances where a case is not considered appropriate for Ministerial approval, appropriate final approval at official level is enshrined, in the process and in practice, in accordance with internal Scottish Government request-handling procedures.
148. Finally, I would like to comment again on one aspect of the role of special advisers which was noted in my 2022 Progress Report.
149. In that report, I noted an increasing practice (when compared with my 2018 Report) of special adviser views being recorded anonymously within case files, with responses, in most cases, being sent from a general special adviser FOI mailbox and framed in a similarly generic manner, with special advisers typically referred to as a single, anonymous entity. This included, for example, the commonly-seen response "*SpAds are content*", along with "*SpAd advice is as follows...*" or "*SpAds have commented as follows...*".
150. This approach has continued throughout the cases examined during 2023, to the extent that there was no individual identification of special advisers in any of the cases we examined at all. This situation contrasts with that of Ministers and officials at all other levels across the organisation, each of whom is transparently identifiable within case files whenever they have a role in the request-handling process.
151. As I noted in my 2022 Report, while this practice does not breach FOI law or existing good practice guidance, it is my view that the Scottish Government should again 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 will present unnecessary barriers or create unnecessary delays for an organisation as it seeks to provide a prompt response.

152. This will particularly be the case in circumstances where, as seen in many of the Phase 1 cases reviewed, the full rationale behind special adviser commentary is not provided, or is not saved to the case file. In such cases, where the organisation is seeking to interrogate or examine decision-making in accordance with relevant timescales where a request is reviewed or appealed, an unsubstantiated redaction which is received from an unidentified individual will clearly cause challenges and delays to that process. I would, therefore, again recommend that the Scottish Government give careful consideration to ending this practice.

# Phase 2: 1 May 2023 to 9 September 2023

## Background

153. As noted earlier in this report, during the period under which the review of Phase 1 data was underway, it was identified that the Scottish Government was managing a historic backlog of unresolved FOI cases. At the point of initial identification of this backlog, that historic caseload sat at 88 cases.
154. In addition to this, the Scottish Government's ongoing monthly reporting had raised additional and substantial concerns regarding the Scottish Government's FOI performance and its ongoing commitment towards FOI improvement.
155. As a result of the identification of the historic backlog and wider concerns around the Scottish Government's performance, commitment and progress, I met with senior officials, including the Permanent Secretary, in May 2023 to discuss these concerns, and seek the resolution of these issues as an immediate and urgent priority.
156. Following this meeting, the Scottish Government committed to undertake a range of measures to address these issues and significantly improve its FOI performance. These included:
- (i) **The reduction of the backlog of historic legacy cases**  
Bringing this to a 'close to zero' level by the end of June 2023
  - (ii) **The introduction of weekly tracking of FOI performance at Director General level**  
To introduce greater accountability and flexibility into the system, enabling request 'spikes' around particular issues to be more readily addressed and performance to be more closely monitored
  - (iii) **The introduction of a two-level reporting system**  
With data extracted and analysed from both the CMS and a manually-checked FOI tracker system, to assess and improve the reliability of reporting systems
  - (iv) **The introduction of a 5-working day target for the allocation of all cases**  
Accompanied by a target to clear by day ten, with senior intervention where this is not possible
  - (v) **The cascading of FOI compliance messaging by Ministers and senior officials**
  - (vi) **The integration of the FOI Improvement Programme within the Scottish Government's Corporate Transformation Portfolio**  
To more closely align FOI improvement with wider organisation improvement objectives
  - (vii) **The relocation of the Scottish Government's FOI Unit**  
Moving the FOI Unit from the Constitution Directorate to the Directorate of Communications and Ministerial Support
157. The implementation of these measures was initiated shortly after my meeting with senior officials in May 2023.

158. While these measures are relatively new developments, it is possible to track aspects of the initial impact of these measures through the following means:

- (i) **Examination of data on the clearing of the Scottish Government's historic backlog of overdue cases**
- (ii) **Examination of Scottish Government monthly performance data**  
Analysis of data relating to performance against FOI timescales supplied as part of the intervention over the Phase 2 period.
- (iii) **A manual review of 5 individual case files**  
A small sample of five case files were selected for review from those cases issued after the measures outlined above had begun to take effect. The five cases were drawn from across five separate directorates, with those directorate drawn from five of the eight Director General 'families' within the Scottish Government<sup>3</sup>.

