



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 23 March 2023

Session 6



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Thursday 23 March 2023

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
SCOTTISH INFORMATION COMMISSIONER	2

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
5th Meeting 2023, Session 6

CONVENER

*Martin Whitfield (South Scotland) (Lab)

DEPUTY CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

COMMITTEE MEMBERS

*Edward Mountain (Highlands and Islands) (Con)

*Collette Stevenson (East Kilbride) (SNP)

*Alexander Stewart (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Daren Fitzhenry (Scottish Information Commissioner)

Margaret Keyse (Scottish Information Commissioner's Office)

Claire Stephen (Scottish Information Commissioner's Office)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 23 March 2023

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Martin Whitfield): Good morning, and welcome to the fifth meeting in 2023 of the Standards, Procedures and Public Appointments Committee. Our first agenda item is a decision on whether to take in private agenda items 3 and 4. Item 3 is consideration of the evidence that we will hear in this session from the Scottish Information Commissioner, and item 4 is consideration of an approach to delivering the evaluation of the Lobbying (Scotland) Act 2016. Do members agree to take those items in private?

Members indicated agreement.

Scottish Information Commissioner

10:00

The Convener: For our second item, I welcome Daren Fitzhenry, the current Scottish Information Commissioner. Daren is joined by Margaret Keyse, head of enforcement, and Claire Stephen, acting head of policy and information. Good morning to all of you. Daren, I will hand over to you to make a short introduction to your report.

Daren Fitzhenry (Scottish Information Commissioner): Good morning, and thank you for that introduction. I am grateful for the committee's continued interest in freedom of information and for the opportunity to assist the committee in its consideration of my annual report and accounts for 2021-22, as well as any other matters that are of interest to the committee.

As members will be aware, my annual report was delayed from its usual September or October laying date due to audit availability. In the interim, to meet our statutory requirements, we laid a section 46 report, and the annual report and accounts followed in December.

As members will have seen from the annual report, it was a busy year for my small team, because it was marked by an extremely high number of appeals to the office. A total of 626 appeals were received across the year, which is the highest number since our initial year of operation, in 2005-06. That 29 per cent increase on the previous year, combined with an existing backlog from the previous pandemic-disrupted year, inevitably created challenges for the team.

The team members have worked incredibly hard in closing 549 cases, which is the highest number since 2013-14, but, unfortunately, the sheer number of cases that we received contributed to some applicants experiencing delays. We have been working hard to manage those delays, through the team's efforts in working on the cases, as well as in keeping applicants informed about where their cases are in the process, including putting information on that on our website. We have also been looking at streamlining our internal processes and procedures to try to speed up matters, while retaining the quality of the appeals.

Moving forward, that situation will, inevitably, have an effect on my next annual report, and the high number of cases have continued, although, thankfully, they have reduced from the levels that we saw in 2021-22. That coincided with some departures, changes in the team and long-term absences, which have created a challenging environment and seen case numbers rise through

quarters 1 and 2 of the current financial and reporting year. In quarters 3 and 4, there has been a stabilisation of that, with much lower increases.

We have had a recruitment exercise, so we now have new people in place. Three investigating officers are moving into enforcement—two of whom are already in place and the other is due in a couple of weeks. We have some more support staff as well as support for the policy and information team. Despite delays in clearances and the like, things are coming on, and we really hope that that will help us to move forward, turn things around and build on that stabilisation period.

Obviously, appeal work is not the only output of the office. In 2021-22, we also made 257 proactive interventions, ranging from very straightforward level 1 interventions to much more detailed level 3 and level 4 interventions. That part of our work receives no dedicated resource and is met from within our existing capacity.

In 2021-22, we also responded to 683 inquiries, helping both members of the public and authorities. In addition to that, we developed our new and improved website, which went online in April 2022 and created a much-improved, faster, more modern and accessible route for people to access our detailed catalogue of guidance and support tools. We also published our second special report on the impact of the pandemic on FOI in Scotland, research into public awareness and a survey of FOI practitioners.

