Special Report

Failure to Respond to FOI requests: extent, impact and remedy

Scottish Information Commissioner

Laid Before the Scottish Parliament by the Scottish Information Commissioner

August 2014

SG/2014/145
Summary
The Commissioner’s introduction and summary

Introduction

Failure to respond to information requests is a problem which threatens to undermine Scotland’s highly respected FOI regime. I first drew attention to this in my 2012/13 Annual Report; another year on, this special report looks at the continuing issue and explores the issues behind the statistics in greater detail.

The report aims to increase Parliament’s (and others’) understanding about the issue of failure to respond to information requests, and to stimulate debate about what we can collectively do to address it.

Parliament is asked to consider the report and promote debate about the impact of failure to respond to information requests on Freedom of Information and its contribution to transparency and accountability of Scottish public authorities.

As we approach the tenth anniversary of the right to information being introduced in Scotland, it is a sobering thought that almost a quarter of appeals to me over the last three years were about failure to deliver that right. The implications of this failure are that the culture of openness, transparency and accountability of Scottish public services is being undermined, and if it goes unchecked, there is a significant risk that the high regard in which our FOI regime is held will be eroded.

As this report sets out, we should recognise that, ultimately, improvement must come from the authorities themselves, but collectively we need to develop meaningful interventions to help authorities get it right first time in order to help people exercise their rights, and make FOI more efficient. We also need to ensure that requesters understand their rights and how they can contribute. Thankfully, we already have many of the answers from experience. The key is to raise the profile of the impact of the problem and extend the learning to every corner of the public sector. To facilitate and enable this, I would greatly appreciate the support of the Scottish Parliament in promoting constructive debate about the issues set out in this report.

Summary of findings and conclusions

- A quarter of appeals, valid for investigation over the last three years have been about failure to respond (at all or on time).
- In 2013/14, just 34 Scottish public authorities (out of hundreds) were the subject of appeals to the Scottish Information Commissioner specifically about failure to respond and only five authorities accounted for 50% of those appeals.
• Many public authorities have shown that it is possible to respond on time to large volumes of requests, but too many authorities are still not doing so. Delays and obfuscation are not only damaging to authorities’ relationships with individual requesters but also Scotland’s reputation for openness and transparency.

• The FOI experience is not consistent for all requesters or types of requesters.

• Failure to respond is an issue, but it is not uniform across all Scottish public authorities. Issues are more acute in some authorities than others.

• In the authorities where the issue is most acute, it appears there are specific underlying issues in terms of:

  (i) The relationship between the authority and the requester or type of requester

  (ii) Single issues which drive particular behaviours or high volumes of requests

• While FOI practice may not of itself be the issue, the data suggests that these authorities are not putting in place effective FOI practices to address underlying problems.

• Data suggests there is little correlation between the size of an authority, the volume of requests it receives, and failure to respond rates.

• Improvement must come from within authorities, but requesters also have their part to play.

• The example of some authorities has shown that positive action, with commitment from the top, can lead to significant improvement, even when there are high request numbers.

Every failure to respond is a denial of an individual’s statutory right to ask for information

Every failure to respond is a failure by a Scottish public authority to meet its statutory duty

Rosemary Agnew
Scottish Information Commissioner
August 2014
Background
FTR: why raise this matter now?

1. This special report focuses on what appears to be a continuing issue of failure by some Scottish public authorities to respond to information requests within the times for compliance required by statute (and in some cases, at all).

2. The Scottish Information Commissioner (the Commissioner, SIC) first drew attention to the failure to respond (FTR) issue last year, in her 2012/13 annual report. The Commissioner monitored FTR appeals over the last year and continued to raise the issue with authorities. There are examples of significant improvement by some organisations which has resulted in a slight reduction in the overall proportion of FTR applications. This demonstrates that the issue can be addressed, but is not representative of all authorities and in some quarters, regrettably, little progress appears to have been made.

3. It is of significant concern that on average 26% of appeals investigated by the Commissioner over the last three years concerned failure to respond. Each of these cases involved a complaint that an authority failed to respond to an information request, or to a request for review, within the required timescales. It was notable that FTR applications which proceeded to investigation almost always resulted in a finding that the authority breached its statutory obligations.

4. The report considers the impact of FTR on the person making the request, the public authority which receives it and on Scotland’s FOI regime.

