

Davie Hutchison

**FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**  
**INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH**  
**GOVERNMENT FOI PRACTICE**  
**INFORMATION ABOUT INDIVIDUAL CASES**

**Introduction**

1. As you are aware, as part of his interview with you, the Scottish Information Commissioner wishes to discuss four specific FOI cases.
2. This minute provides an assessment of the matters that the Commissioner may wish to discuss, based on the information contained in the case file and the FOI tracker.
3. For each case, the special advisers' private office will provide copies of the advice that went to you on publication, the responses from your office, and the correspondence that was issued to the requester.
4. The Commissioner has not indicated to us the specific matters that he wishes to discuss. What follows is our assessment, based on the case file and the FOI tracker.

**FOI/16/00813**

*Details of the case*

Name of requester	[redacted], Labour researcher
Date of request	20 May 2016
Directorate	Health Performance and Delivery
Lead official	[redacted]
Stage concluded	Request

*Timeline*

<u>Date</u>	<u>Event</u>
20 May 2016	<i>Request received</i> Request for information about correspondence between senior management and Board of NHS Lothian and Scottish Government re treatment time guarantee between 1 February 2016 and 19 May 2016.
1 June 2016	Case handler sought clarification of meaning of term "treatment time guarantee" i.e. whether it was to be given its legal definition or if it referred more widely to other waiting time standards and targets. <i>Clock stopped on time to respond until requester provided clarification</i>
28 June 2016	Case handler reminded requester of request for clarification and offered advice and assistance.
28 June 2016	Out of office response received from requester.

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4 July 2016	Requester clarified that his request was for all waiting standards and targets.
<i>4 July 2016</i>	<i>20 day deadline for responding to request restarted</i>
6 July 2016	Case handler requested that searches for information within scope be carried out.
11 and 15 July 2016	Case handler received nil returns from three policy areas.
<i>3 August 2016</i>	<i>20 day deadline for responding to the request</i>
8 August 2016	Case handler received 4 documents thought to be within scope from policy area.
8 August 2016	Case handler sent draft submission to special advisers, proposing to release the 4 documents with redactions for personal data and material outwith scope.
7 September 2016	Case handler sent draft submission to FOI Unit which made technical changes to ensure compliance and resubmitted to special advisers.
7 September 2016	FOI Unit followed up with special advisers' private office, commenting that the case handler was awaiting a response from special advisers and noting that technical changes had been made.
5 January 2017	FOI Unit met PS/Special advisers and Davie Hutchison to discuss.
9 January 2017	FOI Unit summarised discussion for case handler. It recorded Davie Hutchison's concerns about releasing preliminary figures which were unchecked for accuracy and which would likely conflict with the final confirmed figures that had since been published. FOI Unit proposed to redact that information in accordance with section 30(c) (prejudice to effective conduct of public affairs). FOI Unit attached revised draft for case handler to consider.
18 January 2017	Case handler confirmed that he was content with the amendments.
18 January 2017	FOI Unit resubmitted draft response to special advisers for comment.
26 January 2017	PS/Special advisers advised FOI Unit that Davie Hutchison wished the amount of information proposed to be sent in the Annex to the response to be reconsidered.
26 January 2017	FOI Unit confirmed that it had shortened the reasoning in the Annex.
8 February 2017	PS/Special advisers advised FOI Unit that Davie Hutchison had suggested redacting a paragraph from one document and withholding the other three entirely.
9 February 2017	FOI Unit advised that the changes requested would mean that the response did not properly comply with FOISA and gave reasons.  However FOI Unit undertook to make the changes requested and have them sent for Ministerial clearance rather than further delay the response. FOI Unit noted that if an appeal were received it would be necessary to revert to its original approach.
9 February 2017	FOI Unit reverted to case handler with update on agreed position and asked case handler to submit response to Minister for clearance.
10 February 2017	Case handler sent draft response to Minister for clearance.
10 February 2017	Note on tracker: "Spads responded on 10/2".
<i>3 March 2017</i>	<i>Response sent to requester</i>
	[NB there is no further information on the file or tracker, so it is not clear when Ministerial clearance was given.]

