OFFICIAL REPORT
AITHISG OIFIGEIL

Public Audit and Post-legislative Scrutiny Committee

Thursday 19 December 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 19 December 2019

CONTENTS

PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE
29th 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:

Graham Crombie (Scottish Government)
Graeme Dey (Minister for Parliamentary Business and Veterans)
Gerry Hendricks (Scottish Government)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Public Audit and Post-legislative Scrutiny Committee

Thursday 19 December 2019

[The Convener opened the meeting at 10:00]

Decisions on Taking Business in Private

The Convener (Jenny Marra): Good morning and welcome to the 29th meeting of the Public Audit and Post-legislative Scrutiny Committee in 2019. I ask everyone in the public gallery to please switch off their devices or turn them to silent so that they do not affect the committee's work.

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

Members *indicated agreement*.

The Convener: Item 2 is another decision on taking business in private. Do members agree to take in private at future meetings draft reports on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002, the 2018-19 audit of the Scottish Prison Service and the Scottish Public Pensions Agency update on the management of the PS pensions project?

Members *indicated agreement.*

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

10:01

The Convener: Item 3 is post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002. I welcome to the committee our witnesses this morning: Graeme Dey, Minister for Parliamentary Business and Veterans; and, from the Scottish Government, Gerry Hendricks, head of the FOI unit, and Graham Crombie, head of policy and casework. Thank you all for coming.

I understand that the minister does not want to make an opening statement, so we move straight to questions. I ask Alex Neil to open the committee's questioning.

Alex Neil (Airdrie and Shotts) (SNP): Good morning, minister. As you know, there has been some concern about the unavailability of information from private companies that deliver public contracts. Should private companies that deliver public contracts be subject to the freedom of information regime, and should that be limited to matters that relate to the public contracts or should it be wider?

The Minister for Parliamentary Business and Veterans (Graeme Dey): As far as the delivery of public service contracts is concerned, our view is that private companies, or any organisations, should in principle be captured, but I think that—as you have alluded to—we need to be clear about what, among their activities, would and should be captured by FOISA. Clearly, the activities that are publicly funded absolutely should, but we have to be careful to ensure that FOISA captures only the public service element of their work and not anything else that leads perhaps to their competitors gaining a commercial advantage in an area of non-public business.

The Scottish Information Commissioner has been very clear on what he is looking for by way of the extension of FOISA. I think that he said that that should be where organisations provide public services on behalf of the public sector; essentially that was what our recently closed consultation was exploring. The factors approach that he suggested might be a proportionate way to proceed in terms of those safeguards. That is what we do at the moment. I guess that the only debate would be around what factors should be considered.

Alex Neil: I will give a hypothetical suggestion. One of the many advantages of Brexit will be that we will have a great deal more flexibility in relation to procurement rules. As you know, when we reformed procurement a number of years ago, we

wanted to include in the statute a provision that, in order to compete for any public sector contract, a company had to be a living wage company. If we made that a condition of getting publicly procured contracts, is that an example of where you would want to capture information about the whole of the company and not just the bit that is delivering the public sector contracts?

Graeme Dey: I am not sure that I agree with you about there being too many advantages to Brexit—we will have to agree to disagree on that.

This Government is very clear about its fair work agenda, but at this stage, I do not feel that we should speculate about exactly what should be captured by the extension that we are proposing. We have to consider the consultation findings, which we are just beginning to do. Once we have done so, we will make clear our thoughts about the shape that the extension ought to take.

Alex Neil: Are you looking at practice in other countries? For example, some of the Scandinavian countries have had such legislation for a very long time. As well as the internal consultation in Scotland, are you looking at practice elsewhere?

Graeme Dey: Let me bring in one of the team to answer that.

Graham Crombie (Scottish Government): I can confirm that, within the past year, the FOI unit has undertaken some international comparison work to see what approaches to coverage are taken in other countries, not just in Europe, but throughout the world. We are considering the outputs from that report.

Alex Neil: When you publish your report, will you provide information on the comparators?

Graeme Dey: We would be happy to provide that to the committee.

Alex Neil: That would be very helpful indeed; it would help to inform our report as well.

Graeme Dey: How quickly could we do that?

Gerry Hendricks (Scottish Government): I think that we can do that relatively quickly. We have the information now.

Alex Neil: We can leave it until after ne'er day.

Graeme Dey: We will get that to you, convener.

Alex Neil: Companies or agencies that are wholly owned by the Scottish Government are subject to FOI, but companies that are jointly owned with another organisation—sometimes, another public organisation—are not currently subject to FOI. That seems to be a bit of a contradiction. What are the Government's thoughts at this stage on extending FOI requirements to subsidiaries that are jointly owned?

Graeme Dey: I think that I would use the word "anomaly". As we have indicated previously, we would certainly consider that that is worth looking at.

Alex Neil: That is part of what you will pronounce on when you eventually—

Graeme Dey: There is an opportunity with the next extension for us to consider that. We have deliberately drawn the consultation quite widely. We look forward to the committee's report, and you may well draw that anomaly to our attention. At what point we will be able to address it is something that I do not want to commit to today, but—absolutely—there is a case being made there.

Gerry Hendricks: I would not expect us to directly address that as part of our consultation, because the 2002 act is framed in such a way that it covers only companies that are wholly owned, so I would be looking for evidence from the committee in its report that may look at how we take that forward in legislation.

Alex Neil: Why should that being in the legislation restrict you from looking at the issue at the moment? There are loads of things in the legislation—or not in the legislation—that you could be looking at.

