

Freedom of Information during and after the Covid-19 pandemic

Learning lessons and looking to the future

Scottish Information Commissioner



Scottish Information
Commissioner

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About the Scottish Information Commissioner

The Scottish Information Commissioner is the independent public official responsible for promoting and enforcing Scotland's freedom of information (FOI) law. The Commissioner is appointed by Her Majesty the Queen, on the nomination of the Scottish Parliament, and serves for a fixed term of six years. The Commissioner's powers and duties include: investigating and deciding on applications (appeals) and enforcing decisions in relation to Scottish public authorities' handling of information requests; assessing, promoting and monitoring practice by authorities; and giving advice and assistance to the public about access to information under FOI law.

Commissioner's introduction

As with so many other areas of life and public service, Freedom of Information (FOI) practice and performance have not been immune from the impact of the Covid-19 pandemic, especially in relation to public authority resources, access to buildings and information repositories, and delays resulting from lockdowns and the implications of remote working.

As life is slowly beginning to return to normal, this report seeks to review in some depth the specific effects that the events of the past two years have had on FOI practice and use, and also look forwards at where we go from here: what lies ahead for us in the short to medium term, what lessons can be learned to improve FOI law and practice, and what issues do new technologies and ways of working raise?



In addressing these questions, this report builds on the findings of my first report on the subject, published in December 2020. In that report I stated that transparency was essential to an effective pandemic response, and that authorities which deprioritised their FOI function risked damaging not only their FOI performance but also the public's trust in them, if those resources were not restored.

The International Conference of Information Commissioners (ICIC) - the organisation that brings together commissioners responsible for freedom of information around the world - issued a similar message in June 2021. It emphasised the role of openness in building public trust, and placed a particular emphasis on the importance of proactively and promptly publishing information to allow people to understand and scrutinise authorities' decisions, especially in relation to the pandemic.

Our own research suggests that Scottish public authorities have been publishing information about their decisions during the pandemic, and FOI statistics for 2020-21 show that about three quarters of FOI requests in this period resulted in information being provided (in addition to 3,000 further cases in which authorities informed the requester that information was already publicly available).

However, there have of course been some notable cases where information which could have been disclosed much more promptly was only released following appeals to my office. It is telling that media coverage about those cases focused as much on that refusal to provide the information as it did on the content of the information itself. This shows the extent to which the public values transparency about decisions; indeed the public *expects* that transparency.

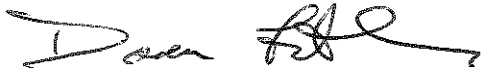
Public authorities must therefore recognise the importance of openness and transparency, in terms of the relationship with the public and also as core values in the National Performance Framework. The pandemic has made it clearer than ever that authorities should see FOI as a core function, and not only resource it appropriately but also give it the strategic focus that it needs and deserves; creating a cultural shift in their approach to information, with an increased focus on proactive publication of information.

The pandemic has also brought into sharp focus differences in information rights in relation to public functions depending on the status of the service provider, notably in relation to private and local authority-run care homes. I addressed this subject in my response to the Scottish Government's 2019 consultation on extending the coverage of FOISA and look forward to contributing to further activity in this area over the coming months.

Another important development over the coming months will be the holding of inquiries into the handling of the Covid-19 pandemic. Records created and held by public authorities that document the actions and decisions taken during the last two years will be vital. This will no doubt include information which was created using relatively novel means such as private messaging or video call platforms and which is stored on one of a multitude of mobile devices.

Inquiries are principally concerned with learning lessons, but we must be cognisant of the danger of planning for the 'last war'. As we look forwards, we must not concentrate solely on pandemic-specific scenarios. The recommendations contained in this report seek to follow this maxim, and focus on maintaining and improving FOI for the long term.

At the same time, I hope that as we emerge from the worst of the pandemic, all who are involved in FOI can in a sense return to some fundamentals; recalling what freedom of information is for and the spirit of openness that it is designed to promote, conducting the process in a constructive, mutually supportive - not adversarial - manner, and being mindful of the effects that these extraordinarily difficult couple of years have had on us all.

A handwritten signature in black ink, appearing to read 'Daren Fitzhenry', with a long horizontal flourish extending to the right.

Daren Fitzhenry
Scottish Information Commissioner

Executive summary

Following on from the previous report on the impact of Covid-19 on Freedom of Information (FOI) in Scotland, published in December 2020, this report takes a broader view of events, with a wider range of evidence from a variety of sources covering a longer period of time. It analyses the key impacts and reflects on lessons to learn from the experience of FOI during the pandemic.

One key source is the array of FOI statistics submitted by Scottish public authorities, which show that after a significant drop in spring 2020, FOI request numbers returned to and have remained at relatively normal levels. Around 69,500 requests were received in the year from April 2020 to March 2021, down from 81,000 the year before. That shortfall was almost entirely due to there being just 12,500 requests in April to June 2020, compared to 20,000 in the previous quarter.

Authorities' FOI performance held up reasonably well in the circumstances - in 2020-21, 85% of responses to requests were on time, compared to 90% in the previous year, and more recent figures suggest that authorities' performance is continuing to recover. FOI requests continue to be fruitful, with around three quarters still resulting in some or all of the information being provided.

In line with previous findings, this report presents further evidence that FOI performance during the pandemic was hindered by the reallocation of resources; closure of premises; limited access to systems and information; and staff shortages or absences. Nevertheless, FOI in Scotland has shown remarkable resilience to the significant challenges posed as a result of Covid-19, with many examples of good practice seen over the past two years.

However, there are ways in which both FOI and wider authority practice can be improved to further strengthen the public's access to information in a modern, post-pandemic context. This report therefore also looks forward using its findings to inform the following recommendations and observations aimed at strengthening FOI practice, performance and culture:

- **FOI is a core function, and authorities should ensure it is afforded the resources and senior-level attention that it requires.**

Poor FOI performance impacts on the reputation of the entire authority, and can be a symptom of broader shortcomings in practice and culture within the authority. Our interventions consistently show that it is only when senior managers take ownership of these issues that lasting improvements can be made. Everyone in a public authority has a part to play in supporting the FOI function, and appropriate training and support should be provided to help them understand those obligations.

