



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Public Audit and Post-legislative Scrutiny Committee

**Thursday 19 September 2019**

**Session 5**



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**Thursday 19 September 2019**

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**PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE**  
**20<sup>th</sup> Meeting 2019, Session 5**

**CONVENER**

\*Jenny Marra (North East Scotland) (Lab)

**DEPUTY CONVENER**

\*Liam Kerr (North East Scotland) (Con)

**COMMITTEE MEMBERS**

\*Colin Beattie (Midlothian North and Musselburgh) (SNP)

\*Bill Bowman (North East Scotland) (Con)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

\*Alex Neil (Airdrie and Shotts) (SNP)

\*Anas Sarwar (Glasgow) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Claire Cairns (Coalition of Carers)

Severin Carrell (The Guardian)

Dr Craig Dalzell (Common Weal)

Rob Edwards (The Ferret)

Carole Ewart (Campaign for Freedom of Information)

Caroline Gardner (Auditor General for Scotland)

Stephen Lowe (Unison)

Nick McGowan-Lowe (National Union of Journalists)

Edward Mountain (Highlands and Islands) (Con)

Bailey-Lee Robb (Scottish Youth Parliament)

Gordon Smail (Audit Scotland)

**CLERK TO THE COMMITTEE**

Lucy Scharbert

**LOCATION**

The James Clerk Maxwell Room (CR4)



**Scottish Parliament**  
**Public Audit and Post-legislative  
 Scrutiny Committee**

*Thursday 19 September 2019*

*[The Convener opened the meeting at 09:00]*

**Decision on Taking Business in  
 Private**

**The Convener (Jenny Marra):** Good morning, and welcome to the 20th meeting in 2019 of the Public Audit and Post-legislative Scrutiny Committee. I ask everyone in the public gallery to switch off their devices or turn them to silent so that they do not affect the committee's work.

Agenda item 1 is a decision on taking business in private. Do members agree to take items 4 and 5 in private?

**Members indicated agreement.**

**Freedom of Information  
 (Scotland) Act 2002  
 (Post-legislative Scrutiny)**

09:00

**The Convener:** Item 2 is post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. I welcome our witnesses and thank them for coming. This is the committee's first oral evidence session as part of our scrutiny of the act. The session will take place in a round-table format, with the aim of encouraging discussion. As usual, committee members will ask questions of witnesses, but witnesses can also ask questions of one another. However, we want to retain some structure to the discussion, so please indicate to me or the clerks—Lucy Scharbert or Alan Hunter—if you want to contribute. When you speak, your microphone will be activated automatically, so there is no need to touch your console.

I intend to structure the discussion around the four themes that are in paper 1, and I will indicate when we are moving on to the next theme. At the end of the discussion of the four themes, witnesses will have an opportunity to highlight any other issues that they would like the committee to consider.

Before we begin, I ask members and witnesses to briefly introduce themselves.

My name is Jenny Marra and I am the convener of the committee.

**Dr Craig Dalzell (Common Weal):** I am head of policy and research at the think tank Common Weal.

**Liam Kerr (North East Scotland) (Con):** I am an MSP for the North East Scotland region and the deputy convener of the committee.

**Bailey-Lee Robb (Scottish Youth Parliament):** I am the member of the Scottish Youth Parliament for Cowdenbeath and the trustee for policy and advocacy.

**Alex Neil (Airdrie and Shotts) (SNP):** I am the MSP for Airdrie and Shotts.

**Carole Ewart (Campaign for Freedom of Information):** I am the convener of the campaign for freedom of information in Scotland.

**Anas Sarwar (Glasgow) (Lab):** I am an MSP for the Glasgow region.

**Severin Carrell (The Guardian):** I am the Scotland editor of *The Guardian*.

**Nick McGowan-Lowe (National Union of Journalists):** I am an organiser for the National Union of Journalists.

**Colin Beattie (Midlothian North and Musselburgh) (SNP):** I am the MSP for Midlothian North and Musselburgh.

**Rob Edwards (The Ferret):** I am a director of the journalists co-operative *The Ferret*.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** I am the MSP for Kilmarnock and Irvine Valley.

**Claire Cairns (Coalition of Carers):** I am the network co-ordinator for the Coalition of Carers in Scotland.

**Bill Bowman (North East Scotland) (Con):** I am an MSP for North East Scotland.

**Stephen Lowe (Unison):** I am a policy officer with Unison Scotland.

**The Convener:** Before we start the discussion on the four themes, I want to get a sense from the witnesses as to whether the Freedom of Information (Scotland) Act 2002 has delivered its policy objectives. Has the act made public bodies more open and transparent, as it was designed to do? I invite brief opening comments from our witnesses on that.

**Carole Ewart:** Undoubtedly, the message that FOI law sends out will result in more openness and transparency. I was around when the legislation was designed—we were involved at the early stages and throughout the passage of the bill. It is designed to work on two bases. The first is about people making FOI requests to force organisations to be transparent and accountable; the second is proactive disclosure of information, which was supposed to be progressive. That second element has failed to realise its potential. There are important problems in that there has been regression. What was previously published is no longer published and there is regression in minute taking and the publication of agendas.

The act has led to greater transparency and openness, but the pressure seems to be on individuals to make requests for information rather than on organisations to enable the public to evaluate a much greater amount of information that is published proactively and is of the kind that people want to see.

**The Convener:** So you are saying that the act has increased transparency but that there are a number of issues, which we will address this morning.

**Carole Ewart:** Yes.

**Stephen Lowe:** The act has delivered up to a point. However, that point is going backwards.

When the act came into force, we had a mosaic of public services. We now have a kaleidoscope and the act is not sufficient to sustain transparency in that rapidly changing environment. What we have is a double standard, when what we need is a single principle.

**The Convener:** A double standard in what way?

**Stephen Lowe:** If a service is being directly delivered by a public body, FOI can be applied usefully at times. When the service has been outsourced to a private company or a third sector body, that public body is putting itself beyond the accountability of FOI. Billions of pounds are being transferred from accountability and transparency to a much more opaque system.

**The Convener:** We will probably get into more detail on that in a bit.

**Severin Carrell:** I would like to clarify one point—Rob Edwards and I are here as representatives of the 42 journalists who signed our joint submission. Our task is primarily to speak to that agreed submission and the evidence that we supplied alongside it.

The one thing that we would say is that FOI remains what it was designed to be, which is a universal service that ought to be free for all and to which there ought to be equal access for all. One of the problems that we encounter is that the notion of it being a universal service that is open and free to all is being undermined and harmed by some of the problems that we identified in our submission. As an individual journalist, I endorse some of the comments that Carol Ewart and Stephen Lowe made about some of the deficiencies; the multiplicity of public agencies or bodies in the private sector that have public sector roles is becoming quite a significant part of the problem. We also think that there are a couple of key issues about the public bodies and organisations in the public realm that were given exemptions by the original act. They ought to be considered as well, namely and specifically the Crown Office and the royal household.

**Bailey-Lee Robb:** Through the act, young people are now able to access information that they might not have been able to access before. In that way, the act is working for young people but, obviously, improvements can be made. Only 25 per cent of young people are aware that freedom of information is there for them so that needs to be addressed.

**Dr Dalzell:** I would echo and amplify Carol Ewart and Stephen Lowe's points, because they are the essence of our own submission. You can imagine how opaque things were before freedom of information; it has certainly been an improvement, but it needs to go further. We need to extend it to places such as the Crown Office

and private sector organisations that are using public money; they need to be under the same scrutiny as public bodies using public money.

A fundamental limit to the current FOI system is that, in order to get information and get an answer, you have to be able to voice the question. If you are not aware of a contract out there, for example, you cannot ask questions about that contract. We would like what we have called a glass-wall approach to freedom of information, where there is a maximum level of proactive disclosure. Anything that would ordinarily be released under an FOI should be proactively released.

**The Convener:** Yes. We have certainly heard some evidence on that before.

**Rob Edwards:** I would add very briefly to what my colleague Severin Carrell and others have said and add my endorsement to most of what has been said already. The freedom of information regime that was introduced in 2005—when I was also around—has made a huge improvement. It has made for much more openness and transparency.

One of our main concerns is that now, years on, the act is being sidestepped by people not recording information. That refers to one of the topics that you mentioned, convener. If it is the case that there are parallel systems for making decisions by public bodies that are designed to avoid FOI through the process not being recorded or being conducted informally or through minutes not being taken, that is a significant concern that needs to be addressed.

**The Convener:** Great—that is theme 3, which we will come on to.

**Nick McGowan-Lowe:** Many of my colleagues round the table are in rough agreement, so I will be brief. The freedom of information legislation has set a high standard for a culture of openness and transparency, but although a high standard has been set, there are clear problems with how that is being implemented, and there is a desire on the part of some organisations to test the limits of that. Decisions are being made in a way that takes them out of the public eye, and public money is being moved out of the way of public scrutiny.

In addition, it is clear from some of the submissions that I have seen from organisations that handle freedom of information requests that a culture seems to be creeping in whereby journalistic requests are seen as annoying flies to be batted away, rather than as being in keeping with the aims of openness and transparency and having public bodies that are accountable.

**The Convener:** That was very helpful.

Theme 1 is making a request for information, which some of you have already touched on. We

have a couple of questions on that theme, but I will begin by asking the witnesses to talk about any specific issues that they have to do with the process of making a request for information.

**Claire Cairns:** Our submission relates to the FOI requests that we submitted to all local authorities in October and November of last year. I will take you through the process and tell you about the issues that we encountered along the way.

The first issue was identifying where to send each request for information. Our requests were for bespoke information, which meant that we had to send individually to each local authority area. First, we had to identify where to send the request. One of the issues around that was that we were asking for information about funding associated with the Carers (Scotland) Act 2016. In one instance, that funding was routed through the local authority to the health and social care partnership while, in another, it was routed from the health board to the health and social care partnership. The difficulty was that, in many areas, we went through the local authority, but it told us that the information in question pertained to the health and social care partnership rather than to it. That happened in four areas. In one area, the local authority said that the request needed to go to the health board, but when we went to the health board, it said that the request was not for it either, so I had to go back and insist on getting a contact in the health and social care partnership.

That is likely to happen increasingly, because a lot of information pertains to partnerships. The difficulty is that the information that is provided on websites about where an FOI request should be sent always gives a contact in the local authority. We need to nail down whose responsibility it is to deal with such requests and to make sure that that information is clear for people.