I would like to look forward a little, convener, if that would be all right. At times of crisis, such as the one that we currently face with the cost of living and high inflation, freedom of information and access to information are more important than ever. When decisions that are taken have a very tangible impact on aspects of people's lives, such as whether they will keep their job, be able to afford to heat their home or put food on the table, or be able to access vital services, that information is more important than ever. Therefore, we have been championing proactive publication, learning from the experiences of the pandemic and our special report on that, focusing on FOI as a core output of public bodies and intervening when authority practice falls short.

As you are aware, we are also engaging with the on-going consultations on improving freedom of information law, including dealing with the information deficit that is caused when public services and public functions are no longer dealt with by public bodies and are contracted out, or new systems are created whose functions are not carried out by public bodies.

We look forward to contributing to that work and to helping the committee with its work in the area.

The Convener: Thank you. We will address many of those issues in our questions. Given that today is the three-year anniversary of the announcement of the first lockdown, I will open by asking you about the effect of the Covid-19 pandemic. I thank you for the paragraphs in your report about that. Where are you in that regard, following the lockdowns and the remote working that you had to do during Covid? Has that affected your priorities as you move forward?

Daren Fitzhenry: A number of lessons have been learned from the pandemic. It has led to greater emphasis being placed on the importance of proactive publication. Therefore, as far as my prioritisation is concerned, we will look at ways in which we can improve the system of proactive publication and enforce it better, and that is tied to the question of changes to the law.

With regard to the importance of FOI as a core function, at times during the pandemic, people in some public bodies were moved away from that function to other functions. The Scottish Government was a prime example of that—its FOI performance was badly impacted by those changes and the whole infrastructure was disrupted. We are focusing on the importance of looking at FOI as a core output and, in future, I intend to approach not just the practitioners but chief executives and senior members of authorities on that.

As far as the impact on our office is concerned, the high number of appeals that we have had is slowly beginning to reduce. We think that, this year, we will have around 100 fewer appeals, so there is a difference, but we are still receiving relatively high numbers of appeals. We will have to see how that pans out.

With some authorities, the overall number of requests reduced during the pandemic, and they have not yet got back to pre-pandemic levels. There are one or two notable exceptions to that, including the Scottish Government, which has had a different experience—its numbers increased during that period.

The Convener: You do not anticipate that we will return to the level of FOI requests that we had before the pandemic.

Daren Fitzhenry: I do not see that happening. The number of requests is still pushing towards 80,000; there has not been a huge drop-off in numbers. I hope that there might be some reductions as a result of increased proactive publication. We would like more information to be pushed out so that people do not have to put in requests. However, there will always be a place for requests, because people will have specific information that they are interested in.

The Convener: That is very helpful.

With regard to my question about the situation as you move forward, can you see any operational risks coming along that you are concerned about? Is there anything on the horizon that is worrying you?

Daren Fitzhenry: My departure is one of those things, probably. [*Laughter.*] There will be a change in commissioner, so that will be a period of change at a time when a lot is happening in the freedom of information bubble. We have to be aware of that. Inevitably, there will also be some changes in my team.

When it comes to appeal numbers, we are reactive. Given that we have achieved a plateau, I am hopeful that the tide has turned and that we will make the improvement in driving down the numbers. If that does not happen—if there is another spike in appeals, despite having the new people in—we will have to seek additional budget.

We are making changes to our internal procedures so as to have more people at the pinch points to reduce case numbers there. We flex and make changes all the time, to manage things within current resources if we can.

The Convener: On the question of resource, I pass to Alexander Stewart.

Alexander Stewart (Mid Scotland and Fife) (Con): In your opening statement, you talked about capacity. I think that we all acknowledge the capacity issue that you have had to endure. However, managing that capacity involves dealing with the staffing and resources that you have. You have identified that, to do the job, you will try to manage within those resources. Do you have an objective of looking at whether more are required? You are aware of where you have been, but achieving where you want to be might not be possible without more staff and resource. Your casework and the backlog have been identified, and you are managing that, but you are probably being asked to do more with less, and you might need a little more to achieve what you want to achieve. Is that where you think you will go?

