

THURSDAY 17 May 2018, 16:00-17:00, St Andrews House

INTERVIEW: Keith Brown, Cabinet Secretary for Economy, Jobs and Fair Work

1. **Can you describe how you're involved in FOI in the Scottish Government?**

Periodically the Government will look at FOI performance, so I'm involved in this respect. The Minister for Parliamentary Business keeps it on the agenda. I also have my portfolio meeting which deals with PQs, ministerial correspondence and deadlines. We look at deadlines and compliance with those. FOI has been incorporated into that meeting.

I also have direct involvement in FOI cases which come to me for sign off through my private office.

2. **Roughly, how often do you clear FOI cases? How many do you get each month?**

Numbers vary. I have two on my desk at the moment, but none in the previous 10 days. I sometimes have as many as five or six a week. This is unusual. None in a week is also unusual.

3. **What kinds of cases are referred to you and why?**

I don't choose my cases – I receive the ones that SPADs feel will require clearance.

4. **What's the quality of presentation of cases to you? Do you have enough / too much / too little information?**

It varies. Sometimes the different style of presentation by different individuals can throw you. I have a high degree of confidence in the integrity of the response provided. It's galling, however, when a third party releases information which is incorrect (referring to a recent HIE example).

How is reasoning explained in the cases you receive?

Generally it's good. One bugbear: we have issued FOI responses where I've been happy, but reviews have overturned the decisions. I would like us to get it right first time. In these cases, the information should have been released at the first point. From memory, in this case, there was a legitimate exemption, but harm test / public interest test considerations favoured release.

Do the FOI Unit have a role in this?

They provide a fresh pair of eyes. There was a period where cases being overturned on review was happening regularly. I found this to be less than satisfactory.

5. **Can you explain to me the roles and interaction between ministers, special advisers and the communication teams in such cases?**

It's legitimate that Ministers are involved. Responses go out in our name. It's also a good way of getting advanced notice of issues.

Sometimes it's not obvious in the cases which come to me what is being redacted, what's staying in, etc. Clearance gives an opportunity to remedy that.

In some cases it's a further check on the checks that have been carried out.

Would you seek further advice?

In general – and this is from my experience only – but Ministers or Private Secretaries will ask case handlers to double check with the FOI Unit rather than do it themselves.

I think I'm quite quick at reviewing FOI cases. FOI comes on top of my experience in local government. I was very familiar with the Access to Information Act. Sometimes my background and an awareness of issues I have can inform an issue and I may ask for a further check.

SPADs can say whether they feel something needs to get a Minister's response.

6. **Can you talk me through how you actually approach FOI cases? What questions might you ask when you're looking at a case?**

I start from a view of all material being released unless there are redactions required.

7. **Have you ever cleared a case a second time because it was the subject of a review? If so, did you perceive any conflict of interest, given you had cleared the initial response?**

I can't think of a case where I've challenged a changed decision. I'm perfectly capable of understanding the review process though.

Are requests being filtered appropriately?

You don't know what you don't know. You have to take it on trust that officials have made a good judgement. I'm not looking for more!

8. **Can you give me a rough estimate of how much time it can take to clear a complex case?**

The two today are very different. Some are huge (e.g. the Prestwick Airport case). In this case I wanted to read and re-read it all myself. Few officials had oversight of the whole case, whereas I had been involved over the years spanned by the case.

The time taken can also depend on other ministerial pressures.

9. **Refer at this point to the 3 cases I mentioned in advance of the interview. In all 3 there were substantial delays between cases being referred to your office for clearance and the decision being made/response being issued. Reasons for delays not clear from the files. Able to explain?**

You need to get space to consider cases because you don't know how much time it will take. Sometimes you need more than a couple of days. I have spoken to my Private Office about the need for officials to submit cases on time.

In the SFC case I can't remember the detail, but the bulk of cases are fairly quickly returned. Some cases involve a huge volume of information and of course, you have to read every page. I went back once or twice to check. These cases are the exception to the rule.

On the Trump case I went back and forward asking questions. This back and forth can take time. Commercial sensitivities were an issue in relation to this case. Complex cases can often involve lots of back and forth.

10. **Very little recorded in the cases referred to – as in the note in the last case. Do you record reasons for the decisions you take or advice you give on FOI cases?**

The submission from officials should include the rationale for any exemptions. I don't ask for my rationale to be recorded. I assume they'll know the basis for an exemption and record it. Under the Local Government Access to Information Act, background papers were made available routinely. I came in to Government with this point of view about transparency and openness. I like to see the maximum possible published generally.

11. **Do you consider that such a process would be helpful in keeping a better record of the rationale of decisions which may be subject to appeal?**

I'm not providing a rationale, the legislation is, I'm asking questions to see if they agree. They know the questions I've asked and why I've asked them, so they will know the rationale.

Authorities often have to reinvent the wheel when a case is appealed because no sufficient record is taken

All they will have from me is a comment if it's not just approving the decision. They should question it if they don't think it's supported by an exemption or otherwise. What they'll get from me is questions.

12. **Have you had any FOI training? (what, when?)**

It mostly comes from experience – both from the past and from my time in Government. You need to challenge yourself to make sure you're up to speed. I can also rely on the expertise from the FOI Unit.

What procedures are in place for cover when you are away?

Requests will still come to me when I'm away – it follows you everywhere! I have 2 Ministers in my portfolio, but FOIs will normally go to the responsible Minister. Ministers can work on a plane, etc, where appropriate.

13. **To what extent do you expect officials to let you know if they disagree with special advisers about advice in a case? Does this happen much in practice?**

It tends not to happen in that way. The information comes as a package in the submission. I don't know what comes from SPADs and what comes from officials. I expect issues to be resolved in line with our FOI obligations before they come to me.

14. **Do you feel the current process is working? Can you suggest any changes to improve the process?**

I would like us to be more consistently on time. I'm keen to meet the FOI deadlines. We need to be accountable for FOIs and PQs.

Getting more time and space for complex FOIs would be good.

There has been a cultural change within government. We are more conscious of the public interest, and often the anticipated backlash doesn't occur. It looks bad when the perception is that information has to be dragged out of you, and I want us to avoid that.