The second issue that we had was to do with timescales. Of the information that we got back, 14 responses to requests were received late, seven of which were received five to seven weeks late, two were seven to nine weeks late, two were nine to 11 weeks late and three were 11 to 13 weeks late. In addition, there were three requests to which we received no response. We did not chase up the requests to which we did not receive a response or complain about that, because we were on a deadline. We are quite a small organisation and we did not have time to follow that through. Therefore, those three have been left as they are.

When we received information, although I felt that our questions were quite clear on what we were asking for, a large number of the responses were incomplete or the responses were very brief or vague, and, in some cases, we believe that they

were inaccurate. Overall, although we got a lot of information from those requests—it was a very useful exercise for us, and it was really the only way to find out how the money that was received to implement the 2016 act had been spent at a local level—there were a lot of holes in the information.

I will refer to one or two responses that we received to illustrate that. From one area, the only response that we got was that £80,000 was given to the local carers centre to provide carer support. However, £413,000 was allocated to that area. There was no explanation of what had happened to the rest of the allocation. There were a lot of responses like that, in which we were given partial or inaccurate information.

09:15

**The Convener:** That is a fascinating case study. Your organisation, the Coalition of Carers in Scotland, would expect consistency across the country, because the policies across the country are the same. It sounds as though you were getting different information and being directed to lots of different places.

**Claire Cairns:** Yes. It goes back to the points that were made at the beginning. That information should have been publicly available. We should not have had to make a FOI request in the first place.

A lot of the information that we received would have come from integration joint board minutes. Some of those minutes might have been available on websites, but they are deep into the websites and we would have had to read through six months' worth of IJB minutes to find out the point at which they discussed the matter and what they minuted from it. Sometimes, the minutes are brief and do not go into detail. Information should be available from every area about the spend on services such as carer support.

**Carole Ewart:** I consider that to be a matter of huge public interest. I agree that some submissions indicated that people were abusing FOI by asking odd questions or asking vexatiously. However, the information should have been proactively published.

What Claire Cairns said confirms what lots of people tell us. It is difficult to capture that, so it is great that she was able to do that.

It used to be simple to make a FOI request. When the law became effective on 1 January 2005, we could go on to the websites of the designated organisations, click on the button and make an FOI request. Hurdles have now been put in the way. First, it is not as easy to find out where to send an FOI request. Recently, we had to open

an account with a local authority on its online portal in order to make a FOI request. On occasion, we have to fill out a pro forma, which means that we do not have a copy of the request that we submitted. Working out who to send a FOI request to has become unduly complicated, because it is now more complicated to work out who delivers public services or services of a public nature.

I repeat that we have a problem with arm's-length external organisations. Audit Scotland is unable to tell us how many there are in Scotland. Its report of a few years ago advised that there were 34 major ones. We also know that, under section 6 of FOISA, publicly owned companies are automatically designated. Despite the fact that, under the model publication scheme, the information should be proactively published, there is no list of publicly owned companies.

**The Convener:** We will come on to that issue. Anas Sarwar has a question regarding private companies and the functions that they carry out and whether they can be captured under FOI—a point that Stephen Lowe raised. Carole Ewart said that it has become more complicated to put in an FOI request. You are from the campaign for freedom of information. Do public bodies do that intentionally in order to limit the number of freedom of information requests that come into them?

**Carole Ewart:** Absolutely. We believe that it is deliberately designed to put people off from making FOI requests because the simple process that was used initially has become much more complicated, despite the fact that the point of so many public initiatives has been to make accessing services simpler and despite the unification of services across local authorities.

One submission suggested that there should be just one website that gives the FOI link to all the designated bodies, so that we can easily access the information. It should not be complicated. A number of the complaints from designated bodies were about the imprecise nature of the FOI request that they received. It is now more difficult to make a FOI request, because public services are more complicated. That makes it more difficult for the public to understand what sort of questions they should ask as well as to whom to direct them.

**Severin Carrell:** As we are on the theme of local authorities not only being difficult to access but using different standards and tests—even though, arguably, they should be using the same model—I will add a piece of supplementary evidence as a case study. It is from a colleague who contacted me a couple of weeks ago, after this committee session was publicised. He said that East Lothian Council blocked an FOI that he had submitted to every other council. The other



councils responded to it with no fuss, but East Lothian Council attempted to charge for one hour of work, saying that it was unfair that councils had to fund our research. That journalist appealed and was eventually given an answer. However, he is worried that local authorities see FOI as a free research tool, rather than a basic universal right and, as FOISA sets it out, a statutory right. He is also concerned that it is an example of journalists and FOI applicants being used as a weapon in a war between councils and Government about funding. That is an additional example of the experiences that we have on a day-to-day basis.

**Anas Sarwar:** I am struck by Carole Ewart's comment that there is no publicly available list of ALEOs or publicly owned companies—showing either the names or the total number—and by Stephen Lowe's and Severin Carrell's comments about the organisations that are not covered by the FOI legislation. Can you give us practical examples of areas where private companies or third sector organisations are acting as public sector delivery arms and getting public money and therefore should be covered by the legislation? Severin Carrell mentioned a couple. Does Stephen Lowe want to pitch in?

**Stephen Lowe:** Glasgow City Council's information technology and information and communication technology used to be delivered in-house. Then it was delivered by an ALEO. Three or four years ago, the council privatised its IT service. A Canadian company, CGI, has an £800 million contract to deliver ICT services for 12 years. If we stick the term FOI into CGI's website, we get nowhere, because the company is not covered by it, so £800 million of public money is not interrogable for FOI purposes. It would have been interrogable when the council delivered the service directly, although far less when an ALEO delivered it.

Another example is selected purchases of social care. The Glasgow City Council has a £304 million contract running over four years that is split between just under 40 organisations. Going down the list, we could put a FOI request into a handful of them. We could not do so for the vast bulk of them, because they are third sector or commercial. That means that £304 million of public money, which is delivering the most intimate of services, is outwith that level of public scrutiny.

**Rob Edwards:** I will add to that. An issue that concerns us at *The Ferret* and other journalistic colleagues is the hubcos, which were set up under the Scottish Futures Trust. They are responsible for building lots of public services, such as schools and hospitals, around the country. They are exempt from FOI, yet they spend vast sums of public money to provide public services. From a journalistic point of view, that is frustrating. The

same applies to the Government organisation the Improvement Service. Bizarrely, the Convention of Scottish Local Authorities is not subject to FOI. Maybe it should be.

**The Convener:** I was not aware of that. That is interesting.

**Bailey-Lee Robb:** According to an Ipsos MORI poll from last year, despite local authorities having a legal obligation to respond to freedom of information requests, only 28 per cent of young people were confident that they would get a response. The same survey showed that 38 per cent of young people felt that public bodies are more likely to respond to requests from adults than young people.

When we look at it as a whole, we see that freedom of information awareness and confidence are low for young people. That is because they feel that the process is too complicated, just as Carole Ewart and others have said. They also feel that they will not be taken seriously. They feel like they are a pain in the backside for local authorities. That is how they feel they will be treated. They do not understand the process, because they are not educated on it. We need to educate our young people to know that the information is at their fingertips and that they can request it.

Young people also feel that local authorities will just kick the can down the road; they will use up the 20 days and then come back with a question and the clock will start ticking again.

That, briefly, is how young people view freedom of information.

**The Convener:** That experience is not unique to young people. Local authorities do that to me as well.

**Anas Sarwar:** I presume that it is universally agreed that any private sector, third sector or other organisation that is receiving public funds should be open to FOI legislation.

**Carole Ewart:** Yes.

**Stephen Lowe:** If you are delivering public services, you should be. If a company is selling paper clips to the council, there is a limit to how much FOI should apply. However, if a company is taking money for delivering services, that is a different thing.

There should be a single principle. If a service is being delivered by public money, whether by a council or a health board or by Carillion or one of those other outfits, the same standard should apply, and it does not apply currently.

**The Convener:** I will put Anas Sarwar's question to Rob Edwards, who mentioned a

number of organisations. Would you like to see them fall under the ambit of the act?

**Rob Edwards:** Yes.

**The Convener:** Thank you.

**Severin Carrell:** One of the salient points of this topic is that there has been a lot of privatisation of the delivery of public services, particularly through the Scottish Futures Trust model. Secondary schools or hospitals that are run and operated as private finance initiative projects for 25 years, and companies that are making significant profits as a consequence of providing core services, such as maintenance or janitorial services, are excluded from the act. One of the interesting questions that emerge when we start to investigate that is that the Scottish Information Commissioner has upheld the defence by local authorities or public bodies that are using such companies that they are commercial, in-confidence contracts. We think—and others have raised the point in submissions to the committee—that that is a significant problem. They are delivering public good, public benefits and public services, and the point at which the commercial interest starts to be seen as superior to the public interest must be tested. People must be much more alive to the purpose of services. They are not for the private company; they are for the public sector.

**Dr Dalzell:** I am willing to accept a certain level of pragmatism. It might not be entirely fair to say that FOI should apply to the entire company in the case of, for example, a hypothetical large multinational information technology services company that serves many different Governments plus the Scottish Government or Scottish local authorities. However, we should certainly be able to use freedom of information to track where and how our money is being spent.

**Alex Neil:** I seek clarity on something that Stephen Lowe said when he made a distinction between delivering a public service and buying something in. The example that he used was paper clips. I just want to be clear that we are not just talking about delivering public services but about supplying products. In procurement, information about anyone who has a contract with a public agency or company or a Government department should be publicly available.

**Stephen Lowe:** The contracting procedure should be fully available. I made the distinction because it just so happened that I was looking down the list of Glasgow's contracts and saw that it gets its milk from Wiseman Dairies. To be frank, I am more interested in being able to interrogate the care services contracts than that.

**Alex Neil:** That might be true for you, but a competitor to Wiseman might also be interested. Surely it is as entitled to that information as you

are entitled to the information that you are interested in.

09:30

**Stephen Lowe:** Quite possibly, but that is not so much my concern. I saw from Glasgow City Council's written submission that it gets a lot of FOI requests from commercial entities, which made me think that, if it puts so many of its services out to the marketplace, it has to expect people to seek market information. Perhaps a way round that would be to deliver more services in-house for the public good rather than private profit, but that is very much a Unison point of view.

**Dr Dalzell:** On the commercial interest issue, if a private company wants to get involved in public spending, the price of that is opening up its books to freedom of information requests. A competitor might come in further down the tendering process and use that information, but it would be under the same conditions as the first company. I am fine with that.