Daren Fitzhenry: Reaching the plateau has coincided with our getting the new staff on board. Obviously, there will be a period of training, which will impact on how quickly that has full effect. However, if appeal numbers remain roughly where they are now, as opposed to where they were last year, and if our staff deal with the numbers as we would expect, I expect that those numbers will come down with the resource that we have. If we find that that is not the case, I will certainly go to the Scottish Parliamentary Corporate Body and make a case for additional resource.

The problem with recruitment is that it takes a long time to get people through the clearance process. Particularly at the current time, when

financial budgets are stretched, I would want to ensure, before I ask for new resource, that I really need it. There are other things for which I could always do with more resource. There are many nice-to-haves. I would love to do more interventions, including in relation to proactive publication. However, to a degree, I have to cut my cloth to fit.

Alexander Stewart: You have just identified that, if you had a wish list, you would do certain things. At the same time, you do not want to be curtailed in what you are trying to achieve as an organisation, which is ensuring that information is transmitted.

I still think that there might well be a requirement for you to seek support to achieve some of the goals that you have set yourself. Otherwise, you might be setting yourself up to fail. I appreciate that you want to make progress, but, at the same time, we do not want you to come back in a year and say, “Okay, we tried, but it didn’t quite work, and we’ve now found ourselves in a slightly bigger situation.” It would be good to get a flavour of how you will try to manage that, because that could—potentially but not necessarily—happen, depending on where you find yourselves.

10:15

Daren Fitzhenry: As I said, one of the areas that we have been looking at is where pinch points happen, and we have obtained budgeting approval from the SPCB to turn some investigating officer slots into deputy head slots, so that we have increased resilience and we put resource at the pinch points in the process. However, if we consider that more is required, because things do not change early on, we will certainly take—

Alexander Stewart: You have identified the pinch points, which is good, because that will give you a flavour as to where you might be.

The other issue that I want to touch on is awareness—that is, your ability to make sure that people are aware of what services you offer and how you will deal with matters. The situation with regard to information is more acute than ever, so it would be interesting to get a flavour of what your approach to awareness is and whether you have plans for communication. You have mentioned your website, but are there other aspects that you can encapsulate that will support you to increase awareness of what you do, which will make it much easier for the public to understand FOI and also make it easier for you, as a management organisation, to cope with the work?

Daren Fitzhenry: Our awareness polling data certainly showed that general awareness of freedom of information remains high and within a couple of percentage points of previous data. We

saw a change in the middle ground between people who were fairly aware or not very aware; there was a movement of 10 or 15 percentage points between those two grounds. Interestingly, there were similar impacts in other jurisdictions—Australia, New Zealand and the United Kingdom. The UK had less of a change generally than us, but there was a bit of a change.

We have more accessible information for people coming to the website; we have pushed out an open update newsletter, which has been very successful and well received; and we are involved in social media. We have also been working with young people to get the message out to them, because, if we break the information down to a more granular level, we see that young people tend to have less awareness than those in some of the older demographics. So, we have been working with them in relation to that, as is mentioned in the report. We are looking to continue work in that specific area with the policy and information team.

We are also doing outreach with the Scottish public information forum, through which we are in touch with campaigners, non-governmental organisations, public authorities and, occasionally, interested people who join the meetings.

We have increased liaison with the Information Commissioner's Office. We certainly want to look at outreach and at how we improve awareness not just generally but for historically disadvantaged groups. Last year, the International Conference of Information Commissioners made a commitment about the importance of that. Interestingly, statistics seem to tell us that, this year, the number of women who have appealed is higher than ever, so we are trying to increase awareness and participation not just overall but in groups that, historically, have not used FOI as much.

Edward Mountain (Highlands and Islands) (Con): Good morning. My question is based around the fact that I hear of more and more people who write letters asking for answers and do not get a timely or full response, so they resort to FOIs because that seems to be the only method that gets a timely response. To be frank, I will admit that there are two organisations in the region that I represent that I have given up writing questions to. I just FOI them as a matter of course, which costs them money.

Of the FOIs that you look at, are you happy that the responses that you have seen are fulsome and open rather than closed and focused on an issue that has not been asked about?