- **Authorities must consider the ways in which they create, store and manage records, particularly when using new technologies.**

Freedom of information is only as good as the quality and availability of the records to which it provides access. Public authorities must ensure information is stored and managed in a way that enables relevant and important information to be provided, and allows the public to understand and scrutinise the authority's activities. With the widespread adoption of new technologies and systems and an increased number and variety of devices being used for work purposes, authorities must consider and put in place effective, up-to-date procedures to ensure records that have been created are retained appropriately and are able to be found if requested. It is essential that any new messaging technologies used by an authority are included in searches for information.

- **Authorities should take a positive, responsive approach to publishing information, learning from the experience of the pandemic.**

With the right strategy, proactive publication can reduce the need for FOI requests, make

responses to requests easier and more effective, manage public expectations, demonstrate transparency and accountability, and maintain trust. Regularly reviewing what is being asked for, considering what is likely to attract interest and being aware of what other authorities are publishing can all contribute to achieving these outcomes. The forthcoming review of freedom of information law is an ideal opportunity to update the law in this area, perhaps by means of an enforceable code of practice to help public authorities make information available in a proactive and responsive manner, while allowing the flexibility needed to reflect particular circumstances, keep up with technological change and meet public expectations.

- **Information should be provided in context to help people understand it and reduce the risk of misinterpretation.**

The pandemic has led to an unprecedented level of public appetite for accessing and scrutinising complex information - some of which may be misrepresented or simply misunderstood, while in many cases information disclosed has prompted further questions. Providing appropriate context when information is published or disclosed could save time later by reducing the likelihood of queries, requests, or appeals.

- **Public authorities must have regard to their FOI obligations when implementing new systems or processes, including business continuity arrangements.**

The impact of the pandemic, and in particular the requirement to close office premises created unprecedented challenges for authorities in providing many of their services and functions, including their FOI function. New ways of working were quickly rolled out, sometimes with information governance implications. Moreover, the prioritisation of some functions resulted in the reallocation of resource away from the FOI function in some authorities. However, FOI remained an obligation throughout, so public authorities need to ensure they properly account for it when implementing new systems or processes, including the making of business continuity plans for the future.

- **Steps should be taken to address disparities in access to information between equivalent public services based on how they are owned or managed.**

For example, the pandemic has brought into sharp focus the differences in how FOI applies to private care homes and those run by a local authority. I look forward to supporting future consultation activity regarding extending the coverage of FOI law, to ensure it keeps up with modern public service delivery models and continues to serve the public interest.

Background

In December 2020 I published a special report, '[The Impact of Covid-19 on Freedom of Information in Scotland: Insights and Reflections](#)', which considered how freedom of information (FOI) law, practice and performance had changed during the first few months of the pandemic, based on statistics and other evidence available at that time.

Special Report 2020: Key findings

- The Covid-19 pandemic did cause delays to some responses to FOI requests between April and September 2020, but overall the impact on FOI in Scotland did not appear to be as significant as some may have feared.
- Reallocation of resources was the most common cause of delays, underlining the importance of properly resourcing the FOI function. Other challenges included the closure of premises, limited access to systems, and staff shortages or absences.
- While relied on in many cases, the temporarily extended maximum timescale of 60 working days for responding to FOI requests did not become the norm. While it was in force, 67% of requests were still responded to within 20 working days.
- Authorities were generally proactive in providing information about the pandemic - 83% of those surveyed published information about their Covid-19 response and 39% said they were publishing more overall as a result of the pandemic.
- Any deprioritising of FOI in response to the pandemic needed to be undone if good performance was to be maintained, and it was essential that authorities that had not already reinstated their FOI function did so immediately.

That report acknowledged that the pandemic was far from over and that it was not possible at that stage to assess its full impact on FOI. One year on, although we are still not yet able to look back on Covid-19 entirely, it is possible to take a broader view of events, with a wider range of evidence from a variety of sources covering a longer period of time.

In highlighting the main findings, analysing the key messages and reflecting on lessons that can be learned from our experience of FOI throughout the pandemic, this report covers many of the same themes as those mentioned above. It also looks forwards, using the findings and lessons to inform observations and recommendations aimed at strengthening FOI practice, performance and culture.

Sources of information

The following sources have been used to form the basis for the analysis in this report:

- quarterly statistics submitted by Scottish public authorities¹ covering the period between April 2020 and September 2021;
- decision notices I have issued in relation to appeals during that period, particularly those regarding pandemic-related requests or addressing relevant challenges in responding;
- outcomes of recent interventions carried out by my office, seeking to understand the causes of individual authorities' poor performance and help them to improve;

¹ More information about statistics submissions is available at www.ItsPublicKnowledge.info/Statistics.

- case studies presented by and discussions held with public authority FOI staff at the Centre for Freedom of Information's online Practitioners' Conference² in August 2021;
- research carried out by my office into authorities' publication schemes, examples of proactive publication, and requesters' use of FOI during the pandemic;
- findings of the Economic and Social Research Council-funded project, 'Uncovering the Environment' by Professor Colin Reid, Dr Jonathan Mendel and Dr Sean Whittaker³.

Throughout this report, examples drawn from some of these sources will be used - presented in green text and indented from the main text - to illustrate some of the key points. Authorities are named where details are already in the public domain, and anonymised in other cases.

Coronavirus legislation

As set out in my previous report, the emergency legislation passed by the Scottish Parliament in April and May 2020⁴ (the Coronavirus Acts) made a number of temporary changes to the Freedom of Information (Scotland) Act 2002 (FOISA), particularly in relation to information requests being responded to outside the 20 working day timescale. The FOI-related provisions of the Coronavirus Acts that remained in force after May 2020 were later extended to the end of September 2021. They did not apply to the Environmental Information (Scotland) Regulations 2004 (the EIRs).

In June 2021, the Coronavirus (Extension and Expiry) (Scotland) Act 2021 brought a gradual end to my ability to consider the impact of coronavirus in deciding whether a Scottish public authority failed to comply with FOISA by failing to respond within the maximum timescale. This 'discretion' cannot be applied in cases where the original request was made on or after 1 October 2021⁵. This Act also means that my office and other authorities can continue to issue formal FOI notices by email until at least 31 March 2022, and Scottish Ministers must continue to report to the Scottish Parliament every two months about their responses to FOI requests.

