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| Report to: | QSMTM Q2 |
| Report by: | Euan McCulloch, Head of Enforcement |
| Meeting Date: | 9 November 2023 |
| Subject/ Title: | Investigations Performance (VC197144) |
| Attached Papers | None |

Purpose of report

- To report to the Senior Management Team (SMT) on investigations performance in Q2 of 2023/24.

Recommendation and actions

- It is recommended that SMT:
 - note this report and
 - agree the recommendations regarding publication set out in the “Publication” section below.

Executive summary

The Commissioner’s duty under section 49(1)

- Under section 49(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), the Commissioner is required to issue a decision in all (valid) applications made to him, unless the application is frivolous or vexatious, withdrawn or abandoned.
- The Commissioner has little, if any, control over the number of applications made to him.
- Decision notices issued by the Commissioner, including notices determining an application to be frivolous, withdrawn, etc., can be appealed to the Inner House of the Court of Session.

Applications received

- We received 131 applications in Q2 of 2023/24.

| Applications received | Number |
|-----------------------|------------|
| Q2 2023/24 | 131 |
| Q1 2023/24 | 119 |
| Q4 2022/23 | 139 |
| Q3 2022/23 | 112 |

- This is lower than the number of applications received in Q2 of 2022/23 (133) and in Q2 of 2021/22 (172).

Cases awaiting validation

- The Commissioner can only investigate applications which comply with section 47(2) of FOISA, where a review has been sought from the authority and where, for example, the

relevant timescales set out in Part 1 of FOISA have been complied with. We refer to the checking process as “validation.”

9. Despite having received 131 applications in Q2, by the end of the quarter there were only 19 applications awaiting a decision on validation.

Applications under investigation

10. We define “applications under investigation” as any open, validated applications. The cases will not always be under active investigation.
11. At the end of Q2, we had 419 applications under investigation. Although this is an increase on the number under investigation at the end of Q1, the rate of increase slowed over the last two quarters 2022/23 and remains steady:

| Applications under investigation | Number |
|----------------------------------|------------|
| Q2 2023/24 | 419 |
| Q1 2023/24 | 406 |
| Q4 2022/23 | 392 |
| Q3 2022/23 | 385 |

12. As noted previously, given the lack of investigative resource over much of 2022, cases are taking a long time to be allocated (as at the end of Q2, we still have over 200 cases waiting to be allocated to investigators).
13. Three new investigators started in Q4, bringing the team complement back up to normal levels, although we are still being affected by long term absence (and a post requires to be filled again following internal promotions – although these have themselves enhanced capacity at DHOE level).

Applications closed in Q2

14. We closed 118 cases in Q2, 13 fewer than we received. The table below shows the stages at which the cases were closed.

| | Validation | Investigation | Decision notice | Total |
|-------------------|------------|---------------|-----------------|------------|
| Q2 2022/23 | 44 | 40 | 34 | 118 |
| Q1 2022/23 | 40 | 27 | 33 | 100 |
| Q4 2022/23 | 54 | 46 | 32 | 132 |
| Q3 2022/23 | 33 | 29 | 48 | 110 |

Average age of cases

15. Section 49(3)(a) of FOISA requires the Commissioner to issue a decision within four months of receipt of a valid application, or such other period as is reasonable in the circumstances. While, realistically speaking, it is not possible to close *all* cases within four months, our aim is to close cases, *on average*, within four months. However, we have not been able to achieve this for a number of years.
16. The average age of closed (valid) cases increased in Q2.

| As at end | Months |
|-------------------|-------------|
| Q2 2023/24 | 12.3 |
| Q1 2023/24 | 10.2 |
| Q4 2022/23 | 7.8 |
| Q3 2022/23 | 7.8 |

17. The average age of open (valid) cases also continued to increase in Q2.

| As at end | Months |
|-------------------|-------------|
| Q2 2023/24 | 11.3 |
| Q1 2023/24 | 10.8 |
| Q4 2022/23 | 8.2 |
| Q3 2022/23 | 7.8 |

KPIs – overview

18. Detailed below is our performance against each of our KPIs in Q2. The KPIs work on a rolling basis, which means that the performance in one year affects the next.
19. At the end of Q2, five of the KPIs were being met. Of the KPIs not met, there has been an improvement in performance in four when compared against performance in Q2 of 2022/23.