Graeme Dey: No, this is about extending the reach of FOISA.

Graham Crombie: Perhaps I can clarify. The extension consultation is about using the existing powers that are in the legislation to make an extension by way of secondary legislation. We understand that primary legislation would be required to change section 6 of the 2002 act to capture the matters that you have raised.

Alex Neil: Again, the committee report can help to inform your position. I do not want in any way to pre-empt what we are likely to say, but it seems to me that primary legislation probably needs to be used to rectify some of the anomalies and gaps and all the rest of it. Either way, whatever type of legislation is required—and doing something by way of secondary legislation is quicker than doing it by way of primary legislation—that argument should not be a barrier to your doing anything.

Graeme Dey: We will be open to considering what the committee brings back. Obviously, primary legislation takes longer, but if there are things that we could reasonably do using secondary legislation, I am happy to look at that.

The Convener: On a practical point, do you think that there is sufficient time left in this

parliamentary session to push any of these changes through?

Graeme Dey: If we are talking about primary legislation, I think that that is highly unlikely, to be honest. If we are talking about things that we can do using secondary legislation, the option is certainly there. The issue should not be a barrier to our following up on your report and setting a direction of travel, in so far as we can.

The Convener: No, indeed.

I am very encouraged by your answers to Mr Neil, especially your first answer that the Government thinks that private companies should be captured, to the extent that they deliver public contracts. I am sure that you have read the evidence that we have heard, but the evidence from Unison springs to mind. Glasgow City Council has a private company that provides it with milk. We would not expect FOI to apply to all of that company's business. I think that we all would agree to be reasonable here, and I hope that you will find our report reasonable in that regard as well.

Alex Neil asked you about private companies and organisations that are owned partly by the Scottish Government and partly by another public authority. You said that that was an anomaly. There are other examples, and some that spring to mind are third sector organisations that receive substantial amounts of Government funding. For example, I understand that 90 per cent of the Equality Network's funding comes from either central Government or other government sources. In effect, it is a public body, or a publicly controlled body, because it is publicly funded. Should such organisations—perhaps those that go over a 50 per cent funding threshold—fall within the ambit of FOI?

Graeme Dey: In principle, my answer would be yes, although we need to be very careful. This is not just about private companies, and there is an argument for capturing organisations of that nature as well. I fully accept that. However, I sound a note of caution. I think that Unison and Unite talked about following the public pound in their evidence to the committee. We need to be aware that there will be a substantial number of small third sector organisations that periodically receive public money—probably relatively small sums. In such instances, there is a requirement on public authorities to be very transparent in their decisions to grant that funding, but it would be disproportionate to seek to make those small bodies fully subject to FOISA when they have received funding against that sort of backdrop. There is a balance to be struck. You touched on proportionality in relation to the expectations of what we can do, and I think that that is important. However, my answer to your question about larger bodies is yes, in principle.

The Convener: Following the public pound is a phrase that we on this committee like to use quite a lot, because our other hat is our audit work, and there are parallels between what should be audited and what should be subject to FOI. I am interested in your response. I do not want to pre-empt the committee's report, but it will be reasonable in its expectations. I take your point about smaller organisations, but we are talking about third sector organisations that regularly receive substantial sums, and 90 per cent is a huge amount of public funding. It is good to get your opinion that you think that they should fall under FOISA.

Graeme Dey: In principle, yes.

The Convener: I will give you another example. We are both familiar with the local example of V&A Dundee. Although Scottish Government central funding makes up less than 50 per cent of its funding, by the time we add all other contributors that are publicly funded, I am very much of the belief that that takes it well over that 50 per cent funding threshold, although it is constituted as a private organisation. Given that it spends such vast sums of public money, do you think that that organisation should also be subject to FOI?

Graeme Dey: I am not entirely sighted on the V&A's funding arrangements. I know that Graham Crombie is desperate to come in with some—

The Convener: Even the principle of it—

Graeme Dey: I understand the principle. I would refer you to my previous answer relating to the other factor here. If you were to capture such organisations, it could only be in relation to the publicly funded element of their work, not in relation to anything else that places them at a disadvantage, although I guess that comparing one museum with another is an odd comparison.

Graham Crombie has something to add.

Graham Crombie: Although there has been discussion about funding levels and so on, that is not the test that is set out for whether ministers can extend FOISA. If ministers are going to extend FOISA using the powers that they currently have, they either need to find a public function of the body or they need to find that it is delivering services under contract with an existing authority that is subject to FOISA. When we are talking about extension work, at the moment we are talking about using the existing powers that have been given by Parliament to ministers, and those are quite tightly circumscribed, in particular in relation to the need to find a public function of the body.

The Convener: That is really helpful, Mr Crombie. The committee will look at that as we pull our report together.

Let me give you one final example that relates to the companies that have recently been constituted. Ferguson Marine and Prestwick airport were taken over by the Scottish Government. Should they be subject to FOISA?

Graeme Dey: They are.

The Convener: Fully?

Graeme Dey: Yes.

Liam Kerr (North East Scotland) (Con): I will ask about responding to requests and specifically the 20-day time limit. The suggestion that the committee has heard is that authorities will work to that 20-day time limit, rather than trying to get the information turned around as soon as is reasonably practicable. What timescales is the Scottish Government working to? Do you have any idea of what percentage of requesters get a response within that 20 days?