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*Potential matters for discussion*

- Causes of the delays in responding, particularly in the period between September and January
- The approach taken to application of exemptions, which became more extensive throughout January and early February

**FOI/16/01545**

*Details of the case*

Name of requester	[redacted], Daily Record
Date of request	12 October 2016
Directorate	Population Health
Lead official	[redacted]
Stage concluded	Review (original decision overturned)

*Timeline*

<u>Date</u>	<u>Event</u>
12 October 2016	<i>Request received</i> Request for details from between April 2015 and October 2016 of any meetings and correspondence between [redacted] Scottish Professional Football League and SG officials in relation to the issue of sectarianism and anti-social and offensive behaviour in Scottish professional football. Requester also sought agendas, minutes and email correspondence on the same topic.
9 November 2016	<i>20 day deadline for responding to the request</i>
9 November 2016	Case handler sent a draft response to special advisers for advice (the email erroneously says “clearance”). It proposed that the agenda of a meeting and four emails arranging a meeting between the SPFL and Ministers should be released, and that two briefings should be withheld on the basis of the section 29(1)(a) exemption (formulation of SG policy).
11 November 2016	Davie Hutchison telephoned case handler, explaining that he considered that much of this material was outwith the scope of the request and asking for it to be removed.
13 November 2016	Requester sought an update.
14 November 2016	Special advisers’ private office passed on further comments on the draft response from Davie Hutchison to the case handler.
15 November 2016	Request sent to Ms Campbell for clearance.
16 November 2016	Ms Campbell confirmed that she was content.
16 November 2016	<i>Response sent to requester</i>
21 November 2016	<i>Review sought by requester</i> [Request for review not on file]
15 and 19 December 2016	Reviewer sought advice from FOI Unit. FOI Unit gave advice that her conclusions would involve substituting a new decision for the original, and releasing additional information.
20 December 2016	<i>Deadline for responding to review</i>

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20 December 2016	Draft review response sent to special advisers for comment. The reviewer and FOI Unit took the view that the material withheld should be released.
21 December 2016	PS/Special advisers advised that Davie Hutchison continued to wish to withhold the material proposed for release as being out of scope.
22 December 2016	FOI Unit set out its detailed reasoning in support of disclosure.
9 January 2017	FOI Unit sought an update from PS/Special advisers.
23 January 2017	FOI Unit met Davie Hutchison to discuss the case.
24 January 2017	FOI Unit updated reviewer on outcome of discussion with Davie Hutchison, commenting:  “ <b>[redacted]</b> So he has agreed that the information in pages 1 to 8 of your scanned documents should be released, subject to the redaction of “Elections and potential new Ministers – opportunities and challenges” and “Measuring football performance/ success/ outcomes” from the 18 April 2016 agenda (on page 7). You’ll need to apply the section 30(c) exemption to cover this – I’ve added appropriate wording to your draft review response.”
24 January 2017	Reviewer revised draft response and sent it to Ms Campbell for clearance.
31 January 2017	Ms Campbell sought clarification on whether release would set a precedent and asked whether the letter was unnecessarily apologetic.
1 February 2017	FOI Unit confirmed that no FOI response set a precedent for future cases and reworded the letter so far as it mentioned an incorrectly-applied exemption.
3 February 2017	Ms Campbell clarified that she thought the paragraph about application of the public interest test, which she thought too detailed.
6 February 2017	FOI Unit advised that the paragraph in question was the minimum required to fulfil the legal requirement to apply the public interest test, and so could not be removed.
13 February 2017	<i>Review response issued to requester</i>

*Potential matters for discussion*

- Reasons behind the differences of view about the scope of the request and what should be released
- The time taken for decisions to be reached at review stage

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**FOI/16/02137**

*Details of the case*

Name of requester	[redacted]
Date of request	20 December 2016
Directorate	Health Performance and Delivery
Lead official	[redacted]
Stage concluded	Appeal (ordered to release information)