Changes to FOI law in Scotland

At the time of writing, consultation is expected soon from the Scottish Government on proposed changes to FOI - in line with the recommendations made by the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee (as it was then known) in May 2020. The Scottish Government is also expected to share its high level approach to extending the coverage of FOISA to include other types of organisations. These activities offer opportunities for anyone interested in FOI in Scotland to contribute to the next stage of these important processes.

The areas likely to be under discussion include proactive publication, defining who and what is covered by FOI, resourcing of the FOI function within authorities, and aspects of the request handling process. Some of these same aspects of FOI law and practice are covered in this report, reflecting how our experience during the pandemic has shown that the FOI process and structure may be further strengthened and modernised.

² The conference programme is available via www.ItsPublicKnowledge.info/News/20210706.aspx.

³ For details, see the project website at <https://sites.dundee.ac.uk/EnvInfo/>.

⁴ Coronavirus (Scotland) Act 2020 (www.legislation.gov.uk/asp/2020/7/contents) and Coronavirus (Scotland) (No.2) Act 2020 (www.legislation.gov.uk/asp/2020/10/contents).

⁵ For more information see www.ItsPublicKnowledge.info/News/20210621.aspx.

Looking back - FOI in Scotland during the pandemic

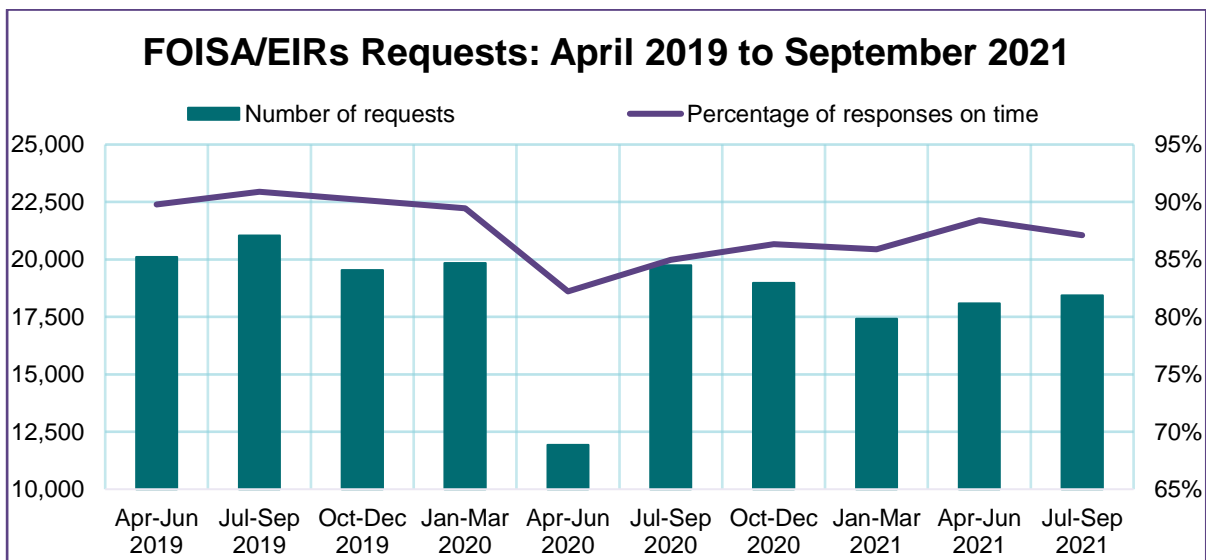
Overall FOI activity and performance

The statistics submitted to my office by Scottish public authorities every 3 months provide a wealth of information and insight into trends in FOI activity and performance in Scotland, and they have been particularly valuable over the course of the pandemic. From before it began, through the first lockdown, initial reopening, second lockdown and most recently the beginnings of the recovery, we have been able to track a range of indicators, including:

- the numbers of requests made;
- the proportion of responses issued on time;
- the extent to which requests have led to information being provided;
- the use of certain exemptions;
- differences between trends seen under FOISA and the EIRs; and
- variations within and between 'sectors' such as health and local government.

Overall, after a significant drop in spring 2020, request numbers returned to and have remained at relatively normal levels. Approximately 69,500 requests were received in the year from April 2020 to March 2021, down from around 81,000 the year before. That shortfall was largely accounted for by the April to June period, when 12,500 requests were made, compared to 20,000 both in the previous quarter and the following quarter too.

Similarly, many authorities' ability to respond to requests within the maximum timescale also suffered initially, before recovering. In 2020-21 as a whole, 85% of responses to requests were on time, compared to 90% in the previous year. While any reduction in performance is regrettable, it is reassuring to see that the system as a whole stood up relatively well to the significant challenges posed by the pandemic, not least the rapid imposition of remote working.



The figures for each quarter of this calendar year suggest that authorities are continuing to recover. Though performance held up reasonably well in January to March 2021 - despite the difficult winter period and the second national lockdown - there was a substantial improvement across almost all sectors in April to June 2021, which was mostly sustained over the summer, and I expect to see the statistical picture return to something resembling how it looked before the pandemic, very soon.

Our activity in terms of appeals has followed a similar trajectory - the number of new appeals to my office dropped to 60 in April to June 2020, but soon rebounded and has continued to grow during 2021 to the current, higher-than-normal level of around 160 appeals per quarter.

In terms of numbers and performance, there were variations between different types of authority. Some sectors such as health and education followed the general trend described above, while others saw their activity increase: the Scottish Ministers, for example, received 4,500 requests in 2020-21. Councils recorded slightly lower volumes than normal throughout the year, but this must be viewed in the context of their very high 'norm', and they still received 56% of all requests.

Requests continued to yield information, too. Around three quarters of requests in 2020-21 resulted in some or all of the information being provided - a very similar proportion to previous years. And in almost 3,000 other cases, the information was already available - an indication of the extent to which proactive publication was maintained or increased during the pandemic.

Factors affecting performance

My previous report highlighted the findings of research carried out by my office into the challenges faced by authorities as a result of the pandemic, which showed that the main factors hindering their FOI performance were as follows:

1. Reallocation of resources
2. Closure of premises
3. Limited access to necessary systems
4. Staff shortages and absence of key staff.