Directorates were selected from those that reported receiving the most FOI requests during the Phase 1 period (1 July 2022 to 31 March 2023).

To ensure that the sample cases were influenced by the restorative action taken following the May 2023 meeting, the Scottish Government was asked to provide the first case issued after 21 July 2023 for each of the named directorates.

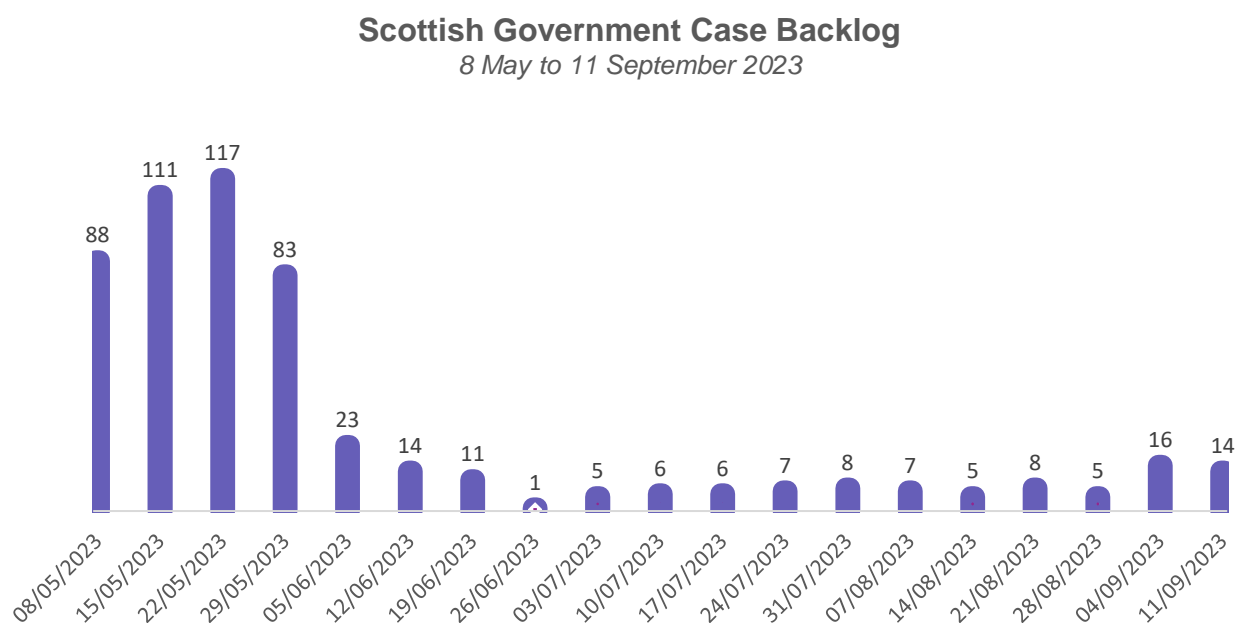
159. The findings from this review activity is set out below.

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<sup>3</sup> See: [www.gov.scot/about/how-government-is-run/civil-service/](http://www.gov.scot/about/how-government-is-run/civil-service/)

## Phase 2 Review: the clearance of the historical backlog of FOI requests

160. In the week commencing 6 May 2023, a total of 88 cases were identified as falling within the historic backlog. Over the next two weeks the total number of historic cases rose further, peaking at 117 cases during week commencing 20 May 2023, as the Scottish Government worked to locate and resolve all overdue cases across the organisation.
161. From the data supplied on these cases it was also clear that a substantial number were significantly overdue, with 39 cases on 20 May exceeding 100-working days, 19 exceeding 200-working days, nine exceeding 300-working days and three exceeding 400.
162. Following this point, however, the Scottish Government worked to rapidly resolve those cases as an urgent priority, with the historic backlog reducing to just 11 cases four weeks later (w/c 17 June), and to just one case the following week (w/c 24 June).
163. Over subsequent weeks, the historic case backlog has been maintained at a comparatively low level, as can be seen from the chart below:



164. While case numbers increased slightly on 4 September (to 16 cases, from five the preceding week) this increase arose as a result of the Scottish Government implementing new measures to locate, identify and action any FOI requests or reviews that had inadvertently been sent to a 'do-not-reply' email address attached to the Scottish Government's CMS. Once these newly-identified cases are resolved, the Scottish Government has reported that the new measures it has implemented will enable it to continue to maintain its backlog at a low level, resolving overdue cases swiftly as and when they arise.
165. It is anticipated that performance in this regard will continue to be monitored over the remaining lifespan of the intervention.