5. This report aims to raise awareness of the issue and its impact, and the need for action (particularly by some public authorities) to address it. By doing so, it is hoped that greater attention will lead to positive change. The report also outlines what the Commissioner is doing to address the issue and points to good practice that authorities and requesters can adopt to tackle the problem.

Requesters
• For Requesters, FTR delays, discourages and deters requesters from accessing information they have a legal right to receive. This in turn fosters mistrust in authorities. FTR may also inhibit the ability to exercise other rights.

Authorities
• For authorities, delaying or not responding to a request is a poor strategy that may prove extremely costly, both in terms of resources and reputation. It reduces the opportunity for constructive engagement.

FOI
• For FOI in Scotland, FTR undermines confidence in the effectiveness of the right to information regime, and damages the culture of openness and accountability Scotland is working so hard to embed.

1 Laid before the Scottish Parliament under section 46(3) of the Freedom of Information (Scotland) Act 2002
2 For clarity, any reference to applications about failure to respond are applications that were received and accepted as valid for investigation, unless otherwise stated
Statutory Duties
An overview of rights and explanation of time limits provisions

Right to information

6. Rights to information and the time limits for responding to requests made under Scotland’s FOI laws\(^3\) are set out clearly in statute. Together FOISA and the EIRs provide individuals with the right to request and to receive any information held by Scottish public authorities.

7. In most cases, making an information request is simple.

8. Under FOISA the requester need only submit a written request, describing the information they wish to see. The requester does not have to cite the FOI legislation nor give reasons for wanting the information.

9. Additionally, under the EIRs requests may be verbal.

Timescales

10. A Scottish public authority is required by law to provide a full response promptly (as soon as possible) and within no more than 20 working days.

11. A request for environmental information under the EIRs may be extended by a further period of 20 working days if it is voluminous and complex, but the requester must be notified of the extension as soon as possible and no later than 20 days from receipt of the request.

12. Failure to comply with this provision is a breach of statutory duty.

13. The 20 working days is the maximum time allowed for compliance. Good authorities take a proportionate customer-focussed approach and respond promptly, rather than taking the full 20 days just because they can.

14. In most cases, the response will be the disclosure of the requested information to the requester. FOI law provides a range of limited circumstances where the authority can refuse to comply with an information request or refuse to disclose information because it is exempt. In such cases, the prescribed time scale also applies to the issue of the authority’s refusal and reasons.

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\(^3\) The Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs)
15. Authorities have to respond in full to any requests for review within 20 working days of receipt.

Right to review and appeal

16. If the authority does not respond, or the requester considers that the authority’s response has been deficient in some way, there is a statutory right to request a review. Following that review, if the requester continues to be dissatisfied, there is a right of appeal to the Scottish Information Commissioner.

17. The appeal provisions (which are the same under both FOISA and the EIRs) are summarised in the diagram below. The three steps, **Request, Review, Appeal**, are the same for all requests, regardless of the grounds for dissatisfaction.

![Diagram showing Request, Review, Appeal process]

Why 20 working days?

18. Why does our FOI regime require responses to requests and requests for reviews to be made promptly and within 20 working days?

19. The original proposal for the timescale was mooted in *An Open Scotland*, the Scottish Executive’s consultation paper on the FOISA Bill in 1999. This paper was the result of substantial research of international experience of access to information. The timescale remained constant throughout the passage of the FOISA Bill and was not challenged during either the pre-consultation or the passage of the Freedom of Information (Scotland) Act 2002. The provision mirrors the one calendar month provision in the European Directive on access to environmental information which was transposed into Scots Law by the EIRs.

20. As a comparison, Regulation 1049/2001 which covers access to European Parliament, Council and Commission documents allows only 15 days for a response.

21. Having a prescribed time for compliance is a recognised strength of Scotland’s FOI laws. It is important because it provides requesters with a level of certainty that their requests will be answered within a specified period of time. The deadline also provides a framework which authorities can use to ensure that suitable systems and administrative arrangements are in place to enable them to respond to requests on time.
22. Of course the disadvantage of having a 20 day time limit is that the cut-off date can attract more attention than the concept of promptness. This can lead to an assumption that an authority should take 20 days to respond, rather than that they have no more than 20 days.

23. While the time for compliance has not been reviewed in Scotland since the Act came into force, the Westminster Justice Select Committee looked closely at the issue in its post-legislative scrutiny of the Freedom of Information Act 2000. This concluded that the 20 day response time for requests is reasonable and should be maintained. On the time for compliance with reviews, the Committee concluded that the UK should adopt the same 20 day provision as Scotland.