These findings have been reinforced by further evidence gathered through our investigations, interventions and other engagement with authorities, such as the FOI Practitioners' Conference, hosted online by the University of Dundee's Centre for Freedom of Information in August 2021.

In discussions at the conference it was clear that one of the main challenges FOI staff faced was the limited access to some systems or hard-copy files, compounded by having to rapidly familiarise themselves with new systems and means of communication. Alongside that was a reduction in or loss of contact with staff across the organisation - either to discuss cases and obtain requested information, or to maintain knowledge sharing and a broad awareness of the authority's activities.

The practical limitations of lockdown and remote working did not just affect access to requested information - in some cases, FOI staff had to arrange to return to their office premises, for example to use redaction software on office PCs, or to check for and respond to requests made by post.

An overriding reflection among conference attendees was that productivity - and FOI compliance - was adversely impacted initially as organisations and people adjusted, but recovered as authorities put in place new procedures and technology to enable remote working and access to records.

One authority with offices across Scotland benefited from already having equipment and systems in place to enable remote working, but still encountered some challenges in relation to acquiring the software needed to redact information when working from home, and in accessing some hard-copy records. The authority mitigated the impact of these issues by amending their acknowledgement emails and keeping in touch with requesters to let them know about possible delays, and providing as much information as possible with advice about when other records would become available.

Understandably, this adaptation happened in different ways and at differing speeds depending on factors including the type and size of authority and its prior readiness for remote working. Polls conducted during the conference suggested a roughly 50-50 split between authorities that did and those that did not need to make substantial changes to working practices.

My organisation was one of those that required substantial change to how we work as an office, including a digital transformation of our IT and procedures to enable remote working following the temporary closure of our office premises in line with government guidance⁶.

Elsewhere, lockdown restrictions led authorities in some parts of the public sector, such as leisure and culture trusts, to pause all activities and furlough most or all of their staff. In some cases this meant authorities were unable to deal with requests or publish information, despite these statutory obligations remaining in place. Even where authorities did remain partially open, the ability of some to respond to requests was restricted by a lack of access to premises, staff absence and self-isolation requirements.

Decision 164/2020 concerned a request to Angus Alive about wildfowling at a nature reserve, where the authority was unable to access some of the information as it was recorded in a book which was held securely in a building. They gave a partial response and later followed up when they were able to access the information. However, as the request fell under the EIRs, I was unable to consider the effects of the pandemic and so found that the authority had failed to comply with timescales. Importantly, the authority recognised, in light of the pandemic, that more information needed to be centrally accessible, and confirmed it was taking steps to record information of this nature electronically in future.

Another cause of some authorities' difficulties in maintaining FOI performance was the diversion of resources - with staff members who would normally be involved in responding to requests being reallocated to or having their time focused on other pandemic response activities. A clear example of this is the Scottish Ministers, where my intervention found that removal of trained staff in the FOI team and throughout directorates was a major factor in significantly reducing FOI performance⁷.

We have also seen other examples of what can happen when an authority either fails to resource its FOI function properly, or deprioritises it in favour of other work. Many of the authorities with the highest rates of late responses to requests have been those which allowed a backlog of FOI requests to build up, and which were then faced with difficult decisions as to how to tackle it.

The University of Dundee and University of Edinburgh both found themselves in this position in the past year as a result of a lack of capacity for, or focus on, dealing with FOI requests in the early stages of the pandemic. However, prompted and supported by my office through interventions, both authorities resolved to address the situation by allocating or recruiting additional FOI staff, and in the University of Edinburgh's case, through reviewing outstanding requests to create 'batches' of those received at a similar time on a similar topic, and dealing with them collectively in terms of locating and reviewing the relevant information as well as identifying what could be published.

As well as there being fewer people available to deal with requests, restructuring and reallocation of resources also impacted on the knowledge and expertise - and lines of communication -

⁶ For more information, see my Annual Report and Accounts 2020-21, available via www.ItsPublicKnowledge.info/AnnualReport.

⁷ See my Second Progress Report at www.ItsPublicKnowledge.info/SGIntervention.

available to FOI staff. Conversely, some staff members who had not previously been involved in responding to requests were being drafted in, having to learn quickly all that the process entails.

This upheaval was particularly challenging where authorities such as those in the government and health sectors saw very high demand for Covid-related statistics, production and publication of which happened in different ways and at different speeds between local and national levels.

What the statistics above also do not show is the degree to which requests have become more complex or large-scale. Meetings my team have attended with individual sectors such as local authorities, NHS bodies and the Ministers have all, separately, reflected a sense that a larger proportion of requests are being received that require input from multiple business areas or those which are themselves facing staff shortages and increased demands.

A typical experience of local authorities during the pandemic has been seeing slightly lower volumes of requests than before the pandemic, counter-balanced by an increase in the complexity and scale of the information being asked for. Such wide-ranging requests typically involve collating information from multiple service areas, the challenges of which have been exacerbated by those services themselves being under strain, by individuals who would normally deal with FOI requests being assigned to other roles, and by the vast majority of council staff continuing to work remotely.

In spite of all of these challenges, however, further evidence has emerged showing that although the maximum timescales for responding to FOI requests were temporarily increased to 60 working days between 7 April and 26 May 2020, this did not become the norm in terms of response times.

While previous research by my office⁸ found that 67% of requests still received a response within 20 working days during that period, informal polls conducted during the FOI Practitioners' Conference in 2021 suggested that only about 1 in 4 authorities made use of the extension at all, with many citing the short time for which it was in force as the main factor limiting its impact.

Adapting FOI practice

The evidence described above shows how the effects of the Covid-19 pandemic presented some significant challenges to Scottish public authorities in relation to FOI. The sudden enforced shift to fully or largely remote working, the initial loss of access to some systems and information, and the reallocation or reduction of FOI-trained staff resource, impacted on the ability of authorities to meet their FOI obligations at least initially.

However, while new technology and practices such as remote access to systems and more flexible forms of communication have made it easier for authorities to continue to function and comply with their FOI obligations during lockdown, they also create their own issues, especially if they have been implemented at speed without the required planning, training or an underpinning policy.

