

THURSDAY 17 May 2018, 15:00-16:00, St Andrews House

INTERVIEW: Stewart Maxwell, Special Advisor

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

When case handlers have an FOI which they think is complex and needs to go to a Minister they will send it to the FOI inbox. Staff print them off and give them to the appropriate SPAD. In my role I deal with the economy, business, skills and fair work.

I will go through and look at it, primarily for basic errors – e.g. people leaving in names or telephone numbers that shouldn't be included. Beyond that I would, for example look at things that are current policy development, or the free and frank exchange of views.

Most of the time there is very little to do and I hand it back. If I have a comment that would be fed back through the SPAD staff. In some cases, I will phone the case handler and have a conversation, or in a minority of cases I would arrange to meet the officials.

Do all of the cases you receive go to Ministers?

There is a filter process. There's a wide range of FOI requests. I wouldn't forward on routine ones, to Ministers. I would recommend that the Minister should look at an FOI if a current policy is being discussed or it is an issue going through parliament. These would almost automatically end up with the Minister. Otherwise, you make a judgement. We know what Ministers are keen to see. We would make a judgement call as to whether Ministers should be aware of an issue. SPADs are close to their Minister – they know them very well.

They are not really taking a decision about what's in or out; it's so that they are aware of what's being asked and what is of interest to those asking.

If a case doesn't have to go to the Minister what happens?

I don't clear FOIs. The phrase "clearance" keeps getting used, but SPADs don't "clear". I assess whether it needs to go to a Minister. Usually I say that I don't have any comment. If it doesn't need to go to the Minister and I have nothing to add, it leaves my desk and I assume officials then send out the FOI response.

Would you ever say that a case doesn't have to go to a Minister, but xyz needs to be done? E.g. suggesting another exemption.

Yes, but this is not advice. There may be a discussion with the official dealing with it. I might say that I think a particular bit should be exempt – can you pass this back to the Case Manager? There's a bit of to and fro. Sometimes I persuade them, sometimes they persuade me.

What if there's an impasse? Would it then go to the Minister?

At that point if there was a difference of opinion, probably you would ask the FOI Unit to take a look. They would give advice.

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

The numbers have gone up a lot. I started in January 2017. I feel it's increased exponentially. I had six this morning. It wouldn't be unusual to get half a dozen or more a week, but it varies. The size of the case can vary as well.

Sometimes the referral note will say that the Minister should take a look. Of the six I got today, 3 or 4 are being referred to Ministers – mostly to ensure they are aware of the issue.

Mostly when it goes to Ministers it's just for clearance. It's usually an important issue. Ministers are ultimately responsible after all.

3. **Can you generally tell, at first blush, whether you can simply note a case or whether it requires more detailed scrutiny? What do you look for?**

You can't always tell from first glance. On a number of occasions I thought it would take no time but then I might find something amiss. To give you a recent example, I had a case where it said nil return. I thought that was odd. I went back to officials because I couldn't believe there was no information. Sometimes it can take time. You have to read it.

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

Generally good, they are not always great. It's improved recently. I think about 12 months ago I was catching more basic errors. That happens less now but it still occurs. There's other things which are, not mistakes exactly. We sometimes suggest context. E.g. in a recent case about contracts and the work done between two periods, I asked officials to put in some extra information to explain an apparent gap. It turned out there wasn't a new contract because the original contract had been extended. I asked for a note to be added to explain the apparent gap. Doing this helps answer the question better, and reduces follow up questions.

5. **Can you explain to me your relationship with the communication teams in such cases?**

A small minority of cases go to the Comms Team. It's always a consideration when reading an FOI, if it will end up in the press. Journalist requests are the minority though – it's usually individuals or opposition researchers. I'll consider whether lines should be prepared.

It's always at the back of my mind. It's not part of the FOI process – I think about FOI first – but I always then ask "Is this a story?"

How do you keep the two considerations separate?

I'm not thinking about the material to be released or not released when considering comms; it's FOI first, then Comms considerations. They are two separate things. I am looking at the document from an FOI point of view.

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

It depends. A lot of cases are very straightforward. The FOI Unit are only involved in some cases. Less than half. It's only complicated cases, or where there's a difference of opinion between me and the case handler.

7. **What value do you see from special adviser advice in FOI cases?**

We add a number of things. Like any organisation it's a bit of a pyramid. An official might only see FOIs every now and again. They don't necessarily know what is happening in other policy areas. It's difficult for officials to make a judgement about how important things will be to Ministers. Because we see across a lot of things, means we can put things in a wider context. We think of the bigger picture. I think that's helpful. We're aware of things in other policy areas which may be relevant.

SPADs add value because we speed the process up. We filter out some cases from Ministerial view, and make sure that the cases that go to Ministers are high quality so it reduces the amount of time that Ministers have to spend on FOI. It makes their job easier and more efficient and helps Government do its job properly.

