

FRIDAY 18 May 2018, 11:00-12:00, St Andrews House

11

INTERVIEW: Davie Hutchison, Special Advisor

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

Role in relation to FOI is similar to the SPAD role in relation to any other work i.e. to provide advice – principally for Ministers, mainly on order to save ministerial time.

Ideally it should be a case of seeing whether the end product that is proposed to go to ministers is in keeping with the request and in keeping with FOISA. In reality, we pick up a lot of process issues.

SG is a large organisation. Relatively junior officials are expected to make relatively technical assessments. Because of that our role can often be one of quality control and ensuring we meet our range of obligations.

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

It varies wildly. In health we account for 45% of Scottish Government spending, but it's not an equivalent proportion of requests. My sense would be that Health boards deal with lots of requests that might otherwise come to us.

Volumes can be famine or feast. Sometimes a couple weeks go by without seeing one, at other times we'll see five at one time.

I've been in post for seven years. I suppose the average is one or two a week, but it's not as steady as that. Although in that time there has been a clear increase in the volume of requests to Scottish Government and we've had to change our processes to try and respond to that.

3. What kinds of cases are referred to you and why? (by business area / sensitivity of issue?)

I'm a policy SPAD, we are all appointed by the FM and then cover a number of specific policy areas. The vast majority of my time is in the health portfolio, with a small amount of time for areas including broadcasting, and architecture – and in the past Freedom of Information legislation.

In the past we got emails directly from officials, as we would with any other form of correspondence - It was a big issue for me keeping track of them – like playing "whack-a-mole" with emails. This made tracking of cases difficult due to the volume of correspondence we get generally.

The Private Office team has really added value. They corral and track information and help manage us to ensure cases are dealt with more quickly.

The SPAD FOI Inbox has been "a godsend", its benefit being it allows the Private Office team to keep track of requests and hunt me down, if needs be, and push me to ensure it's done so it can go to ministers. It's made a vast difference.

The quality of product we received varied hugely, but the Private Office team now do a lot of the "pushback" to ensure the product coming up meets basic standards. For example, perhaps the most common issue I came across in the past would be the lack of application of data protection rules to details of junior officials.

It's meant less of my time being used on quality control issues since it was instigated around a year ago. SPAD Private Office team have helpfully stepped into that space.

What do you look at first in cases?

No particular "first thing", more a process of considering the detail of the product before me. Considering at what points there may be a judgement required on an exemption, particularly if it involves the application of the public interest test. We look at exemptions and assess whether they are applied correctly.

I try and avoid that the system says that cases are vexatious – as even though it may be justified as I don't think it is one which would be politically tangible for us. In that some requesters would raise the application of vexatious as a political issue in and of itself. We try to ensure if possible that the information goes in some form if that is possible.

With relation to health boards I tend to look at issues around service planning and policy development. Policy development is a big consideration. I assess whether policy is still under development – officials dealing with an allocated FOI sometimes don't know about the ongoing work in other areas.

For cases involving the public interest test I assess whether the balance is considered carefully.

I do a little bit of EIR on health infrastructure related requests, but it's limited relative to FOI requests.

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

The quality is now better, but that's not to say it's always good. There can still be issues. For example, I've had cases where the proposed release that came up said 'information not held', but I've gone back to officials to point them to where some relevant information would be held – but as it was live policy development they should consider whether it should be exempt for release because of this. The difference being that the requester got an accurate response and knew information had been exempt.

It's just not the case that things are always dealt with properly by the time they reach us. Quality issues can sometimes still not be picked up even when they've been through someone at DD level. I think it's hard on relatively junior officials to expect them to do a fairly technical piece of work in applying FOISA when they only have to do them once in a blue moon. If they haven't had that experience or grounding then it's a hard thing to do.

I think our organisational training around Data Protection is much stronger than for FOI – there we have an annual refresher.

Scottish Ministers are cited in the legislation, responses go in their names - so our challenge is making sure the product we're getting is of a good enough standard to go in front of a Minister. SPADs are in the service of Ministers.

Is there room for improved filtering at Director / DD level?

If it isn't happening now, I'm not sure what we can do to make this happen

We have many good officials confident in FOISA, who are already driving things forward. For others who don't have that confidence in applying FOISA it's trying to make sure that the training is there. Some may never make that standard, so it's important that training is clear,

which would help ensure the basics, like data protection, so a better understanding is there.