*Timeline*

<u>Date</u>	<u>Event</u>
20 December 2016	<i>Request received</i> Request for list of meetings between Cabinet Secretary for Health and Sport and Chair/Chief Executive NHS Greater Glasgow and Clyde since May 2016 where the Vale Community Maternity Unit was discussed, and all related briefings, minutes etc; all communications between SG and NHS GGC re marketing to promote the Vale Community Maternity Unit.
4 January 2017	Case handler asked Cabinet Secretary's private office to search for information about the Cabinet Secretary's meetings falling within the scope of the request.
4 January 2017	PS/Cabinet Secretary responded with information falling within scope.
13 January 2017	Case handler sent draft response to special adviser (Davie Hutchison). Case handler noted that there was nothing particularly sensitive or contentious to be released, and that while out of scope material was redacted, no FOISA exemptions were being applied to the 6 documents within scope.
23 January 2017	<i>20 day deadline for responding to the request</i>
23 January 2017	PS/Special advisers told case handler that Davie Hutchison was suggesting that documents 2, 3, 5 and Annex A of document 6 should be withheld as being exempt under section 30(b)(ii) (free and frank provision of advice); document 4 and first 3 paras of document 6 should be redacted as outwith scope.
25 January 2017	Case handler revised draft response as proposed and sent to Ms Robison for clearance.
26 January 2017	Ms Robison's private office advised case handler to hold off further action as Davie Hutchison wanted to have a further look.
31 January 2017	Requester sought update.
1 February 2017	Case handler issued holding response, saying "It has taken longer than originally envisaged to source and consider the relevant information."
17 February 2017	<i>Requester sought review of failure to respond</i>
21 February 2017	FOI Unit contacted PS/Special advisers to offer revised draft following a meeting to discuss Davie Hutchison's concerns.
28 February 2017	Case handler revised draft response to reflect that a review request had been made, taking in FOI Unit revisions of 21 February.
1 March 2017	FOI Unit confirmed it was content with revised draft response.
1 March 2017	Case handler sent revised draft response to special advisers.

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17 March 2017	<i>Deadline for responding to review</i>
21 March 2017	<i>Requester appealed to the Scottish Information Commissioner</i>
5 April 2017	Commissioner notified SG that appeal had been validated. The appeal related only to the procedural issue of failure to respond. Submissions were requested by 21 April 2017.
6 April 2017	Case handler notified FOI Unit that Davie Hutchison had considered the 1 March draft. He commented:  “His office replied earlier this week rejecting this and instructing that the majority of info be withheld under s.30(c).”
6 April 2017	FOI Unit noted the position adopted by Davie Hutchison. It advised:  “As this is a review response and there is also an ongoing appeal to the Commissioner about the failure to answer it, <b>[redacted]</b> next step is to appeal to the Commissioner about the refusal to provide the information sought by part (ii) of her request. This is an appeal we will inevitably lose unless we decide to release the information during the investigation.”  In the circumstances FOI Unit was content with the amended draft response that gave effect to the views communicated to the case handler.
21 April 2017	<i>Deadline for responding to the Scottish Information Commissioner</i>
24 April 2017	<i>Response sent to requester</i> <i>Response sent to Scottish Information Commissioner</i>
25 April 2017	Commissioner issued decision finding that the Scottish Ministers had failed to comply with FOISA by failing to respond within the timescales laid down in the legislation.
15 May 2017	<i>Requester appealed to the Scottish Information Commissioner</i> Requester complained about the application of the section 30(c) exemption, and application of the public interest test.
30 May 2017	Commissioner notified SG that the appeal had been validated and requested that all of the withheld information be provided by 13 June.
12 June 2017	FOI Unit supplied the requested information to the Commissioner.
30 June 2017	Commissioner invited detailed response from SG, to be received by 17 July.
17 July 2017	FOI Unit submitted response to the Commissioner.
7 September 2017	<i>Decision issued by Commissioner</i> The Commissioner found that the Ministers had correctly withheld some information under section 30(c) (two sentences in document 4). She found that they were not entitled to withhold the other information, and required them to disclose it.
11 September 2017	Case handler redacted document 4 in accordance with the Commissioner's Decision and prepared the other documents for release, notifying FOI Unit.
23 October 2017	<i>Information provided to requester</i>

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*Potential matters for discussion*

- Causes of the delays in responding throughout the case, particularly in dealing with the review request and in issuing the information following the Commissioner's Decision
- Reasons for the approach taken to applying the section 30(c) exemption in light of the differing views about how to do so

**FOI/17/00171**

*Details of the case*

Name of requester	[redacted], BBC
Date of request	16 January 2017
Directorate	Health Performance and Delivery
Lead official	[redacted]
Stage concluded	Appeal (withdrawn following release of information in full)