## Phase 2 Review: monthly performance data

166. As noted previously, the Scottish Government's on-time performance in relation to FOI requests and reviews had fallen considerably in recent months, and had failed to be fully restored to 2019/20 levels following the pandemic.
167. Indeed, across the Phase 1 review period, between 1 July 2022 and 31 March 2023, on-time performance levels sat at 85% for FOI and EIR requests and 67% for reviews, significantly short of the 95% target set by the intervention.
168. Following the remedial measures introduced in May 2023, however, Scottish Government performance increased considerably in this area. Indeed, the latest data available at the time of writing shows that Scottish Government performance across this period was as follows:

Month	% of requests on time	% of reviews on time
May 2023	87%	87%
June 2023	97%	91%
July 2023	98%	83%
August 2023	95%	88%

169. The average on-time performance for FOI and EIR requests across this three-month period was therefore 94%, while the average on-time performance for reviews was 87%. While data for August 2023 was not available at the time of writing, the Scottish Government has indicated that early analysis suggests it will achieve a similar level of performance across this period.
170. There are strong signs, therefore that the measures introduced by the Scottish Government in response to the concerns raised in May 2023 - including the introduction of weekly tracking at Director General level, new targets for the allocation and clearance of cases and the cascading of FOI compliance messaging across the organisation - are having the desired impact on performance, and are supporting a return towards the performance levels achieved prior to the pandemic.
171. Going forward, however, it should be recognised that this visible, high-level commitment to improvement has been a crucial element in the success of the work that has been carried out to date, and will remain crucial in achieving wider and long-term cultural buy-in to FOI improvement in the future.
172. Continued reporting to, and scrutiny by, the Commissioner's office will, of course, support the retention of focus on this area in the coming months, while the Scottish Government seeks to consolidate and embed the learning from recent improvement activity into its ongoing FOI culture and practice.

## Phase 2 Review: manual review of five individual case files

173. Our Phase 2 manual review of case files considered a small additional sample of cases, in order to obtain a qualitative impression of request-handling in the early days following the introduction of the Scottish Government's 2023 improvement measures. Five cases were examined as part of this review, with cases drawn from cases issued after 21 July 2023, following the introduction of the 2023 improvement measures. Cases were selected from different directorates, with no further selection criteria (e.g. in relation to sensitivity, requester-type, etc.) imposed.
174. The comparatively small size of the sample, alongside the fact that the 2023 measures had been newly-introduced (so impacts from those measures may not yet have fully bedded-in), mean that the learning from this sample will be limited. A fuller analysis at a later date will be required to assess the full impact and effect of the 2023 measures.
175. That said, the Phase 2 case file review found the following across the five cases reviewed:
- All five cases examined were classified as 'routine' within the Scottish Government's CMS.
  - All five cases were responded to within statutory FOI timescales.
  - None of the cases assessed were subject to special adviser review or Ministerial approval.
  - However, issues with gaps in case documentation remained and was significant, with four of the five cases containing gaps. For example:
    - A 'statement of compliance' was recorded in only two of the five case files (although, for the third – which was principally a straightforward 'information not held' response, the official reviewing the case notified the case-handler that a 'statement of compliance' would not be required).
    - Only two cases contained a record of the search carried out for information.
  - One case, which resulted in a refusal on the grounds of excessive cost, held no information in the case file on the work done to identify information falling within scope, nor any information setting out the basis of the cost calculation. In addition, the response provided no advice to the requester on how their request might be narrowed. The limited case file available for this case also contained no record of any internal review or approval.
  - A further case (also featuring a limited case file) in which a low level of knowledge about FOI processing was a feature for the case-handler in the handling of the case. This included no references to statutory reasons for non-disclosure in the final response (e.g. no reference to section 25 (information otherwise accessible) or section 17 (information not held) when these provisions were applied, along with no information on the requester's statutory right of review and appeal.
  - We also found examples of good practice when reviewing these cases, including examples of helpful narrative text given alongside responses to provide background context and advice and responses which had been issued fully and promptly.
176. The recommendations which are highlighted in the following section will be relevant to the Scottish Government as it considers its case handling moving forward.