Those with more experience will take steps to get things right. Picking up the phone and talking to us is to be encouraged. But we're a large organisation many will have no experience of working with SPADs and so there can be different attitudes on what they think their engagement with us can be. There's a different attitude towards SPADs from different parts of the organisation.

Different parts of the organisation, as a series of warring tribes, have different roles and skills. As a result different bits of the civil service have different levels of knowledge of how they can engage with SPADs. There is no single type of civil servant, there are different strata of officials, from statisticians through policy, through to analysts, through to communications, who engage differently with SPADs depending on their area. Often if an official picks up the phone and call a SPAD they can short circuit a lot of stuff. But some types of official are more likely to do this than others. If they did do it earlier, it would often help.

Former Private Office staff who have gone back to work in policy are much quicker to pick up the phone – they understand they can put things to us.

I don't, however, see how an extra level of filtering would necessarily help with the process. Processes, as our Private Office team have done for us, can be improved - but I don't think this is necessarily a personnel-level issue. Whether that be improvement is in records management or other areas.

5. **Can you explain to me the roles and interaction between ministers, special advisers and the communication teams in such cases? Do all cases down for clearance end up with Ministers or is there a filter process? If so, how does that work?**

I'd like to receive a product that Ministers could sign off quickly.

Do you have a filtering role?

Generally my view is that Ministers should be aware of requests officials have flagged. FOI applies to Ministers, after all. I expect PQs, FOIs, etc to have a Ministerial sign-off. Ideally they would also have sign-off on Comms lines, but in some cases these Comms lines can be cleared by SPADs if necessary.

Any FOIs that officials plan on sending to any of my Ministers should come to me before going to Ministers.

Comms role is to issue responses to request from journalists, and to issue lines in case of follow-up on any point – not only on FOI but any issue – as part of normal operations.

6. **Is the FOI team involved in advising in all cases which are referred for clearance?**

Occasionally. It depends on the nature of the case or if there's a delay. In those cases the FOI Unit can help speed things up. There has been less need for this since the introduction of new systems as our Private Office team push us before it would get to that stage.

In the sectarianism case an FOI Unit colleague and I disagreed over the interpretation of the Act and the request. I thought the information proposed for release was out of scope as the information asked for in the request was not held. There's often some FOI Unit involvement with case handlers before it comes to me.

As a result, the FOI Unit's guidance also informs general handling, even if I haven't had direct advice from the FOI Unit.

7. **How do you expect case managers to view your response? Should it be treated as advice, discussion, or an instruction?**

It's not instruction – we don't instruct. Generally speaking its suggestions and advice – that's my role here.

Do they follow your advice?

It's a mixed bag. More helpful if when an official disagrees with advice I've suggested that they flag this, rather than not moving it forward.

New system has helped prevent this happening as we have more clarity when a case handler is awaiting our feedback, or if we've already provided it.

8. **Can you give me a rough estimate of how much time it can take to clear a complex case? Delays caused? – case ██████, ██████ (9-10 months to respond), delay in review – ██████.**

The volume of FOI requests we were receiving from the same requester here at that time was very high. We were getting many requests on similar or the same subjects. Our poorer processes at the time led to gaps – this is less likely to happen now. The volume of requests was an issue.

The volume being dealt with but not being tracked well was also an issue with the request from a BBC journalist. The case manager on that FOI is a diligent official, but the information concerned related to on-going policy development work. There could be cases where I think I've given my view but the case-handler thinks I'm due to do something else – that should be resolved with the new mailbox system.

When there's disagreement would you push it up to Ministers earlier?

No. I'd rather get it resolved before going to Ministers. I'd rather come round to some form of broad agreement.

I've sat down with FOI Unit colleagues to discuss cases in the past. In one case I highlighted the issue of releasing information would have led to us receiving a complaint under the Stats Code. The official stats it related to are published every 12 weeks and are verified information. We came to an agreed view, and that is generally where come to if there are differences in interpretation or judgement.

We generally come to some agreement though. Disagreements are not common. The key thing is that SPADs know about live issues. Some take the view "we just need to get it out", but I'm clear we have a clear obligation to get it right rather than put something out we know to be wrong.

SPADs appear to wear two hats – as a civil servant and as a political advisor – how do you keep these separate?