24. The Committee recognised that 20 days could be challenging, for example if there was need to consult a third-party, but in practice, appeals to the Commissioner have not shown this to be a significant issue. What is more apparent is that authorities with good systems and robust processes build in consultation time from the outset.

“...we see no reason why there should not be a statutory time limit - 20 days would seem reasonable - in which they must take place”

Westminster Justice Select Committee

The Impact of Not Responding

Why does FTR matter?

25. If an authority fails to respond to requests, or responds to requests late, it effectively denies people their rights because it prevents or delays them getting the information they are entitled to promptly. The consequence of this can be both stressful and damaging to requesters. It also undermines trust and confidence in authorities and in the FOI regime.

26. Access to information is often time-sensitive for the requester. For example, where a parent wants to know more about a proposed school closure or a community group wants to understand a decision about a change in road use, they need the information at the particular time, not several months later.

27. Authorities should be able to resolve any failure to respond at an early stage. If they miss the initial deadline, then a response should be sent out as soon as possible; without waiting for a request for review. It is unacceptable that a requester should have to involve the Commissioner to simply secure a response, and a poor demonstration of commitment to openness and transparency by the authority.

28. Although the Commissioner resolves such cases quickly, the need to go through the appeal route at all adds further delay as there is a statutory appeal period of six weeks for compliance with the Commissioner’s Decision Notices.
29. If an authority does not take steps to put matters right, an appeal about FTR could take up to six months simply to get the requester the response they were entitled by law to receive within 20 working days.

30. But that may not be the end of it for the requester. Even when the response has at last been secured, it is still possible that the requester is dissatisfied with the response; in which case they may have to appeal to the Commissioner all over again. In such cases the authority has, effectively, already waived its right to review, so the requester can make an appeal directly to the Commissioner. This still means a second round of appeal and further delay.

31. Case times for ‘substantive’ cases to the Commissioner (i.e. where the authority has responded to the request and/or review) understandably take longer because of the need for a full investigation and submissions by both parties. The reality is that, because of the statutory steps the Commissioner must follow, unless the case is settled, the requester may have a further wait of several months for a decision (on average 16.6 weeks), followed by a further six week appeal period for information or explanations that they should have received within 20 working days.

32. Only a small number of cases are referred back to the Commissioner for a decision following a FTR. It is impossible, without further research, to establish the reasons for this. Potential questions for such research might explore:

(i) Whether requesters are satisfied by the response eventually received.
(ii) Whether the prospect of further delay has a deterrent effect.
(iii) Whether the currency of the requested information has so diminished over time there is no further value in pursuing the case.

What does the public think?

33. The Commissioner undertakes public opinion research periodically to gauge the level of public awareness of FOI in Scotland.

34. The findings from 2013 awareness research carried out by Ipsos MORI for the Commissioner revealed the strength of public support for Scotland’s FOI laws and how important it is that they are effective. Indeed, the research found that 93% of respondents agreed that it is important for the public to be able to access information held by public bodies and 91% agreed that FOI is important in holding public bodies to account for their spending decisions.

<table>
<thead>
<tr>
<th>If you made a request for information, how confident are you, or not, that you would get a response within 20 working days?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very confident</td>
</tr>
<tr>
<td>Fairly confident</td>
</tr>
<tr>
<td>Not very confident</td>
</tr>
<tr>
<td>Not confident at all</td>
</tr>
<tr>
<td>Don’t know</td>
</tr>
</tbody>
</table>

35. But the research found that the public were uncertain about whether they would receive a response to a request within 20 working days. While 49% of respondents expected they would get a response within this timescale, the responses indicated significant uncertainty: 10% of respondents were very confident while 12% were not confident at all about this most basic provision of the right to know.

36. This is a cause for concern as FOI is a significant channel of communication and engagement between the public and Scottish public services.
What is the impact on authorities?

37. Not responding to a request does not make it go away (it can often make things worse).

38. If the requester exercises their right to request a review this can result in considerable additional expense for the authority. For example, not only does it require further work, but expense may be incurred as more senior staff are often engaged to conduct a review.

39. If a requester then exercises their right to appeal because of lack of response from the authority, the Commissioner must follow specified steps when investigating to ensure that investigations are fair and thorough. Even in straightforward appeals, the investigation process places significant demands on the authority. The Scottish Government’s FOI Annual Reports for 2012 and 2013 identified the average cost of compliance with an appeal investigation as £1,344. This was 5.5 times the cost of complying with a request in the first instance.