# Conclusions and recommendations

177. As will be clear from the content of this report, my 2023 Progress Report is very much a report of two halves, with progress and performance during the Phase 1 period of my review (1 July 2022 to 31 March 2023) raising significant concerns in a wide range of areas.
178. Concerns identified during my Phase 1 assessment included:
- On-time performance levels for FOI requests and reviews falling significantly short of the intervention target of 95%
  - Increased average response times for FOI request and reviews, extending significantly beyond the statutory maximum response time of 20-working days
  - Significantly increased average response times for request and review cases marked at 'sensitive' (and therefore subject to special adviser review and Ministerial approval).
  - A failure to progress a significant number of 'late' cases as an urgent priority once timescales had been missed
  - A substantial and concerning backlog of historic late requests
  - Widespread failures to comply with internal records management requirements
  - Significant variance in the FOI knowledge, experience and expertise of FOI case-handlers, reviewers and approvers, and corresponding variations in the quality of case-handling and outcomes
  - Where sensitive cases were subject to Special Advisor review only, it was not clear where the decision-making role rested
179. However, following my meeting with the Scottish Government's Permanent Secretary and senior officials in May 2023 to discuss my concerns at that time regarding on-time performance levels and the size and scale of the historic backlog, a number of improvement measures were rapidly put in place by the Scottish Government (summarised at paragraph 156 above).
180. These measures led to the following improvements being identified through my Phase 2 analysis:
- The rapid resolution of the historic backlog of overdue FOI cases and the ongoing monitoring, maintenance and resolution of backlog cases
  - Significant improvement in on-time performance levels for requests and reviews, with an average request performance of 94% and review performance of 83% reported across May-July 2023 (up from 85% and 67% across the Phase 1 period).
181. While it is certainly early days in the implementation of these measures then, I am pleased to conclude this report – and, indeed, my term of office as Commissioner - with a cautious optimism that a number of the concerns identified during my Phase 1 assessment activity may now, at last, be being effectively tackled, and we may now be seeing the beginning of a return to the significantly higher levels of FOI performance and practice seen during 2019/20.
182. That said, however, there remain a small number of concerns which may not be fully addressed and resolved though the current improvement measures being implemented by



the Scottish Government. In particular, these include issues related to standards of compliance with internal records management procedures; and those relating to the skills, knowledge and experience of staff at all levels of the request-handling process. I will discuss to these issues further below.

183. I will conclude this report, then, by considering two final elements. The first element concerns how the findings from my 2023 assessment activity relate to the intervention questions which underpinned the launch of my current activity in 2017. These second element considers the Scottish Government's progress in relation to the updated intervention recommendations contained in my 2022 Progress Report.
184. I will address each of these elements below.

## 2017 Intervention Questions

185. I will provide comment in relation to the following four questions which underpinned the launch of my intervention activity, these four question being those which remain relevant in relation to the issues identified in this report.

### **What is the role of special advisers in the request-handling process?**

186. My June 2018 Report found that the Scottish Government's clearance procedures at that time, lacked detail, including lack of clarity around individual roles and responsibilities. I recommended that a detailed review of clearance procedures be undertaken. 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. 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 the 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.
188. My 2023 Progress Report has found that, on review of cases categorised as 'sensitive' (and therefore subject to a Ministerial, rather than an official decision-making process), it was not clear where the decision-making role rested. From this review, there appears to be a significant risk that special advisers may be perceived to be - and may even, in some cases effectively be filling the role of- the decision-makers in the process. Indeed, it was not clear from case files, in most cases where sensitive cases were subject to special adviser review only, where else this decision-making role rested, and final responses were commonly issued shortly after the special adviser response was provided, with no sign of subsequent review or approval by senior officials. This is particularly concerning as it is an issue which the clear categorisation of cases was meant to address, so that there was always a clear decision-maker, and that if a case was no longer considered sensitive, an official would be appointed as the clear decision-maker.
189. Such practices – where were not evident in any significant degree during my 2022 assessment activity – create risks in relation to the integrity of the Scottish Government's decision-making process, and the wider perception of the role and function of key staff within that process.