They're not separate. It's the same thing. I'm a political and policy advisor. We are among the few people with breadth of sight across the organisation, not least on policy development.

9. **Do you record reasons for the decisions you take or advice you give on FOI cases?**
Case ██████ – the need for rationale to be clear – FOI unit comments. Case ██████ – clear rationale of the legal tests required.

I try to give feedback via the Private Office team – something I think I've done more so under the new system that have been established. Usually I'm asking whether someone has genuinely looked at something against the policy development exemption as we know related work is on-going, rather than specified particular things for exemption.

An ideal case takes 10-15 minutes – I reviewed a case like that this morning. I considered whether disclosure could inhibit the supply of information, but a relevant senior official was comfortable it would not - so I passed on I was happy for it to go to the Minister for clearance.

10. **Would you like more guidance and support for FOI? (what?)**

I was FOI Manager at Architecture & Design Scotland prior to being a SPAD. My background in FOI and EIR starts there to implement the FOI regime there and seek support in doing that from the SIC office.

Generally, for guidance now I will refer to the SIC website.

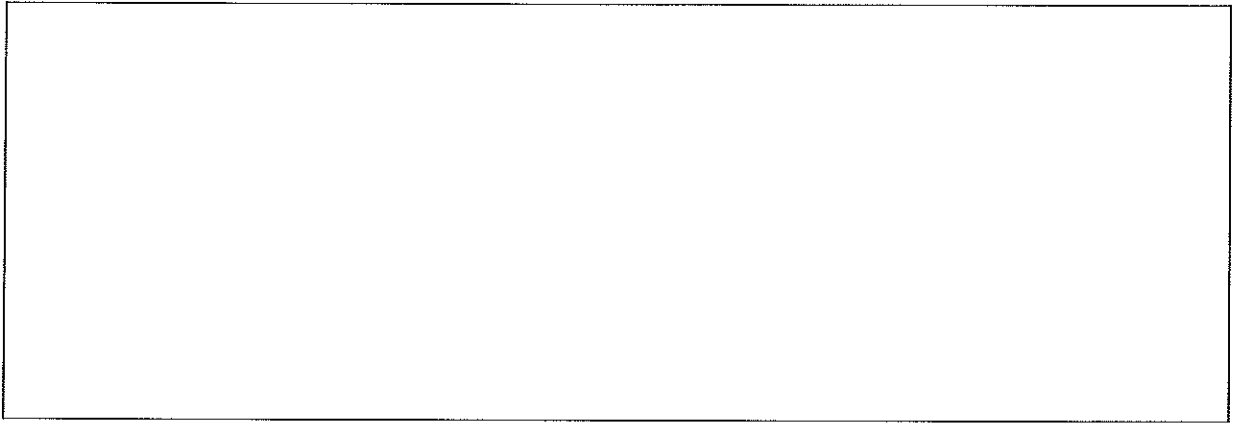
In my view the FOI Act has a number of areas with undefined vagaries within it – so reverting to guidance can be helpful in these cases.

When I started the admin support for SPADs was slight – we now have proper Private Office support. Having that improved support and the new system in the last year has made our operations considerably better. Gaps in support from some years ago have largely been resolved for us.

The training and support available has also improved.

For officials who are coming to FOI cold, it's trying to assure ourselves that they have good advice to call on. Is there someone available to them who has a depth of experience in FOI in their policy area who can guide them? But for me I don't think there are massive gaps in the support available.

There are lots of people coming to FOI cold though – where are they taking their advice from?



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

The product coming up must be coherent; it must apply the law and must give proper advice and information to Ministers.

There can be a concern that FOI can be used as a way to use SG resource, or to delegitimise the role in government of considering FOIs.

Secondary legislation could be passed to clarify what is vexatious to stop the use of FOI being used inappropriately to use up resources. But as with the application of vexatious now it would be politically difficult to do so.

How do we change our engagement so FOI is used to facilitate public information and engagement – rather than perhaps exclusivity of information? We don't want to be in a place where one person can effectively shut down a section of a department through volume of requests.

I remember thinking that the increase in volume during the Independence Referendum was massive – but requests have more than doubled since then. So systems have had to change to try and meet this.

We can make the system more efficient, but that will only ever take us so far if there is still an explosion of volume and we do not tell requesters who make large volumes of requests on the same topic that we are treating it as one request – or if we do not have the option of realistically applying vexatious to request that would merit that.