10:15

Graeme Dey: We have clear guidance for staff, and our updated guidance tells staff that they should turn around FOI requests as quickly as practical. The guidance says that the 20 working day mark is a limit, not a target; most requests can and should be responded to well before then. To drill down into that, our average response time is falling. In 2017, the average was 17 days, last year it came down to 16 days, and the year to date suggests that it has come down to 15 days.

Liam Kerr: The committee has heard evidence from various groups, and one of the things that it heard from the Law Society of Scotland is that we need a greater enforcement initiative to ensure compliance. Do you take a view on that? Do you think that there should be a penalty for non-compliance?

Graeme Dey: Is this to do with the suggestion that there should be fines levied against organisations?

Liam Kerr: Potentially, or some kind of incentive to comply.

Graeme Dey: I am not sure that that is necessary, or that the evidence suggests that it is necessary. The reputational damage that is done to any organisation where the commissioner is forced to intervene can achieve the desired purpose. That approach has certainly seen change implemented and considerable improvement brought about. East Lothian Council's performance level went from 30 per cent to 99.4 per cent following an intervention by the commissioner. In addition, I think that I am correct in saying that the commissioner has never had to use his ultimate sanction of going to the Court of Session, which tells you that the existing powers work.

Liam Kerr: We have heard some evidence that the possibility of seeking clarification can be used as a delaying tactic—we get to day 19 and the organisation seeks clarification in order to stop the clock. Do you take a view on that, and on what might be done to prevent it? We heard that potentially the clock might be paused rather than reset. Is that a feasible suggestion?

Graeme Dey: I think that it is. I go back to the start of your question. The Scottish Government's internal triage system ensures that if there is a need for further clarity, that is identified at a very early stage. The guidance to our case handlers in those circumstances is that they should contact the requester without delay. At that point, they are also required to provide assistance to secure that clarity. I read the evidence that you received in that regard, and I can see the sense of a pause-the-clock mechanism to avoid such situations arising in other authorities.

Liam Kerr: Finally, do you take a view on whether 20 days is sufficient time for a response? If not, might the 20 days be extended? Do you think that people would just work to whatever threshold you put in? Could you put in more caveats, saying that there can be extensions only in very specific circumstances?

Graeme Dey: That is a really important issue. We do not favour extensions per se. I think that you are right. We can see that the overwhelming majority of requests can be addressed within the existing timeframes. You are also correct that a wholesale change to those deadlines would see people working to the new deadlines. That would fail to serve the purpose of FOISA.

I have one suggestion, however, around a single specific change, concerning the festive season over Christmas and new year, when most public bodies shut down either completely or largely. There is no doubt that you see pressure build on hard-pressed staff to get FOI requests cleared before the festive season—otherwise, they know that they are coming back to a substantial workload. I have some sympathy for hard-pressed public sector workers who find themselves in that situation. If we were to bring in an amendment that saw the clock stopped at midnight on 24 December and restarted at midnight on 3 January, that would provide that once-a-year break, when everyone tends to be on holiday anyway. If that had been in place this year, it would have added only three days to the process, which is not very long. I accept that it would add to the wait for receiving responses, but I think that, on balance, that would be worth doing. That would be the only

time in the year when I would suggest a break of that nature, and I hope that it is a suggestion that the committee might give some consideration to.

On your original point, I do not think that we should extend beyond 20 days. There will always be exceptional circumstances that arise where the complexity or the nature of an FOI request leads to the response taking longer, but I think that we are in a reasonable place with that timeframe.

Liam Kerr: I am grateful—thank you.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I would like to have a look at the pressure on resources that is caused by FOI. The Scottish Information Commissioner's annual report for 2018-19 showed a rise of 8 per cent in the number of FOI requests compared with the previous year. Is the level of FOI requests sustainable, given the year-on-year increases that we have seen?

Graeme Dey: You do not need to tell us about the growth in volume. We have seen significant growth, and we have seen spikes in requests within that. To put that in perspective, in 2018 we received 3,407 requests. That was 12 per cent up on 2017, which was up on 2016. In fact, over three years we have seen an increase of 62 per cent in the level of FOI requests. That would put pressure on any organisation. I think that more of the pressure has come from some of the patterns: it is not just the volumes, but the spikes, as I said. We had a famous incident where we received 84 requests from the same individual in the space of 56 minutes—coincidentally, that was the day before we were due to respond to the commissioner's intervention. That would create a challenge for any organisation. You will see within such blasts of requests some perfectly serious and legitimate requests, alongside some that many people would consider to be quite frivolous.

I am sure that other organisations see similar challenges, but as an organisation we have to rise to them. We have done that. From answering 76 per cent of requests on time in 2016, we reached 91 per cent last year. At this stage, it looks as if the figure for this year will be 93 per cent, which I think is quite an achievement, given the increase in volume and the other aspects.

I think that there is a bit of a misconception about how an organisation responds. It is not necessarily about throwing more resource in as the volume goes up. Sometimes, it is about taking a step back and reflecting on how you deal with that. Perhaps counterintuitively, the Scottish Government has gone from having 1,000 people who, one way or another, were dealing with FOI requests to having three highly trained, better trained case handlers.

Gerry Hendricks: Three hundred.

Graeme Dey: Sorry, we have 300 case handlers doing that work. We have also more than doubled the size of our FOI unit to oversee the triage process and so on. Therefore, it is doable, but I think organisations have to prioritise FOI in their work. It cannot be seen as an additional burden; it has to be woven into what they are doing. The short answer is that, yes, the pressures are growing, but organisations need to reflect on how they respond. As we are evidencing, there are ways in which that can be done.