190. **The Scottish Government would be advised, therefore, to ensure that, in circumstances where a case is not considered appropriate for Ministerial approval, appropriate final approval at official level is enshrined in the process and in practice, in accordance with internal Scottish Government request-handling procedures.**

**Is the Scottish Government managing requests from journalists differently compared to requests made by other people?**

191. My June 2018 Intervention Report found that Scottish Government procedures at the time required that almost all media requests be sent to special advisers and Ministers for review and approval. This process essentially meant that journalists (along with elected representatives and political researchers) were subjected to a different request-handling process, with decision-making informed principally by the category of the requester, rather than the nature of the request. My 2018 Report called for the ending of this practice, leading to the development of the Scottish Government's Criteria for Decision-Making, which set out that escalated approval procedures should be informed by the complexity and sensitivity of the request, rather than the nature of the requester.
192. My 2023 Progress Report found that, as with previous reports, this practice has effectively been ended. Indeed, as noted elsewhere in this Report, while requests from the media (alongside those from elected representatives) were more likely to be categorised as 'sensitive' (and therefore subject to an escalated approval process), the majority of requests from the media (77%) were categorised as 'routine', and therefore not subject to this process. (For elected representatives, 83% of requests were categorised as 'routine').
193. As a result, I am therefore satisfied that the Scottish Government is not, in principle, managing requests from journalists differently based on the nature of that requester. While it is certainly the case that journalists (and elected representatives) may find themselves more likely to have their requests categorised as 'sensitive' than other groups, and may, during the Phase 1 period, have been more likely than other groups experience a late response, it is most likely that this is due to the nature of the specific information being requested, rather than the category of the requester.
194. I also note the new measures put in place by the Scottish Government in May 2023, include measures to: support improved compliance with FOI timescales; eradicate the backlog of historic cases and prevent such backlogs arising in future; improve the tracking, monitoring and reporting of FOI requests; and introduce and monitor new targets for the allocation and resolution of cases.
195. If maintained successfully, these measures should significantly reduce average case times for all requester groups, including journalists, in future.

**Is there evidence of deliberate delays in responses to some information requests?**

196. While we did not find evidence of requests being deliberately and purposefully delayed in order to postpone disclosure during our 2023 assessment, we did identify one case where a response to a request which was already two weeks overdue was subject to a further administrative delay of three-working days to ensure that staff were available to respond to any follow-up enquiries that may be received.
197. As noted in paragraph 118 above, FOI law requires that all requests and reviews are responded to promptly, and within 20-working days of receipt. In circumstances where the 20-working day timescale is missed, the FOI requirement to respond promptly should be of paramount consideration, and public authorities should seek to ensure that responses are

issued as an urgent and immediate priority. It will, therefore, never be appropriate for a response to be delayed simply because it is administratively more convenient for the organisation to do so.

198. **I therefore recommend that Scottish Government take steps to ensure that staff and Ministers at all levels across the organisation are fully aware of this statutory requirement, in order to prevent a recurrence.**

199. I also note that the new measures introduced by the Scottish Government in May 2023 should, if successful, contribute significantly to the prevention of such delays in future.

**Is there evidence of a practice of requests being blocked or refused for tenuous reasons?**

200. The findings from my Phase 1 review of highlight several areas where we found that FOI practice fell short of expected standards in request-handling, and the lack of documentation available in many case files created challenges in assessing whether the rationale for particular decisions was appropriate, or otherwise. Issues we identified included:

- A case where a response which had been drafted for approval subsequently had its response time extended under the EIRs, with no documentation in the file setting out the rationale for this decision.
- A case where an excessive cost refusal was calculated using inappropriate methodology, with no sign of those calculations being subject to scrutiny during the review / approval process.
- Cases where those involved in case handling (including special advisers), sought to apply exemptions in a 'blanket' fashion to particular types of documents, without full and appropriate consideration of their contents.

201. With specific regard to special advisers, we also saw a number of cases where this resulted in a narrowing of the information proposed for disclosure through FOI responses, whether it be through e.g. querying the case-handler's interpretation of the scope of a request, recommending the application of exemptions to particular documents (often without any clear rationale recorded in the case file) or proposing the removal of information which might be accessible to the requester through another route.