Daren Fitzhenry: As you would imagine, it is variable. To put the issue into context, last year, we dealt with about 0.8 per cent of all the freedom of information requests made in Scotland, and the

figure was quite high that year. We also deal with the cases that arise when people are less happy with the outcome and take them to a review and then to an appeal to us. In focusing in on that, I do not want us to miss the fact that around 75 per cent of the applications that are made result in some or all of the information sought being provided and that more than 50 per cent result in all the information being provided.

On the specific question about the cases that we see, historically, the findings have tended to be in thirds in that we generally find in favour of the applicant a third of the time and in favour of the public authority a third of the time. The final third is where we find that some additional information needs to be provided. In the reporting year 2021-22, it was closer, I think, to about 50 per cent—

Margaret Keyse (Scottish Information Commissioner's Office): The figure was 55 per cent partly or wholly in favour of the applicant.

Daren Fitzhenry: So, it was a slightly lower figure in favour of the applicants and there were more cases in favour of the authorities.

There are some cases that we see in which we think that authorities have applied unduly narrow interpretations of requests. In those cases, we comment on that in the decisions or, if it does not go to a decision, we will let the authority know that and see whether they will provide the additional information. If anything was to go as high as a section 65 offence of deliberate concealment, that would be another matter altogether. We are seeing more allegations of those, but we have still not seen a section 65 case go to court.

Therefore, the picture is variable. Some authorities do not provide the quality of responses that we would want. If we see bad responses, we note those in a register, which feeds into our intervention procedure. Margaret Keyse might be able to elaborate on how that works in practice.

Margaret Keyse: Claire Stephen and I might be able to explain that between us. In my team, I manage the investigations. If an authority is late with its response or has not provided sufficient advice or assistance, or if we think that it has been overly restrictive or narrow in its interpretation of the request or has simply not played ball with us, those things are recorded. That will then be passed on and Claire's team does wonderful things with that report.

Claire Stephen (Scottish Information Commissioner's Office): We combine the intelligence that we gather from our case-handling system and the statistics that we receive. We analyse that quarterly and determine where we need to take action in terms of good practice to improve practice. Therefore, it is a two-pronged approach. A decision will go out, but we might pick

up an intervention at a later date to improve practice more generally.

Edward Mountain: The final part of my question is that I think that I have some FOI requests of one organisation that have been outstanding for four and a half months. It does not surprise me that three months is standard. Do you know which organisations across Scotland are performing badly? I am not asking you to name and shame them, but is there a view of who is not performing as well as they should be? Would there be some merit in publishing a league table of the worst offenders, to try to get them to lift their standards? I think that there might be some merit in that.

Daren Fitzhenry: The process that we have just mentioned is the way in which we ascertain which authorities we think have problems and need to improve their performance. We will then proceed with an intervention to help them to improve their performance.

I see interventions as a way of us helping the authorities. Sometimes they have problems because staff have left, and sometimes it is about a lack of training or awareness. We want to target those problems so that we can fix them and help the requesters.

The authorities that we think have the greatest problems and practice difficulties tend to be the ones where you will see a higher grade of intervention. The more serious the problems, the higher the level of intervention.

Edward Mountain: Do you publish—

Daren Fitzhenry: We do publish that information. We put it on the website, do we not?

Claire Stephen: Yes. As well as publishing our intervention activity reports, we publish our quarterly statistics. All 510 Scottish public authorities report to our office quarterly on their performance and that information is published on our website.

Edward Mountain: That will save me making an FOI request. I had better just check to make sure that my local authority is on there.

Collette Stevenson (East Kilbride) (SNP): Good morning. You have touched on the interventions element. Why has there been a 48 per cent increase in interventions?

Claire Stephen: Last year, we did a bit of work that involved looking primarily at publication schemes. As a result of our work in that area, we had to open interventions with a few public authorities to look at their publication schemes and make sure that those were all up to date. That is why there was a jump in the number of level 1 interventions last year.

Collette Stevenson: To what extent, and how, have the issues with the Scottish Government's FOI practice been resolved?