In particular, many authorities are likely now to hold work-related information in more systems and on more devices than before, including in well-known but often complex applications like Microsoft Teams and WhatsApp. It doesn't matter how or where the information is stored - all work-related information is subject to FOI. Authorities must therefore have the means and the procedures for identifying and searching for any such content.

⁸ This research featured in my previous report, available at www.ItsPublicKnowledge.info/CovidReport.

When carrying out investigations that concern whether an authority holds information - or has identified and located all the relevant information it holds that falls within the scope of the request, I must be satisfied on the balance of probabilities that all information in scope has been identified. Therefore, I must be able to see sufficient evidence of the searches that were carried out and/or a clear rationale for judgements that were made as to where any information might be stored.

In [Decision 105/2021](#), the City of Edinburgh Council's submissions on searches were not sufficient to allow me to conclude, either way, whether the Council held any information falling within scope of the request for information. While the council claimed it held no information falling within the scope of the request, it was not possible to tie together cohesively the various submissions about searches that the council provided during my investigation, which meant there were gaps. While I acknowledged the challenges in providing submissions resulting from a changeover of staff involved in the case, my decision required the Council to carry out further searches. Had the authority carried out full searches from the outset, and retained records of these, this would have lessened the work involved, and may even have avoided the need for an appeal.

There have been a number of instances during the past 18 months where an authority has not carried out sufficient searches to locate all of the information it holds that falls within the scope of a request. Often, such cases have come to my office on appeal and, prompted by our investigation, the authority has carried out additional searches, identifying further information - sometimes in places they did not expect to find it - which was then provided to the requester.

There is also the risk of some modern forms of information being inadvertently destroyed - for example through scheduled automatic deletion - after some of its content has been requested, which could represent a breach of FOISA. Authorities must therefore take steps to avoid this, for example by carrying out searches of all systems as soon as possible after a request is received.

In a case that was settled in early 2021, the Scottish Ministers had been asked for the transcripts of the coronavirus daily briefings. The requester was initially told that no transcripts were held, but after an appeal and additional searches being carried out, 30 transcripts were located and disclosed. Meanwhile, [Decision 122/2021](#) illustrates the risk of inadvertent destruction of information given the ephemeral nature of SMS and WhatsApp messages and the lack of backup services used by Scottish Government devices. It also illustrates how this may be mitigated by records management policies, including remote working guidelines, being in place, combined with thorough searches.

As well as many authorities rapidly having to reform how they operate in order to maintain their FOI function during the pandemic, we have also seen examples of the remarkable resilience and adaptability of individuals working in FOI in authorities across Scotland. Many of them took a pragmatic approach in responding to the challenges, including:

- explaining to requesters why the response to their request may be delayed;
- keeping requesters updated on progress, and any changes in circumstances;
- providing partial responses in the interim until a full response was available; and
- offering advice and assistance including about other means of accessing information.

These approaches sought to maintain a positive relationship with requesters, reminding them that those dealing with their requests were human too. This experience has shown that strong and proactive communications with requesters and staff can be crucial and very helpful.

Effects of proactive publication

As I reflected on in my previous report, the pandemic demonstrated the importance and the value of proactive publication - and many authorities embraced that, with our research in summer 2020 finding that the vast majority were publishing information about their Covid-19 response, and 39% of those surveyed said they were publishing more information overall than they had done before (with only 9% publishing less).

During the conference in August, we heard a number of FOI officers state that the pandemic had brought a welcome emphasis on publication within their authority, with the value of doing so being increasingly recognised at a senior level or existing aspirations being accelerated by necessity.

The following quote reflects a number of contributions made during the conference:

"The pandemic led to there being more emphasis on publication, and more buy-in for it from senior managers. The agenda for proactive publication, which had been talked about but never really put into action, was made much stronger by the circumstances. It also led to more staff being 'exposed to' FOI - it gained more attention internally and externally, and we were able to demonstrate what it means and what it involves."

Unsurprisingly, authorities that already made information available routinely, and recognised the benefits of doing so, fared better than those that didn't. The NHS in particular was a case in point; one of the sectors most affected by the pandemic, most health boards acted quickly to establish what information they should be publishing to help them deal with the demand, taking into account:

- what was in the public interest;
- what information people were requesting; and
- what format the information was required in.

In general, FOI staff in the health sector were also aware of the need to coordinate with other authorities to ensure information was accurate and up to date. For example, high-level statistics concerning Covid-19 case rates, for which there was understandably high demand, were being produced and published in different ways and at different speeds at local and national levels.

In a typical regional health board, around a quarter of the FOI requests they received during 2020-21 related to Covid-19. In this context, the authority set about publishing information - about the pandemic itself, how decisions were being made, and so on - on a dedicated area of its website. Although the exact impact cannot be measured, the impression was that this approach had a positive effect. The authority was also able to use data held by them from national bodies to respond to requests, particularly where the requests were similar and arose from, for example, social media campaigns.

Pandemic-related information was, as one might expect, also subject to exceptional scrutiny by requesters. Health boards and others regularly received requests for information that queried elements of both official and media reporting around Covid-19, for example:

- distinguishing between deaths 'with' or 'due to' the virus;
- comparing statistics in 2020-21 with 'normal' levels; and
- querying the safety and effectiveness of the vaccines.

There have been good examples of authorities coping with the pressures associated with providing - and publishing - this type of information, and keeping it up to date in a fast-moving situation.

One authority responded to the pandemic by shifting the focus of its information governance team almost entirely onto day-to-day operational delivery. Despite this, the increased volume but also complexity of information requests being received proved challenging at first, with a need to understand new types of information and potential impacts, ensure accuracy amid regular updates, provide clarity and context to avoid misinterpretation, and align with other data being produced and published elsewhere.

In my own office, we also found it useful to check what other authorities were publishing, so that, in cases where requesters erroneously believed we held the information, we could be as helpful as possible in referring them to the relevant website where they could access the information.

However, while there were clearly a number of positive developments on the proactive publication front, there were also instances where information that could have been provided reasonably promptly was only disclosed - often several months later - following appeals to my office. Some of those cases received media attention that focused as much on the authority's refusal to disclose the information as it did on what the information itself revealed.