202. With regards to the latter point, while this is by no means inconsistent with FOI law, it does seem that seeking the active removal of information which has already been prepared for release in a response which is already significantly late, is likely to contribute to further unnecessary delays, while information is removed and the response is redrafted and submitted for further approval. In such circumstances, it would appear appropriate for the statutory FOI duty to respond promptly to take precedent over any preference to have the requester access the information themselves from a published source.

203. **In this context, I would therefore recommend that the Scottish Government implement further targeted training for case approvers generally, and special advisers specifically, in order to ensure that the core underlying FOI principles, including those relating to openness, transparency, the duty to advise and assist and the duty to respond promptly, are at the heart of the review and approval process.**

204. It is also the case that issues relating to the skills, knowledge and experience of all staff involved in request-handling were central to the issues we identified. This issue will be discussed further in the following section.

## 2022 Progress Report Recommendations

205. My 2022 Progress Report provided updates to my 2017 Intervention Report recommendations, focussing on those areas where outstanding action was required. I will provide further comment in relation to progress against these recommendations below.

### Clearance Procedures

206. With regard to the procedures through which the Scottish Government reviews and approves its responses to FOI requests, my 2022 Progress Report made the following recommendations:

- (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.*

207. It is clear, from the information in this report, that there remained, at the time of the Phase 1 review, a significant amount of work to do in this area.

208. Our Phase 1 assessment activity identified a number of issues in relation to the clearance of requests, including a number of 'routine' requests which were nevertheless still subject to special adviser review and comment, including in circumstances where those cases were passed to special advisers for the purposes of 'awareness' only. The importance of clearly identifying a decision-maker cannot be over-emphasised. In particular, where a case is not considered appropriate for Ministerial approval, appropriate allocation and final approval at official level should be ensured, in accordance with internal Scottish Government request-handling procedures.

209. We also, perhaps inevitably, found significant delays and bottlenecks affecting the 'late' cases we examined, with the result that such delays had a significant impact on the Scottish Government's FOI performance as a whole.

210. With regard to the FOI Unit, and as noted above, we found that wherever staff from the Unit were involved in case-handling this had a positive effect on the standard and quality of the subsequent response. We found, however, that the skills, knowledge and expertise which the FOI Unit brought to case-handling was also absent from a significant number of cases, where request-handling (and subsequent approval) appeared, in many cases, to be undertaken by those with significantly lower levels of experience, with lower-quality responses often the result. This issue will be further explored below.

211. It is also the case that the new measures introduced by the Scottish Government are, if appropriately supported and maintained, likely to have a significant impact in this area, focussing as they do on the progression of cases and the avoidance of delays, backlogs and bottlenecks. Indeed, the early signs in this area from my Phase 2 assessment are extremely promising.
212. I am, however, of the view that the above recommendations should continue to be monitored in future reporting in order to consider and assess the Scottish Government's ongoing progress in this area.

### **Quality assurance**

213. In relation to the quality assurance of FOI request-handling, my 2022 Progress Report made the following recommendation:
- (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.*
214. Following the publication of my 2022 Progress Report the Scottish Government took steps to introduce this monitoring, which is now in place and ongoing.
215. As a result, I consider that this recommendation from my 2022 Progress Report has now been met.

### **Case file records management**

216. In relation to case file records management, my 2022 Progress Report recommendations were as follows:
- (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.*
217. As detailed throughout this report, FOI record-keeping practices across the organisation remain one of the most significant, if not the most significant, persistent and recurring issues identified. Indeed, 18 of the 20 cases examined during our Phase 1 case review contained omissions from the required documentation, with a proportion of those cases featuring significant and substantial omissions.
218. While many of the issues identified during my Phase 1 assessment show signs of clear improvement following the Scottish Government's May 2023 activity to improve performance, case file records management is an area where my Phase 2 assessment activity suggests

that significant issues remain. Indeed, of the five cases examined in detail during Phase 2, four contained gaps in the required documentation.

219. Additionally, it is recommended that where special adviser advice or comment is obtained, as well as it and the rationale behind it being recorded, the name of the relevant specialist adviser or adviser should be recorded.
220. It is my view therefore that progress against this recommendation should continue to be monitored and assessed as this intervention enters its next phase.