*Timeline*

<u>Date</u>	<u>Event</u>
16 January 2017	<i>Request received</i> Request for information about correspondence between Scottish Government and [redacted] re NHS Scotland Productivity; also for same re his role on the Cabinet Secretary's 2020 Vision Advisory Board.
23 January 2017	Case handler consulted [redacted] about whether information should be disclosed.
23 to 25 January 2017	Case handler liaising with policy areas to collate information within scope of request.
31 January 2017	Case handler received response from [redacted] indicating he had nothing to add to his previous letter.
6 February 2017	Case handler sent request and collated documents to special advisers' private office as requested by Davie Hutchison.
7 February 2017	Special advisers' private office acknowledged receipt and asked for draft response.
8 February 2017	Case handler sent holding response to requester, commenting "it is taking longer than expected to deal with your request because we are checking with third parties."
8 February 2017	Case handler sent draft response to PS/Special advisers.
8 February 2017	PS/Special advisers sought clarification about which documents the case handler proposed to release.
10 February 2017	Case handler responded to PS/Special advisers.
16 February 2017	<i>20 day deadline for responding to the request</i>
5 March 2017	Case handler requested update from PS/Special advisers.
5 March 2017	PS/Special advisers confirmed that draft was still being considered by special advisers.
22 March 2017	Requester sought update.
23 March 2017	Case handler requested update from PS/Special advisers.

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24 March 2017	Case handler advised requester that no update was forthcoming as she was awaiting input from colleagues.
3 April 2017	<i>Requester sought review of failure to respond</i>
4 April 2017	Case handler informed PS/Special advisers and FOI Unit of request for review.
4 April 2017	FOI Unit provided advice on how to deal with review request.
10 April 2017	Case handler acknowledged receipt of review request to requester.
11 April 2017	<p>PS/Special advisers responded to case handler:</p> <p>“I have discussed with Davie and his view is that while this information is a couple of years old some of the material is still being actively considered in the formulation of SG policy in relation to the Health and Social Care Delivery Plan – and as such should be considered for exemption under s.29(1)(a). Grateful if you could reconsider the information you propose to release in light of Davie’s comments.</p> <p>If you could then provide a revised response to reflect the above and that this is now a review etc. I will discuss again with Davie.”</p>
12 April 2017	<p>Case handler responded to PS/Special advisers:</p> <p><b>[redacted]</b></p> <p>Case handler went on to set out detailed reasons for her views.</p>
13 April 2017	Case handler met PS/Special advisers and Davie Hutchison.
14 April 2017	<p>PS/Special advisers revised the draft response and indicated to the case handler:</p> <p>“Subject to the changes proposed being taken on board Davie is content for this to go to the Cabinet Secretary for clearance.”</p>
18 April 2017	Case handler sent draft response as revised to Cabinet Secretary for clearance.
20 April 2017	Ms Robison’s private office asked case handler to confirm two details.
2 May 2017	Case handler reverted to private office on return from leave.
2 May 2017	Case handler consulted FOI Unit on draft response as sent to Cabinet Secretary.
3 May 2017	PS/Cabinet Secretary confirmed that Ms Robison was content to approve the response.
4 and 5 May 2017	FOI Unit and case handler liaising on technical changes required to put letter in proper format.
11 May 2017	FOI Unit revised draft and advised that exemptions could not be applied in a blanket fashion as suggested. The covering letter was identified as a particular issue.
16 May 2017	<i>Response sent to requester</i>
23 May 2017	<p><i>Requester appealed to the Scottish Information Commissioner</i></p> <p>Requester complained about length of time taken to respond; failure to give advice and assistance; application of exemptions and public interest test.</p>

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30 May 2017	Commissioner notified SG that the appeal had been validated and requested that all of the withheld information be provided by 13 June.
13 June 2017	FOI Unit supplied the requested information to the Commissioner, noting that information had been identified that had been withheld in error, and that the FOI Unit proposed to release it as soon as possible.
27 June 2017	Commissioner invited detailed response from SG, to be received by 11 July.
10 July 2017	FOI Unit confirmed to Commissioner that all information requested had been released to the requester.
11 July 2017	Commissioner advised FOI Unit that the appeal had been withdrawn by the requester following release of the information.

*Potential matters for discussion*

- Causes of the delays in responding throughout the case
- Reasons for the approach taken to the section 29(1)(a) exemption, and the reversal of that decision when appealed to the Commissioner

**Conclusion**

5. You are invited to note the information in this minute.

[redacted]  
FOI Unit  
[redacted]

**16 May 2018**

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Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness

Paul Gray  
Alan Hunter  
Andrew Scott  
David Rogers  
Ian Davidson  
[redacted]  
[redacted]  
Liz Lloyd  
Stuart Nicolson  
John Somers  
[redacted]  
[redacted]