Daren Fitzhenry: Obviously, we have the level 3 intervention on-going with regard to the Scottish Government. We started on that back in 2018, with the early work on getting the report and putting in place a work plan to make the improvements. We saw substantial improvement in timelines. Timeliness was up in the 90 per cents. We also saw training taking place and more trained individuals carrying out the casework. Everything was going brilliantly well until we got to early 2020 and the pandemic, when the infrastructure for that disappeared; it was completely fragmented and a lot of the work that had been done to put systems in place and make everything work disappeared. That caused major issues with timelines, performance and, inevitably, quality.

In addition, because of the pandemic, my planned assessment did not take place in 2020-21. Last year, we did our first detailed assessment for some time and we drilled deep again. We did a mini deep dive into performance over the two-year period from just before the pandemic to the year after, and we noticed a number of areas that had improved. The most obvious improvement that we saw was on the problem of special advisers and ministers not dealing with journalists and researchers immediately. There was no longer a default position; the response depended on the seriousness or the complexity of the case. There was a triage system that put requests out to the appropriate bodies.

We also saw that the FOI unit had greater visibility within the Government. It was being listened to more and was providing expert advice on FOI, so we saw a shift away from what we had seen during the first deep dive, when there was more dispute. We saw the visibility and the value of the FOI unit increase, which was another very good point. Obviously, performance is now back up in the mid to high 80s, and we want to see that figure increase a bit more.

10:30

As to where things go from there, one of the downsides was non-compliance with procedures. The first time that we looked, the procedures that were in place were not very good—they were confusing and did not work. The second time, the procedures were there but, in some cases, were not followed, and information was not recorded when it should have been—particularly in relation to cases that had changed from being decided on by officials to being decided on by ministers. We did not always have an audit trail for those cases—indeed, in many cases, we did not have

an audit trail—to see why things were not working. That was a problem.

Generally, there was a problem with the provision to us of reliable statistical data. The system that was used was not fit for purpose—it was not working as it was meant to work—which also meant that the Government was not getting the information that it should have been getting to enable it to monitor its performance.

Two big issues exist. I am talking in broad-brush terms here; I can provide more detail if the committee wishes. The first is that training needs to increase to comply with the procedures in greater detail and to have fewer but better-trained people dealing with the FOI requests. That is now happening—I am seeing positive signs in the Government's monthly reporting on that front.

The second one is the need to have an information technology infrastructure that is fit for purpose for monitoring FOI requests in a way that will give the Government visibility of cases that are really late, that will allow it to track how long cases have been on the books, whether they have been dealt with in time and whether they have been dealt with by a minister, and that will record, if that has changed, why it has changed. We are looking for increased transparency. That is what we will look to test this summer—before I leave, I want that tested to see where we are and whether we have hit some of those remaining points.

Collette Stevenson: So, will it be the summer when we receive the interim performance report?

Daren Fitzhenry: We will do the work on that in the summer. The report itself might go into early autumn.

Collette Stevenson: Can I quickly come in on one of those points, convener?

The Convener: Please.

Collette Stevenson: I want to move away from the intervention aspect and clarify points around the likes of Police Scotland. Obviously, when an FOI is submitted for Police Scotland, for instance, an element of sensitivity and security is involved. How do you clear the lines, if you like, with regard to what it can and cannot provide?

Daren Fitzhenry: Over the years, we have built up quite a number of detailed cases and experience of the various exemptions and their applications. From that, we have put together detailed guidance notes for the authorities to provide a degree of standardisation of approach, which rely on the previous decisions that have been made.

When it comes to appeals, we get detailed submissions from the applicants and the authorities, which allow us to apply the specific

exemptions. There are more specific exemptions for some authorities that are almost tailored for them. Margaret Keyse might want to mention some of the common ones in relation to the police and law enforcement.

Margaret Keyse: I have quarterly meetings with the person who heads up FOI in Police Scotland so that we can deal with any particular issues that are coming up.

There are particular exemptions for Police Scotland that are to do with the prevention and detection of crime. Many particular law enforcement exemptions that it relies on are subject to a public interest test, so there will still be consideration of whether the information should be disclosed. Obviously, we are all covered by data protection. Therefore, if a request relates to a specific individual—particularly if it relates to a crime or an alleged crime—there is certain information that Police Scotland cannot disclose.