## **Case handling**

221. With regard to case-handling, the updated recommendations in my 2022 Report were as follows:
- (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.*
222. In relation to the second of these recommendations, the May 2023 improvements contain strong measures to address this matter, with a new, monitored 5-working day target for the allocation of all cases, and a further target to clear responses by 10-working days, with senior intervention where this is not possible.
223. While early signs of progress in this area are encouraging therefore, I am again of the view that progress against this recommendation should continue to be assessed going forward.
224. With regard to my first case handling recommendation, it is strikingly clear from my review of cases across both Phase 1 and Phase 2 of this assessment that this is an area where immediate and urgent attention is required.
225. A common feature across all the cases reviewed was the - wholly unsurprising - finding that, where case-handlers and reviewers had experience, knowledge and understanding of FOI both appropriate FOI practice and core FOI principles, the case-handling outcomes were positive, considered and robust. On the other hand, where staff – including case-handlers, reviewers and special advisers – did not demonstrate an appropriate level of FOI knowledge or a firm understanding of core underlying FOI principles, the outcomes were significantly less positive.
226. As I also noted in my 2022 Progress Report, the benefits that a confident, experienced and knowledgeable case-handler brings to a case was 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 quality of the record keeping; the confidence with which a case is made to the willingness to challenge colleagues when the direction of travel begins to stray from FOI good practice.
227. When reflecting on this finding, it is appropriate to consider the successes achieved by the Scottish Government as it implemented its pre-pandemic FOI improvement plan in 2019/20.
228. At that time, much of the organisation's case-handling focus was on the development of a core group of trained case-handlers across the organisation, which numbered 280 staff

members in March 2020. The FOI improvement work at that time placed a strong emphasis on engaging with, training and supporting this network in order to build knowledge, develop networks and support a positive FOI-compliance culture within the network, with a view to supporting wider cultural change across the organisation.

229. This activity stemmed from a recommendation in my June 2018 Intervention Report, where I advised the development of such a network in response to the finding in that report 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 those individuals responsible for responding to just one request across the year.
230. In such circumstances, it will be extremely challenging for individual skills to be developed and for knowledge to be retained, and it is wholly unsurprising that may lead to poorer outcomes in terms of response quality.
231. The network which was established and developed in March 2020, however, was significantly disrupted as a result of the pandemic and has not been effectively restored in the intervening period. Indeed, despite repeated feedback from my office on the value of a smaller core network of experienced practitioners, the Scottish Government has continued to focus on a wider retinue of case-handlers with, currently, around 1,300 staff currently trained on FOI case-handling. As was the case in 2018, however, it is likely that relying on such a wide group of case-handlers will lead to particular case-handlers working on FOI infrequently, if at all, over the course of a year, leading to a loss of skills, a depreciation of knowledge and poorer outcomes as a result. Indeed, the impact of this issue across my current case review activity was clear.
232. I am therefore of the view that both case-handling recommendations made in my 2022 Progress Report should continue to be monitored and assessed, and I would urge the Scottish Government to direct particular focus towards developing, up-skilling and supporting a core network of case-handlers across the organisation, enabling the significant benefits of this approach to be restored.

### **Monitoring FOI requests**

233. My final recommendation related to the monitoring of FOI requests. In this regard my 2022 Progress Report recommended:
- (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*
234. It was, of course, extremely disappointing to note that my recommendations to improve the tracking, monitoring and reporting of FOI performance and reactively resolve late cases was not appropriately implemented following my 2022 Progress Report.

235. However, I am pleased to note that these specific elements have been developed and implemented in response to my May 2023 meeting with the Scottish Government and, as is clear from the findings from my Phase 2 assessment activity, are having an immediate and significant impact, with on-time case performance improving significantly and the case backlog being all but eliminated. I look forward to observing further progress in these areas as the improvement measures bed-in.
236. I am of the view, however, that these recommendations should continue to be monitored and assessed, in order to support the early progress made in this area in recent months be sustained through the longer term and embedded into the normal business activity of the Scottish Government.



## Next steps

237. Given that this report represents my final report as Scottish Information Commissioner, decision-making in relation to the next steps of this intervention will, of course, fall to my successor as Commissioner.
238. I would, however, suggest that the implementation of the new performance measures introduced by the Scottish Government is monitored closely over the coming year, along with progress against the outstanding recommendations highlighted in the previous section, with a view to undertaking a further, and I would hope final, review of Scottish Government performance in 2024.

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