Colin Beattie: Do you have any feel for the actual financial cost of providing the service, either in the Scottish Government or across the public sector as a whole?

Graeme Dey: We have a rough number for the Scottish Government.

Gerry Hendricks: We did some work back in 2012 and updated that—not particularly scientifically—last year. The average cost of a request is £234 for the Scottish Government. We have not looked at that for any other authorities. We are working with our analytical services people just now in the hope that they will be able to carry out some more detailed work, probably in April/May, because we are introducing a new case-handling system. That new start should give us a better way of measuring how much a request costs, so we hope to get clearer information.

Colin Beattie: If we are looking at the public sector as a whole, we are mainly talking about local authorities and the pressures that they are under. The evidence that we have received is that there is clear pressure there. It has been suggested that additional resources might be needed. Has the Government thought about providing extra financial resources to help councils meet their obligations?

Graeme Dey: As I said, it is not always about throwing more money—more resource—at the issue. Sometimes, it is about taking a step back and considering how FOI requests are dealt with. I know that you have had evidence that suggests that there should be a single point of contact, or individual portals, in local authorities.

In short, the answer is no, because I think that an organisation has to consider its own operating model and how it might deal with requests more efficiently. Of course, some local authorities will handle considerably less volume than others. It just depends.

Colin Beattie: You have mentioned several times improved efficiency within the Scottish Government in providing the service. How is that best practice shared across the public sector? Councils, which are a large part of this, seem to have a wide variety of processes and efficiencies in terms of providing the service. Is there any way

that you can assist them, short of financially, perhaps through upskilling and so forth?

Graeme Dey: If, for example, we have a situation in which FOISA is extended, the Government provides support through the commissioner. With the previous extension of FOISA to registered social landlords, the commissioner provided training for RSL staff. That ran over about a nine-month period, to help ensure that RSLs hit the ground running when they began to be captured by FOISA. Beyond that, our staff have guidance, which is available publicly. We have done at least one public workshop that I can think of and our staff engage with practitioners regularly. We try to share and encourage best practice.

Colin Beattie: You mentioned the person who put in 84 requests within an hour. We have heard evidence that that has happened in other cases, with sometimes hundreds of requests put in, yet councils do not seem to be particularly tough on enforcement when it comes to the question of vexatious requests. Is there a case for being tougher on such requests? That would reduce the volume.

Graeme Dey: Right now there is a bit of an imbalance between the use of FOI by Joe Public and its use by others. Over 2018, 20 per cent of the entire FOI volume that the Scottish Government dealt with came from just five people. Incidentally, I understand that four of them were political researchers, so there is an issue there. However, I think that all bodies are reluctant to use vexatiousness as—I hate to use the phrase—a get-out. A request would have to be legitimately vexatious, and there is a genuine attempt to embrace the concept and principles of FOI.

There is perhaps an argument for looking at the vexatiousness provisions, in so far as they cover only a request or a collection of requests. Some might say that there is an argument for looking at whether the behaviour of an individual is vexatious, and therefore the individual is vexatious. I guess that it might be possible to design a scheme that allowed for that, but it would have to be very carefully drafted and there would perhaps have to be a right of appeal to the commissioner if someone objected. There is perhaps a conversation to be had about something along those lines.

10:30

Colin Beattie: Is the Government actively considering that?

Graeme Dey: If I am being honest, we have trusted the committee to do the work that it is doing, and we have been keen to work with you to see what your deliberations throw up. It is not something that we have actively looked at; I am simply contributing to your deliberations. It is important that we wait to see what the committee comes up with, and we will give due consideration to what is recommended.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I will move on to look at proactive publication and whether there should or should not be a duty to record information.

In his evidence, the Scottish Information Commissioner recommended removing the requirement to adopt a publication scheme and replacing it with a duty to publish information. From reading the Scottish Government's response on proactive publication, I think that we seem to be in the same territory. Is that the view of the Government? Why would proactive publication provide us with a better solution? The issue came up several times during the committee's evidence sessions.

Graeme Dey: The existing arrangement that you refer to has probably been overtaken by time. I do not think that it is suitable for current purposes, so encouraging proactive publication is undoubtedly the way to go. However, it is worth recognising that huge volumes of additional information are already out there in the public domain compared with what happened in days gone by. Given the sheer scale of local authority websites and the amount of information that is put out there readily, I think that—compared with where we were two decades ago, perhaps—we are in a much better place, although there is clearly room for further improvement.

Willie Coffey: Would tipping the balance away from having a scheme towards encouraging, whether by regulation, code of practice, guidance or whatever we decide is more appropriate, give the public more access to information than they currently enjoy?

Graeme Dey: This is a journey for all public bodies. We can all improve our FOI performance, and the next stage on that journey is to move on to embrace more widely the concept of proactive publication. There are always pressures on organisations. For the likes of the Scottish Government at the moment there is the Brexit pressure, and local authorities will be facing the same pressure, alongside the additional burdens that are a consequence of the late United Kingdom Government budget. There is always something extra being added into the mix, but I think that it is certainly something that we are committed to doing. We have on-going conversations both with the commissioner and internally about how we can get better at proactive release of information, but as things stand, we put out quite a lot in a variety of ways.

Willie Coffey: On the duty to record or otherwise, we know that there is no duty to record anything within FOISA, but you must be aware that in previous evidence sessions a number of witnesses have complained about the lack of minutes or records of meetings and so on. It was clarified in evidence that there is no duty to record anything. The 2002 act is about accessing information that exists or legitimate requests to create information in the public interest. Where does the Government stand on whether there should be a duty to record things that are of importance and of concern to the wider public? I mean things such as Government minutes, records and so on. Should there be a central log of such things so that the public can get greater and better access to information on things that are being delivered by the Government and officials on their behalf?