**Alex Neil:** It is a level playing field.

**Carole Ewart:** I want to add to the conversation the duty to comply with human rights law. The Human Rights Act 1998 requires everyone who delivers public services or services of a public nature to comply with the European convention on human rights. Article 10 is the right to form an opinion by receiving and imparting information. Through the famous Magyar case, it was decided at the European Court of Human Rights that that equated to the right of access to information. In our submission, we pointed out that non-governmental organisations, bloggers and journalists have an elevated right, because they act in the public interest.

That is relevant to our conversation because we are talking about the fact that, when services of a public nature are delivered, the organisations that deliver them should be covered by the 1998 act. Therefore, if a voluntary or private organisation delivers services of a public nature, it should be open to scrutiny by providing information, which would allow us to form an opinion as to whether we were getting value for money and fit-for-purpose services. We must be mindful that there are several regimes that impact on how FOI is delivered in Scotland.

**The Convener:** We have touched on the issue of public contracts being outsourced and private providers coming into the ambit of FOI.

I am also acutely aware of organisations set up in Scotland that are huge recipients of public funds from various sources, either directly from Government or from universities. The one that springs to mind in my region is the V&A museum

in Dundee, which I believe does not fall into the ambit of FOISA but is a huge recipient of public funds. Do witnesses have any experience of similar organisations that are 50-plus per cent funded by the taxpayer but are not subject to FOISA? Should such organisations come into its ambit?

**Severin Carrell:** I thought that the museums sector was covered. Does that mean that National Museums Scotland is not covered either? I have not looked at that.

**The Convener:** I am not 100 per cent sure about all of them, but there are certain organisations that are not covered.

**Severin Carrell:** It is completely logical that they should be.

**The Convener:** Should there be a specific test for that, such as a 50 per cent funding test? Those organisations are set up as companies and private entities in many different ways, so how would we decide which were covered?

**Severin Carrell:** Would the question not be about an organisation's founding purpose? If its founding purpose is to charge entry fees for everything as a private company but it manages to get public funding for doing something additional for the public, that is fine. However, the V&A Dundee is set up as a public institution and is publicly funded, with the exception of a small amount of private charitable donations. It is funded by the lottery, the Scottish Government and Dundee City Council, so it is axiomatic that it should be covered.

**The Convener:** That is helpful.

**Carole Ewart:** I want to raise the issue of the scrutiny process by which those organisations are funded. If the lottery or the local authority puts in money, they do not just hand over a cheque. They require accountability for the spend, which is the kind of information that should be routinely and proactively published.

**Rob Edwards:** I have a quick point from a wider perspective. I stress that this is my personal view and is certainly not that of all journalists.

In principle, I do not see any reason why, if FOI has been extended to all public sector agencies and successfully extended to all major bodies that spend public money to deliver public services, we should not go several steps further and extend it to NGOs that provide public services and to private companies—full stop. I know that that is a whole different ball game, but it seems to me that, if we make improvements and get the principle of FOI, which is very important for democracy, transparency and the health of our society, to work well in the public sector, there is no reason why it should not be extended to the third sector and

beyond, perhaps even to journalistic organisations. Who knows?

**Stephen Lowe:** If we take an organisation-based approach, we will always be playing catch-up, because there is repetitive competitive tendering and reorganisation. Let us take the Glasgow ICT example. If the nature of the organisation makes it subject to FOI, people can simply change its nature for whatever reason and get out of that, whether or not they do that for that purpose. However, that will not be done if the principle is that there is accountability for public money via FOI. If there is such a gateway principle, that problem will be avoided. Kevin Dunion argued that in his submission, and that is the way we ought to be going.

**The Convener:** Wearing our other hat in the committee, we follow the public pound. If I understand you correctly, the principle would be that, if the public pound goes into an organisation, it would become subject to freedom of information. Is that right?

**Stephen Lowe:** Yes.

**The Convener:** Thank you.

I am keen to move on to our second theme, which is users' experiences and responses from public authorities. Claire Cairns has already given us a very interesting example, but I would be interested to hear a bit more on that theme if the witnesses want to add anything. Do the witnesses want to contribute on that theme?

**Severin Carrell:** Rob Edwards and I are here to talk about our joint submission. The obvious example for newspaper, television and radio journalists is the role of special advisers and ministers or officials with a public role in public sector bodies who influence how FOI requests are handled and what is disclosed, and put them through an additional level of filtering. Our submission goes into some detail about that, and we know that other witnesses who have put in submissions have made similar points.

From an objective point of view, we simply need to refer to the Scottish Information Commissioner's submission and to what Scottish Government ministers have undertaken to do, which is to limit that and give special advisers and ministers a role in only the most sensitive cases. We need more evidence that that is being adhered to. We remain concerned about the fact that, perhaps through the backdoor routes that Rob Edwards has alluded to, there are unrecorded ways in which special advisers or ministers can influence the disclosure or handling of FOI requests that journalists have made. There needs to be much greater emphasis on a neutrality of approach that is blind to the identity of the organisation that has made the application. In my view and, I think, Rob

Edwards's view, Daren Fitzhenry's submission is on the money on that.

I go back to the fundamental point that we are talking about a universal statutory right that should be blind and equal, and that access needs to be equal for all, even if there is a sense that we get privileges. Carole Ewart alluded to the Human Rights Act 1998. Of course we have additional rights in that context, but that does not imply that those rights somehow bring with them additional burdens.

**The Convener:** So you are saying that, when a request goes to a public authority, whether it the Government or a council, the person who deals with it should not know who it has come from.

**Severin Carrell:** That has to be the basic principle. That person ought not to change the way they behave on the basis of who made the request. People ought to be treated absolutely equally. The flipside of us being treated differently is that ordinary members of the public are treated worse than we are and that is a problem. Claire Cairns's experience is the flipside of this conversation. We are information professionals. We share information among ourselves. We know where to look and how to look; we also know how to chap on the door very loudly if we do not get what we want.

**The Convener:** Claire Cairns—you are nodding your head.

**Claire Cairns:** Yes. I have another point about the quality of the information that we received. The people who are responsible for responding to FOI requests in local authorities, health boards or health and social care partnerships are not necessarily the people who have the best information.

After we put in the FOI request, we spoke to carer leads across Scotland. They are the people who tend to know all the ins and outs of service delivery to carers in their areas and they were quite disappointed about some of the responses that we received from their local authorities. They felt that the responses were not full enough, or that they were vague or not entirely accurate. I wonder where the people who respond to FOI requests get their information from. Should there not be more of a process of going back to the people who are more involved in the provision of whatever the FOI request is about?

In one area, we received the response:

"Service proposals from a range of agencies including the voluntary sector are currently going through the appropriate governance approval processes and are ... not confirmed at this time."

That was quite a vague response to get eight months after the implementation of the Carers

(Scotland) Act 2016 but, behind the scenes in that area, a lot of good work was going on that was not captured in that response. In response to our question about the £2 million that went in in advance of the 2016 act being implemented, one area said:

"The allocated £34k will be used to review policies and processes in preparation for implementation of the Act."

However, that was eight months after the implementation of the act. You have to ask yourself: what does that piece of information mean? I suspect that a lot of the time, people are just lifting responses from old minutes with no sense checking or accuracy checking.

We had to take the information that we received at face value when we were producing our reports, even though we knew that some of it probably should have been delved into further.

**Nick McGowan-Lowe:** To echo Severin Carrell's point, it is the experience of our members that their requests frequently come back with some kind of indication that they have been handled in a different way because the requests are from journalists or media or broadcasters; the requests have come back with indications on them that say, "This is a journalistic FOI request or a media request." We can only speculate why that is.

We represent members who work as communications officers and who are tasked with handling FOI requests on behalf of organisations as part of their job. I am told confidentially that those requests are handled differently because they are seen as a greater danger to the organisation. However, those two channels should not exist. The process should be blind as to whether the request is coming from a member of the public or a member of the media.

**Bill Bowman:** I recognise Claire Cairns's point about getting information that seems incomplete or does not seem right, but is it not the job of the person answering to just give you what is there? You said that you got information but no explanations. If people start interpreting and explaining the information, that seems a little bit more dangerous than just giving you what is there. Unfortunately, we may then find out that the information that is held is not very good.

Stephen Lowe spoke about public bodies outsourcing to companies, which then means that you cannot get information through FOI requests. The contracting organisation should have the information, so can you not ask it to get that information?

**Claire Cairns:** We are planning to repeat our FOI request and we will be asking for the eventual end spend relating to the question that we asked

about the previous year. We think that we will gather more information this time and we suspect that there will be a difference between people's intentions about what they planned to spend the money on and what happened in the end.

I take Bill Bowman's point that it is not for the person who is providing the FOI response to interpret that information for us, but I felt that, in some areas, the information was incomplete, which is a different issue entirely. I think that a lot of the responses were speculative. We were eight months into the implementation of the 2016 act. At that point, they really should have understood what the money was being spent on in that financial year; in that sense, the responses were quite disappointing.

**Bill Bowman:** You say that they should have understood but, unfortunately, they just gave you what they had.

**Claire Cairns:** I wonder whether it was just somebody reading through minutes and then copying and pasting. That does not give a full response because, quite often, what is recorded in minutes is not what ends up happening. There could be further information at a later stage that is not captured.

09:45

**Stephen Lowe:** I have two comments on Bill Bowman's point that people should go to the organisation that does the contracting. One is that it is still the case that two standards are built in. You can go directly to the health board and get all sorts of information, right down to shift patterns and staffing levels, whereas, if services are outsourced to a private company, all that you can get is what the health board says the contract should result in. That will not go into the same level of detail, because the board is interested only in the end result. However, there are all sorts of reasons why people might be interested in how that end result is achieved.

Claire Cairns's experience of doing that sort of wide-scale FOI exercise is exactly our experience centrally. However, I have to say that, generally speaking, it is our members who respond to requests in an awful lot of public bodies, and dealing with FOI is simply not perceived as a front-line service by most bodies.

**The Convener:** Should it be perceived in that way?

**Stephen Lowe:** Yes.

**The Convener:** Why?

**Stephen Lowe:** It is a public right and is the same as other rights. We are doing work with our members on the issue. That work is still at the

survey stage, so this is a bit anecdotal, but the general trend is clearly that the units that deal directly with FOI have had reductions in staff. An awful lot of organisations do not provide a great deal of training on how FOI requests should be handled. There might be two or three people who know that and who initially get the requests, but they do not have the information and they then have to find someone else.

**The Convener:** Let me put that back to you a little. Councils have raised in written evidence the fact that they get vexatious requests.

**Stephen Lowe:** How do you define "vexatious"? Once you start going down that route, you are quickly in fairly dodgy territory. Either it is a right or it is not a right.