In the case of Decision 079/2021, the National Records of Scotland (NRS) had been asked in September 2020 for a breakdown of the numbers of confirmed and suspected Covid-19 deaths in each care home in Scotland during the previous six months. Having originally withheld the information under the personal data exemption in FOISA, the NRS accepted during my investigation that that exemption did not apply, and instead cited exemptions relating to commercial interests and health and safety, use of which was informed by representations from relevant third parties. Although I accepted that the requested information was commercial in nature and acknowledged the challenges care home providers were facing, I was not convinced that there was evidence of the substantial prejudice required for the exemption to apply, and I also concluded that, in any event, the public interest favoured the information being disclosed.

Elsewhere, we heard from some authorities about requests that appeared to have been prompted by information that was published, suggesting that in some cases proactive publication piqued the curiosity of members of the public on matters that they might not otherwise have been aware of. We also saw examples of authorities 'falling behind' in publishing regular business, with the impact of the pandemic sometimes cited as a contributing factor.

In September 2021, concerns were raised in the media about delays to the Scottish Government's publication of details of ministerial engagements. Meanwhile, in autumn 2020, my office carried out interventions with Highlands and Islands Enterprise and the Scottish Qualifications Authority after it was specifically brought to our attention by members of the public that each was failing to publish recent board minutes. In both cases the issue was resolved shortly after we intervened.⁹

⁹ For details of interventions I have carried out, see www.ItsPublicKnowledge.info/InterventionsActivity

Looking forward - learning lessons for FOI in the future

FOI resources and culture

We have seen how the severity of the impact of the Covid-19 pandemic on individual authorities' FOI performance, and the speed of their recovery, depended on how quickly, effectively and appropriately they were able to implement new procedures and technology, and reinstate FOI resources.

At the same time, the circumstances led to a heightened appreciation of the role and value of FOI, both within authorities and more widely. At a time when there are few who have not been touched by some degree of loss or worry, or affected by restrictions on our personal liberties and our way of both living and working, the nature of the information requested during the pandemic has emphasised the importance of the right.

In that context, devoting sufficient resource to all that FOI entails is critical. As request numbers continue to rise as we emerge from the worst of the pandemic, authorities which have not, at the very least, restored their FOI function to pre-pandemic levels will struggle to cope with the increased demand and will risk damaging public trust in their activities.

We have heard from one authority that recognised the importance of getting FOI right and voluntarily underwent an external audit of its FOI practice in 2021, conducted by practitioners from other authorities. The audit aimed to constructively challenge the authority's decision-making, particularly in the use of exemptions, and supplemented ongoing internal evaluation and knowledge management, including a decision log designed to help explain decisions if they were later reviewed or appealed. In some cases these processes led to information being published that had previously been withheld, as the passage of time reduced the likelihood of the disclosure causing harm.

That focus on FOI should not be limited to a discrete area of the authority. As we heard during discussions at the Practitioners' Conference and has been seen in investigations and interventions over the years, it is key that FOI is recognised and understood across the organisation - from communications or website teams responsible for disseminating information, to frontline workers dealing with requests and enquiries from the public. While the degree of knowledge required will vary depending on the roles of the individuals, the awareness of FOI and an understanding of their role in implementing it is essential.

When it comes to FOI performance overall, we have seen in many of our interventions to improve individual authorities' practice, that where they respond by just temporarily focusing attention and resources on dealing with FOI requests within the statutory timelines, a target may be reached but often in a way that is not sustainable. It is when senior managers lead the implementation of more strategic changes, with an appreciation of the openness and transparency that FOI brings, that lasting improvements and changes to organisational culture are made.

These broader actions often include:

- reforming how responses are coordinated and who is responsible for issuing them;
- recruiting or assigning additional members of staff to the FOI function;
- providing appropriate training to everyone involved in responding to requests, and issuing communications in the name of the chief executive; and
- importantly, the senior management team directly reviewing and overseeing FOI performance as part of standard business.

For example, prompted by an intervention opened by my office in late 2019, Highland Council implemented an action plan focused on three key areas: organisational culture, awareness and training, and reporting and monitoring. As a result, the council has improved the timeliness of its responses to requests (despite the challenges posed by the pandemic). These long-term structural changes have been made possible by the involvement and actions of senior managers, who recognised the need to incorporate FOI within a broader reorganisation and cultural shift, and the benefits of achieving a consistent level of service to the public across the council's large geographic area.

Meanwhile, as part of wider organisational changes and after I opened an intervention in October 2020, the Scottish Police Authority focused responsibility for dealing with FOI requests in a new corporate management team. This shift aimed to provide senior-level recognition of the importance of FOI, resilience in the event of staff absences, and clarity as to who is responsible for decisions about providing or withholding information. Having achieved its target of issuing 100% of responses within the statutory maximum timescale, the authority is continuously self-evaluating to identify further improvements, particularly in relation to proactively publishing information that is often requested.

Above all, FOI should be seen as a core function of any public authority, with the principle of transparency incorporated within the organisational culture as well as being served by specific actions or procedures. This includes making access to information an important consideration when implementing new systems or processes and in looking at business continuity arrangements, to be ready for potential disruptions to normal operations – bearing in mind that the next disruption may not be like the one we saw in spring 2020.

New approaches to publication

Throughout the pandemic, pushing out information to the public was key in governments' attempts to control and mitigate the impact of the pandemic. Authorities' generally positive approach to proactive publication about the pandemic will almost certainly have gone some way to reducing the number of requests about information of clear public interest.

However, it will also have set expectations about the ease with which information can and should be accessed from public bodies, and failing to meet those expectations will ultimately have a negative impact. The nature of the information being sought has emphasised the importance of transparency and the consequences of failing to maintain it. With important, wide-ranging and highly consequential decisions being made by public bodies both during the pandemic and in the recovery, being open about and accountable for those decisions is essential.

In December 2021, the Auditor General for Scotland remarked on the need for the Scottish Government to be more transparent about its spending in response to the pandemic, noting the large sums of money and significant public interest involved. While acknowledging the swift and decisive action that was needed to respond to the pandemic, as well as the challenges of defining what is and is not Covid-19 spending, the Auditor General called for a more proactive approach to showing where and how money was spent - with a clearer line from budgets to funding announcements to actual spending - to support public scrutiny and transparency.¹⁰

¹⁰ See www.audit-scotland.gov.uk/news/scottish-government-pandemic-spending-must-be-more-transparent and www.audit-scotland.gov.uk/news/covid-19-spending-transparency-will-be-increasingly-difficult.

In fact, the ESRC-funded 'Uncovering the Environment' research project - which focused on the use of public access to environmental information, but whose findings are also broadly applicable to FOISA - concluded that the public do not necessarily even see information being published as part of the fulfilment of a legal right; being able to access information is just what is expected of a public authority and assumed to be inherent in how they should and do operate.

This illustrates how public expectations about what information should be made available and how it should be accessed have changed significantly in the two decades since FOISA was passed. This is likely to have accelerated in the last couple of years, with more time spent online and the value of reliable, up-to-date, accessible and understandable information being clearer than ever.

As I have previously stated in my evidence and submissions to the Public Audit and Post-Legislative Scrutiny Committee, the publication scheme model in FOISA would benefit from being strengthened and updated. This view was shared by many in a discussion on this subject at the FOI Practitioners' Conference.

The following quotes are examples of the perspectives shared during the conference:

"We publish a lot, and that has increased since the pandemic, but that isn't equated - internally or externally - with the publication scheme duty; that might not be a bad thing in itself, but would suggest the limited usefulness of publication schemes."

"People might often look for information on our website but probably don't know about publication schemes - they don't 'resonate' with the public."

That is why my office will continue to engage in discussions about reform of the publication requirements of the legislation to ensure that the duty can remain up-to-date with fast-paced technological advances and increasing expectations of society that information will be quickly and easily accessible, often without having to make a request.

One aspect of proactive publication that I would like to see more focus on is responsiveness. The [Section 60 Code of Practice](#) currently recommends that, in deciding what to publish, authorities consider factors such as:

- information which is regularly the subject of information requests;
- information relating to forthcoming/recent decisions or announcements;
- information about current issues which are attracting, or are likely to attract, significant public interest or media coverage; and
- information disclosed in response to requests (i.e. disclosure log).

My suggestion for a new, enforceable Code of Practice on Publication includes reinforcing these considerations as part of how authorities can demonstrate their commitment to putting the public interest at the centre of their approach to providing access to information. We have seen how authorities responded to the impact of Covid-19 by publishing details of how they were responding to the extraordinary circumstances; there is no reason why this greater transparency cannot be maintained as we emerge from the pandemic.

As part of one council's response to the pandemic, FOI staff were given the task of monitoring trends in the volume, nature and subjects of information requests and other interactions with the public, to identify what information was of most interest to which groups of people, both in the region and further afield. This analysis, which included mapping these trends against external events such as the start and end of lockdown

restrictions, was then used to inform decisions about what information should be collated and published, as well as messages issued by the communications team.

Looking ahead, as the report on the post-legislative scrutiny of FOISA highlighted, authorities will need to consider what information people want to access and how, and reflect that in the way in which they create, store and publish it - ensuring it is as findable, understandable and usable as possible. This is an example of how proactive publication could be built into authorities' standard business practice and procedures, rather than being seen as a separate, retrospective task.

As the 'Uncovering the Environment' research project also found, information is often not stored the way people expect it to be; as a result, a request that someone may assume is straightforward to answer can end up being complex and taking a lot of work to find the information, often from multiple sources within the public authority. This might be because the way a requester 'frames' an issue or a service differs from how it is managed and consequently how information is organised.

[In Decision 104/2021](#), I accepted that a request was manifestly unreasonable under the EIRs. The request was for a wide variety of information over a 5-month period relating to a 'Spaces for People' project. Aberdeen City Council decided it would be too costly and time-consuming to search for and provide the information because the nature of the project meant responding to the request would involve a large volume of files held in multiple locations. The council did offer at several stages to advise on how the request could be refined, which it appeared the requester had not taken up.

Of course, the way that information is stored and managed, particularly in different areas of larger authorities, is likely to be beyond the control or responsibility of those leading or coordinating the responses to requests. The same is true for publication; we have heard from researchers and practitioners alike that FOI teams are often not involved in decisions about what is published or made aware of what is or is not available, even though it has a direct impact on their work.

This is another area in which authorities would benefit from considering FOI compliance - and transparency more broadly - as an organisation-wide endeavour, with appropriate resources and leadership. Doing so will have benefits for FOI staff, for the public, and for the reputation of the authority as a whole.

Meeting expectations of transparency

The increased focus on transparency that we have seen during the pandemic, combined with the largely-enforced shift to more nimble ways of working, has led to concern about an apparent increased use of private or informal channels to conduct official business. The concern here is two-fold: that proper records are not being made of meetings that are held and decisions that are taken, and/or that information is not able to be found when requested under FOI.

There have been very few cases that have come to my office where this was a concern, but it is nevertheless clear that new technologies such as private messaging apps and video call software present challenges particularly in relation to the retention and searchability of information.

While obligations around the creation and retention of records - including any potential 'duty to document' - principally falls within the scope of separate, recordkeeping legislation, it is clearly in the interests of transparency not only that information that is held is either disclosed or proactively published (subject to exemptions), but also that that information exists in the first place.

As the [Section 61 Code of Practice](#) makes clear:

"Freedom of information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon ... Good records and information management benefits those requesting information because it provides some assurance that the information provided will be complete and reliable. It benefits those holding the requested information because it enables them to locate and retrieve it easily within the statutory timescales or explain why it is not held."

It is equally vital that information which has been created and documented can be found and disclosed in order to enable scrutiny of those activities.

Updated guidance recently issued by the Information Commissioner's Office (which is responsible for FOI in the rest of the UK) regarding official information held in private communication channels may be instructive. It highlights the need to ensure staff can access official systems and equipment, to recognise when informal communications relate to official business and transfer that information into an appropriate storage location, to consider when dealing with a request whether relevant information may be stored in private channels, and where possible to avoid auto-deletion of messages.

As well as meeting public expectations of transparency, though, it can sometimes be important to manage expectations too. We saw examples of this in the pragmatic approaches taken by some authorities in the early stages of the pandemic. FOI requests are often handled by customer services staff, and indeed - especially in difficult circumstances - FOI can be as much about good customer care as it is about fulfilling legal requirements.

This customer-focused approach is encapsulated by the often-underappreciated duty under FOISA to provide advice and assistance. One increasingly important way to fulfil this duty is to provide context alongside recorded information in response to requests, to help the public understand what is being disclosed (as long as it is made clear what is recorded information that the authority already holds, and what is being added to provide context). Sometimes, that may involve going beyond what has been asked for, but it can have a number of wider benefits, including:

- saving time in the long run by minimising the likelihood of a review or appeal;
- maintaining a positive relationship and sense of trust between authorities and requesters;
- reducing the risk of the information being misunderstood or misrepresented.

This scope for placing information in context is one of the reasons behind a number of decisions I have made in which I have required authorities to disclose information which they had previously withheld owing to concerns about the risk of it being misinterpreted. I understand those concerns, but as we have seen, sometimes withholding information altogether merely serves to increase suspicion and distrust of official sources.

Decision 056/2021 concerned a request made to Police Scotland for the numbers of suspected drug deaths in 2019; the authority disclosed the number of confirmed drug deaths but withheld the figure for suspected cases on the basis that their work might be disrupted if numbers were to be exaggerated. However, the authority failed to explain how that effect would arise or convince me that it was likely to, and I required them to disclose the withheld information.

Decision 076/2021 was about numbers of deaths in individual care homes in West Dunbartonshire. One of the concerns of the Care Inspectorate was that disclosing the figures would lead to misinterpretation of the data, or to the public and media making

inaccurate judgments about care services. However, as I pointed out in the decision (and is stated in my guidance), information being complex or potentially difficult to interpret does not mean it should be withheld on public interest grounds. If a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop them explaining the information.

There have of course been other, high-profile cases of failure or refusal to disclose important information, and it is telling that those decisions about disclosure were as much the focus of attention as the content of the information itself. This illustrates the extent to which the public values transparency about decisions; indeed the public expects that transparency.

Reflecting more broadly, in my view the pandemic has drawn into sharp focus the disparities in access to information between equivalent public services based on how they are established or governed. For example, there may be complications arising where private hospitals are providing healthcare services on behalf of the NHS. The clearest example, though, is the distinction between privately-owned care homes and those run by a local authority.

Information relating to care services has always been the subject of public interest, but never more so than during these difficult past two years. However, the legislation currently means that, for example, relatives of people receiving the same care are less able - and have less of a right - to access information about the overall management of that care home or service than others, based on who happens to be running it. This disparity may be addressed in forthcoming consultation activity regarding the use of section 5 powers to extend the coverage of FOISA, or as part of the proposed legislation creating a National Care Service for Scotland.

Conclusion and Recommendations

FOI in Scotland - in terms of the system itself and the people who work in it, day in day out - has shown remarkable resilience to the significant challenges posed as a result of the pandemic. Though the work of my office might inevitably tend to be focused on cases where a requester is dissatisfied with an authority's response, we have also seen many examples of good practice over the past two years.

Nevertheless, there are a number of lessons that can be learned and ways in which both FOI and wider authority practice can be further improved to strengthen the public's access to information in a modern, post-pandemic context. Below I set out my observations and recommendations.

- **FOI is a core function, and authorities should ensure it is afforded the resources and senior-level attention that it requires.**

Poor FOI performance impacts on the reputation of the entire authority, and can be a symptom of broader shortcomings in practice and culture within the authority. Our interventions consistently show that it is only when senior managers take ownership of these issues that lasting improvements can be made. Everyone in a public authority has a part to play in supporting the FOI function, and appropriate training and support should be provided to help them understand those obligations.

- **Authorities must consider the ways in which they create, store and manage records, particularly when using new technologies.**

Freedom of information is only as good as the quality and availability of the records to which it provides access. Public authorities must ensure information is stored and managed in a way that enables relevant and important information to be provided, and allows the public to understand and scrutinise the authority's activities. With the widespread adoption of new technologies and systems and an increased number and variety of devices being used for work purposes, authorities must consider and put in place effective, up-to-date procedures to ensure records that have been created are retained appropriately and are able to be found if requested. It is essential that any new messaging technologies used by an authority are included in searches for information.

- **Authorities should take a positive, responsive approach to publishing information, learning from the experience of the pandemic.**

With the right strategy, proactive publication can reduce the need for FOI requests, make responses to requests easier and more effective, manage public expectations, demonstrate transparency and accountability, and maintain trust. Regularly reviewing what is being asked for, considering what is likely to attract interest and being aware of what other authorities are publishing can all contribute to achieving these outcomes. The forthcoming review of freedom of information law is an ideal opportunity to update the law in this area, perhaps by means of an enforceable code of practice to help public authorities make information available in a proactive and responsive manner, while allowing the flexibility needed to reflect particular circumstances, keep up with technological change and meet public expectations.

- **Information should be provided in context to help people understand it and reduce the risk of misinterpretation.**

The pandemic has led to an unprecedented level of public appetite for accessing and scrutinising complex information - some of which may be misrepresented or simply misunderstood, while in many cases information disclosed has prompted further questions. Providing appropriate context when information is published or disclosed could save time later by reducing the likelihood of queries, requests, or appeals.

- **Public authorities must have regard to their FOI obligations when implementing new systems or processes, including business continuity arrangements.**

The impact of the pandemic, and in particular the requirement to close office premises created unprecedented challenges for authorities in providing many of their services and functions, including their FOI function. New ways of working were quickly rolled out, sometimes with information governance implications. Moreover, the prioritisation of some functions resulted in the reallocation of resource away from the FOI function in some authorities. However, FOI remained an obligation throughout, so public authorities need to ensure they properly account for it when implementing new systems or processes, including the making of business continuity plans for the future.

- **Steps should be taken to address disparities in access to information between equivalent public services based on how they are owned or managed.**

For example, the pandemic has brought into sharp focus the differences in how FOI applies to private care homes and those run by a local authority. I look forward to supporting future consultation activity regarding extending the coverage of FOI law, to ensure it keeps up with modern public service delivery models and continues to serve the public interest.

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