Police Scotland has its own issues when it comes to records management, for example, because of the costs of Scotland-wide requests, which sometimes take it past the limit over which it does not have to reply. However, I know that it is working hard on its records management.

Finally, of all the public authorities in Scotland, Police Scotland is probably the one that most often uses the neither confirm nor deny provisions, in cases in which confirming whether the information exists would give away, for example, whether your next-door neighbour was being investigated for a crime. There is a lot of stuff to prevent information that should not be disclosed from getting into the public domain.

We give a lot of advice not just through our briefings but personally to authorities, inquirers and applicants.

Collette Stevenson: That is interesting. Thank you very much.

The Convener: To move back to interventions, the Scottish Government is currently at level 3, which means that it produces a plan, which you oversee. In May last year, you produced a report on Scottish Government intervention, and you are looking at doing another deep dive into the plan that it has proposed, after which there will be a report on that. Is it your hope that, at that stage, it can move from level 3 intervention or, given, to be fair, the size of the organisation and the complexity of data—in particular, the statistical data that you have talked about—are your concerns such that the critical friend exercise, in which you are there to help and assist, might be on-going?

Daren Fitzhenry: Obviously, I cannot prejudge what I will find, convener, but all authorities are

monitored once an intervention has completed. As we have discussed, we still monitor performance through the quarterly inputs from the authorities, and any additional information and intelligence from other sources is fed in so that we can look at those authorities.

We have had cases in which authorities have had interventions and have improved and we have managed to end the intervention, but we have then seen their performance slip again and have got them back in, so that they have known that they were being monitored. We are looking for sustainable improvement. We are not looking for quick fixes after which authorities think that they can get away with things. The monitoring continues, regardless.

The Convener: So, you remain a critical friend for all organisations.

Daren Fitzhenry: We do our best.

The Convener: It is right and proper to point out that one organisation is currently at level 4. Can you say anything about how long you anticipate that it will remain at that level for? That is the highest level of intervention that you undertake.

Daren Fitzhenry: In essence, a level 4 intervention means that we have used our formal powers. That intervention was a practice recommendation for Aberdeenshire Council, and we expect it to end imminently.

The Convener: That is very helpful.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Thank you for your evidence so far, which has been really helpful.

At the start of your contribution, you mentioned that we are going through a period of change. At some point, you will demit office, and we wish you well for the future when you are no longer in office. It is a day for changes.

Edward Mountain: I do not think that he is going just yet.

Bob Doris: We are not trying to get rid of you early. [*Laughter.*] Mr Mountain was suggesting that this is your last day; I was not doing that.

There are other transitions. The Scottish Government has been consulting on changes to freedom of information. A number of changes have been suggested—for example, a change to the number of organisations that are subject to FOI; a change to the use of section 5 of the Freedom of Information (Scotland) Act 2002 to add bodies to the list; and the introduction of a gateway clause by which third party organisations that fulfil public functions and currently avoid FOI could be brought into its gambit. There are quite a lot of potential changes. I understand that an update to the section 60 code of practice to

provide guidance for informal communications such as those on WhatsApp and whether those should be subject to FOI—what I might refer to as the “Hancock clause”—is also potentially within the scope of the changes.

Quite a lot is within the scope of the consultation. I am not necessarily trying to draw you on your views on those things, commissioner, but did the Government get the scope of the consultation just about right? Do you have any other reflections, not on the Hancock clause in particular, but more generally?

Daren Fitzhenry: We have been spoiled for choice. We had two consultations—the Scottish Government one and the proposed member’s bill one—which were like two buses coming along at once. You will not be surprised to hear that we have tried to ensure consistency of approach across both consultations.

I will deal first with the issue of WhatsApp because, although it is topical, it has also been around for a while and we have addressed it throughout the years. Most recently, that was one of the issues that I raised in my second special report on the impact of the pandemic on FOI in Scotland, which was about increased use of social media by authorities and the importance of making sure that that information is captured, searchable and disclosable. Our guidance on that area has been consistent for a considerable time. Our guidance for public authorities suggests that they read our briefings and guidance. With regard to searches, we ask that they provide details of which sets of records or data were searched, including information that

“may be held on WhatsApp, mobile phones, etc.”