40. In cases where the Commissioner finds against the authority, the only possible outcome is that the Commissioner orders the authority to respond (if they haven’t already done so). This means that the authority, and ultimately the public purse, has had to bear the financial and other resource costs of something that might have been avoided.

41. In addition to the potential substantial resource costs, FTR presents an even greater risk: the risk of reputational damage to authorities. This can come about in a number of ways, such as the result of negative media coverage or simply a loss of confidence and trust by the requester in the authority. FOI, rather than the information sought, becomes the story. It can also lead to loss of confidence in Scottish public authorities.

Examples of the impact in practice

42. The following examples are from appeals received by the Commissioner. They illustrate just how long requesters had to wait for responses and information.

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 November 2012</td>
<td>Ms Gordon-Nesbit made a request to Glasgow City Council, but did not receive a response to her request or subsequent request for review. Response issued 120 working days after the request for information was first made.</td>
</tr>
<tr>
<td>30 April 2013</td>
<td>Response issued to Ms Gordon-Nesbitt during the Commissioner’s investigation.</td>
</tr>
<tr>
<td>31 July, 9 and 24 September 2012</td>
<td>Mr Reyner made three requests for information to Shetland Island Council. The Council failed to respond to any of the requests. Mr Reyner requested reviews and a response was provided, in response to one of his requests. Responses issued 120 and 108 working days after the requests for information were first made.</td>
</tr>
<tr>
<td>4 March 2013</td>
<td>Following Decision 001/2013, Mr Reyner received responses to the two outstanding requests.</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>26 September 2011</td>
<td>Mr Edwards made a request to the Scottish Ministers for information about the nuclear power stations at Torness, East Lothian and Hunterston, North Ayrshire. 3 April 2012 Response issued to Mr Edwards.</td>
</tr>
<tr>
<td>25 July 2011</td>
<td>Mr Rule made a request to the Scottish Ministers for information about the engagements of a special adviser. 10 November 2011 Following Decision 224/2011, a response was issued to Mr Rule.</td>
</tr>
<tr>
<td>28 June 2012</td>
<td>Dundee based charity, Eighteen and Under, made a request for information to Dundee City Council. The Council failed to respond to the request or the subsequent request for review. 22 November 2012 Following an investigation, the Council eventually responded to Eighteen and Under.</td>
</tr>
<tr>
<td>9 March 2012</td>
<td>Mr Costello made a request for information to Dundee City Council. The Council failed to respond to his request and his subsequent request for review. 15 June 2012 Following an investigation, the Council responded to Mr Costello.</td>
</tr>
<tr>
<td>18 April 2013</td>
<td>Mr Mackay made a request to Stirling Council, but did not receive a response to his request or subsequent request for review. 4 November 2013 Following Decision 240/2013, a response was issued to Mr Mackay.</td>
</tr>
</tbody>
</table>

Eighteen and Under commented:

“Accessing information from the Council has been like drawing teeth. If authorities don’t respond, what’s the point in having the legislation at all?”

Mr Costello commented:

“With Dundee City Council any request for information has been met by a blank wall, necessitating a further request.”
### Decision 126/2013: Mr Severin Carrell and the Scottish Ministers

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>26/09/11</td>
<td>Request made for information about nuclear power and nuclear power stations.</td>
</tr>
<tr>
<td>07/10/11</td>
<td>The Ministers responded by asking Mr Carrell if he would narrow down the scope of his request due to the amount of information asked for.</td>
</tr>
<tr>
<td>12/10/11</td>
<td>Mr Carrell confirmed that he was willing to reduce the period of time covered by his request.</td>
</tr>
<tr>
<td>14/10/11</td>
<td>The Ministers notified Mr Carrell that due to the complexity and volume of the information falling within the scope of his request they were (in line with regulation 7 of the EIRs) extending the timeframe for responding by 20 working days &amp; providing a date of the 21/11/11 by which the response would be issued.</td>
</tr>
<tr>
<td>17/11/11</td>
<td>The Ministers informed Mr Carrell that the date for response would now by 30/11/11.</td>
</tr>
<tr>
<td>01/12/11</td>
<td>Because Mr Carrell had not received a response he contacted the Ministers asking when he might receive a response.</td>
</tr>
<tr>
<td>05/12/11</td>
<td>The Ministers responded by confirming they would respond as soon as possible.</td>
</tr>
<tr>
<td>20/12/11</td>
<td>Still no response, Mr Carrell asked for an update. This was later confirmed by the Commissioner in her Decision to be the date Mr Carrell made a request for review on the basis that he had not received a response to his request.</td>
</tr>
</tbody>
</table>