**The Convener:** Does the legislation therefore need to deal with that and have some parameters, or should bodies just respond and respond and respond?

**Stephen Lowe:** It is a right. If the information is there, it should be published. That takes me on to the point that, if there were more transparency, there would be less scope for freedom of information requests.

**The Convener:** We will come on to proactive publication in the next theme.

**Dr Dalzell:** I have not quite had the sort of experiences of FOI that Severin Carrell mentioned, but maybe that proves his point. I would definitely identify more with Claire Cairns's experience. I have had information back that suggests that the person at the other end has answered the letter of the question rather than the spirit of it, because they have given the bare minimum to deal with the question. That has caused issues for us. Compared with other think tanks, we work fast. The journalists here will know about tight deadlines and they may even be a little faster than us. If you have to wait for an FOI response and then find out that it is insufficient so you have to follow up on it, that pushes your deadlines way out and is tricky to get round.

Maybe some of my questions have been seen as vexatious. I do not know, because I do not know what is going on at the other side, which kind of gets us back to the issue that we will talk about later, which is the need for proactive disclosure to sidestep the problem entirely.

**Liam Kerr:** My question arises from some of the answers that we have heard, particularly the point that Stephen Lowe just made and Severin Carrell's and Carole Ewart's points about difficulties at local authority level—Severin specifically mentioned local authorities. We have heard that there is no one easy system for requests. However, a number of the

representations that we have received refer to the cost and the resources that are required at council level to deal with huge numbers of freedom of information requests. Rob Edwards talked about extending the regime to cover the third sector, which one would have thought would be even more challenging. Do you recognise that that is an issue and, if so, what is the solution?

**Severin Carrell:** I refer back to a point that we have addressed a couple of times. Jenny Marra asked why FOI should be part of bodies' central provision—the reason is that it is a statutory right. We hear public sector bodies accepting that FOI is a public good. The basic point is that, if it is a statutory right and a public good, it ought to be embedded in everything that those bodies do. It is not a peripheral offering or something that they can do if they have sufficient time and resources; they need to make it part of their central service provision.

I absolutely accept that there are resource costs, but I am afraid that some local authorities are using special pleading. We all have resource pressures. My industry is under enormous resource pressures—we have lost many journalists, our budgets are being slashed and there are immense pressures on colleagues in many Scottish newspapers to produce large quantities of copy. We could make the same special pleading case as well.

To a degree, there is an obligation on us to ensure that our requests are properly structured and focused so that we ask questions that we expect that the bodies can answer and that are not daft-laddie questions. Actually, it is poor research if we ask a daft-laddie question. The local authorities need to work out why they do not regard public scrutiny, transparency and accountability as central to their core purpose. It seems to me that those things absolutely are central and that local authorities need to reorient the way they approach the topic.

**Nick McGowan-Lowe:** I completely agree with Severin Carrell's point. Our journalists are under so much pressure that they do not have time to put in silly requests. That has come out as we have talked to journalists. They put in requests because they need to know information that needs to be in the public domain. Providing or revealing information that should be in the public domain absolutely should be part of the day job for organisations that spend public money.

On the idea of vexatious requests, any public service throws itself open to abuse. I particularly worry about the language that we are using here, because it clearly mirrors the idea of the vexatious litigant. There is an idea that our public services such as courts and freedom of information should under certain circumstances be taken away from

people who abuse them. Clearly, what is vexatious has to be considered carefully, and the court service does that. The number of vexatious litigants, who have to go through extra steps to bring a court action—the right is not completely withdrawn from them—is a fraction of the total number of litigants.

**The Convener:** To clarify, the term “vexatious” is used in the act. Are you suggesting that it should be taken out of the act?

**Nick McGowan-Lowe:** No, but it clearly mirrors the idea of the vexatious litigant in the court service, and there are clear barriers there. We do not want what is vexatious to be defined by the person who receives the question.

**The Convener:** I understand.

**Rob Edwards:** I have two slightly different points. One is about the controversial issue of vexatious requests. The Scottish Information Commissioner makes the point that the act gives public authorities enough leeway and should not be changed. Personally, I agree with that. The Information Commissioner also makes the point—this is the key thing, and it relates to Severin Carrell's point about FOI being a universal right—that it is the daft questions that are asked persistently by members of the public who think that something is wrong that reveal things of great public interest. That is how it is meant to work. It might seem like a request is vexatious to a highly pressured public official, but that is what the act is for. I would be very worried if, as some of the submissions to the committee have suggested, we widened the vexatious request exemption or made it easier to use, because that would deprive lots of people of their rights and it could mean that things that are of public interest are kept secret.

The second point sort of runs counter to what I have said. For years, I have been going to Holyrood's annual conference on freedom of information, as other people here have done. The conferences are mostly full of scores of freedom of information officers from all the public agencies. I take my hat off to them, because a lot of them work very hard to enforce the 2002 act and give people the right to information. However, some of them are stuck in organisations in which the hierarchies still think that freedom of information is an add-on or an annoying thing that they have to do, but it would be wrong to say that that is the case universally. There are lots of really good freedom of information officers, many of whom are Unison members, who work very hard in public sector agencies to convince them to do the right thing.

**Willie Coffey:** I have been looking back at the *Official Report* of the meeting in March at which the commissioner talked about vexatious inquiries,

which can also relate to the number of inquiries. I recall that my colleague Alex Neil mentioned that one person had sent 84 FOI requests within an hour. The commissioner has the power to reject such requests if they are considered to be vexatious, and he said that the Court of Session judgment gave some clarification on that matter, but it is clearly still an issue for people. Someone can say, "If the information is there, let's have it, because it will reveal certain things that are in the public interest." Does the panel think that we need to look at the issue in a bit more detail to clear up what is vexatious and who determines whether a request is vexatious?

**The Convener:** Severin Carrell, what would you do in that instance?

**Severin Carrell:** My problem with a lot of the evidence to the committee that I have read on the issue is that the concept of "vexatious" has been weaponised somewhat, as a way of pushing back, erecting barriers, increasing costs and making life more difficult for general applicants. I would ask organisations for evidence and to prove it. They should give us a breakdown and tell us about the cases. They should give us the percentages and tell us exactly how much extra effort was required to deal with the requests, as a proportion of the entire FOI burden that organisations have to fulfil.

In our submission, we quite deliberately went further in providing evidence than we did in our letter of two years ago. We made a series of very critical points about organisations that we deal with professionally day to day, and we came up with proof. We said, "Look—these are the exact cases." We can provide evidence, and we need local authorities to provide evidence of what they claim is wrong with the system, rather than just throwing out claims or making assertions.

**The Convener:** I will take Carole Ewart, and then we will move to the theme of record keeping and proactive publication.

**Carole Ewart:** I want to come back to Liam Kerr's question about cost. I echo what has been said about the Scottish Parliament deciding that freedom of information is a free and enforceable right. The Parliament has delegated the delivery of that right to 10,000-plus organisations in Scotland. Of course, a cost was going to be attached, but when the bill that became the 2002 act was passed, the Minister for Justice, Jim Wallace, said that openness, transparency and accountability were fundamental to Scotland, as the Scottish Parliament and a new way of doing politics were being set up, so no extra money would be available to agencies to deliver the work, because they should be doing that anyway. That was predicated on the belief that there would be lots of proactive publication of information, so the cost to

an agency of answering FOI requests would not be huge. The two issues are intertwined.

I also want to emphasise the point about staffing. There is some disquiet about the numbers of staff who are allocated to answer FOI requests. The numbers of staff in departments working with carers or whatever have been depleted, which has an impact on the availability of staff to gather together information to provide to the FOI officer who then answers the FOI request. That has an impact on overworked staff and their days, and I understand the pressures that they are under. However, I come back to the point that Severin Carrell made: there is a corporate responsibility. We need to focus on saying, "We are committed to this, we are going to deliver it and we are going to deliver it well."

That brings me to the other point about cost. The Scottish Government is still subject to enforcement action by the Scottish Information Commissioner. There is a cost to the public purse of the Scottish Government not meeting its legal obligations, which is a worry. There is also a cost to the commissioner, because the fact that designated public agencies are not delivering FOI rights results in appeals to the commissioner. The system is creating additional costs as a result of failures to comply in the first place.

**The Convener:** Thank you very much, Carole. I ask Colin Beattie to begin our next theme.

10:00

**Colin Beattie:** We touched on this in part in our earlier discussions. The act applies only to recorded information, so if the information does not exist in that form it cannot be provided under the act. A number of respondents have highlighted concerns that certain information is not being recorded or minuted. Do our witnesses have any examples of that? What might be done about it?

**Severin Carrell:** I will start. Rob Edwards and I, along with his colleagues at *The Ferret*, have done a lot of work that has involved going back to the Scottish Futures Trust. From FOI requests made by ourselves and others, we know that meetings have taken place between Government ministers and senior figures in the trust—but off campus, as it were. For example, there have been breakfast meetings at the Contini restaurant on George Street, and other meetings inside Government buildings, which have been recorded in ministerial diaries but for which no agendas have been published and no minutes have been taken. We know that such practice is widespread across the work of Government and other public organisations, and we are absolutely certain that it is also a constant issue in local government. It concerns core questions of democratic

accountability and the capacity of constituents, voters and citizens to know what their elected representatives are doing on their behalf. If unminuted meetings are taking place on matters that involve huge sums of public money or public contracts, that is important.

I add a final point. There is a new aspect to the issue, which is about not just the duty to record such meetings but the inclusion of non-official means of communication. We know that the Scottish Parliament is presently wrestling with that, in connection with the special inquiry into the Scottish Government's handling of the harassment complaints against Alex Salmond and the disciplinary aspects of those at civil service level. There is a question there about access to WhatsApp messages, texts and private email communications.

That is also an issue at Westminster at present, with the Brexit affair and everything that has been happening at Downing Street. When I was researching I was reminded of several things that have happened already. One of the most interesting characters of all has been Dominic Cummings. We discovered that in September 2011 there was a piece in the *Financial Times* that proved that he, Michael Gove and other UK Government ministers of the time were using back-channel communications—their own or their wives' private email addresses—to discuss Government business, explicitly to avoid detection. When the Department for Education was challenged about that by the UK information commissioner and the *FT*, it was able to say that, legally—under the act—such information was not held or recorded. Well, it might not have been held or recorded by the department, but presumably it had been by Google, Yahoo! or Hotmail. There is therefore a question about whether we need to have a much broader understanding of our rights to access information, to have it recorded and if such recording happens unofficially—off campus—to have that captured, too.

**Colin Beattie:** Taking the examples in Scotland that you mentioned, are you suggesting that every meeting of a Government minister or official should be minuted and the minutes made available? Where is the limit on that?