Our review of cases suggests that SPAD involvement tends to lead to non-disclosure, rather than disclosure

In my experience, the biggest grouping is one where we suggest no change. Second, we might suggest applying an exemption, and third we would suggest fewer exemptions.

Why is it more common to suggest exemptions?

We have the ability to look across a broader policy spectrum. Officials tend to finish their work and move on to another issue. What's current to them is often just what they're currently working on, but policy development can still be live, even when the issue has moved on.

I may know something which affects the tests and therefore have a broader view of the policy relevant to exemptions under section 29 and 30. Work that has gone before is still part of policy development.

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

I offer an opinion. Quite often I think my emails would say, I think this, what do you think? I don't instruct officials – I don't think that's my job. I don't think that their expertise is less than mine. It would be more about having a conversation.

9. **Refer to both cases previously notified – seems as though your views were taken as something to be followed – comment? Especially with less experienced caseworker?**

That's not the way I do it. Email is often not the best form of communication. I refute the idea that I instruct officials in this or in anything else. There is a lot of back and forth in the emails. I think that it shows that there was a back and forth discussion.

In one of the cases cited I met with the case handler to have a discussion – we spent a couple of hours going over it.

If case managers are of a junior grade – how do they view this interaction? Do they view it as instruction?

I would hope not. I treat it as a discussion.

10. **What about if you disagree with FOI unit advice – what happens then?**

A difference of opinion has no doubt happened, but I can't recall any specifics. At the end of the day, it's the FOI Unit. They're the experts. I am not aware of a case where there has been a butting of heads. Sometimes because it's the FOI Unit, their explanation of why things should or shouldn't be released is much clearer and better explained than it has been by an official. That usually means it's fairly easy to deal with.

11. **Do you apply a presumption of disclosure?**

Yes. My expectation would be that everything would be disclosed. Most of the time the exemptions have been applied correctly.

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

It varies. It took me 45 minutes to deal with six this morning. Big complicated ones can take a lot of time.

13. **Do you record reasons for the decisions you take or advice you give on FOI cases? (if yes, where?; if no, why not?)**

I would go back and say the reason why. I would always do that – otherwise I wouldn't have a reason for saying it.

The SPAD Inbox Guidance states that only final advice should be kept?

I wasn't aware of the guidance. As far as I was aware the box was a good way of monitoring. I have no problem with the information being logged on the tracker by the case handler. If providing a view, I'll say "This is the bit I think is incorrect, and here are the reasons I think it's incorrect."

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

I was an MSP for 13 years, a Committee Chair and a Government Minister for two years and have seen it from a number of different angles. I had FOI experience in all those roles. When I took up this post, the online material was shown to me, and I met with the FOI Unit. SG staff spoke to me about FOI, and I spoke with other SPADs.

I didn't go on a formal training course. I rely on a combination of background training and my experience.

I also didn't start doing FOI on Day 1 in my SPAD role. It was about a month before I started, so I had some on-the-job training.

15. **How confident are you about FOI knowledge (on a scale of 1-5, where 5 is confident and 1 is not at all confident?)**

I'm not an expert, but I am fairly confident. Four out of five. I'm confident that I understand the rules and processes, and that I'm applying them correctly.

I've been dealing with FOI in various forms over 15 years.

16. **Can you call on anyone for support with an FOI case? (case handler, FOI Unit, colleague?). Do you ask for help? How often?**

There have been one or two cases where I've picked up the phone to speak to the FOI Unit.

17. **From your experience, what's the purpose of the FOI clearance process? Why is it needed? Ministers and special advisers?**

Ministers are legally responsible, Good governance requires that Ministers are involved in the process. I think SPADs add value to what Ministers do. I think that what we are doing is helping the process. I believe that in most cases, an FOI request is speeded up by me looking at it rather than not.

Ministers could get bogged down by reading FOIs – SPADs clear this. This morning, for example, my intervention meant that 3 or 4 rather than six cases went to Ministers. It also means that he has confidence that someone he has a relationship with and is close to has looked at it. I think that speeds things up and gives confidence to Ministers. In general because of the role we undertake and our position with a broad view of what's going on in government and our relationship with Ministers, we help the process in the majority of cases.

In the vast majority of cases we hit the 5 day turnaround time. Normally I try and deal with them on the day, or on the following day. I give it a high priority. If it's longer than 5 days, it's because we don't work 7 days a week. Material can come in on the Friday while I'm in Glasgow, and I'll get to it on a Tuesday (Some weeks I spend Monday and Friday in Glasgow). However if a case that needs dealt with immediately comes in on one of those days, SPAD staff would contact me to let me know there was a case waiting and I would deal with it on that day.

Longer cases are more complex – it can take a few days to go through. It's the volume that causes delay more than anything else.