KPIs – validation

20. These KPIs focus on how long it takes us to determine whether an application is valid.

Determination on validity to be made in 70% of cases in less than one month

21. This target was being met at the end of Q2 (91.6% actual). There has been a steady improvement over the past year.

Determination on validity to be made in 90% of cases in less than two months

22. This KPI has again been exceeded – 96.9%.

Determination on validity to be made in 97% of cases in less than three months

23. This KPI has again been exceeded – 98.5%.

KPIs – Failure to respond (FTR)

24. These KPIs focus on how quickly we close cases where the sole reason for the application being made to us is that the public authority has failed to respond.

25. FTR cases are, in the main, investigated by our Validation Officers. The percentage of all validated applications which were FTR remains high for the year to date, at 35%.

60% of FTR cases to be closed in less than 1.5 months

26. This KPI was easily exceeded in Q2 (80%).

100% of FTR cases to be closed in less than four months

27. This KPI was met in Q2.

KPIs - substantive cases

28. These KPIs focus on how long it takes us to close “substantive” (i.e. non-FTR) from the date of receipt.
29. Performance against substantive KPIs remains a significant concern, given that performance falls well below the KPIs.
30. As noted previously, because of various issues including the high caseload, a number of long-term absences and changes to the team make-up since the start of 2022, there is a big delay in allocating substantive cases to FOIOs for investigation. As the FOIOs’ personal targets show (personal targets run from date a case is allocated to an FOIO for investigation rather than the date we received the application), once cases are allocated they are generally dealt with quickly.
31. As noted elsewhere, with the appointment of three new investigators in 2022/23 Q4, the team is back up to complement, so, provided the number of new applications remains steady (and subject to further required changes following the appointment of new HOE/DHOEs), we should start to see an improvement on these KPIs towards the end of 2023/24.

50% of substantive cases to be closed in less than four months

32. Not met – 7.8%, a significant decline from last quarter’s 15%.

75% of substantive cases to be closed in less than six months

33. Not met – 14.1% (close to last quarter’s 15%).

95% of substantive cases to be closed in less than 12 months

34. Not met – 34.4%. A consequence of the long delays in cases being allocated for investigation, but still an improvement on last quarter’s 28%.

KPIs: “All cases”

35. This set of KPIs looks at all of the applications made to us.

70% of cases to be closed in less than four months

36. 50% - not met (and the decline from 66% in Q1 is of concern).

85% of cases to be closed in less than six months

37. Not met – 53.4%, again a decline from 66% in Q1.

97% of cases to be closed in less than 12 months

38. Not met – 64.4%. Not as sharp a decline here, from 71% in Q1

Risk impact

39. We have procedures in place providing detailed guidance on the investigation of applications. We also have set KPIs for these investigations. Failure to comply with the KPIs is likely to undermine confidence in the way applications are processed. This committee report, in allowing SMT to keep track of investigations performance, mitigates against this risk.

Equalities impact

40. There are no direct equalities impacts arising as from the recommendations in this committee report.

Privacy impact

41. There are no direct privacy impacts arising from the recommendations in this committee report.

Resources impact

42. The number of applications received in previous years, together with the fact that the team has not been at full capacity since early in the pandemic, continues to place a lot of pressure on the team. We are, however, continuing to seek and implement ways of managing the whole caseload, including the backlog, more efficiently and effectively, with a view to easing that pressure.
43. The return of new applications back to more normal figures, and the addition of three new investigators, have had a definite impact on the backlog and consequent delays. However, we have entered another period of flux, with our capacity enhanced at DHOE level but a consequent reduction at investigator level as a result of internal appointments. It is important that we move swiftly to maintain capacity at all levels.

Operational/strategic plan impact

44. This committee report reflects objective 6 in the Commissioner's strategic plan for 2020-24: to be recognised as an organisation of independent and trusted experts that is run efficiently, governed effectively and is open and transparent.

Records management impact (including any key documents actions)

45. None.

Consultation and Communication

46. Once approved, the report will be communicated to the Enforcement Team..

Publication

47. I recommend that this committee report is published in full.