**Severin Carrell:** Of course there is a limit. We have discussed the point among the group of journalists that I mentioned, but here I am speaking on my own behalf rather than for them. Such meetings are generally organised and arranged by civil servants and are held to prosecute public policy, with which such civil servants are involved. It seems to me that there is a point at which the staff of a minister's private office or civil servants in a particular directorate ought to be empowered to say, "Minister, because

this involves X it needs to be recorded and minuted." They must be empowered to have a level of oversight or intervention to ensure that that standard is upheld.

Of course, some matters will be routine and will not necessarily involve significant amounts of public money or pivotal moments of public policy development, which is fine. However, when they do—for example, if Angus Grossart, who is chair of the Scottish Futures Trust, which is in charge of close to £10 billion-worth of public money over the lifetime of SFT projects, meets a Scottish Government minister—meetings must be properly minuted and not held, for example, at Contini on George Street.

**Colin Beattie:** I am sorry to pursue that, but are you boiling it down to the fact that, when a critical decision is taken in connection with public finances or policy, it should be minuted? That is a bit of a judgment.

**Severin Carrell:** I know, but I am throwing it out there, because it is a topic of conversation. We must strike a balance and there is a limit to resources, but we need to avoid the idea that an issue ought not to be dealt with simply because it is difficult or will involve a balance or a test. We must have the conversation and work out what the balance is and what the tests are.

**Stephen Lowe:** I have another example. Unison represents the workforce at Scottish Water, so we take an interest in its structure. We were working with a young PhD researcher—he was young when he started—who was looking at the private water industry and its attempts to get involved in Scotland. He asked for the diary of the water industry commissioner to see who he was having meetings with. That became a long, drawn-out fight and, eventually, the information commissioner ruled that the water industry commissioner's diary should be publicly accessible. The diary showed that there were lots of meetings with private water companies. The water industry commissioner stopped keeping a diary, so, when the next request came in, the answer was, "We don't keep a diary any more."

**The Convener:** Was it in his wife's diary?

**Stephen Lowe:** I have no idea, because that was a number of years ago. However, there was a diary at one point, so how the commissioner plans his day now, I have no idea.

**Anas Sarwar:** Freedom of information legislation is about opening up access and transparency. Do Government and local authority officials now deliberately avoid putting things on paper or recording things because they do not want to be caught out by the FOI legislation? If that is the case, it defeats the purpose of the legislation.



**Rob Edwards:** I would be hard put to prove that in a court of law, but if you ask me for my personal opinion about whether that happens—yes. I do not know how widespread it is. My opinion comes from experiences over many years, for example of special advisers saying, “Don’t email me; call me.” We all know how those things work. By definition, it is tricky to make an FOI request to find out how people avoid FOI.

**The Convener:** Have you tried it?

**Rob Edwards:** Yes, but without any success. We cannot put numbers on it or quantify it. However, if it is not happening, you could knock me down with a feather.

**Carole Ewart:** I return to the issue around recording. I take the committee’s point. You are in a dilemma. Does the law need to be changed or do we simply require the current rules to be followed? The civil service code says that meetings that involve substantive Government business must be minuted. What is substantive to me might not be substantive to somebody else, so that should be more rigorously applied. The model publication scheme, which all designated bodies must accept, requires minutes and papers about proceedings and business to be made available.

There are issues around the delay between the meeting happening and the minute appearing. I had a conversation with someone who said, “We published the minutes a couple of months after the meeting but somebody was ill and we were looking for further information.” I said, “But it was a minute of the meeting that was held on that date. You should not be adding anything to it subsequently.”

There are all sorts of devices to delay publication. There is the Public Records Act 1958. There is also a presumption in FOI that, through the model publication scheme, meetings, minutes and agendas will be subject to scrutiny. Again, that relates to the culture of organisations and to whether there is a commitment at the highest level to openness, transparency and accountability.

**The Convener:** We have covered the minuting of meetings and how that is avoided. On the issue of proactive publication, I found Claire Cairns’s evidence striking because, with much of the information that she was looking for, it seems that it would have been a lot easier if it had simply been published on the website of the organisation in question or otherwise made publicly available. Should some of the information that you sought just have been available to you?

**Claire Cairns:** Absolutely. That would have made our job a lot easier. That information could have been included in various publications. Each area had to publish a local carers strategy this year or towards the end of last year, which should

have included the amount of money that it had allocated to carer support from the additional money that it received for the Carers (Scotland) Act 2016 and from other sources, but that information has not been included in most of the strategies. Making that information available in that way would mean that not just somebody in my position, but a carer in their local area who wanted some information about carer support, would be able to look it up. I do not think that it is that easy to find that out, and that is not the only area in which that is the case.

One of the most difficult things to do is to look at how money flows from its initial allocation through budgets to how it is spent. It is not easy to follow that transition. Even having done the FOIs, I do not think that we have the answers in all the areas.

**Dr Dalzell:** We have had the debate about where the line should sit when it comes to freedom of information and whether it should stay where it is at the moment or whether it should be pushed up. I reiterate that, wherever that line ends up, everything below it should be proactively published. We should not have to ask the questions. Anything that would be disclosed under a reasonable FOI request should just be proactively disclosed. That might involve resource costs, for example to do with designing new infrastructure and new systems, but transparency is crucial to democracy. If democracy is not cheap, that is fine. I am not saying that it will be cheap; I am saying that it is worth it.

**The Convener:** But how do public authorities second-guess what questions they might get to make that information available proactively?

**Dr Dalzell:** We need to have a good, hard think about what kind of information is stored and what kind of information should be publicly disclosed and start building that into the foundations of our information gathering.

**The Convener:** I have just put in an FOI request to discover how many single-sex female beds and wards are disappearing across hospitals in Scotland. How would a health board second-guess that I wanted that information? If the disclosure of that information would make it clear that the board had cut the number of such beds over the past few years, why would it proactively make that information available?

**Dr Dalzell:** That information should probably be available on some database or spreadsheet. It should be possible for you to look at the longitudinal data and to interrogate it yourself.

**Severin Carrell:** It is possible to look at other jurisdictions for models of proactive publication. A colleague of ours, Mark McLaughlin, is doing a lot of work on Donald Trump’s sojourns in Scotland and how much money has been spent on his

behalf at his own facilities. Much of that information is derived from several databases that the American Government and its agencies have put online. For instance, all contracts with the Department of Defense and the Department of State are proactively published; in fact, pretty much every federal agency publishes its procurement contracts, at least in headline form, online proactively.

**The Convener:** Are you saying that Trump's Government is more transparent than our Government?

**Severin Carrell:** Yes. In that regard, it absolutely is, but that is nothing to do with Donald Trump, I hasten to add; such openness has been around for quite some time. The same is true at state level in the United States. There are also other European countries—I think that the committee has had evidence to this effect—where publication of such information is a duty, not an add-on. It is simply a case of designing Government systems in the right way.

With the availability of cloud computing, public databases and freeware databases, the cost is not huge. It is not a case of going to IBM and asking it to design from scratch a data set or software package; it is all available.

10:15

**Stephen Lowe:** On the convener's specific example about single-sex facilities, surely if health boards are doing proper equalities impact assessments, the information would be available and they would not need to get it for you.

To follow up on Severin Carrell's point, any number of places across the world publish vast amounts of detailed information. I do not know which London mayor was responsible for this, but there is a wall of iPads and people can just go in and do all sorts of things on them. In Baltimore—more famous round here for "The Wire"—if someone reports a broken street light, they can track what happens to that complaint from when it is made. If you publish that level of detail, you are not going to have hellish many FOI requests.

I remember the standard response in the early days after the 2002 act came in. People would make an FOI request and they would get an email with a link to the website and where the response had been published. I had a wee look the other day and very few authorities are doing that any more. I might make a request and it will be answered, but Severin Carrell will not know that it has been answered, so he might make a very similar request and the authority will have to go through it all again. If the authorities proactively published even the results of FOI requests, that might help a bit.

**Alex Neil:** I want to make a distinction between the Parliament and Government, at local or national level. The Scottish Parliament had a problem at the beginning, in that we were literally flooded with requests every day, which were mainly about members' expenses. For the first four years of the Parliament, there was a headline almost every day about some expenses issue.

When George Reid became the Presiding Officer, he changed the system entirely and all expenses are now published regularly and proactively on the Parliament's website. That had three consequences. First, the number of FOI requests collapsed enormously. Secondly, the costs involved went down enormously, because people do not need to fish around to get the information. Thirdly, behaviour changed, primarily in the case of journalists but also among MSPs, because some members gave more thought to what they were charging the Parliament, knowing full well that the information would appear a month or two months later on the Parliament's website. There is, therefore, evidence for the benefits of proactive publication from our own example. At the time, some party leaders opposed the change but they are now its biggest fans because they realise that it has benefits.

We need to look for a solution to all the problems that we are discussing, and a good chunk of a solution lies in proactive publication. The Parliament's experience demonstrates beyond any reasonable doubt the benefits of proactive publication. I think that there is universal agreement on that.

**The Convener:** Does anyone want to disagree with Alex Neil on that point? There are no takers.

Alex, you wanted to move on to talk about solutions.

**Alex Neil:** That is the start of the solutions. My question is about what we want to do. There have been loads of submissions and recommendations, and proactive publication seems to be at the top of the list in terms of effectiveness and improving the system.

What are the top three or four things that the witnesses want Parliament to do to improve the situation and rectify the problems with the FOI legislation and its application? As Mrs Thatcher used to say, "Bring me the solution, not just the problem."

**The Convener:** After we have taken evidence, the committee will compile a report and make recommendations on whether the act should be revised and, if it should, what the changes might be. We are therefore keen to hear any solution, as Mr Neil said.

**Claire Cairns:** Carole Ewart has already mentioned a simple solution. All the contacts should be available in one place; that would make things a lot easier. It should be quite clear who the request needs to be sent to. To use the example that I gave earlier, if someone is looking for information from a health and social care partnership, do they have to go directly to the local authority or the health board? That needs to be clear.

**Rob Edwards:** In our submission, we make a series of specific recommendations, which Severin Carrell and I have referred to. They include having a “clear duty to record” to avoid having unminuted or unrecorded communications, expanding freedom of information to include

“bodies that derive all, or a substantial proportion of, their revenue from the public sector”—

we have mentioned some of those bodies—

“Removing the Crown Office’s exemption ... limiting the rules on non-disclosure of material concerning the Royal Family ... Limiting the rights of ministers and special advisers to oversee or influence information requests”

and having

“clearer duties on public bodies to follow best practice”.