Graeme Dey: I do not accept that that is a significant problem at all. By way of reassurance, I note that, in the context of the Government, the permanent secretary wrote to all staff in 2018 about the need to maintain appropriate records. Our knowledge and information management team is presently looking at refreshing the guidance around that, but, as I say, I do not think that it is a significant issue at all.

It is also worth considering that a duty of the type that you are calling for would capture everyone who is covered by FOISA, from a huge organisation such as the Scottish Government to local authorities and all the way down to individual general practitioners and pharmacists. This is about proportionality. In his evidence to you, I think that Severin Carrell admitted that there should be a limit and that routine matters should not be captured. Proportionality, in the widest sense, should be at play here.

Willie Coffey: In the Government's written submission, there is a section on records management. Section 61 of the 2002 act provides for ministers to issue a code of practice on records management, but your submission says that you think that that is no longer of any practical purpose—"otiose" is the interesting word that is used to describe that. You go on to say that it is possibly best a matter for the keeper of the records of Scotland to have guidance on records management. Could you explain that in a little more detail, please?

Graham Crombie: I am not sure that there is much we can add immediately to what is in our written submission to the committee. The point is that the duties in FOISA pre-date the modernisation of public records legislation that took place around 2010-11. Given that a modern scheme of records management for public bodies is set out in that specific legislation, that might be the more appropriate place to tackle records management concerns rather than trying to tackle them through FOI legislation.

Willie Coffey: As you have mentioned, minister, we are in a new world, where information is packaged up in many different ways, particularly online and on the internet. Is there a need for an information standard to emerge that defines the types and the shape of information that should be made available to the public? Let me give you an example. If we go on local authority websites, or even the Government's website, to look for documents, we can see that they tend to be fairly hefty. Is there a need in the modern world, where people are looking for quick access to accessible information, to make available to the public shorter, sharper, more focused versions of information for public consumption? Should such a standard fall within the legislation?

Graeme Dey: I am laughing, because yesterday I was at an open government forum event and was taken aback to see a presentation that was in plain English, because—let us face it—in this place we all deal with papers that are rarely written in plain English. I have considerable sympathy with the point that you make. By way of example, when the Government produces statutory instruments, we are asked to include a short, simple explanation for members as to what the instrument is trying to achieve. There is a lesson there for local and national Government and many other public bodies: we should write in a way that recognises that people need to understand things very readily, rather than having to walk away, reflect and work their way through information. I have some sympathy with that point. Graham Crombie is desperate to come in.

Graham Crombie: I want only to add that already in the legislation is the right—although it is perhaps quite a little-known right—to ask for a digestible summary of information. If information is not in a form that they find helpful, individuals have the right to ask an authority to package it differently for them, if that would help their understanding.

The Convener: Does that include MSPs? I would very much like a digestible form of national health service board papers. [*Laughter*.] I am sure that it does.

Graham Crombie: It applies to any requester, convener.

Willie Coffey: It is important to make information publicly available that the public can digest easily. Rather than having a right to ask for that, should we proactively generate and create information in that format, knowing that it is needed?

Graeme Dey: There is an argument about the format in which information is put out, but I would sound a slight note of caution. When people are looking for information, they are often looking for a specific piece of information. We need to put out information in a way that is not simply a large-scale dump of information that people have to work their way through to find the tiny little nugget that they are looking for. There is a balance to be struck. As I said, this is about a direction of travel, and that direction of travel should be informed by the points that you have just made.

Bill Bowman (North East Scotland) (Con): I will change the subject to fees and the fee cap. At the moment, the cap is £600, based on 40 hours at £15 an hour. In other parts of the UK, there is a different cap with a different rate per hour, so the number of hours' work involved is different. We have had some suggestions in evidence that there should be a change. Does the Scottish Government believe that the fee cap needs to be reviewed? If so, what should it be set at and what criteria should be used to calculate it? Have you had discussions with any other agencies about that?

Graeme Dey: To answer your last point first, no, we have not been approached by other agencies on the cap.

Bill Bowman: And you have not gone to other agencies to discuss it.

Graeme Dey: Not proactively, no, we have not. I want to bring Gerry Hendricks in on the general point and then I will get into some of the specifics around the fee cap.

Gerry Hendricks: On the cap, I would suggest that instead of talking about money, we should look at hours. Essentially, as Mr Bowman says, it is a 40-hour cap. It simplifies things to say that it is about the number of hours. People talk about changing the various rates—staff salaries have gone up and there has been inflation—so it confuses things when we can instead just say, "Here is the number of hours you should spend." We think that it would be good to simplify how that is presented in the 2002 act. There are calls to increase the ability to charge fees, but we believe that that would undermine people's information rights, so we are conscious that we should not go that way at this time. That is all that I would say about fees.

Bill Bowman: Are you comfortable with the 40 hours? That would be the—

Gerry Hendricks: I am broadly comfortable with the 40 hours, yes. Just as we think that the 20 days works, we find that the majority of requests can be answered within—

Bill Bowman: You are not proposing a change other than to move to hours, because that is the number that is there at the moment.

Gerry Hendricks: And to potentially simplify people's understanding. We do not support calls to increase the ability to charge fees.