In our section 17 briefing, we referred to

“information held in other formats, such as WhatsApp exchanges or recordings of Zoom meetings”.

Therefore, that is not a new point—that information is recovered. We have case law for our decision notices, in which we have specifically referred to that issue and looked at such documents in the past.

However, the issue is a concern, and the authorities need to be aware of it. They should know which platforms people in them are having conversations about, relating to their functions, and make sure that those conversations are recorded and searchable.

Bob Doris: Commissioner, before you move on to the rest of the potential scope of consultation or, indeed, legislation, I will ask about the section 60 code of practice, although I have to admit that I am no expert on it. Maybe I will read it out, because it is in front of me, but I now know that it exists. Is there a need for greater clarity?

Referring to the “Hancock clause” was a glib comment. I have no desire in the slightest to defend Matt Hancock, but I will make a serious point. I can imagine people who are in positions of power wanting to communicate quickly and freely with a range of officials and stakeholders in very short and condensed formats, just for speed. They need to be really careful about what they put on those platforms, because not everything is captured in a text or an abridged WhatsApp message. It is not just about having shining, absolute transparency about what people in power are really thinking; it is also about making sure that people who are in power are very clear about expectations. With that caveat, do we need clarity? Does that code, which I now know exists, need to be clarified or updated?

Daren Fitzhenry: The current section 60 code refers to the checking of systems. That relates not just to information technology systems; it can include any other systems. Therefore, there is reference there to something that could cover that.

The code is probably due for a refresh. Obviously, it is not controlled by me—it is issued by the ministers, although they need to consult me, because the statute requires that. They need to consult me before the code is changed. I think that the code should be refreshed to keep it relevant to the particular issues of the moment. In the meantime, our guidance fills that hole and expands on the statement in the code.

Bob Doris: That is helpful. I apologise for cutting you off in full flow. You were going to talk about the rest of the scope of the consultation.

10:45

Daren Fitzhenry: It was crucial that the consultation looked properly at the loss of information rights and the way in which public services have been outsourced during the 20 years since the Freedom of Information (Scotland) Act 2002 was enacted. The changes that have been made during that time have resulted in a loss of rights as more services have been contracted out or delivered in ways other than by public services. The section 5 order was meant to fix that and keep things up to date, but there have been only three orders since the inception of the act. The last one was the big one for registered social landlords, which was a positive move.

The reality is that the legislation is not keeping pace, which is why there is a drive for another solution to the problem of how the legislation keeps pace with the changes. In my consultation responses, I have acknowledged that the current system is not working as quickly as we would like it to. However, I am concerned that a gateway clause, which, depending on how it is worded,

could hugely increase the number of bodies that are subject to FOI without necessarily giving clarity about exactly whether body A or body B is subject to it, could lead to a lack of clarity for the bodies themselves, requesters and the regulator.

I have suggested a potential way forward. Parliament could look in more detail at the list in schedule 1 and specific sectors that it might want to be subject to freedom of information. A date for that to come into force could be set so that we can train each sector and get them and their publication schemes ready and best set to meet the requirements of freedom of information. The visibility of the sectors that are subject to freedom of information could be increased for the requesters so that they know whom to go to and that they have those rights. That would also mean certainty for us as the regulator.

That involves a huge discussion but a really interesting one. I am concerned that, if it goes the wrong way, we could have a lot of uncertainty. The system’s workability, which means that 75 per cent of information is provided, could be put at risk if it is not dealt with properly.

Bob Doris: I do not want to misinterpret what you are saying, commissioner, but it is almost as though you are saying that the Government and the Parliament should take a considered and almost incremental view of how we can extend FOI on a sector-by-sector basis by considering the implications, getting the balance right in each sector, and implementing changes accordingly rather than looking at everything all at once and trying to legislate in haste. We have to consider the evidence that we have heard this morning, and I do not want to misinterpret or analyse incorrectly the points that you are making.

Daren Fitzhenry: It is possible to have a gateway clause that would be drafted to include any body that receives public funds or carries out public functions. However, there are problems with such a clause. What is the definition of “public functions”? How many public funds are involved? How do we evidence those things? Who is subject to the clause? How do we keep track of that?