**The Convener:** Thank you. We have the list in your submission.

**Bailey-Lee Robb:** Young people want the Scottish Information Commissioner to create an easy-to-use template for young people to send to public authorities, and for all 32 to use the same standardised form across the board.

**The Convener:** All 32 councils.

**Bailey-Lee Robb:** Yes. We also want the Scottish Information Commissioner, with partners, to educate and engage young people on freedom of information. We call on the Government for it to be taught in schools, so that awareness is raised and young people know that they can use freedom of information legislation.

There should be a media campaign to raise awareness among young people, because, as I said earlier, only 25 per cent—a quarter—of young people are aware that they have rights under the act. Social media, schools, youth groups and voluntary organisations should be used to raise awareness. Something should also be done to speed up the process so that requests are answered quicker.

**Dr Dalzell:** I endorse all the suggestions that we have heard so far. In addition, if we are not going for full, glass wall, proactive, total disclosure, we probably need an FOI advice centre, which would be a single shop where people could go to get advice on writing an FOI request, such as how to

form the question that they want to ask to get the maximum benefit from it and where to send it.

Even for information that is proactively disclosed, an advice centre might be able to help with directing people to databases. Using the example that the convener gave earlier, if someone wanted to find information on hospital beds, an advice centre could point them to it.

**Carole Ewart:** I want to emphasise the importance of a central list, which would set out the 10,000-plus public sector bodies that are already designated. It would add value because it would list publicly owned bodies—if we ever find out what they are—and ALEOs. Looking ahead to the designation of registered social landlords and their subsidiaries, it would list which of the RSL subsidiaries will be covered by FOISA, because that is still unclear.

The model publication scheme must be enforced by the commissioner and must be used better. The commissioner has set out a template and that could be replicated on the website of every designated body with links to all the information that comes under those headings.

We reckon that there is room for improvement in appeals to the commissioner, because when you make an FOI request at the moment, you do not have to mention FOISA. That is taken as a given—“I am asking for information; please provide it.” The appeals process is pretty complicated for people but, despite the terminology in the legislation, it should not be so complicated. People tell us that when they make an appeal, they just want to tell the commissioner the things that happened to them that were wrong and that were not in the spirit of the law. However, they have to give a detailed explanation, including the fact—although it is glaringly obvious—that the body did not respond within 20 days. That has to be stated as a problem before the commissioner will take up the case. The appeals system could be improved.

**The Convener:** Thank you very much. Your point on appeals takes me neatly on to theme 4—reviews, applications and appeals—which I anticipate will be quite short. Does anybody want to address those processes?

**Severin Carrell:** I am happy to do so, again, on the basis of our submission. We would like to have capacity to appeal the Scottish Information Commissioner’s rulings and judgments about appeals that we have made. There is an information tribunal system in England, about which the commissioner has given evidence. The commissioner feels that it is extremely unwieldy, costly and delayed, but flagged up the idea that the SIC should have the capacity to internally investigate its own decisions.

That relates to what Alex Neil said about the Scottish Parliament being proactive on publication. As I understand it, the Scottish Parliament is also the funding body for the Scottish Information Commissioner. Our view is that the SIC needs more money from Parliament, so that it can do its job better, expand its role, start being more proactive and do its own appeals more quickly. Its appeals process is clunky and often time-consuming.

As Carole Ewart said, it is often an intellectual challenge for professional journalists to put in an application. It is a burden to re-examine the process before we get to appeal and then to have to explain what we think is wrong and why. We would like the commissioner to be much more proactive, and to examine that experience from top to bottom. I have had experiences in which I had thought that I knew the issues, but the commissioner said, "Well, actually, that's not the problem. You have to go and think about that again and come back to us."

**The Convener:** There are no further questions on theme 4. Do members have final questions for the witnesses?

**Bill Bowman:** I will go back to the beginning, when Carole Ewart mentioned the kind of freedom of information process that the public want. Do the public have a real interest? On what do you base the statement about what the public want?

**Carole Ewart:** That view predates FOI law being passed in Scotland, when there were vibrant conversations about the kinds of information that people would want to see. That has also been the subject of regular polling by the Scottish Information Commissioner.

For example, people say that they want information about how public money is spent and how public services are delivered, on which there is already a lot of information. However, as soon as the Scottish Government announces an increase in funding for child and adolescent mental health services, for example, people want to know how that impacts their local community. By virtue of making such announcements, the Scottish Government makes those things matters of public interest, which people want to follow up. Recently, I have been to meetings at which people have said that it is difficult to understand where the money from the Scottish Government goes, on a local basis.

Local authorities and health boards are constantly making announcements, and people are often prompted by those announcements to make FOI requests. Therefore, we cannot always anticipate what the public want, but that is the point of FOI: we have the right to request

information and, if it is not proactively published, the right to receive an answer.

**Bill Bowman:** The public are interested when something comes up that relates to them.

**Carole Ewart:** People are interested in things that relate to them, their community and their place of work—why their place of work is closing and what intervention there has been, for example.

General practitioner surgeries are designated under FOI legislation. Recently, a lot of conversations have been prompted by issues in America about moneys that pharmaceutical companies have given to doctors, so people ask whether that has any impact on Scotland. I tell them to use FOI law to find out.

**The Convener:** MSPs have no further questions before we finish the session, so I turn to the witnesses.

**Dr Dalzell:** In answer to Bill Bowman, if, hypothetically, the Scottish Government were to announce tomorrow that it was scrapping the Freedom of Information Act 2002, I am sure that public interest would spike.

**The Convener:** That could be a technique.

**Bailey-Lee Robb:** This will tie back in with Bill Bowman's question about whether the public are interested. The public are interested—that is my view, not the Scottish Youth Parliament's. Because we are not all lawyers, journalists or technical people, the Scottish Youth Parliament—this extends to adults—wants the information that we request to be in plain English. We want it to be accessible, so that we can understand it. That needs to be stressed, because if we get information back and it is too clunky or full of jargon, what has been the point of waiting for it for 20 days or longer?

**The Convener:** That is a good point.

**Rob Edwards:** In my experience, people make FOI requests about things that they care about. People care about a lot of things that affect them. That will always be the case.

10:30

**Nick McGowan-Lowe:** I agree with the points that my colleagues have made today. I will pick up on a point that I made in my opening remarks. Journalists, the public and the legislation share the values of openness, transparency and accountability. However, it is a matter of concern to us that in some submissions to the committee there is an undercurrent of feeling that—as I phrased it before—journalism gets in the way of people doing their jobs, instead of being a way in

which the public hold public bodies to account when they spend public money.

One submission to the committee said that “the Act was created for individuals and not media houses”, which is astonishing. Journalists and individuals have the same rights under the act. The submission goes on to complain that “the ‘public interest’ ... in some requests” is “questionable”, and that some requests are just a journalistic “exercise”. Journalistic exercises are concerned with the public interest. We cannot pretend that there is a Venn diagram in which the two circles are completely unconnected.

**Stephen Lowe:** It is absurd that we have a situation in which, simply because of a contractual arrangement, people in Aberdeen have more right to find out what is happening in their schools than do people in Glasgow and Edinburgh. That is an inadequacy in the set-up. The single principle should be that with public money comes public accountability. The principle should not be about the name of the organisation or its corporate structure, the principle should be that we are allowed to follow the money.

**Severin Carrell:** On behalf of my colleagues and me, I thank the committee. The fact that we are having this meeting is terrific, and it has been useful to read a lot of the evidence that you have received. We now understand some of the mindsets that we need to start talking about.

Primarily, this is an extraordinary opportunity for the Scottish Parliament. You now have the chance to produce for the future an information transparency regime that will surpass everything that we currently have. Undoubtedly, better transparency is for the public good and strengthens our democracy and the country. I urge the committee to seize the chance.

**The Convener:** I thank our witnesses. This has been a dynamic and informative session. The next evidence session on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 will take place on 3 October, when the committee will hear from regulators and academics.

10:32

*Meeting suspended.*

10:39

*On resuming—*

## Section 22 Report

### “The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain and funicular railway”

**The Convener:** Agenda item 3 is a section 22 report entitled “The 2018/19 audit of Highlands and Islands Enterprise: Cairngorm mountain and funicular railway”. I welcome to the meeting our witnesses from Audit Scotland: Caroline Gardner, Auditor General for Scotland; Gordon Smail, audit director; and Maggie Bruce, senior audit manager. I also welcome Edward Mountain MSP, who is attending for this item.

Auditor General, would you like to make an opening statement on the report?

**Caroline Gardner (Auditor General for Scotland):** Thank you, convener. I will make a brief opening statement.

The report provides a summary of the circumstances surrounding Highlands and Islands Enterprise’s establishment of a subsidiary company—Cairngorm Mountain (Scotland) Ltd, or CMSL—to take over the operation of the Cairn Gorm mountain ski resort. I intend to prepare a more detailed report on HIE’s management of the ski resort, including the funicular railway, in spring 2020.

The Cairngorms mountain range is an environmental and economic asset for Scotland, and it plays a key role in underpinning the local tourism industry and the economy. HIE, which is the long-term owner and custodian of Cairn Gorm mountain, began the construction of a funicular railway to serve the ski resort in 1999.

I apologise for the number of acronyms that crop up in the report and that will crop up as I talk. I am happy to clarify what I can.

Cairngorm Mountain Ltd—or CML—assumed operation of the funicular railway in 2001 under a lease agreement with HIE. However, CML experienced financial losses, and HIE took CML into public control back in 2008 to keep the resort open. It transferred ownership to Natural Assets Investments Ltd—or NAIL—in June 2014 following a competitive dialogue procurement process.

In September 2018, CML took the funicular railway out of service because of safety concerns. In October 2018, it requested a working capital loan of up to £1.8 million from HIE in order to ensure the continuation of winter sports activities while the funicular was closed. HIE’s board rejected the request because of concerns about

CML's ability to repay the loan and because NAIL did not offer any security for the possibility of CML defaulting. CML subsequently went into administration, and HIE established CMSL in December 2018 to take over the operation of the ski resort.

HIE's 2018-19 financial statements make a number of references to CMSL, including an accounting provision of £9.6 million to reflect its obligation to repair the funicular.

HIE continues to develop proposals for the future operation of the funicular. That has involved in-house teams and consultancy support to consider options. The likely cost of bringing the funicular back to full working order and the development of a business strategy that will provide for the long-term sustainability of the resort are key issues. HIE intends to repair and reopen the funicular, but it is still not clear how much it will cost to do so, how that will be afforded, and what impact that will have on HIE's financial position. That is likely to require some tough decisions to be made over the coming months.