**60 working days since request was made**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>13/03/12</td>
<td>Nearly three months passed with no response from the Ministers. Mr Carrell once again asked for an update.</td>
</tr>
<tr>
<td>15/03/12</td>
<td>The Ministers responded by confirming that a response would be issued by the end of the following week.</td>
</tr>
<tr>
<td>20/06/12</td>
<td>Mr Carrell wrote to the Ministers seeking a further update as a further two months had passed and he still had not received a response.</td>
</tr>
<tr>
<td>26/06/12</td>
<td>Mr Carrell appealed to the Commissioner to investigate the handling of his request.</td>
</tr>
</tbody>
</table>

**187 working days since request was made**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>31/07/12</td>
<td>Commissioner issued Decision 126/2012 where the Ministers were found to have breached sections 10 and 21 of FOISA and ordered them to respond to Mr Carrell by 14/9/12.</td>
</tr>
<tr>
<td>06/09/12</td>
<td>The Ministers responded to Mr Carrell in terms of the EIRs providing him with information they considered to fall within the scope of his request and confirming that they held no further relevant information.</td>
</tr>
</tbody>
</table>

**238 working days since request was made**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>07/09/12</td>
<td>Mr Carrell appealed to the Commissioner on 6/9/12 about the response received from the Ministers. He was concerned that he had not been provided with all the information held and falling within the scope of his request.</td>
</tr>
<tr>
<td>26/06/13</td>
<td>Commissioner issued Decision 121/2013, which found in favour of Mr Carrell, ordering the Ministers to respond to him in line with the terms of the decision by 12/08/13.</td>
</tr>
<tr>
<td>12/08/13</td>
<td>Response issued by the Ministers to Mr Carrell in-line with Decision 121/2013.</td>
</tr>
</tbody>
</table>

**471 working days since the request made**
Failure to Respond in Scotland
What is the extent of the issue?

An issue at all stages

43. To understand the issue fully, it is necessary to appreciate that appeals to the Commissioner are the final stage of the FOI process. By the time it reaches the Commissioner an appeal can reflect a series of failures that do not routinely come to her attention:

(i) Failure to respond to an initial request (on time or at all). This is within the gift of the authority to detect and address. It is unlikely these failures will be brought to the Commissioner’s attention at this stage (or at all) as the next step for requesters is to ask the authority for a review. The Commissioner cannot accept an appeal purely about failure to respond to an initial request because it is not a valid application until the requester has asked for a review and waited 20 days.

(ii) Failure to respond to a request for review (on time or at all). This is, again, within the gift of the authority to address. It is worth remembering that at this stage the authority has potentially had 40 working days to respond to a request: the equivalent of two months!

(iii) Failure to respond to both the request and review (on time or at all). This double failure is, in the Commissioner’s view, the most reprehensible. 100% response rate in the first instance is challenging (but not impossible) to achieve. The Commissioner appreciates that occasionally requests are not responded to on time, but this should be for exceptional reasons and not represent a pattern of behaviour by an authority. To compound the first failure with a second failure at review stage is unacceptable.

44. Because not all failures to respond are brought directly to the Commissioner’s attention, information about them is incomplete; but there is sufficient to indicate the scale of the issues. This information is discussed in greater detail in the following sections.

Appeals to the Commissioner about failure to respond: authorities

45. In her 2012/13 Annual Report, the Scottish Information Commissioner first drew public attention to the increasing number of appeals about failures by public authorities to respond to requests for information and review.

46. Appeals to the Commissioner need to be considered in context, as they represent only a very small proportion of FOI activity in Scotland (it is estimated only 1% of FOI requests result in an appeal to the Commissioner). To a great extent, the number of times an authority fails to respond is not the point: the point is every failure is a denial of rights.

Invalid appeals: those that do not meet the statutory criteria for investigation. Most commonly these are appeals where the requester has not completed the necessary request and review stages outlined in paragraph 16, or has not waited sufficient time to allow the authority to make its response.

Invalid applications include complaints about FTR, but the failure may not be down to the authority so the SIC does not count them in her FTR statistics.
47. There have been 1,695 appeals to the Commissioner since 1 April 2011. Of those 1,183 were accepted as valid for investigation. The proportion of those valid appeals specifically about failure to respond (FTR) was 26%. This has not varied significantly over the last three years, although last year saw an overall slight fall to 24%.