Graeme Dey: Absolutely not—we do not. I was a little bit concerned by the evidence that you took about the possibility of having a two-tier system for commercial applications. Reading that evidence, I was struck by questions such as what would be considered a commercial request and who would make such a request. For example, a journalist might be seeking information for a story that might boost the sales of their newspaper, but they might argue that there is a public good to be had from the story. I am not sure that that is a road that we would want to go down, and I am pretty sure that it is not a road that the commissioner would want us to go down.

There is an argument for maybe tweaking the legislation. At the moment it refers to the ability to charge—full stop. It could be amended to say that charges could be imposed only by exception—specifically, when a request can be deemed to be excessive, manifestly unfounded or repeated. That would bring FOISA into line with the general data protection regulation.

Bill Bowman: I took the commercial aspect of that split as meaning that it was not so much about a journalist looking to get information and more about somebody trying to get a significant volume of research done by someone else. Is that different from the split that you see?

Gerry Hendricks: We see people who are obviously asking for commercial information, but that involves us making a value judgment, which I do not think that we should do. We should not be judging whether person X is applying as an individual or in order to save him or herself some work.

Bill Bowman: Minister, will you repeat what you said about the three ways that you would judge such cases?

Graeme Dey: I referred to excessive, manifestly unfounded or repeated requests.

Gerry Hendricks: There is a judgment in there at some point as well. You have to somehow put that in guidance.

Graham Crombie: I suggest that there is a difference between making those sorts of judgments and making judgments that involve assessing who the requester is and what the purpose of their request is. That is what would be involved if you were trying to draw a line between commercial and non-commercial requests. It strikes us that there would be a very real practical

difficulty there. For example, let us say that person X routinely makes requests that are of a commercial nature, for the sake of argument, but they then happen to make a separate request in a purely private capacity. Would trying to work out the basis on which that person was making their request not involve quite a difficult balance? It goes against the spirit of the legislation as a whole to analyse people's motives in that way.

10:45

Bill Bowman: Just to be clear, minister, you would retain the ability to charge.

Graeme Dey: In exceptional circumstances—the circumstances that I mentioned.

Bill Bowman: In particular circumstances.

Graeme Dey: Yes.

Bill Bowman: Would the fee levels remain the same?

Graeme Dey: That would be based on the number of hours involved.

Anas Sarwar (Glasgow) (Lab): Good morning. I start, convener, by apologising to you and the committee for my late arrival this morning.

I want to ask some questions about what is covered in the law and perhaps where some of the gaps are in relation to emails and WhatsApp groups. Do you believe that the current legislation covers private emails and WhatsApp groups?

Graeme Dey: Yes, it does.

Anas Sarwar: Are you aware of any Government ministers that use private email?

Gerry Hendricks: We have seen the press coverage that, back in 2015, the First Minister used her Scottish National Party account in exceptional circumstances to receive urgent information when she was not supported by Scottish Government officials.

Anas Sarwar: Is that just the First Minister, or do other ministers use private email addresses?

Graeme Dey: Ministers do not routinely use private or party email accounts, for example, for substantive Government business. Such business is generally conducted in hard copy, using ministerial boxes, or via secure electronic methods. As Gerry Hendricks said, there was a media report about an arrangement for out-of-hours communication for a very short time in 2015, which was quite some time ago. I should say that such activity does not breach FOISA, GDPR or the ministerial code. Nevertheless, the First Minister now uses a Scottish Government email account for papers that require to be sent out of hours. That is the lead that is followed by other ministers.

Anas Sarwar: That was back in 2015, so as it stands at the moment, there is no use of private emails by any ministers.

Gerry Hendricks: It would be in very exceptional circumstances. Again, we have recently released information that was sent to the First Minister on two occasions—I think that it was late in the evening for events that she was attending the next day. We have released that under FOISA, so it is covered by FOISA, and we—

Anas Sarwar: Are there any recent examples in the last year or two years, where an FOI—

Gerry Hendricks: That was relatively recent.

Anas Sarwar: Apart from that one, any FOI requests that have included—

Gerry Hendricks: There have been a number of FOI requests specifically asking for information in that regard, and searches have not found anyone—

Anas Sarwar: What about WhatsApp groups? Are ministers on WhatsApp groups?

Gerry Hendricks: If we found any information that was in a WhatsApp group, that would be covered. Our guidance is explicit.

Anas Sarwar: How would you find the information in a WhatsApp group unless you were a member of the WhatsApp group?

Gerry Hendricks: Our guidance tells case handlers that they would need to ask the person involved—because, for example, there would have been personal advice—to do a search to see whether they have anything that is relevant to that particular request.

Anas Sarwar: Is there a ministers' WhatsApp group?

Graeme Dey: I am not aware of one.

Gerry Hendricks: Covering Government business? No, I am not aware of one.

Anas Sarwar: Is there a special advisers' WhatsApp group?

Graeme Dey: I am not aware of such a group either.

Anas Sarwar: If there was a special advisers' WhatsApp group and it discussed Government business, would it be covered by FOISA?

Graeme Dey: Yes.

Anas Sarwar: If something was discussed on a special advisers' WhatsApp group relating to Government business and that information was not given as part of an FOI request, would that be in breach of FOISA?

Gerry Hendricks: Without knowing any specifics, we have to judge everything on its own merits, but I would assume so.

Anas Sarwar: Is there any plan to review the use of WhatsApp groups in the same way that that has been done with private emails?

Gerry Hendricks: Review in what sense?

Anas Sarwar: You mentioned the report on the use of private email. That looked at what would be done going forward and now you use private email only in really exceptional circumstances—the First Minister will now use a Government email address, for example. Has any such conversation, discussion or review taken place around the use of WhatsApp groups?

Graeme Dey: We are not aware of WhatsApp groups that are being used for that purpose. Clearly, if that came to our attention, it is something that would be—

Anas Sarwar: Are you happy to look into it and share some details with the committee about the number of WhatsApp groups that exist that involve ministers or special advisers? Will you provide that information to the committee?

Graeme Dey: Where it is relevant to Government business, I am happy to take that away and look at it.

Anas Sarwar: Thank you.

Gerry Hendricks: We have had FOI requests about information on WhatsApp, and we found that there are not a lot of WhatsApp groups. I have used WhatsApp once for a particular business purpose. When we had the British-Irish Council summit in Glasgow in 2016, myself and two of my staff set up a WhatsApp group so that we could be in touch with one another immediately because we were running the event. We used it for that day and then deleted it because we had no more business need for it—it was just transient.

Anas Sarwar: It would be common practice in most workplaces, including in this workplace. I am sure that there will be WhatsApp groups for political parties, for MSPs and for MSPs and their staff. I stress that there is nothing wrong with having a WhatsApp group—I am not suggesting that there is. I am suggesting that if WhatsApp is used in the real world—in other workplaces—I imagine that it is used in the Scottish Government as well, and if it is being used, to what extent is it being used and is it an open channel when it comes to FOI legislation?

Graeme Dey: We are clear that what is captured is not the platform but what is being discussed. If that was happening, it would be captured.

Anas Sarwar: Are you happy to go away, look at the groups and come back to us?

Graeme Dey: Absolutely, yes.

The Convener: I turn to the commissioner's intervention with the Scottish Government last year. The commissioner had sufficient concerns about the Scottish Government's handling of FOI requests to stage the intervention. He gave you some recommendations, because he was concerned about the Government's practice. You are in charge of the area, minister, so it is great that you are here today. The practice of referring requests for clearance by ministers simply because they come from journalists, MSPs and researchers is inconsistent with the principle of FOI. Have you ever been asked to clear an FOI request?

Graeme Dey: Under the current system, no. Did I see an occasional FOI request prior to that? I would have done, but only as an exception.

The Convener: What do you mean by "the current system"?

Graeme Dey: We have a completely different system. Would it be useful if Gerry Hendricks talked you through the system that is now in place following the intervention?

The Convener: No—I understand what you mean. The new system has come into place since the commissioner's intervention and you are saying you have not been asked to approve—

Graeme Dey: Yes. Are you asking me, personally, as a minister—

The Convener: Yes, but—

Graeme Dey: Not in high volumes anyway.

The Convener: You have not been asked to approve any FOI requests since that new regime came in after the intervention. Is that right?

Graeme Dey: Personally? Not that I can recall.

The Convener: How about before the intervention?

Graeme Dey: There would have been a very small number of FOI requests that I would have seen. That certainly was not based on who the requester was, but was to do with the nature of the FOI request itself.

The Convener: How do you know that it was based on the nature of the request and not the requester? The name of the requester would have been in front of you.

Graeme Dey: The basis of my seeing an FOI request would be the content. That is absolutely the case now. That is why I think that it is worth understanding the basis on which we operate in

the Scottish Government. I will bring Gerry Hendricks in to explain that clearly for the record.

The Convener: Please.

Gerry Hendricks: Following the commissioner's intervention, we immediately changed our guidance on the need to consult ministers on the use of requests by journalists—that was done the day we received the commissioner's report. The guidance says that it is explicitly about the nature of the content of the request rather than who has made that request. We have developed guidance on case handling and how cases are decided. There are two tracks. If a case is deemed sensitive and requires a ministerial decision, a sensitive case will go that way. Otherwise, the assumption that we start with is that most, if not all, cases are routine. It is only when the FOI unit receives them and carries out a triage process that we determine whether they should be treated as sensitive.

The Convener: Let me drill down into the first point that you made, Mr Hendricks. You referred to dealing with journalists' requests. Was it the case before the commissioner's intervention that all, or nearly all, journalists' requests went straight to ministers or special advisers? What is the rough percentage now?

Gerry Hendricks: That was not the case. Our guidance, which was publicly available, said that most journalists' requests should go to ministers, but that those that were not sensitive did not need to. It also said that sensitive requests from any other individuals should go to ministers. We tidied that up and simply made it clear that it was only about the sensitivity.

The Convener: What percentage of journalists' requests that come in under FOI now are cleared by ministers and special advisers?

Gerry Hendricks: We do not record that centrally. We could possibly work it out from our stats, but we do not record that as a routine process.

The Convener: Was that not a point in the action plan that was due to be implemented by last month?

Gerry Hendricks: The point is that we are reducing the numbers by determining that more cases are routine—that is happening. We are putting the processes in place now and we have not carried out any assessment of the actual numbers.

The Convener: Do you think that it would be fairer for all requests to be anonymised?

Graeme Dey: I will answer that. I do not think that it is about fairness; it is about practicality. There are very good reasons why the FOI process should not be anonymised. There are a number of instances where it is necessary to anonymise, such as where someone is looking for information concerning themselves, or where there are repeat requests. I am trying to think of some other examples.

Gerry Hendricks: If you are looking to determine the vexatiousness of requests, you may look at the behaviour of an individual, so you need to know that the request comes from that individual.

Graeme Dey: The key point is that it is about the application. The process has to be seen as applicant neutral. It is not about the person; it is about the application and its consideration.

The Convener: Surely anonymising might be a bit fairer. You said you have 300 people handling FOI. I was quite surprised by that—

Graeme Dey: That is across the Government and its agencies.

The Convener: Sure. When the request for information comes in, if it is deemed to be sensitive enough that it reaches a minister's desk, surely it can be anonymised by that point, so that the minister is giving information fairly and impartially.

Graeme Dey: How is that relevant, as long as it is the nature of the request that is being considered, not the requester? The key point is the request and the content of the request.

The Convener: Can you be blind to the name of the requester if it is a high-profile journalist? Is it within our human nature or our political nature to be blind to that?

Graeme Dey: Frankly, we are more interested in what the request says, rather than who is asking.

Gerry Hendricks: In the commissioner's intervention report, he said that, except for 2015-16, statistics do not show that journalists are treated in a materially different way from other requester types in relation to obtaining information. That is in paragraph 123 of his report.

The Convener: It was part of the commissioner's intervention that the Scottish Government takes longer to respond to journalists' FOI requests than to other requests. It was the commissioner's opinion that they were treated differently.

Gerry Hendricks: Yes, but not in relation to the information that they receive, which suggests that the decision as to whether we release information is not influenced by who takes that decision. It took longer, and we recognise that. Journalists sometimes ask fairly complex questions, which may add to that, although I do not have enough

empirical evidence to confirm that. As part of the response to the intervention, our aim is certainly to bring the average response time down for all requests.

Graeme Dey: The evidence is showing that we are doing that.

The Convener: What is the role of special advisers in FOI?

Graeme Dey: The commissioner has stated a number of times—and I was interested to see that this was reiterated just the other day in *Holyrood* magazine—that there is a transparent role for special advisers. He has also expressed content with our guidance, which Gerry Hendricks touched on. That guidance is in the public domain, but I am happy to send a copy of it to the committee. The involvement of special advisers is to provide quality control when a sensitive FOI request has been identified and will be going to the minister.

The Convener: I refer you to section 5(2)(b) of the 2002 act. Mr Crombie, you responded to one of my earlier questions by quoting section 5(2)(b), which is the section of the act that the Government is currently consulting on. Is that correct?

Graham Crombie: The consultation that has just closed principally looked at section 5(2)(b), but the final question invited consultees also to comment on the powers that we have under section 5(2)(a).

Graeme Dey: That was question 7.

Graham Crombie: Yes.

The Convener: Is there scope for change under section 5(2)(a)?

Graeme Dey: Change in what way?

The Convener: This pertains to a question that I asked you earlier, minister. We discussed V&A Dundee. Section 5(2)(a) applies to organisations that appear to Scottish ministers to exercise functions of a public nature. In a way, given section 5(2)(a), it would be within your discretion to look at applying it to the Equality Network, which is 90 per cent publicly funded and ostensibly operates a function of a public nature, and to V&A Dundee, which is more than 50 per cent publicly funded. Do you agree that that is within your discretion under the 2002 act?

11:00

Graham Crombie: It may help if I explain that, in the three previous extensions, ministers have taken a factors-based approach, and the factors that ministers have taken into account have been set out on each occasion. There is certainly nothing to stop them looking at any individuals or organisations. We receive suggestions from time to time from members of the public that we might wish to consider adding certain bodies to FOISA. We draw those suggestions together and when there next is a consultation, we put those into the mix at the time. Generally speaking, there is no attempt to close off 5(2)(a), if you like. My understanding is that ministers are always open to receiving suggestions as to where extension might take us next. Over the years, ministers have been clear that the direction of travel is greater extension of the FOI regime and that that is not coming to an end.

Graeme Dey: I take your point, convener, about the specifics that you mentioned. Let us take that away and we will write back to you on that point.

The Convener: We took evidence from Professor Dunion, who was the previous Scottish Information Commissioner. I am mindful of the suggestion in his written evidence that consideration should be given to amending the law to have a gateway provision that brings within the scope of FOISA bodies that carry out public functions or which are in receipt of significant public funds, such as the ones that I mentioned. Our current commissioner is, I think, of the same view. That is quite weighty evidence from men who have done that job for a number of years and who are saying that we should consider organisations where the majority of their funding comes from public funds.

Graeme Dey: You mentioned changing the law to afford that opportunity.

The Convener: If you consider that necessary and if you think that that is within the scope of the 2002 act. You have better access to the legislative experts than I do, but if you think that it is within the scope of the act to extend its provisions to those public bodies without primary or secondary legislation, is that something that you could respond to us on?

Graeme Dey: Yes is the answer. I noted and was struck by the comments from the current commissioner about the interaction of sections 5(2)(b) and 5(2)(a) in relation to care home services. However, I think that he slightly misunderstood what we were doing in that regard. The consultation was deliberately widely drawn, but we asked question 7 to try to ensure that we capture as wide a range of organisations as is possible. If you would like us to write back to you with a clearer understanding of the questions that you have asked today, we would be happy to do that.

The Convener: That would be really helpful, thank you.

Members have no further questions for the minister and his officials. Minister, this has been an extremely helpful session and I think that there

has been a bit of a meeting of minds on several points. We will put together as thoughtful and constructive a report as we can. If we can work together to try to resolve some of these issues, that would be extremely helpful. Thank you very much for your evidence this morning.

I now close the public part of the meeting. I wish everyone a very good break.

11:04

Meeting continued in private until 11:27.

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