As members know, those events and the future of the Cairngorm funicular railway have generated significant public and media interest. It is important that HIE can demonstrate that its decision to transfer CML to NAIL was robust, that it managed its relationship with CML well, and that its decision making in the run-up to the company's administration was well founded. That will be the subject of my fuller performance report next year.

We will do our best to answer the committee's questions.

**The Convener:** Thank you very much, Auditor General. I ask Liam Kerr to open the committee's questioning.

**Liam Kerr:** We have just had a session on transparency so, for the avoidance of doubt, I declare that I got married at the resort. However, I will be as objective as ever.

At the start of your remarks, you very clearly set out the company structure. What were the responsibilities of each of the companies?

**Caroline Gardner:** I ask Gordon Smail, as the auditor of HIE who has looked very closely at that issue, to talk members through that.

**Gordon Smail (Audit Scotland):** As we have just heard, the structure is complicated. That has particularly been the case over recent months as events have unfolded. The key issue is that HIE owns the assets—the funicular, the buildings and the business on the mountain. The assets are therefore in public ownership.

Over time, different companies have been responsible for operating the business on the

mountain. They have operated the day-to-day business and, until recently, paid HIE rental income for the use of the assets. The businesses have been operated in that style, so there is a clear separation. In a technical sense, there is an agency agreement whereby HIE has handed over the rights of the operation of its public assets to a company—CML until around autumn last year and CMSL since then—to operate the assets on the mountain.

10:45

**Liam Kerr:** In October 2018, CML was still there and the funicular was closed. CML requested a working capital loan of up to £1.8 million to continue winter sports activities while the funicular was closed. That request was rejected by HIE. Did CML set out clearly what it needed £1.8 million for and how it would spend it?

**Gordon Smail:** We need to look at that in more detail. There is a separation—which we might discuss this morning—between what we set out in this report on HIE's 2018-19 accounts and the work that we are planning to do to better understand the circumstances around what happened at that time.

Broadly, a business case was made and HIE had to consider it. As I said a minute ago, the key thing for HIE is to make sure that it protects the public assets that it is responsible for. It is responsible for making sure that such assets are safeguarded and used to best effect. Presented with the circumstances, HIE had to do something. We need to look more closely at and make some judgments about what happened when things started to unfold in autumn last year, particularly regarding the problems with the funicular.

**Liam Kerr:** You might give me a similar answer in response to this follow-up question. I think that at the same meeting where CML requested £1.8 million and HIE rejected that, there was talk of a £1 million investment in snow-making equipment—I presume to keep the resort working—that HIE approved. Did it give approval for CML to purchase the equipment or did HIE purchase the equipment?

**Gordon Smail:** As you anticipated, that is the type of thing that we want to look at in a bit more detail. Our understanding is that HIE was on track to look at options about what might be available to support skiing and winter sports in particular, given the experience over recent years in relation to the availability of snow.

Our understanding is that HIE was going down the path of investigating how to improve the business on the mountain through the purchase of snow-making and snow-spreading equipment.

However, we have to unpick that a wee bit and understand the sequence of events better.

**Liam Kerr:** Yes, because if HIE has been getting involved in that sort of thing, it has stopped being simply a landowner and has been becoming an operator, like CML.

**Gordon Smail:** HIE owns the assets on the mountain and it is looking at what further assets may be available to support the business on the mountain. As I said, it is responsible for the operations on the mountain and for the public assets, and indeed it has a responsibility to support the economy, tourism and the like, so there are lots of elements to consider. We would want to look at those things in more detail as we get under the skin of the events that were happening around that time.

**Colin Beattie:** Auditor General, the feel of this report is slightly different from the ones that you normally produce. You give more of a position statement, rather than taking it to the next level. I presume that that is what you were referring to when you said that you were going to be revisiting the situation. What is the timescale for the follow-up report?

**Caroline Gardner:** You are absolutely right. This is one of the section 22 reports that I have the power to produce on the back of a body's annual audited accounts. There is a fixed timescale in legislation for doing that and a deadline by which such reports need to be laid. Given the public interest, I thought that it was appropriate to bring this report, which was produced on the back of the 2018-19 accounts, to the committee now.

As Gordon Smail said, we are doing the work that is needed to answer those wider questions, not just about the decision making last autumn but about the decision to enter into an agreement with Cairngorm Mountain Ltd back in 2014. We expect to be able to publish that report and bring it to this committee in spring 2020.

**Colin Beattie:** The questions that arise from your conclusions in paragraph 22 will, we hope, be answered in your follow-up report.

**Caroline Gardner:** That is our intention. In the report, we have tried to highlight, in effect, the accounting treatment and the financial implications for 2018-19. We are doing a wider piece of work to answer those questions and to take account of the work that HIE is doing to develop options for the longer-term future of the resort. The next report will be published in spring 2020.

**Colin Beattie:** This is a random question. Paragraph 14, on page 6 of the report, says that HIE spent £0.25 million on "legal and accountancy advice". Is that not a lot of money for advice?

**Caroline Gardner:** It is a significant amount of money. We would expect HIE to take proper legal advice, particularly in such circumstances. I will ask Gordon Smail to give you a bit more colour on what we have seen on this occasion.

**Colin Beattie:** Is it value for money?

**Caroline Gardner:** I do not think that we can answer that question yet, but we can give you a bit more information about what has been spent so far.

**Gordon Smail:** As the Auditor General said, and as the committee knows from what we have already explored, there was a complicated set of circumstances that involved the administration of one company handing over responsibility for the operations on the mountain to another company. As you would expect, lawyers and accountants were involved in helping to support the decision-making process. As the Auditor General said, that was appropriate. We will look at whether the amount represents value for money and at what has been expended.

I make the point that there were a complicated set of circumstances that we will need to untangle. HIE is looking at what options might be available after it looks at the circumstances that led to the administration of CML, as it was at the time, and at the subsequent starting up of CMSL.

**Colin Beattie:** On the need for that advice, the 2018-19 annual budget report recommends that

"HIE should consider whether its finance team has the capacity and expertise ... to account for the"

complexity of the transactions that

"it is involved with",

and whether the tasks that are, I presume, being outsourced could be brought in-house.

**Caroline Gardner:** I am not sure that that is quite right. I will ask Gordon Smail, the auditor, to unpick those issues a bit.

**Gordon Smail:** That is right, Mr Beattie. You are referring to our annual audit report, which accompanies the output from the year's audit work. The audit team and I have been reporting on those issues for the past couple of years. As we have done with other organisations, we wanted to highlight the capacity and expertise issues in finance departments. We thought that it was particularly important to refer to those issues last year and, indeed, again this year. The point was heightened this year by what we have reflected on not only recently at Cairn Gorm but in relation to other challenges that HIE faces. As I said, we are highlighting the fact that many things that are going on in HIE's business world require a good, strong finance department. We are ensuring that we reflect that and bring our judgment to bear.

We have had some positive responses from HIE, through its audit committee. It wishes to pursue those points to ensure that it is as best placed as it can be to deal with the challenges of Cairn Gorm and the many other financial challenges that we set out in the audit report.

**Colin Beattie:** My next logical question is about how HIE responded to the recommendations. Has it done anything about them?

**Gordon Smail:** Maggie Bruce and I were pleased with the response that we got from HIE's audit committee, which is taking up the recommendations and has been active in getting assurances from officials that action is being taken. The audit committee has asked for officials to give a clear steer on what they will do in response to our audit recommendations. We are pleased that the work has been taken forward in that way.

**Colin Beattie:** Taking that to the next step, the session 3 Public Audit Committee's report asked Highlands and Islands Enterprise to

"provide evidence to demonstrate that its current procedures and control systems produce dependable budget estimates".

In the light of the significant findings in the 2018-19 audit report, are you satisfied that Highlands and Islands Enterprise has in place procedures and control systems to produce dependable budget estimates?

**Gordon Smail:** Our report on the audit refers to our overall conclusions on the internal controls, which we believe are adequate for the preparation of the accounts.

**Colin Beattie:** Are they adequate or good?

**Gordon Smail:** They are adequate—they provide a safeguard over public money and controlled processes for the production of the accounts.

**Colin Beattie:** That is accountant speak.

**Gordon Smail:** We reach conclusions on that side of things annually, as you would expect. As you will see, there is quite a lot of information in our annual audit report.

On the budget, the audit report has conclusions in the section on financial sustainability, which is one of the dimensions that we look at. In that section, we highlight some of the substantial risks and challenges that HIE faces in its finances. Just to be clear, it is not just us who are raising those issues. HIE recognises the issues. In our section 22 report, which we are talking about today, we highlight a few sections in the annual report part of HIE's "Annual Report and Accounts 2018-2019" where the risk that HIE sees and some of the conditions that it has identified are needed to put

its finances on a more sustainable footing are writ large. HIE faces significant financial challenges.

**Colin Beattie:** I think that more questions will arise when the follow-up report is published.

**Bill Bowman:** I have a couple of questions about the "Conclusions" paragraph in the section 22 report. You state:

"It is important that HIE can demonstrate that its decision to transfer ... was robust, that it managed its relationship with CML well and that its decision-making around events leading to the company's administration was robust and well-founded."

The events happened some time ago. Has nobody asked HIE to demonstrate that already? Will HIE do that in future or has it done so already?

**Caroline Gardner:** That refers to the audit work that we will carry out between now and next spring. We have looked at some of those issues. Clearly, HIE will already have the information, records and documents, if it has them at all. However, to answer the questions properly, we need to go back and look at events in 2014 when CML was established to consider the due diligence that was done, the quality of the business case that was in place and the detail of the agreement between the two bodies. You will recognise that the audit of the financial statements is in itself a demanding period, so I made the judgment that we would produce a section 22 report now with what is known at this stage and then return next spring with a section 23 report that covers the wider picture.

**Bill Bowman:** My reading of the sentence that I quoted is that you have some doubt about whether HIE can demonstrate those things.

**Caroline Gardner:** It is not our intention to suggest that. My intention is that we should step back and look at the whole picture in detail with the proper audit evidence that we require to reach conclusions. As I said, we need to recognise that HIE is in the process of developing options for the future of the funicular railway and how it will be managed. I am holding off in order to give you the big picture.

**Bill Bowman:** In the next sentence in the "Conclusions" paragraph, you state:

"While HIE's intention is to repair and reopen the funicular, it is still not clear how much it will cost to do so, how it will be afforded, or what impact it will have on HIE's financial sustainability."