My consultation responses go into a lot of detail on the benefits of the current system, the benefits of a gateway clause, the risks of both systems, and the potential route that Parliament might wish to consider if it is seized of the issue in legislation. That is simply a regulator’s view of the documents that were put forward for consultation, but we go into a lot of detail on those specific points.

Bob Doris: That is very helpful. I understand that you made a specific recommendation in relation to the report by the Public Audit and Post-legislative Scrutiny Committee in session 5. You said that you would like to replace the current

requirement for a public authority to maintain a publication scheme with a duty to publish information. I am keen to know the difference between those. I know that the duty would be supported by a legally enforceable code of practice. It would be helpful for the committee to know the distinction between the current requirement and a duty and the difference that that would make.

Daren Fitzhenry: A publication scheme is, in essence, a scheme that says that you will publish information about specific pieces of information. That is contained in a separate document, which is the authority's guide to information. It also sets out any charges and so on, so there are a number of provisions. The guide to information sets out the categories of information that are provided and the documents that are provided underneath that.

It is quite a paper-based system. It is based on pre-IT concepts of access to the internet, and it does not reflect very well the way that information is published by authorities nowadays. It also allows authorities to say, "Oh, yes, we've got a publication scheme. We've got a guide to information," but it does not necessarily have that focus on the publishing of information—the pushing out of information that is in the public interest.

I would love to see that openness or transparency by design move authorities towards wanting to push out information and the code of practice enabling and helping them to do that in a structured way that ensures that information that is in the public interest is there. That should include a requirement to carry out annual reviews to ensure that they are pushing out information and that they have considered the freedom of information requests that they have received over the course of the year to see what the public are interested in. They should then think about proactively publishing that information, which will help.

More than anything else, it is about a shift in attitude, away from saying, "I've got a document and therefore I'm complying with the law" to thinking positively and proactively about pushing out as much information as possible in an appropriate and accessible way for the public.

Bob Doris: That is incredibly helpful, but I want to be sure that I do not misinterpret that. The current situation feels very process driven. It seems that people say, "I've got a policy, I've got a document, I've got a process. It's published, it sits there, I'm compliant—tick. Let's move on and brace ourselves for what requests come in now. We've got a policy for how we process those requests" as opposed to turning the whole thing on its head and saying, "We're an open public body. How are we going to actively publish the

information that we think is in the wider public interest to have that transparency?" I want to be sure that I have captured that correctly, because the committee will need to consider the evidence that we have heard this morning.

Daren Fitzhenry: That is a very nice way of putting it. It is exactly about that shift away from undue process and towards the desire to push out as much information as possible in an accessible way to the public and the implementation of that desire.

The Convener: As you have said, you wait an eternity and then two buses come along at the same time. There is the proposed member's bill and the consultation on which you have responded as one. Is there anything in the proposed member's bill that you were glad to see being proposed or anything that was in it but was omitted from the other consultation's proposals?

Daren Fitzhenry: It was welcome to see proposals on proactive publication being pushed forward in the proposed member's bill and mentioned in the Scottish Government consultation. If you will excuse me for this, convener, the two have somewhat merged in my mind, so I am not able to give you a blow-by-blow account of the differences, and I would be worried about making an error.

The Convener: There will be time for that in due course.

The final point that I want to make comes from your statement in the report. You said:

"it is clear that a strong and effective FOI regime and the openness and transparency it creates remains key in supporting accountability, strengthening participation and building trust in our public services."

I echo that because of all that is needed. We have heard a lot of evidence today about the importance of FOI. We have had a hint of the challenges that Covid created when, for very obvious and understandable reasons, resources had to be moved within organisations to service other immediate needs. However, it is good to see things coming back, although it is probably sad to see that happening as slowly as it is.

You are in your final period of being our commissioner. The committee will have an opportunity before you depart to talk again, but I wish you all well until then. Thank you for attending today.

Daren Fitzhenry: Thank you very much, convener.

The Convener: I move the committee into private session.

10:55

Meeting continued in private until 11:09.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba