



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 20 November 2025

Session 6



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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
22nd Meeting 2025, Session 6

CONVENER

*Martin Whitfield (South Scotland) (Lab)

DEPUTY CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

COMMITTEE MEMBERS

Emma Roddick (Highlands and Islands) (SNP)

*Sue Webber (Lothian) (Con)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Katy Clark (West Scotland) (Lab)

Graeme Dey (Minister for Parliamentary Business and Veterans)

Ross Grimley (Scottish Government)

David Hamilton (Scottish Information Commissioner)

Rona Mackay (Strathkelvin and Bearsden) (SNP) (Committee Substitute)

Jill McPherson (Scottish Government)

Paul Mutch (Scottish Information Commissioner)

CLERK TO THE COMMITTEE

Catherine Fergusson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 20 November 2025

[The Convener opened the meeting at 09:00]

Freedom of Information Reform (Scotland) Bill: Stage 1

The Convener (Martin Whitfield): Good morning. I welcome everyone to the 22nd meeting in 2025 of the Standards, Procedures and Public Appointments Committee.

I have received apologies from Emma Roddick. I welcome Rona Mackay, who attends as committee substitute. Good morning, Rona.

Our first item is an evidence-taking session on the Freedom of Information Reform (Scotland) Bill at stage 1. We are joined by Katy Clark MSP, who introduced the bill.

I welcome our witnesses. David Hamilton is the Scottish Information Commissioner, and Paul Mutch is deputy head of policy and information in the commissioner's office. Good morning.

I will kick straight off with questions. I will come to you first, David, as commissioner.

In the spirit of a starter for 10, will you expand on why you think that reform of primary legislation is needed at this stage? That is a nice, easy opening question.

David Hamilton (Scottish Information Commissioner): Good morning, everyone. I thank the committee for the opportunity to give evidence.

The Freedom of Information (Scotland) Act 2002 has been in force for 20 years, and it has delivered some tremendous results for people in Scotland. Back then, comparative technologies, such as smartphones with cameras, had only just become a thing. However, we are in a different world now. The digital revolution has been extraordinary and the pace of change has been enormous.

We need to tighten up the nuts and bolts by tightening up the legislation a little bit. Some things have opened up, and we have different governance structures that did not exist before, such as arm's-length organisations.

The legislation has changed slightly through designation, but slowly. We are now in a position where we need to review the whole system and ask how we can make it better so that we retain our place as one of the leading freedom of

information regimes in western Europe, and that we get back up that ladder in the context of the world.

The Convener: That is helpful.

You have picked up on the fact that the delivery of services, as well as the technology, has changed over the past 20 years. Interestingly, the bill itself does not extend the scope of the legislation. Is that a shortfall in the bill? Is the bill missing items that you would have liked to see in relation to extending how freedom of information would apply, and to whom?

David Hamilton: I consider this as an infrastructure bill. It provides a mechanism that allows things to happen more easily. Designation is a great example of that. The pace at which designation happens, or does not happen, has been pretty appalling. That has been a big issue. We need something that is more agile and flexible, and also more accountable, in relation to how we expand designation.

The bill provides a mechanism to allow things to happen. It does not replace but adds, in order to keep the pace of change moving more appropriately.

There are also other bits and pieces. To be honest, I would have liked to have seen the Lord Advocate and the Crown Office and Procurator Fiscal Service fully covered by freedom of information appeals. That is not in the bill, and I do not think that there is a good reason for it not being there.

The Convener: That is helpful. Thank you.

If you wish to add anything, Paul, just jump in.

Paul Mutch (Scottish Information Commissioner): The only point that I will add is that our experience shows that a measured and proportionate approach to designation has been most effective. That has ensured that we have the ability to support organisations and different sectors as they prepare for their duties under freedom of information. That can be seen from the phenomenally successful designation of registered social landlords in 2019, which is now consistently one of our best-performing sectors under the legislation.

The opportunity to take that more paced and proportionate approach to designation is helpful in ensuring that the rights remain as effective and as robust as possible.

The Convener: One thing to consider is the balance between primary legislation, secondary legislation and non-legislative processes. David, do you have any comments about the balance that has been struck in the bill? You have described the bill as a kind of scaffolding for what goes

forward. Are you content that it will allow us to continue to modernise without having to wait for potentially 20 years-plus for more legislation?

David Hamilton: Yes. I think that the bill does that, which is key. Along with designation, codification of publication is another key piece of infrastructure that we can put in place, allowing us to move more dynamically as things happen.

We should not have to bring legislation back to Parliament every time that there is a technological evolution. We are already looking at artificial intelligence, which has come on so much since the bill was first talked about in around 2022, and we are now in a different world in terms of artificial intelligence.

I would like to replicate the principles of the original legislation that have stood the test of time, which are broad enough in their definitions to not narrow us down to a particular area. We should have principles and a structure that allow us to build on the legislation, which will mean that we can adapt and move at pace, and dynamically, in the future.

The Convener: Annie Wells joins us online. *[Interruption.]*

Annie Wells (Glasgow) (Con): My apologies—I have had a few problems with my Surface Pro this morning.

Good morning, and thank you for coming along, David. You have stated that designation under section 5 is “the most appropriate route” to bring organisations delivering public services within the scope of FOISA. At the same time, you have expressed concern in your written evidence that the section 5 mechanism, as currently utilised, is not an effective or responsive means of ensuring that FOI rights keep pace with changes in service delivery. Can you explain what protections or benefits the proposed designation procedure offers?

David Hamilton: The principle of the Parliament having a role in that is a good one—it is an additional role. However, there is nothing to stop the Scottish Government and Scottish ministers continuing in their existing capacity to designate, review and take things forward. Frankly, the Government has not been doing those things, and it is pretty preposterous that the Government said in its submission that it has not been going slowly. If this is not slow, I do not know what slow is, because progress is glacial.

There is a consultation about the care sector that started six years ago—the consultation about the consultation about the consultation has just finished. It gets ridiculous, and it really is not good enough. In the freedom of information world, we use the line, “Information delayed is information

denied.” That is happening on an organisational scale, across the whole regime.

We need something that we can adapt much more quickly. If, for whatever reason, the Scottish ministers are not able to designate quickly, maybe there should be another avenue for doing so—one that gives the Parliament and the people the opportunity to designate.

Annie Wells: Yes. I could not agree with you more, David.

In your written submission, you noted that the process to bring registered social landlords within scope took 13 years and that the Scottish Government is due to consult on extending FOISA to cover care homes. Have you been invited to contribute to the scope or design of the upcoming consultation on care homes, and do you have any expectations or recommendations regarding the timescale for implementation?

David Hamilton: I will ask Paul Mutch to answer that. Paul has been in the Scottish Information Commissioner’s office from the very beginning. He is almost as old as designation, and he has been very much involved on that side of things.

Paul Mutch: Yes, we have been involved. The process started back in 2019, with an initial consultation about the further use of the section 5 powers. That has now moved on to the announcement of the consultation to extend designation to the care sector.

As part of that process, the Scottish Government has established a consultation advisory group, involving representatives of the sector and a host of other organisations and stakeholder interests. We have been involved in that process by helping to shape the consultation document. We are awaiting the launch of that document—I think that the intention is to launch it this side of Christmas, so fairly soon, but I am sure that the minister can provide more information on that.

On timescales, as I said, the process started back in 2019. We are about to consult on an extension to the care sector. In the meantime, we have had a pandemic, which highlighted the need for greater transparency in relation to the services that are provided through the care sector. The fact that it is 2025 and we are still waiting for the consultation that may eventually lead to further designation illustrates the issues with the pace of designation.

Annie Wells: I have a final question. This is for David, although Paul might want to comment. Do you have any views on the proposal to provide Parliament with a power to designate public authorities?

David Hamilton: It is an interesting and imaginative proposal. I envisage that happening through the same degree of consultation, although not as much consultation as is currently happening. That would be scrutinised through the Parliament's committees—probably this committee. It would involve consulting more quickly. There would be the same amount of consideration, but it would work a bit faster and be reflective of what matters to people. The care sector matters to people and they want designation. We have seen that in all the survey responses and all four or five—or however many it is—consultations. Stakeholders have their views and, as you know, people often start off in a position in consultations and end up in the same position. I am never sure how much we get from consultation responses, because I do not see a lot of movement in them. We go through the process, we give everyone the opportunity to be heard, we listen and then we move on.

The Convener: I want to explore how you envisage the role of Parliament. The current consultation period covers two sessions and two iterations of Parliament. There is a view of what the role of Parliament is. What is the philosophical reason for giving Parliament the power to designate when almost everything else sits with Government and is then scrutinised by Parliament? What are the advantages? What are the timescales? What is the problem that we are trying to address? Is it just that it is taking too long to expand designation?

David Hamilton: Part of the problem is that if the Government does not want to do something, it does not happen—it does not have to vote for it. If the Government wants to do something, it can happen. Providing Parliament with the power to designate allows for a proper discussion about designating areas that people feel are appropriate. It allows things to surface. I feel slightly uncomfortable about the fact that something that is core to democracy and should be apolitical can be tinkered with by the party of Government, whoever that is. That is why I see a real advantage in Parliament expressing a view. It is unusual—there is not a lot of precedent for it. However, the last time I looked, this was meant to be a new Parliament with exciting ideas. Let us push the boundaries. Why not?

Ruth Maguire (Cunninghame South) (SNP): Good morning. I have some questions about publicly owned companies, time for compliance and independent schools. Section 3 of the bill proposes a small technical amendment to the definition of “publicly-owned companies”. We have not discussed the issue in our evidence session so far, and only you and the Scottish Government provided any substantive views on it in our consultation. For the record, can you provide

examples of companies that would fall within the revised definition of “publicly-owned companies”, as proposed in section 3?

09:15

David Hamilton: That is a real technical question for the FOI geeks, and I cannot claim to be one. I can speak about the general principle behind the proposal. Essentially, the problem that we are trying to fix is that companies that are jointly owned by Government and local authorities, for example, are not covered. Paul, do you have any examples?

Ruth Maguire: Do you have any examples of specific information requests or appeals that would illustrate the impact of that anomaly?

Paul Mutch: I am not aware of specific examples of such companies. The minister might be best placed to answer regarding the types of companies that are owned by the Government and other public authorities. The issue is, fundamentally, an anomaly in the legislation whereby companies across the public sector that are wholly owned by public sector bodies are covered by FOI legislation—and rightly so, because they are owned by and deliver functions on behalf of public sector organisations—as are companies that are wholly owned by a local authority or two local authorities. However, companies that are wholly owned by ministers and another public authority are not covered.

Ruth Maguire: I understand that. Have any specific information requests or appeals been made to your office that would illustrate the impact of that anomaly on access to information for the public?

Paul Mutch: I am not aware of any particular appeals, but we can look into that. However, a possible situation that falls within those circumstances is that, because those companies are not covered, people requesting information may not be informed of their rights in order to go on and make an appeal. That makes it difficult to answer your question. We can go away and check in with our colleagues on the enforcement side of the office to see whether we can provide any information on that.

Ruth Maguire: That is helpful.

There were positive responses to the proposal to “pause” time for compliance in both the consultation by the Public Audit and Post-legislative Scrutiny Committee—I am in the wrong job to not be able to say “post-legislative”—and the consultation by the member in charge of the bill, Katy Clark.

Your response said that the proposal

“would undoubtedly be preferable to the approach required by the current regime”.

The Scottish Government suggests that improved guidance for public authorities on seeking clarification could address the information requesters’ concerns about delays. We will all have views on how helpful guidance is. Do you agree that guidance alone would resolve those issues? What changes would you expect to see in the revised code of practice in terms of timing and the approach to clarification requests?

David Hamilton: I do not think that guidance is enough, because this is a world of lawyers, and lawyers look at every single word and say, “We don’t need to do that.” However, there is nothing that we can do about that.

The point of the pause is to fix the problem of people coming in at the very last minute, asking for clarification and resetting the clock. It is like snakes and ladders. It is not good practice, but it is legal. The pause is a way of tightening that up. It is a good example of getting the machine’s engine serviced and working again.

Ruth Maguire: Your evidence provided the committee with the statistic that 88 per cent of responses were provided on time last year. Does that statistic include cases in which requests were clarified multiple times?

David Hamilton: I do not think that it does. That information is supplied by the public authorities, and I do not think that the sheet goes into such granular detail.

Paul Mutch: I think that cases in which clarification has been required are included in that data. However, in most cases, whether a body complies will have been worked out from the time at which clarification was received, because the 20 working days would have reset. Public authorities judge their compliance against that timescale.

I do not think that we currently ask public authorities to supply us with information about the number of clarification requests that have been submitted, but we could perhaps look at the data that we collect from public authorities in order to gauge that better.

Ruth Maguire: Any additional evidence or data that your office holds on whether such clarification requests are being used to delay disclosure would help the committee.

In your written evidence, you also highlighted concerns about how the provisions on valid requests interact with those on time for compliance. Can you explain to the committee why introducing the pause mechanism might create an incentive for public authorities to treat unclear requests as invalid?

David Hamilton: It would essentially push them one way. When you ran out of time, you would be more inclined to make a request invalid. That is an unintended consequence.

Ruth Maguire: Given that potential risk, do you still consider the pause mechanism to be preferable to the current reset approach?

David Hamilton: Yes—I think that it would be better. In our consultation response, we actually made a slightly different proposal. The Scottish Government had a similar take, which is that you would have a limited period of time for clarification and could use up your time thereafter. To us, that seems to be a better way of doing it, but what is in the bill is better than what is currently in place.

Ruth Maguire: Thank you. That is helpful.

The Convener: I have another question to ask before you move on from that, Ruth. One thing that has come up is the fact that the actual request can change in the 20-day period, which means that what is finally answered is sometimes very different from what was initially asked, partly because some information will have been delivered. How do you see the interaction between what are effectively new freedom of information requests arising in that period and the risk that the pause could be undermined because the request is treated as being new, which triggers a fresh 20-day period?

David Hamilton: I guess that there is a risk of that, but if the request has changed significantly, it is ultimately a new request. FOI professionals will have to work that out themselves. If people are not happy with it, they can come and speak to us.

Paul Mutch: Our proposal is designed to incentivise early clarification, which should, we hope, minimise the likelihood of that happening, because it would encourage authorities to get the request to the right person early, so that they could consider whether clarification was required. That should have a positive impact on all requests, not only those in which clarification is required, because reaching the right person early will get the ball rolling on a request as early as possible.

The Convener: In your proposed process, the clarification would effectively happen at the start, before there was any breakdown in relations or the organisation was set upon, which would mean that a conversation would happen and what the individual making the freedom of information request needed would actually be understood.

Paul Mutch: Yes. It is about incentivising early consideration so that people can get back to requesters from the outset if they have any concerns about the request. Those late-stage clarifications, which sometimes happen for legitimate reasons, might not reach the right

person until day 15 or 16, or the organisation might not consider the request until quite late in the process because it looks easy at face value but, when it gets into it, it turns out that it is not. Incentivising such early consideration by allowing the clock to be reset only within, say, the first five working days would have a benefit and would improve compliance with timescales right across the board.

The Convener: Would it also develop the relationship between the requester and the answerer, in terms of the actual problem, and perhaps promote support for freedom of information among the public?

Paul Mutch: Undoubtedly. Requesters getting a late-stage request from the organisation often happens for reasons that are not to do with delay but that look like it from the requester's point of view, which frustrates relationships between individuals and organisations and causes further problems down the line.

The Convener: Thank you.

Ruth Maguire: That was helpful. What are your views on the proposal to repeal the regulations that allow an extension of up to 60 working days for grant-aided and independent special schools whenever the statutory deadline for responding to a request would otherwise fall on a day that is not a school day?

David Hamilton: I am generally quite sympathetic towards that as an equalisation of rights. We are talking about tiny numbers—I think that three quarters of schools reported no requests last year, and those that did had received only one or two.

You could make the same argument for state schools, as most of the records management issues and responses are coming from schools, and state schools are suffering the same challenges.

Ruth Maguire: That is helpful.

What support is your office prepared to provide to organisations that would be affected by a reversion to 20 working days as the maximum time for a response?

David Hamilton: None.

Ruth Maguire: That is fair enough. *[Laughter.]* That was refreshingly direct—thank you.

David Hamilton: We have factored that in to the financial memorandum to the bill. There will be a resource requirement from us to make the bill successful. As with everything, we should be pragmatic about it and make the change in a sensible way. When there is any kind of change, we give people some latitude and deal with it accordingly. That is part of the training, and we

would expect to assist in the provisions being delivered and rolled out.

Sue Webber (Lothian) (Con): I have some questions about your general functions under the bill. Why do you consider it necessary to have a statutory power to require individuals to provide information when it is necessary for the commissioner to perform its statutory functions, such as issuing practice recommendations and handling applications for review?

David Hamilton: It can help to add some colour to organisational responses when we are considering particular issues. In the worst-case scenarios, we may be blocked by a corporate response when we want to speak to people and understand something fully. It is a matter of getting an understanding of practice issues.

The power is not something that will be used regularly, but it is a card to have. With any kind of investigatory function, it is important to have the ability to speak to people. We had an intervention with the Scottish Government—it is on-going, in fact—to do with some of the roles of special advisers. The Scottish Government was very good in giving us access—allowing us to go in and speak to the spads. Had the Government not allowed us to do that, we would not have had that access. It was important to get the colour that the spads could provide, with a degree of granularity about their function, instead of just getting washed through a corporate gateway.

Sue Webber: I understand that there might be some limits to how you can respond to this, but can you provide examples of situations in which the absence of the proposed power has hindered your ability to improve FOI practice or to conduct investigations effectively?

David Hamilton: Personally, no, as I have managed to get through things by other means. I do not know whether Paul Mutch can provide any corporate history in that respect.

Paul Mutch: Nothing specific about the absence of that power springs to mind, although, as David Hamilton has said, we know when we have pursued that approach. It is a power that we would not expect to use particularly regularly, although it would be helpful to use it when there was cause to do so, as there was with the Scottish Government intervention. As David said, that gave us some really useful insight into roles and relationships, which led us to the issues that formed the basis of the intervention, and it has subsequently led to those matters being significantly addressed, such that the issues that were at the heart of the intervention are essentially no longer of concern to us.

David Hamilton: Sometimes, our relationships with public authorities are not swimmingly good.

We get pushback, and we can encounter some not particularly helpful attitudes and approaches. Having the power as a backstop at least reminds public authorities that they are dealing with a regulator and that they need to—

Sue Webber: It is not just about you, as an organisation, having that clout; it is about having the law to support that.

David Hamilton: Yes, it is about being able to do that. Also, if there are issues that need to be addressed, we will be able to address them, because people will be more likely to speak to us personally than to go through line managers.

09:30

Sue Webber: You will not be forcing them, kicking and screaming.

Paul Mutch: We have the power to issue information notices, which require the supply of information to us, but not everything that is helpful to an investigation exists in recorded information. Sometimes, a discussion with an official about the rationale for a particular action being taken, for example, is what adds essential additional colour to a particular circumstance.

Sue Webber: Sticking with the Scottish Government element, section 13 of the bill proposes to repeal section 52 of FOISA, which is sometimes colloquially referred to as the First Minister's veto power. Many of those who were consulted view the veto power as unnecessary and contrary to the principle of openness that underpins freedom of information.

What evidence or examples of how late compliance with that decision—oh, goodness! I am getting all mixed up. I do not need to ask you that—my apologies. My questions for the different sets of witnesses are split, and I am getting a bit confused.

Let us move on to failure to comply with notices. I do not need to ask you about the veto—

The Convener: Unless anyone wants to comment on that.

Sue Webber: Yes, you might want to comment on the First Minister's veto being repealed. Do you think that is a good thing?

David Hamilton: Yes. *[Laughter.]*

Sue Webber: That is good for the *Official Report*.

David Hamilton: To be quite serious, actually, the veto drags us down in our international standing, and we could immediately see an increase in our international standing by getting rid of it. The power has never been used, and we have dealt with some fairly sensitive issues. Most

recently, you will have seen—now that it has been publicised—that we dealt with the Faslane situation, which, incidentally, would not have come under the veto, because it came under environmental information regulations. The veto has had its time. It was a safety net, but it is not required.

Sue Webber: It has never been used.

The Convener: Is it fair to suggest that that is an example of the fact that we are dealing with 20-year-old legislation? That provision was included in the 2002 act because people were concerned about what freedom of information would look like, but, as we look back, we realise that it was an unnecessary use of belt and braces—and probably a second belt, just to make sure.

David Hamilton: That is a great way of putting it. It has never been used, and it is not needed.

The Convener: Thank you. I am sorry, Sue.

Sue Webber: Please do not apologise, convener. Thank you for making me look more on the ball this morning. *[Laughter.]*

Let us have a look at failure to comply with notices. Section 14 of the bill amends section 53 of the 2002 act to make it explicit that failure by a public authority to comply with the timescale specified in a decision notice can result in referral to the Court of Session for enforcement. Do you have any examples or evidence of how late compliance with decision notices has caused inconvenience or resulted in unnecessary expenditure for your office?

David Hamilton: Yes—last week.

Sue Webber: Oh, it is a very live issue. Please carry on.

David Hamilton: That was another frustrated comment in a release that we had to put out. It was to do with—let us name it—East Dunbartonshire Council, which did not comply with the instructions of the notice. It was meant to comply within six weeks, as everyone is required to, but, after another four or five weeks, it still had not complied. We warned it and warned it, and eventually we said that we would report it to the Court of Session. The reality is that you have to instruct lawyers, get the case to court and go through the legal process, by which point—suddenly—the response pops out. It is really frustrating, because there is no point in our taking the case to the Court of Session once the response is out, because the offence is not complying and the organisation is just saying, “Oh, we're late.”

There was an omission in the drafting: the power should have been in the legislation from the beginning. It is in the UK legislation, but it was just

forgotten about in the Scottish act. The provision in the bill tidies things up to sort that out.

Sue Webber: That is helpful.

David Hamilton: I should add that we are not going to report someone to the Court of Session because they are late by a few days. We have to be pragmatic and sensible about it, acting according to the circumstances. However, as a backstop, public authorities need to understand that there are consequences to not complying with the law. At the moment, they know that they do not have to comply.

Sue Webber: That is fine. I will not ask the next question, because it has been answered.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Annie Wells alluded to my first question, but I will tease some more out of it. The Scottish Government suggested that, as drafted, the new duty to publish could require public authorities to publish all the information that they hold. What information should fall under that duty? Should the bill be amended to clarify that exempted information should not be subject to the publication duty? Can you clarify the position on that?

David Hamilton: You are talking about the change to the publication scheme, which everyone says does not work. Here is a starter for 10: what we have does not work, so how can we fix it?

How the duty will work is getting quite a lot of interest across the world, because it is about a much more dynamic and flexible way of publishing information. Everyone is asking me what the code will look like, but I am not entirely sure yet. To be frank, the key thing is getting stakeholders together and finding out what people actually need and want. Part of that is about public authorities understanding what they are being asked for and what they want to put out; part of it is about finding out what would be useful and what is important. Some of the stuff is already in the existing publication scheme, as you would expect, but the new publication scheme will allow a bit more granularity for different sectors, and it could allow for a bit of standardisation.

The spin-offs from this have probably not yet come out in the evidence. In looking for an example, I looked at affordable housing. We have a housing emergency, but there is no common definition of affordable housing in Scotland, so there is no way of comparing data across different authorities. We can start to look at that as part of an evolving landscape, and we can ask different stakeholders to agree on a definition, to give people a real ability to compare and contrast their local authorities and services against others. That is a spin-off mechanism from the change to the publication scheme.

Rona Mackay: Has that work started yet?

David Hamilton: No, simply because I do not have the resource to do it. We are kicking this thinking around just now—thinking about what the process could look like. I am quite clear that the stakeholders need to work together on different sectors, because it is not going to be a case of one size fitting all. When we start to get people together, it will be a case of asking what they are looking for in order to find a way forward. A code of practice can be iterative in that it can start off very similar to what we have but move rapidly—or slowly, although not as slowly as other things—to a position where it starts to evolve, to reflect what people are looking for and to allow people to strategically design into their systems the way that they do things.

Another example is the use of AI, which we talked briefly about. Artificial intelligence is being adopted, but it is not being incorporated from an information perspective, which is a concern for me, because every time that you make a generative AI query, you are creating records—creating information. I have yet to hear an AI vendor or a public authority talk about that. People need to start collecting that information, and, if people ask for it, releasing it. It is about publication by design, whereby you have your systems and you start to show things.

Therefore, I see a journey in the short, medium and long terms. It could be quite exciting for everybody, and I genuinely believe that we can start to cut costs in public authorities, because it will require less processing in the background, particularly with the live publication of data.

Rona Mackay: That is interesting. Is it the responsibility of your office to start that work and to get stakeholders together to try to change the system?

David Hamilton: Under the bill, it will be—yes. If the bill is passed, we will look at that, and it is one of the things that have been costed in the financial memorandum.

Rona Mackay: That brings me to my next question. What are the resource implications of the proposal for your office?

David Hamilton: We have fully costed the staffing for it. I think that we said that there would be two officers initially.

Paul Mutch: We did, yes.

David Hamilton: They would develop the scheme and do the engagement work. We have certainly been tight in that regard. We understand the public sector constraints and the fact that, as the bill is a member's bill, it does not have Government funding. We are aware of that and we have tried to cut our cloth accordingly.

Rona Mackay: Okay. Thank you. In your view, could the proposal's objectives to embed a professional culture and improve accountability be achieved through non-legislative measures such as strengthening the section 60 code of practice? Is there any possibility of that? If so, what changes would be most effective?

David Hamilton: We can hope, but it has been 20 years and we still have problems, so I think that it needs a little push. In many ways, the opportunity for non-legislative measures has passed. I suggest that we have done it a certain way for 20 years now and we still have some problems.

The Convener: Do you see the designation of freedom of information officers within institutions as an advantage? Do you see the benefit of having such officers as a place for you or the public to go to in the first instance?

David Hamilton: I am fairly sanguine about that. The benefit is probably to do with equality of arms when it comes to data protection. It is a role as opposed to a post, if that makes sense. I do not think that people need to start employing lots of different people for the role, because staff are probably able to double hat, as it were.

The benefit is that it will give the freedom of information function in organisations clout. I regularly see problems in that regard. I have previously said, both to the committee and in my general reports, that the best thing that I can do when I see an authority in crisis is to speak to the chief executive and start getting some investment in that function. The bill may start to push things up the chain. I think that freedom of information has always been the poor relation of data protection.

The Convener: This is potentially beyond the scope of the bill, but is there some value in looking to bring records management, the general data protection regulation and freedom of information together in a combined role in order to give people access to information and stop them running into walls—internally, within organisations—that others are defending?

David Hamilton: There is massive crossover. It is like looking at a Venn diagram to see whether all the different circles converge on a particular role. Again, it depends on the organisation. Some of the big organisations would struggle with that, whereas the smaller ones certainly would not. It makes sense, and it is happening. In fact, it is not even about individual posts; as I said, it is about the role and the function.

Rona Mackay: On a more general point, you talked about the changes over the past 20 years, but have there been iterative changes throughout

that time, albeit in a small way? Have you been able to move with the times a bit?

David Hamilton: Paul, when was the section 60 code last changed?

Paul Mutch: It was in about 2016.

David Hamilton: So, the answer is perhaps no. [Laughter.]

Paul Mutch: I think that the last update to the code of practice was in 2016. Over the past 20 years, we have taken a slightly different approach to publication schemes, with the commissioner creating a model publication scheme for authorities to adopt rather than requiring the submission of individual publication schemes. That was a step towards a greater degree of standardisation.

As you will know from your evidence sessions so far and the submissions that you have received, there is consensus across the board that the approach is just not working effectively in practice. However, we have taken steps to improve things and make them work more effectively.

The Convener: David, you talked about the changing position of AI, and you rightly pointed out that it is in a very different place now from where it was when the bill was first considered. Do you have any fears about technology effectively allowing for information to be hidden? Is that a genuine concern? Is it something that we should be worried about and that the bill can address or should we be a bit more optimistic about technology, because new technologies such as AI might make it incredibly difficult to hide data and information?

09:45

David Hamilton: I am optimistic about technology. I am sceptical about a lot of AI, particularly in relation to financial savings, but its functional savings are fantastic. Globally, we are facing a data explosion, which is going to be off the scale when you consider where we will be in the future. The problem with freedom of information is that you cannot release information if you cannot find it—AI can certainly be of use in that regard.

That is particularly true of agentic AI. That is where you go to a website, the AI asks a question, it checks data sets and records and comes back with information. That technology exists just now. In fact, you can train your own AI on somebody else's public data set. That type of thing allows people to get good granularity of information.

The difficulty will be standardisation. For example, if you are asking about who has the

most affordable houses as a ratio, you might not get that information, because the definitions will be different. However, the potential is that we can drive better public services and a better society by using AI for the publication schemes.

The Convener: That is helpful. Interestingly, in its submission, the Law Society of Scotland talked about your lack of power with regard to the inspection of electronic devices and things like that. You have already talked about certain areas in which things need to be tightened up because they were missed or because they just need to be tightened up. Have you considered what other powers you need and whether the bill might be the vehicle to provide you with those powers? Such powers could include the seizure of electronic devices or access to AI databases in California to see what is in them.

David Hamilton: We have the power to search—we can get a warrant for that. That is something that we explored but did not have to use in the end. That is another good example of where there is a backstop that allows us to say, “If you don’t let us see the information, we’ll get a warrant.” A warrant is a world of pain for everyone. I am comfortable with that approach—the information that is held is the information that is held.

There is a difference between what I need to do to satisfy my function and what would be looked at as part of a policing investigatory function. I am clear about the parameters and differences between the two functions. I do not feel in any way that we need further interrogation and search powers, beyond what is mentioned in the bill.

The ability to speak to people is key, as are the enhanced powers under section 65 of the Freedom of Information (Scotland) Act 2002. That provision is to do with intent to destroy information and, if you do not mind, convener, it merits a comment. I want to give some reassurance, as I gave to a conference the other day, that there is a very high threshold for showing intent. We have never used the current power in relation to showing intent to destroy information and evade freedom of information legislation. People know that the power is there if there is a live investigation.

However, the difficulty is that it is not a criminal offence for stuff to be deleted with the intention of evading freedom of information if there is not a live investigation. There may be some records management issues and practice concerns with doing that, but those are just practice issues, which are not enforceable. Therefore, the provision would put in a backstop to make sure that people clearly understand the parameters of the legislation, which is fine.

The concern with the provision has been about conflict with records management and that we could end up not deleting records. People should have no fear of that, because if they have a records management plan, there would clearly be no intent to evade freedom of information by deleting records; they would just be following the plan. If people are doing everything normally, even outwith a records management plan, they will not meet the threshold unless somebody else says, “They destroyed that information because they wanted to avoid FOI, and I heard them say so.” That is the kind of threshold that we are talking about. There are very few circumstances that meet that threshold.

We get allegations about section 65 cases, with people saying, for example, that somebody destroyed something as soon as they asked for it. If we ask why they think that, they say, “Well, they should have it.” That is not good enough. There has to be a smoking gun that shows that there is something that merits investigation. As I say, we have not had to pursue that.

The Convener: We have heard concerns about the timings that are proposed in the bill and whether the years are triggered from the time of the event or the investigation. Even the most innocent of people might think that it is a challenge to have a timescale that does not start when an event happened but starts when another event happens at some future date. What is your view on that?

David Hamilton: The challenge here is that, at the moment, it is quite strictly time limited. I will use the Scottish Government’s Covid situation as an example. In that scenario, everything was time barred by the time we got to it. I am very clear that there were no offences, but, had there been any, we would not have been able to take them forward.

My concern is that we are just talking about the Scottish Government. Multiple public authorities were in exactly the same situation, having information that they did not record properly, but the Scottish Government just happened to be caught in the spotlight of the Covid inquiry. Had the same inquiry been run across all the other agencies, I suspect that we would have found exactly the same practices.

We need to be mindful that the time limits matter. We have a more pragmatic way of dealing with a time bar, so that if it does come up, we can deal with it rather than it just being time barred, because inquiries are sometimes made years after.

The Convener: So, the public can be confident that not starting the time until some future date is because the level that is needed to prove a

potential offence is so high that it will be used only when something has been put beyond the reach of the public deliberately, with the intent of preventing the public from seeing it. The public can take confidence in having a more elongated timescale, if I can put it that way.

David Hamilton: Absolutely. Again, as a former police officer, I understand very clearly how intent applies in a criminal situation. If you hit somebody by accident, it is not an assault. If you hit them because you want to hurt them, it is. Take that across. I do not have any difficulty with that, but a bit of reassurance needs to be given to the wider public.

The Convener: The junior officer standing by a shredding machine shredding stuff because they have umpteen copies of it has nothing to fear.

David Hamilton: No, nothing at all.

The Convener: Good. My final question is about the 12 months until royal assent, should the bill be passed. Do you have any views about the code of practice on proactive publication in that time?

David Hamilton: It depends on how the code of practice lands, but if we get to an iterative position and we can move dynamically, that would be the best way—get it up and running and get it going. Off the top of my head, one option would be to take what we currently have and make that the code of practice. Then we move on and so on. We can do it.

The Convener: Brilliant. Thank you for your evidence this morning. If anything further comes to mind or you want to send anything in, you know how to reach us and vice versa. I call a temporary halt to the meeting for a changeover of witnesses.

09:53

Meeting suspended.

09:58

On resuming—

The Convener: For our second panel, we are joined by Graeme Dey, Minister for Parliamentary Business and Veterans, who is supported by the Scottish Government officials Jill McPherson, head of the freedom of information unit, and Ross Grimley from the legal directorate. I welcome you all to the committee. Minister, I understand that you would like to make a brief opening statement, and I am more than happy for you to do that.

The Minister for Parliamentary Business and Veterans (Graeme Dey): I am delighted to have the opportunity to give evidence on Katy Clark's Freedom of Information Reform (Scotland) Bill.

The Government's starting point is that the current Freedom of Information (Scotland) Act 2002 is fundamentally sound and well used and that there is strong compliance. It ensures a strong and enforceable public right of access to information about the work of Government and public services. It also contains safeguards to protect genuinely sensitive information and the resources of public authorities. Although it is similar in form to the United Kingdom legislation, our regime is more weighted towards the rights of the requester in a number of respects, so more information is released.

However, that is not to say that it is perfect or that it could not be improved. FOI law has not remained static over the past 20 years. The Freedom of Information (Amendment) (Scotland) Act 2013 made a number of changes to ensure that the law was working well, including changes to ensure that the offence of altering records with the intent to prevent disclosure was enforceable, and to enable earlier release of historical records.

In relation to coverage, FOISA has also been extended in a number of significant ways through the exercise of the existing extension powers that are held by ministers, as approved by Parliament. Those include extensions to local authority culture and leisure trusts in 2013; to bodies of various types in 2016, including grant-aided and independent special schools; and, in 2019, to registered social landlords and their subsidiaries. I led the last of those extensions during my previous time as Minister for Parliamentary Business and Veterans. One year on from designation, 97 per cent of RSLs indicated that they were confident in responding effectively to FOI requests. We are now preparing to consult on extension to private and third sector care homes and care-at-home services. I hope that those initiatives show the value that ministers have attached to protecting and expanding FOI rights since the Government has been in office. We have taken a proactive approach to enabling provision of information.

10:00

There is no doubt that fulfilling FOI obligations can place a high demand on resources, particularly of larger public authorities. The Scottish Government now responds to 6,000 requests per year, some of which can be complex and multiple in their asks. We are currently analysing how much those requests cost us. Initial work on 12 cases suggests a cost of anything between £215 and £3,400 per request. Clearly, more work is needed to understand those variances, and that work is under way.

The Scottish Government is not alone in seeing rising request numbers year on year, and that is a cost to the public purse. As we consider reform

and improvement of FOISA, we must therefore be mindful of the need to ensure that it remains proportionate in its requirements. However, I want to be clear that I highlight that not as a complaint or to appear resistant to change or reform but to offer a fuller perspective on how FOISA works in practice.

Turning to Ms Clark's bill, as members will have seen from my memorandum to the committee, we have sought to take a constructive approach. We have set out where the Government agrees with the bill's aims and where we think that some of the proposals might be improved, and we have highlighted the aspects of the bill that the Government regards as problematic.

The bill is not a Scottish Government bill, so it is for the member in charge to address any concerns that the committee's stage 1 report might raise. However, I am ready to engage with the committee and wider Parliament, both in the context of the proposed legislation and in a wider sense, on how the regime might be improved. Therefore, I and my officials are happy to answer any questions that members have today to that end.

The Convener: Excellent. Thank you very much for that opening statement, minister.

Would it be right to say that the Government now recognises that the time is right for some changes that can be achieved only through primary legislation?

Graeme Dey: As you will appreciate, I cannot speak for the Parliament in the next session, but I think that it would be fair to say that we recognise that there are some areas where, if there was a primary legislation vehicle in the next session, it might be appropriate to use that opportunity to look at where FOISA is working effectively and where things might be tightened up. Without committing Parliament or the next Government to that, I think that there is a recognition that a time is perhaps coming when that would be useful.

The Convener: You mentioned in your opening statement the support that the Government is willing to provide with regard to assisting with shortcomings in the bill. I welcome that on behalf of the committee and, of course, the wider Parliament. Is the bill not the vehicle to conduct that primary legislative change?

Graeme Dey: The issue is time, as the Law Society of Scotland has touched on. The bill was introduced quite late in this parliamentary session. It requires appropriate consideration and, from our perspective, amendment. I have to acknowledge—that, like the Parliament's resources at this stage in this session, the Government's resources are spread

quite thinly when it comes to activity on both its bills and members' bills.

You will recall that, just a few weeks ago in the chamber, I committed to assisting the committee and the Parliament with regard to another bill. I cannot sit here today and say that we could commit the resources that would be required to amend the bill to get it into the kind of shape that I think that it would need to be in to proceed. However, of course, it falls to the committee to come to a conclusion on what should happen with the bill.

The bill is helpful in refocusing attention on FOISA. If the bill could not be sufficiently amended or simply fell because of lack of time, that is not to say that it would not point to a way forward, perhaps for the Parliament in its next session. Of course, there is always the option for members to bring back the bones of a bill that fell in a previous session.

The Convener: Who should take responsibility for the vehicle of a freedom of information bill? Should it be a member, the Scottish Government or the Parliament? We have had this discussion about a number of items, particularly those that come to this committee for various reasons. On behalf of the Scottish Government, who do you think the correct driver of the vehicle should be?

Graeme Dey: That is a really interesting question. We would all think that Parliament should, at times, take the lead on a bill. However, as we all know, Parliament is not resourced to take the lead on every bill, which is something for the institution to reflect on. The Government will always seek to assist. We have a duty and a responsibility to ensure that legislation that is passed by Parliament is competent and workable. However, we also have to consider the optics if, for example, the Government is perhaps seen to be stepping in and could be accused by some people of protecting its own interests.

The Government is sometimes between a rock and a hard place. I hope that, in my commitment to the bill that I referred to previously, I struck the right balance between offering to assist and appearing as if the Government was stepping in. There are certain areas of Parliament's legislative activities in which it is not for the Government to take a lead.

The Convener: What is the Scottish Government's view on approaches that would lead to improvements in the freedom of information world? What is the balance between primary legislation, secondary legislation and non-legislative approaches?

Graeme Dey: I will bring in Jill McPherson in a moment, because she is leading on that. There is an opportunity to make improvements outwith

primary legislation—we are taking forward a number of matters in that way. However, there are aspects—which we may come on to—that will require primary legislation. If we had had more time for the bill, we could have used it as a vehicle to implement changes that might best be implemented.

The Convener: I could sarcastically suggest that 20 years is a long period, but I will not.

Jill McPherson, can you offer us an insight into any non-legislative solutions?

Jill McPherson (Scottish Government): The debate has been about extension, particularly to bodies such as care providers. Although we are aware of little pockets where an improvement in the law that required primary legislation would be beneficial, the thinking has been that, instead of pushing on with a large amount of primary legislation, the big wins have been getting that big extension done and some of the other work that we have been able to effect.

Graeme Dey: It is about culture, is it not? In the early days, there was a sense in organisations that FOI was an additional burden—an additional ask. People’s mindset was perhaps not what we would have wanted it to be. However, reflecting on my time since I came back as a minister, I would contend that the attitude and approach of those who deliver FOISA in our organisation is much improved. It is now part of the day-to-day work of the Government. Culturally, FOI has moved on quite a lot, and that has not required legislation.

The Convener: It requires cultural change.

Annie Wells joins us online.

Annie Wells: Sorry—I am having technical difficulties here.

Thank you for joining us, minister. I would like to look at the further powers to designate public authorities. Do the minister and the Government agree in principle that changes in public service delivery models require timely designation of organisations as public authorities under FOISA?

Graeme Dey: It goes back to those age-old questions about how quickly organisations can be designated and whether the whole process should be sped up. I have some sympathy for that argument and can understand frustration from the outside about the time the process takes, but if you consider all the requirements that need to be met to get the process right, you see that much of that time is necessary. I would certainly be happy to explore how the process could be sped up without compromising it or its robustness in any way.

Annie Wells: I have a follow-on question, minister. Does the Scottish Government

“reject any suggestion that it has been slow to make use of the extension power”?

Graeme Dey: It does, and I said so in the memorandum that I sent to the committee, but I can understand why people from the outside would feel otherwise. However, since the last additional roll-out, which I led, we had the pandemic, which had an enormous effect on the activity of the Government and the Parliament, and we took a view that the Care Reform (Scotland) Bill should be in place before we conducted the consultation on this issue.

I defend that decision, but I can understand why people have looked at that situation and felt that it was frustrating that more had not been done or that things were not done more quickly.

Annie Wells: On the memorandum, will you provide an update on the review of the public authorities that are listed in schedule 1 of the 2002 act?

Graeme Dey: I will bring in Jill McPherson on that.

Jill McPherson: This is where I need to find my notes. [*Interruption.*] The review is something that we will take forward. At the moment, our feeling is that the majority of public authorities would be covered by the measures that are already in place.

Annie Wells: Thanks for that. If you want to add anything further later on, please come back to us.

What is the timetable for and scope of the planned consultation on extending FOISA to private and third sector providers of care homes and care-at-home services?

Graeme Dey: I had hoped to be able to say today that the consultation would commence next month. It might still commence next month. We are just dotting the i’s and crossing the t’s at the moment. If it is delayed into early January, that will be because of the festive season, but we are close to getting it done. I cannot give you a definitive answer, but I am happy to write to the committee as soon as we have a date.

The Convener: Please do.

Annie Wells: My final questions are about section 2. Section 2(1) of the bill would require that Scottish ministers consider recommendations from the Scottish Information Commissioner on designating new bodies as public authorities under FOISA.

Would the Government like to expand on the concerns outlined in its memorandum regarding the provision in section 2(2) that would give Parliament the power to designate organisations as public authorities under FOISA?

Does the Government wish to clarify whether it believes that those provisions should be amended or removed from the bill?

Graeme Dey: There is a lot in there.

Annie Wells: There is quite a bit.

Graeme Dey: On section 2(1), we would always consider recommendations made by the commissioner on the extension of FOISA, and we can demonstrate that that is the case.

We have reservations about the extension of the Parliament's powers, which part of your question was about, and we went into some detail on those reservations in our memorandum to the committee. I can summarise them, if you like, but they are well covered there. For the reasons that we have outlined, we are not convinced that that is the appropriate way to go. It is worth noting that Parliament already has a substantial input in that designating is dealt with under the affirmative process, which means that there is a balance between the role of ministers and Government and the role of Parliament. I think that that strikes the right balance.

10:15

Annie Wells: Can you clarify whether the Government believes that the provisions should be amended or even removed from the bill?

Graeme Dey: We do not believe they are appropriate. We think that the current system strikes the right balance.

The Convener: I want to clarify a couple of things. Section 2(1) would require the Government to take heed of the commissioner's proposals. I presume that the Government has no concerns about that, because you have just asserted that you would always listen to the commissioner, which should mean that any obligation or requirement on the Scottish Government to respond to such proposals would therefore not be too big a step for the Government to take.

Graeme Dey: If we are talking about a requirement to consider, the Government would be relaxed about that, but a requirement to be directed would be another matter.

The Convener: Does the Government accept that there is not a challenge in being required to consider a proposal from the commissioner, which would therefore result in a requirement to respond that?

Graeme Dey: There is not in principle.

The Convener: That is fine.

I am going to jump about a bit and come to Jill McPherson regarding the listed public authorities. Is the review still on-going or has it concluded?

Jill McPherson: Do you mean the review of schedule 1 of the 2002 act?

The Convener: Yes.

Jill McPherson: That is not something that we have directly looked at. Our focus has been on the care extension.

The Convener: So, there is no review of schedule 1 going on at the moment.

Graeme Dey: There will be, once the care issue is dealt with.

The Convener: That will happen when the space appears. I am trying to clarify that. If you want to write to the committee regarding that, that is fine.

My final question is for you, minister, and it is about the proposal to involve Parliament in designating public bodies. In essence, there is a concern that the process currently takes too long, and the proposal is, in part, driven by frustration with how long it takes. If Parliament is not the appropriate vehicle, how are we going to curtail the length of time that it takes to designate? I mean that in the widest sense.

Graeme Dey: That is a fair question, but I refer you to what I said earlier. Although I can understand the frustration about the time that that takes, I am not necessarily sure about the alternative process. We have some concerns about how that would work in practice and are not sure that it would necessarily deliver the robustness that is needed. None of us wants to be in a situation whereby, after it has progressed something, Parliament could be challenged on the groundwork that was done before it decided to proceed or on the robustness of the actual process beyond that. That is our concern.

If Parliament is to have a process that is sufficiently—I am going to use the word "robust" again—robust to relieve it of any risk of judicial review, I am not sure that it could do things more quickly. However, I get the point about the time that that takes.

The Convener: Is your concern that Parliament could not create a process that would stand up in court, or is it a more prosaic concern that the resources available to Parliament to undertake the sort of inquiry that is needed fall far short of those available to the Scottish Government?

Graeme Dey: It is a mix of both. I will bring Ross Grimley in on that point.

Ross Grimley (Scottish Government): I can give some background, which we tried to set out in the memorandum. Section 2(2) would introduce section 5A, which sort of mirrors what section 5 of FOISA currently does. However, the designating process would be initiated by Parliament instead

and would use a parliamentary resolution-making process to achieve what section 5 currently does.

For background, when we looked into the provision, we found that the law-making-by-resolution power that is proposed for section 5A is relatively unusual. We were able to find four other instances of law making by that method—four other statutes on the statute book do it. I will not list them, but the thing that they all have in common is that they are typically used to regulate matters of special parliamentary interest or something to do with the internal running or administration of the Parliament. That rationale does not apply to FOISA.

The designation of bodies as public authorities under FOISA has a really strong ministerial interest, which relates to the wider running of the Government and to the impact on organisations. Typically, when we see the section 5 process happen, it involves extensive input from the Government policy directorates, the FOI unit and the business area that understands this specific area. That level of ministerial involvement is essential in exercising the function of extending FOISA. We do not think that the parliamentary resolution power would be an appropriate way to achieve that.

The Convener: One of the examples that the Parliament looks at is lobbying.

Ross Grimley: It is. There is the Interests of Members of the Scottish Parliament Act 2006, the Scottish Parliamentary Pensions Act 2009, the Lobbying (Scotland) Act 2016 and the Scottish Parliament (Assistance for Political Parties) Act 2021.

Of those, the Lobbying (Scotland) Act 2016 seems like a bit of an outlier, but if you look at the policy memorandum, the delegated powers memorandum and the legislative competence note that accompanied them, it is very clear that, during the passage of that bill, real consideration was given to whether there should be a resolution power or a Scottish statutory instrument power. It was considered that regulation was primarily a parliamentary matter, so although there was executive interest in the matter, the outcome was weighted towards the side of parliamentary interest. The bill already had other resolution powers, so the Government said, “For consistency’s sake, let’s make it all resolution powers.” Essentially, it is evident from the paper trail that that was the approach.

I agree that the 2016 act is an outlier to an extent, but it was still the fact that the issue was primarily a parliamentary interest—

The Convener: Interestingly, it was the Government that proposed that regulation of

lobbying become a parliamentary interest under the 2016 act.

Ross Grimley: Yes, it was. I take the point about the 2016 act, but the same considerations about parliamentary interest and oversight do not apply to the designation of bodies as public authorities under FOISA.

The Convener: Therefore, the Scottish Government’s concern is not that law making by parliamentary resolution is an unusual vehicle but that the Scottish Government’s wider interest in FOI—you have talked about cross-policy input—is so great that designation should not sit with the Parliament, but should stay with the Government, with the various iterations being updated accordingly.

Ross Grimley: There should be both parliamentary and ministerial involvement in that process.

Graeme Dey: That goes to your point about resource, which is the word that you used, convener. We have the breadth of expertise and input into the process that the Parliament is currently unable to provide.

Jill McPherson: It is really important that, in the extension process, we set up the bodies that are coming in to be designated so that they are operationally and practically successful thereafter. It is not only a case of carving out a designation and saying, “Okay, it is X, Y and Z.” For example, the process that we are going through with the care organisations very much involves considering the size and type of organisation.

With help from the commissioner’s office and our advisory group, we are already beginning to talk to organisations about the support that is in place and build their expectations around what is practically involved when FOISA designation is rolled out. It is not just the case that you get a badge stamped on you that says, “You are now under FOISA, so go and get on with it.” The process that we are going through is highly useful in ensuring that, once the extension goes live, it works and is effective. Our experience with the RSLs demonstrates the value of that process.

The Convener: If we compare the bill to the Lobbying (Scotland) Act 2016, we see that the reality is that it is not the Parliament that carries out the designation of the new entities that are deemed to be lobbying. That is done by another body.

What we are talking about is the decision point. As Ross Grimley has rightly said, rather than designate bodies through secondary legislation, it is effectively done by way of motion.

Graeme Dey: The engagement that there is in the lead-up to the completion of the FOISA

designation provides the groundwork to ensure that the result will be successful.

The Convener: I am not convinced that the argument that you are presenting—that the Parliament is incapable of doing the preparatory work—is as strong as is being relied on, but I understand the evidence that you have put forward.

Ruth Maguire: Good morning. Thank you for the memo you sent to the committee, which lays out your position, and for your opening statement. Both were helpful. I have a couple of questions: one is about an area where the Government is supportive and the other is about an area where it is not.

The first question is on publicly owned companies. The Information Commissioner and the Scottish Government were the only organisations to provide substantive views on the proposal in section 3 that provides for a technical amendment to the definition of publicly owned companies. Are you able to provide examples of companies that would fall within the revised definition of a publicly owned company?

Graeme Dey: We have been doing work on that, as you might imagine. It has not concluded, but, as things stand, we have identified only one company that we believe will be captured by that—Research Data Scotland. The members of the company are the Scottish ministers, Public Health Scotland and a number of universities. I am not saying that that will be the definitive list, but we have identified one.

We recognise that there is an anomaly, and we are supportive of the approach that is proposed in the bill, because it would allow us to address that anomaly.

Ruth Maguire: The fact that you have flagged only one company explains why, in the last session, we were not able to get any examples of where that anomaly had caused a hold-up in people receiving information.

Graeme Dey: If we identify others quickly, we will write to the committee with further information.

Ruth Maguire: My second question is about time for compliance and the proposal for a pause. The Public Audit and Post-legislative Scrutiny Committee and the member in charge both consulted on that, and responses about the proposed change were positive. I understand that the Scottish Government is not persuaded of the need to change the reset mechanism and allow for a pause. Will you give your views on that?

Graeme Dey: I will bring in the team, because they have the detailed answer.

Jill McPherson: We understand the concerns that underpin the provision, and it is important that, if a clarification is required, it is given as early as possible during the handling process. If that is not the case, it can cause frustration for requesters, and that is not okay.

I do not think that requests for clarification are systematically misused as a delaying tactic. We are not picking that up across the sector in Scotland, and certainly not internally in the Scottish Government, where we have our own big operation under way. Delays often happen because something else has happened in the process—perhaps an issue in the allocation or because somebody has gone on holiday—and, at far too late a point, it is identified that what is coming up in the searches does not quite fit with the question that is being asked.

Adding in a pause could result in unintended consequences. Very poor responses could go out if the pause happened late in the process—there is concern about that. It is also very hard to say at what point in the process we would put the pause in.

Ruth Maguire: How does the Scottish Government know that there is not a systematic misuse of requests for clarification? How is it measuring that?

Jill McPherson: We know that simply because we are networked across the country. We talk to the commissioner's office and to other people who are involved in the FOI process.

Ruth Maguire: So, the evidence is anecdotal.

Jill McPherson: Yes.

Ruth Maguire: Some of the evidence that we heard in favour of the change was about the perception of trust and people's perceptions. We acknowledge that not everything is intentional, and you gave the example of somebody being absent. We heard full evidence from Glasgow City Council, for example, about how it deals with things. Is there not value in making changes that will improve trust in the system?

10:30

Graeme Dey: Yes—if there is a significant issue to be dealt with and if it does not create practical issues.

There is perhaps a lack of knowledge of the processes that organisations have to follow, particularly with a complex request, to ascertain which part of the organisation might hold the information and can pull it together. I can understand the issue if someone who has requested information is contacted on day 17 and asked whether they can give further clarification.

Perhaps they have started from a standpoint of great concern, so they will treat that request with suspicion. We are saying that there are often practical and understandable reasons why that has occurred.

We are not aware, anecdotally or through the network of contacts, that there is a significant issue. We just have to ensure that, if such a change is to be made, there will be no unintended consequences that might lead to poorer-quality answers being provided simply to avoid falling foul of the process.

Sue Webber: Section 11 of the bill proposes repealing section 48A of FOISA, which prevents the Scottish Information Commissioner from investigating the handling of information requests by its own office. You have adopted a neutral position on that. I was wondering whether you had assessed or reached a position on whether the exclusions for the Lord Advocate and the procurators fiscal should also be repealed. If you have not, what factors would you need to consider in order to be able to take a position?

Graeme Dey: We have concerns based on legislative competence in relation to the Lord Advocate and the procurators fiscal. I will bring in Ross Grimley to expand on that a little.

Ross Grimley: I do not have too much to add. We would have to look at the issue in a little more detail. As the minister said, there are legislative competence issues that need to be considered in more detail. If it is helpful, we could set that out in more detail for the committee.

Sue Webber: It would be helpful to understand why you take that position.

Ross Grimley: We would probably have to submit more detail in writing.

Graeme Dey: We have concerns about the prosecutorial activities of both in terms of legislative competence.

Sue Webber: That would be interesting, because we got a very strong yes from our previous panel on whether those two groups should be included in the legislation.

Graeme Dey: You will appreciate that our job is to interrogate the workability of proposals.

Sue Webber: Yes, I understand that.

Making the codes of practice under FOISA enforceable would, in effect, give them the status of law. Why do you consider that proposal to be problematic within the current freedom of information framework? If the proposals on enforcement notices were introduced, what form of parliamentary oversight would be necessary to ensure accountability?

Graeme Dey: Jill McPherson knows all about codes of conduct.

Sue Webber: That is good.

Jill McPherson: We take the view that the existing codes of practice play a valuable role in setting standards for good practice. As we know, the commissioner can issue practice recommendations. However, allowing the issuance of enforcement notices would elevate the code to the level of enforceable law, and there is a clear distinction between the statutory requirements of FOISA, which are legally enforceable, and the requirements of the codes that advise on standards of good practice. That distinction has served us well.

It is also easier to update the codes as we go on. The minister has talked about cultural change as time goes on, and people have got more used to FOISA. The codes of practice are a good way to work with the case-handler community in Scotland to maintain good practice.

Sue Webber: Have the codes been updated often in the past 20 years?

Jill McPherson: We are working on one at the moment.

Sue Webber: How long does it take you to work on one? We have heard some challenges about progress, and the pace at which things seem to move has been classed as “glacial”. I wonder how you respond to that.

Jill McPherson: We are at an advanced stage with that at the moment.

Sue Webber: An advanced stage.

Jill McPherson: Yes. We are getting towards the final edit stage. The minister outlined some of the challenges that there have been in the landscape over the past few years, and we are a small team. In the past couple of years, we have put a lot of focus on the extension, because we knew that that was a public priority, as well as on some of the work that we are talking about today, which is progressing.

Sue Webber: Perhaps you could provide us with some timelines, just for assurance and so that we get a sense that there is progress. There is an appetite for the process to be modernised and brought up to date, but not everything is changing at the pace that the public and members might want to see, so we are looking for a bit of assurance.

Graeme Dey: I understand that, and I give you the assurance that I am pushing all of this as hard as I can—

Sue Webber: I understand that, minister. I know you well.

Graeme Dey: It sometimes takes time to get processes right, but my understanding is that the work is quite well progressed. We can write to the committee quickly with some more detail on that.

Sue Webber: That will be good.

Section 13 of the bill proposes the repeal of section 52 of FOISA, which is sometimes referred to colloquially as the First Minister's veto. I think that you oppose that. Most of the consultees who responded said that the veto power is unnecessary, and we heard that it has never been used and is contrary to the principles of openness that underpin FOISA. Why does the Scottish Government believe that it should be retained, even in a limited form? What risks would arise if the power was repealed?

Graeme Dey: It is important to note that it is not a *carte blanche* power. It is restricted to very sensitive issues, and it is extremely narrow. The fact that it has not been used does not mean that it might not be required on issues of sensitivity. Our view is that, on balance, it should be retained.

Sue Webber: In relation to our international standing, we have heard that, if the power was removed, our legislation would rank even better in the world. What are your thoughts on that? Do you not want to see that progress?

Graeme Dey: It is not about not wanting to see that progress—

Sue Webber: I apologise for that language.

Graeme Dey: Not at all—I understand the perspective, and people have different perspectives on the matter. People might say, “Well, you would say this, wouldn't you?”, but our position is to reflect on the merits of the proposals and to work through whether there could be any unintended consequences. The fact that the power has not been used up to now does not mean that, in the world that we live in—I am thinking of national security, for example—there might not be an instance in which its use was necessary. That is why we favour its retention.

The Convener: Can I clarify that? It is not the only protection that would prevent disclosure of information. In effect, the First Minister's veto is the last of a number of walls that have to be gone through or over—however we want to describe it. It is the last step of the Scottish Government, which is represented, along with the law officers, by the First Minister taking the decision, and my understanding is that reference then needs to be made to previous barriers that could have prevented the publication. The power has never been used, and it is an outlier on the international stage.

Ross Grimley: I do not want to just reiterate what the minister has already said. In relation to

attitudes towards openness and transparency, the fact that the veto power has not been used demonstrates that we are not overly keen to use it to stop transparency.

You are right that the veto is part of a suite of protections against the release of information. Just as the other methods under FOISA for either disclosing or withholding information are subject to judicial scrutiny, the First Minister's veto power is subject to that scrutiny, too. It has previously been made clear that the First Minister's power in that respect is not immune to judicial challenge—it is not above the law. If that power were to be used, it would still be subject to scrutiny and could be challenged in the same way that the other measures under FOISA could be challenged.

Jill McPherson: Having the veto is recognition of the fact that, because of our nature as an organisation—and because of the unique nature of the Scottish ministers—we might occasionally hold highly sensitive information.

The Convener: But that sensitive information is already protected.

Graeme Dey: This is a layer of the overall protection.

The Convener: So, it is just belt and braces.

Graeme Dey: Yes. I would also point out that, when the Parliament deals with legislation, we will often look at future proofing it; we try to guess what might come down the track and not bind ourselves. What I am saying is that having the veto future proofs the situation, because there could be something further down the line that would require us to use it, even though we have not used it up to now.

The Convener: It is for that exact reason that the committee is asking itself how, subject to the Parliament's decision on the bill before us, we might future proof that situation in which a First Minister might use the veto. In that case, the only remedy for an individual would be, as Ross Grimley has said, to take the First Minister to court and have a judicial review of the process of using that veto, which might have been used because of, say, national security or any of the other exemptions.

This is one of the few areas of the bill where the responses that we have received have been overwhelmingly articulated in the same way, which is as follows: “This veto has existed from day 1, it has never been used, and we don't think it is necessary.” The Scottish Government is making a statement to the people of Scotland that there is some information that, rightly and for extremely good reasons, cannot be disclosed, but the power is never going to sit just with the First Minister—there are layers before that.

I just wonder whether this brings us back to what we have been talking about with regard to the pause and people failing to get the information that they think they are entitled to or that they think exists. Is the Scottish Government actually the outlier? I understand the reasons behind the argument, but can I suggest that you think again—or at least consider the issue again?

Graeme Dey: We said in our response that we are not fully persuaded by the proposal. I understand the rationale for it, but I am simply putting the counter-argument, which probably reflects the fact that we are not persuaded at this stage. Clearly, it is a matter for the committee to take a view on.

The Convener: Absolutely. I am sorry, Ruth—you wanted to come in.

Ruth Maguire: Just briefly, convener.

Minister, I know that the power has never been used. However—and I am thinking about my constituents who might be looking at the headline here—can you set out the sorts of occasions on which it might be used? That would help people to understand why it is needed.

Graeme Dey: Given that it has never been needed, it is hard to come up with a precise example, but I talked earlier about something in the space of national security. That would be an example.

Jill McPherson: I would suggest international relations, or perhaps investigations by Scottish public authorities.

The Convener: Correspondence with the royal family?

Jill McPherson: I could not possibly comment.

The Convener: And all of those things have protections already.

Graeme Dey: Yes.

The Convener: Sue, can I bring you in?

Sue Webber: That was the question that I was going to ask, convener.

The Convener: No problem—that is excellent. I call Rona Mackay.

Rona Mackay: Good morning, minister. The Scottish Government has stated that it cannot support the proposals as currently drafted, but can you summarise the main reasons for that? Could the issues that have arisen be dealt with by amendments, or do you have more fundamental objections to the bill?

Graeme Dey: In our response via the memorandum, we have identified our areas of concern, and, when those are taken cumulatively,

we cannot support the bill, or aspects of it, in its current form.

The question then comes down to something that we touched on earlier: the amount of time that we have in which to address the concerns. From the Government's perspective—not just as the Government, but in trying to ensure that any legislation that is passed is workable, appropriate and fit for purpose—we do not have a lot of time in which to address the issues. As I said to the convener previously, our resources are spread very thinly, given that so many bills are on the go and a lot of SSIs are in play or coming into play, for us to have the time to address the issues in the remainder of the parliamentary session.

Clearly, if the bill is recommended to the Parliament and passes stage 1, we will do our bit to work with the member in charge, where they are willing to work with us, to explore how to ensure, as best we can, that anything that comes forward to the Parliament at stage 3 is as workable as possible.

10:45

Rona Mackay: Thank you. That is clear.

I will move on a wee bit, to the provisions on the destruction and retention of records. Is the Government considering similar measures in its revision of the section 60 and section 61 codes of practice? I am not sure whether that is what you were referring to earlier, Ms McPherson, when you talked about how you are already working on issues regarding the codes of practice. Are you looking at that?

Jill McPherson: In our draft of the section 60 code revision, we certainly have improved guidance on the searching of records, including the searching process, which is very important for identifying potential information for release.

When it comes to the section 61 code, we are currently under an intervention from the office of the Scottish Information Commissioner that relates to records management following the WhatsApp debate. We are waiting for the report of the outcome of that intervention, to consider our options for a review of the section 61 code.

Rona Mackay: Do we have any timescales on that, or is it just a work in progress?

Jill McPherson: You would have to ask the commissioner—we are awaiting his moves.

Rona Mackay: I understand. Thank you very much.

Graeme Dey: Just to be clear, we are not placing the burden back on the commissioner. It is simply logical to await his final report in order to understand whether there are any implications or

read-across that should inform how we progress—that is all.

The Convener: I go back to the concept in the bill of a movement to proactive publication. You have set out your response to that and the concerns about it. Would the Government support it if a limitation to the specific information that needs to be proactively published was specified through secondary legislation or guidance, or, to look at it the other way, if there were very clear exemptions to proactive publication? Could a process shift the view of the Government on its stance on institutions moving to proactive publication?

Graeme Dey: So that there was greater clarity over what was in scope?

The Convener: Yes.

Graeme Dey: I guess that the answer to that is, “Potentially.” One concern that we have expressed is that it is not defined. It is very wide ranging. If some specificity was delivered on that, that might address our concerns.

The Convener: So, it is not a cultural stance that proactive publication is wrong, and the reality of understanding what is—and possibly more important, what is not—covered by the term may move the Government’s stance.

Graeme Dey: That is a fair assessment—I speak for an organisation that is actively in the proactive space. It is a good summary, convener.

The Convener: That is very helpful.

Jill McPherson: Part of the issue around proactive publication at the moment is that, although we all acknowledge that the current schedule is out of date, there is probably a lack of clarity about what is expected. The reality is that what each public authority would need to proactively publish varies enormously across the sizes and types of organisations.

At a conference a couple of days ago, I was sitting next to somebody from a university, and her experience of what she was being asked for and the information that she was proactively publishing—and the routes by which she was doing that—were worlds away from my experience. Wherever we get to in this debate, the arrangements need to be flexible enough to work for individual authorities and for their customers and stakeholders. We should recognise that there is a breadth of interest and of volume.

Another issue is covered by some research work that our sister team, the open government team, is involved with. It involves setting the standard for proactive publication across Europe. There is an implementation burden, which we need to consider as part of the mix so as to get the

balance right with the volume of what we are producing. Is it the right information in the right volume for an organisation’s particular customer group and considering the cost of producing it? There will be a happy balance somewhere.

The Convener: We are discussing almost the same questions about what freedom of information means that we were being asked 22 or 24 years ago, before the first legislation. You have summed it up nicely, Jill, in that there needs to be a balance.

Jill McPherson: Yes. It is a matter of prioritisation.

The Convener: Absolutely.

Before I bring in Katy Clark, I have a couple of questions for you, minister, about the change in the technological field, even since we started scrutinising the bill and certainly over the past 20 years, particularly in relation to the AI applications that are available now. We are potentially entering an area where we can use AI to mine publicly available data or data that may exist in a public form in one organisation but not in others. If we are optimistic, that may take us strides forward in freedom of information and in what information is available.

I can think of cases about whether councils knew about potholes, for example. Responses to freedom of information requests suggested that the council knew about them only once in one department, whereas AI suggested that 20 different departments knew about the same pothole. Technology is making available information that is not connected up within organisations. What is your view about how we can encompass that in the changing world of FOI?

Graeme Dey: Well, thanks for that question.

The Convener: It is an easy one to finish with.

Graeme Dey: It is a fascinating question, in fact. It relates to what the Parliament does in the next session and how it could pursue legislation that might quickly be overtaken by AI in a variety of ways. You are right in that the ability to access information could change completely, courtesy of AI, and the process could become much simpler. There is no doubt that that would inform the views of the Government and the Parliament about the future expansion of FOISA.

The Convener: You are confident that the definition of freedom of information that we have had over the past 20 years is sufficiently robust and is at such a level that we can still rely on our top-level understanding of what we mean by it. What will change is the technology that gives access to it. Would it be fair to say that?

Graeme Dey: Yes, it would be fair. I hope that the instinctive resistance to further roll-out that is sometimes encountered will be addressed by the experience of RSLs. It is human nature to say, “It’s not for us. It’s too much work. What a burden!” I will remember the resistance from RSLs, but—returning to the figure that I quoted earlier—within a year they were not experiencing the problem that they had expected.

All of us who support FOISA need to promote the message: the law is a good thing, it is right that it is there, and we should expand it. The concerns that have been expressed—the idea on the part of smaller organisations that the requirements are burdensome, and so on—should not lead people to be fearful of their organisations being captured by the law.

The Convener: And there is a value in freedom of information.

Graeme Dey: Yes.

The Convener: Thank you for your patience, Katy. I will now hand over to you.

Katy Clark (West Scotland) (Lab): As the minister is probably aware, the bill has been drafted on the basis of work over several parliamentary sessions; a number of consultations; the work of this committee in the previous session; the recommendations of four information commissioners over the long period of time since the Freedom of Information (Scotland) Act 2002 was enacted; the views of stakeholders such as FOI officers at events that I know you attend, who are asking that they be put on a statutory footing that is similar to, and mirrored on, data protection, in order to give them more authority to require their organisations to comply with the law; and the views of campaigning organisations and many others that I could list. The bill is an attempt to capture discussions that have taken place for a long time.

Do you accept that the reason why we are discussing this bill is the Scottish Government’s failure to respond to those calls for reform, most recently the post-legislative scrutiny report in 2020 and the consultation in 2023? Therefore, do you accept that there is a lack of confidence that the Scottish Government is driving or will drive the changes that are needed?

Graeme Dey: Earlier, I mentioned the word “perspective”, and everybody has a perspective on these things. There are people who will want FOISA to be rolled out far more widely than it has been and there are others who, rightly, are coming to a view on what they would consider to be shortcomings. I have acknowledged that there are shortcomings, and I have also acknowledged that I understand the frustration about the pace—I do not accept that it is glacial, but I know that it is not

what some people would want it to be. However, I have also outlined the process that has to be followed to ensure that we get it right.

I think that the bill has usefully brought FOISA back into focus and has aired—or, more accurately, is airing—people’s concerns. As I said earlier, because of the lateness of the bill’s introduction in the parliamentary calendar, it may time out. That may be what happens. However, I would like to think that the issues that the bill has aired could at least contribute to, if not form part of the basis for, what will be done in the next session to address the issues that we have identified and that the bill identifies, accepting that there will be different viewpoints on some of the proposals, as we have heard today. We have been clear in the memorandum that we do not rule out the possibility of the need for further legislation. As the convener has alluded to eloquently, AI is an example of where we might need further legislation on what it will do and whether it will make freedom of information easier to implement, for example.

I am not being critical of the bill—I think that it has been very useful—but our job is to look at the practical application of some of the issues, examine the unintended consequences and help the Parliament to interrogate that and come to the appropriate conclusions. Sometimes, that paints us as being negative and resistant to things.

Katy Clark: I appreciate your evidence in relation to the work that you have personally been involved in to extend FOI. I appreciate that you have been back in your role—

Graeme Dey: I have been back in it for only nine weeks.

Katy Clark: So, only very recently. Do you accept that there is also a great deal of concern about the pace of designation since 2002, particularly given the changing nature of how public services are delivered with outsourcing? On occasion, as we have heard in evidence, that has led to a loss of rights. We have taken evidence today about changes in technology. The Scottish Parliament designated 10,000 bodies in 2002, when the act was passed, but, as we have heard, since then, the pace of designation has been described as “glacial”. Do you accept that we need to speed up the pace of designation, given the loss of rights and that the public have a right to know how their money is being spent?

Graeme Dey: I understand the frustration that we have not progressed matters at a greater pace. However, as I outlined previously, the process is there for a reason. Do I think that it is clunky? Yes, I do. Do I think that it takes too long? Yes, I do. However, we do not intend to go the other way, where we just designate willy-nilly and it creates

difficulties for us. There is a balance to be struck, and we are willing to explore what that balance would look like.

Katy Clark: As I said, we designated 10,000 bodies in 2002, and they were often similarly complex. The question really is whether you accept that we need to speed up the pace of designation.

Graeme Dey: We have to be clear: the process that is followed determines whether the initial look at a body and all its elements is confirmed by the activity that takes place to make sure that every aspect of its work is captured. I am choosing my words carefully, convener, because at times I get very frustrated by process.

I would like to see this and other things move more quickly. I accept that there is a discussion to be had about how to develop the process to make it move more quickly, but it has to maintain its integrity.

Katy Clark: Many of the bodies that were designated in 2002 were complex. For example, general practices make up a wide range of different bodies. My essential point is that we need to speed up the process, don't we?

Graeme Dey: I accept that we do, but I would say to you that this is the Parliament. It has a responsibility to make sure that there are not unintended consequences from the practical application of what may at first glance be considered an appropriate way to go. I am just saying that there is a balance to be struck, and I accept that that balance needs to shift from where it is currently, but we must at all times ensure that the action that we take is appropriate.

Katy Clark: Thank you.

The Convener: Thank you, minister, and thank you, Jill McPherson and Ross Grimley, for your evidence and for attending the committee this morning. I know that you are going to write to us. We know where you are, and you know where we are.

11:01

Meeting continued in private until 11:24.

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