That is a serious comment, as it brings HIE's sustainability into doubt. We have heard that the audit report cleared the accounts and did not mention that issue. However, in the section 22 report, you give a clear warning that something could threaten HIE.



**Caroline Gardner:** I will ask Gordon Smail to comment in a moment, but I think that you are focusing on the specific going-concern judgment that the auditor is required to reach in relation to the annual reports and accounts. We are comfortable about that, given the status of HIE as a Government body that receives Government funding. However, given what is known about the cost of rectifying and making good the funicular railway and the impact on the financial position within its current budget, that is one of the things that we will look at in our further piece of work.

**Bill Bowman:** When you refer to an effect “on HIE’s financial sustainability”, to me that suggests that you are calling into question HIE’s ability to continue.

**Caroline Gardner:** During last year, because of the events around the funicular, HIE needed additional funding from the Scottish Government over and above its normal grant to enable it to carry out its activities. HIE is looking at the options for bringing the funicular back into safe operation and is looking at business models that might avoid the repetition of the problems that we have seen over a long period, heading for two decades. It is the issue of how the repairs can be carried out and how a sustainable business model for the future can be put in place that leads me to ask that question. I am not prejudging the answer, but it is an important question.

**Bill Bowman:** There have been previous occasions on which you have brought serious matters to the committee’s attention—for example, in relation to NHS Tayside—yet the accounts have been cleared. Very serious issues have arisen that have not been mentioned in the auditor’s opinion.

11:00

**Caroline Gardner:** That is not quite the position. The financial statements have received a true and fair opinion. I will ask Gordon Smail to talk you through the thinking behind that. Because I think that there are significant issues here, I have taken the judgment to produce a report using my powers under section 22 of the Public Finance and Accountability (Scotland) Act 2000, which is what we are discussing this morning. I will use my section 23 powers to answer the wider questions around that that do not affect the audit opinion but are significant in terms of how public money is used in the body.

**Gordon Smail:** As regards the technical point about the going-concern requirement, it is for the management of the organisation to make that assessment, because it is the management who produce the accounts and they have to decide whether a going-concern basis is the proper basis on which to prepare the accounts. As auditor, I am

required to do work to confirm that that is indeed a valid assertion. We do the work on that, as you would expect us to do, as part of the audit.

There are many public sector organisations that are under financial pressure and are experiencing challenges. The going-concern aspect is something that we look at, but it is unusual for it to become an issue in that technical sense because, in the case of HIE and public organisations generally, we can refer to the fact that the Parliament is committed to continuing to finance them through the Government. We must separate the technical nature of the clean conclusion that I came to in my auditor’s report in relation to the going-concern basis of the accounts from what we do in what we call our wider dimension public audit, which we do through our annual audit report. In that context, we believe that it is right for us to make judgments on financial sustainability.

In the case of HIE’s report, we have made it clear that HIE has to manage a range of challenges and risks. The report identifies two or three fairly substantial issues. It is in that context that we wanted to play in the issues surrounding Cairngorm, because the figures that we are talking about—which relate to what the funicular has cost so far and the prospect of repairing it in the future—are big numbers in HIE’s terms. HIE is a £100 million organisation and, as we say, the accounts this year contain provision of almost £10 million for repair of the funicular. It is right that we identify where there are risks to the organisation’s financial sustainability and make a judgment on the extent to which it is preparing for and dealing with those risks.

**Bill Bowman:** You just have to hunt for them, whereas the Auditor General brings us the report and makes that clear.

**Willie Coffey:** My question is on the same theme as Bill Bowman’s line of questioning. Does it come as a surprise that a funicular railway that is 20 years old needs to be maintained? Is there a design issue here? Is there an argument about maintenance and who is responsible for that? It seems to me that, after 20 years, such a facility will require maintenance and servicing, which will come at a cost. Why was provision for that not built in at the initial stages of the project? Was the possibility that the railway might need to be repaired at some stage in its life overlooked?

**Caroline Gardner:** That is exactly the sort of question that we will be looking to answer in the section 23 report next spring. You are right that there should be provision for maintenance in the agreement between HIE and the company that operates the resort, and there should be mechanisms for making sure that those provisions are monitored and that that investment is made. We need to do the work to answer that to our

satisfaction before we can report back to Parliament.

**Willie Coffey:** Is there a dispute about who owns the railway and who is responsible for fixing it?

**Gordon Smail:** The ownership of the funicular is quite clear—HIE owns it. Within that, there are questions that we need to look at to do with the relationship between HIE as the owner of the assets and the operator, which was previously CML and is now CMSL. As the Auditor General said, those are central points that we want to consider as part of the further work that we will do.

**Willie Coffey:** So there is no question of design failures or things like that; it is purely a maintenance issue that we are talking about, and what the cost will be.

**Caroline Gardner:** We do not know that yet. That is part of the wider picture on which we are looking to provide answers.

**Edward Mountain (Highlands and Islands) (Con):** I thank the convener for allowing me to ask a couple of questions. As members know, I wrote to the committee on the subject last year, and I am pleased that the Auditor General is looking at it.

I make the observation that HIE's cost of £10 million for repairing the funicular, which seems to be 50 per cent of the cost of building it, is an amazing figure. I do not accept that figure; I think that the costs will be much higher.

I want to build on an earlier question. From my experience as a surveyor I know that obligations exist between a landlord's agent—which in this case is HIE—and a tenant. Are you satisfied that £10 million-worth of repairs happened in the last year of Cairngorm Mountain Ltd's period of operation of the funicular railway, or do you feel that the landlord's agent failed to inspect the asset throughout those five years? I do not believe that repairs of that value happened in 2019.

**Caroline Gardner:** I clarify that the £9.6 million to which we refer in our report is the provision in HIE's accounts at this stage, which means that it reflects an uncertain amount. I ask Gordon Smail to talk members through what we know so far about that figure.

**Gordon Smail:** Much of the reasoning behind our bringing the section 22 report is to unpick and give some transparency on the complicated position that is set out in HIE's accounts, as the committee would expect us to do. The provision is there and meets the requirements of the accounting rules on how much has been set aside. However, there are uncertainties on that, which is what I think Edward Mountain is alluding to.

On the more fundamental aspect of his question, I go back to a point that we have made a couple of times. We need to explore further the nature of the relationship between HIE and CML and what expectations were in their agreement in relation to on-going assessment of the funicular's state of repair and what might require to be done to it. That is another central issue that we will want to look at.

**Edward Mountain:** Following on from that, will you also be looking at the payments that were made by CML to Natural Assets Investments Ltd for being a subtenant? It appears to me that money was being taken out of the asset but that no repairs were being carried out. I would like to have a handle on how much those payments were per annum.

**Caroline Gardner:** As part of our work for the section 23 report we are looking at issues such as the whole relationship between HIE and NAIL, the owner of CML, and the extent to which that was based on due diligence in the first place and then properly monitored during the life of the agreement, until CML went into administration last autumn.

**Edward Mountain:** Convener, I would like to go a wee bit further on that. Because of commercial confidentiality, it is impossible to see the terms of the contract between HIE and Natural Assets Investments Ltd. I want to know whether there was an agreement on subtenancy and change of ownership, as there would be in all commercial contracts. Where ownership of the asset ended up in 2019 was not where it started in 2014. I have severe doubts that any due diligence was carried out. Will you be looking at that? I think that we all know that Natural Assets Investments Ltd was the only organisation that was really interested in taking on the project.

**Caroline Gardner:** One of the benefits to the Parliament of having an Auditor General with the powers that I have is that I have access to contracts that are not otherwise publicly available. I have said that we will be looking at the due diligence that was done, the quality of the contract and the way in which it was managed during its life. We will note the specific issues that you have raised and will do our best to answer them as part of that work.

**Edward Mountain:** I have a final question. If, as I suspect, there is some dubiety about the way in which people have acted on behalf of the general public who own the asset—because although HIE holds the title, it is just an agent for the people of Scotland in this case—will those people be chased? Will you be advising that the matter is pursued back to those who have possibly taken money out of the asset and allowed it to crumble in front of their eyes?

**Caroline Gardner:** My responsibilities are to report to the Parliament on what we find in those areas, but we will certainly be looking at issues of accountability and liability as far as we are able to do so.

**Edward Mountain:** Thank you—and thank you, convener, for allowing me to ask those questions.

**Liam Kerr:** The committee published a report on the asset in 2009, at which point £26.75 million of public money had been spent on it. Have you any indication of how much public money has been spent up to this point?

**Gordon Smail:** We have. For the reasons that I mentioned earlier, in the section 22 report we have tried to highlight some of the important figures in HIE's accounts and to focus on its balance sheet as at 31 March, which is linked to our assessment of sustainability. Having carried out work to prepare for today's meeting, we believe that, in 2018-19, the overall cost incurred by HIE was of the order of £3.7 million.

I will briefly break that figure down. It includes £1 million on the snow-making equipment that was mentioned earlier and £2.4 million on the set-up and operation of CMSL. A final point that members might find helpful is that, as we mention in the section 22 report, there has been an associated cost of the order of £0.3 million for HIE's officers to deal with all the issues that have unfolded. We think that it has been quite good practice that HIE has been able to identify the cost that it has incurred through its people having been involved in that process. The cost has come about not through extra money having been spent but through the time and cost incurred through HIE officials having to deal with the Cairngorm issue instead of its other operations.

**Liam Kerr:** One assumes that the 2009 figure of £26-odd million was the global figure up to that point. Do we have one up to this point?

**Gordon Smail:** Not for the overall project. In the interests of helping the Parliament to understand the 2018-19 accounts when they are laid before it, we have looked specifically at the key elements that relate to the Cairngorm mountain project and HIE's involvement in it.

**Liam Kerr:** There is one final thing from me. Obviously a lot of public money has gone into the project, so there will have been investment in the asset itself. However, there will have been a much wider benefit of having such an asset there. Has anyone quantified the extra value of the return on that investment?

**Gordon Smail:** It is very much part of the business case that we see that starting to emerge. You are right to say that the issue is not just about the cost of repairing the funicular and the like;

there is a much broader one about the effect on the local economy, jobs and tourism. Lots of different factors are involved, but those are the issues that we would expect to see when we do our additional work. As auditors, our job is to look at the basis on which crucial decisions have been made. We look at what information was available, its strength and whether those decisions were reasonable based on the information that was available at that time. Those are all valid points that we would consider as part of the wider work on which we are now embarking.

**The Convener:** As members have no further questions, I thank our witnesses very much for giving their evidence. I now close the public part of the meeting.

11:12

*Meeting continued in private until 11:29.*



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