



Scottish Information  
Commissioner  
*it's public knowledge*

Our Ref:202400135

Your Ref:

Mr John-Paul Marks  
Permanent Secretary  
Scottish Ministers  
By email: PermanentSecretary@gov.scot

07 February 2024

Dear John-Paul,

### **FOI Intervention**

Following the initial notification sent on 2 February 2024, I am writing with further details of the Level 3 intervention I have opened regarding Scottish Ministers' compliance with the Freedom of Information (Scotland) Act 2002 (FOISA) and the associated Codes of Practice.

As part of my duty to promote and enforce FOI law, my office carries out interventions in cases where it appears a Scottish public authority has failed to fulfil its statutory obligations or to follow good practice in the discharge of those functions (including the good practice set out in the Section 60 and 61 Codes). You can find more details in our Intervention Procedures, which are available via [www.itspublicknowledge.info/Interventions](http://www.itspublicknowledge.info/Interventions).

As you will know, the primary aim in undertaking interventions is not to penalise authorities for poor practice, but to support them in improving performance by identifying and resolving issues of concern.

This intervention will take place at Level 3. Level 3 interventions aim to remedy serious systemic practice failures. Level 3 interventions require a detailed action plan to be put in place to address the failures/practice concerns identified and achieve a required outcome.

As stated in my earlier correspondence with your FOI Unit, following recommendations made by both my Head of Enforcement and Head of Policy and Information, I opened this intervention as a consequence of the witness statements made and the evidence disclosed during Module 2A of the UK Covid-19 Inquiry hearings. This evidence raised a number of concerns regarding the Scottish Government's practice in relation to the handling of informal communications and the steps taken to record key decisions and actions. The evidence presented at the Inquiry also appears to diverge from formal case-related submissions made to my office.

This intervention will therefore consider the recording, retention and identification of relevant information:

- whether practice in relation to the retention of informal communications and recording of key actions aligns with good practice as set out in the Scottish Ministers' Code of Practice on Records Management by Scottish Public Authorities under FOISA (the Section 61 Code). My office will be consulting with the Keeper of the Records of Scotland in relation to this point.
- whether the quality and thoroughness of searches conducted by the Scottish Ministers', in response to valid information requests, are consistently adequate in identifying all of the information falling within the scope of the request (and, in particular, that they are properly scoped and rigorously conducted, with appropriate safeguards in place to guarantee this). In this regard, I will be assessing whether the Scottish Ministers' practice aligns with the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA (the Section 60 Code)

The aim of this intervention is to support the Scottish Ministers' to improve its practice in these areas by identifying and resolving or overcoming any internal issues that are impacting performance and compliance.

### **Action required**

As a first step to achieving this outcome, please provide the following information in writing **no later than Thursday 29 February 2024**:

- *The Scottish Government's overarching FOI Policy Statement*
- *The Scottish Government's current policy with regard to the use of informal communications along with all policies or guidance on the use of informal communications which predate the current policy and which were in effect from 1 January 2018 onwards. The above should include:*
  - *Details of retention periods for informal communications*
  - *All ICT guidance provided to Officials/Special Advisers and Ministers on installation of informal messaging applications on personal and/or government devices for the purpose of government business and any guidance provided on retention of messages.*
  - *All procedures for the retention/transcription of informal communications into the formal public record and details as to how this is monitored*
  - *Any training, instruction, advice/guidance or other communication (including communication specific to particular circumstances) provided to Officials, Special Advisers and Ministers on the use of informal communications*
  - *Any advice provided to Officials, Special Advisers and Ministers with regard to the status of informal communications and FOI*
- *Scottish Government's policy on recording key actions and decision-making*
- *Details of any remedial action taken or planned to address the concerns related to the retention and locating of informal communications*

After we have received and reviewed this information, we will be in touch to agree the next steps in our intervention, which will be taken forward with your authority's lead officer.

Our ongoing intervention related to the Scottish Government's FOI Performance has delivered significant and positive changes for the organisation. Similarly, my office will work positively and supportively with your team to identify measures which can bring improvement in this important area.

Please be aware that I plan to publish this letter on my website on **Friday 9 February 2024**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Hamilton', with a stylized flourish at the end.

**David Hamilton**  
**Scottish Information Commissioner**  
**cc. The Keeper of the Records of Scotland**