48. This means that, on average, about a quarter of valid appeals over the last three years were about FTR. This is unacceptable, especially when, invariably, the Commissioner finds in favour of the requester.

49. Simply looking at the overall trend confirms that the issue is significant but does not of itself indicate what the underlying reasons and issues are.

50. The Commissioner produces and publishes an extensive list of annual statistics about the appeals she receives, including the extent of failure to respond. What these statistics show is that the majority of authorities are subject to very few appeals about FTR.

51. The range of Scottish public authorities is huge. Schedule 1 to FOISA specifically names over 200 authorities or types of authorities. They include, for example, Scottish Government, 32 councils, 8 NHS Boards, countless dental and GP practices, leisure trusts, regulatory bodies such as the Scottish Public Services Ombudsman and the Scottish Information Commissioner herself.

52. In this context, it is significant that in 2013/14, just 34 authorities were the subject of appeals to the Commissioner about failure to respond. What is even more significant is:

(i) Only 10 authorities were the subject of three or more FTR appeals. While this is encouraging at an authority level, it is important to recognise that cumulatively there is a body of requesters who do not receive responses until they have appealed to the Commissioner

(ii) Five authorities accounted for 50% of all FTR appeals

(iii) The FTR appeals from that same five accounted for 8% of all appeals to the SIC, and 12% of all appeals investigated by the SIC

(iv) There appears to be no direct correlation between the size of the authority and the number of FTR appeals. For example, the Scottish Police Authority was the subject of only one FTR appeal.

(Bear in mind, just one FTR request, review or appeal will have a disproportionate statistical impact on small authorities or authorities which receive few requests in the first place.)
53. The table below details the ‘top’ 10 authorities in 2013/14.

<table>
<thead>
<tr>
<th>2013/14, Failure to Respond Appeals from top 10 Authorities</th>
<th>Number of FTR appeals to the SIC</th>
<th>%age of all valid appeals to the SIC</th>
<th>Cumulative %age of all valid appeals to the SIC</th>
<th>%age valid FTR appeals to the SIC</th>
<th>Cumulative %age of all valid FTR appeals to the SIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government</td>
<td>25</td>
<td>6.5%</td>
<td>6.5%</td>
<td>26.9%</td>
<td>26.9%</td>
</tr>
<tr>
<td>East Dunbartonshire Council</td>
<td>6</td>
<td>1.6%</td>
<td>8.1%</td>
<td>6.5%</td>
<td>33.3%</td>
</tr>
<tr>
<td>NHS Highland</td>
<td>6</td>
<td>1.6%</td>
<td>9.6%</td>
<td>6.5%</td>
<td>39.8%</td>
</tr>
<tr>
<td>Highland Council</td>
<td>5</td>
<td>1.3%</td>
<td>10.9%</td>
<td>5.4%</td>
<td>45.2%</td>
</tr>
<tr>
<td>Scottish Prison Service</td>
<td>5</td>
<td>1.3%</td>
<td>12.2%</td>
<td>5.4%</td>
<td>50.5%</td>
</tr>
<tr>
<td>Stirling Council</td>
<td>5</td>
<td>1.3%</td>
<td>13.5%</td>
<td>5.4%</td>
<td>55.9%</td>
</tr>
<tr>
<td>Transport Scotland</td>
<td>5</td>
<td>1.3%</td>
<td>14.8%</td>
<td>5.4%</td>
<td>61.3%</td>
</tr>
<tr>
<td>Comhairle nan Eilean Siar</td>
<td>4</td>
<td>1.0%</td>
<td>15.9%</td>
<td>4.3%</td>
<td>65.6%</td>
</tr>
<tr>
<td>NHS Western Isles</td>
<td>3</td>
<td>0.8%</td>
<td>16.7%</td>
<td>3.2%</td>
<td>68.8%</td>
</tr>
<tr>
<td>Scottish Borders Council</td>
<td>3</td>
<td>0.8%</td>
<td>17.4%</td>
<td>3.2%</td>
<td>72.0%</td>
</tr>
</tbody>
</table>

54. In **2012/13**, **33 authorities** were the subject of FTR appeals. Of these, **nine** were the subject of three or more FTR appeals. These are detailed in the table below.

<table>
<thead>
<tr>
<th>2012/13, Failure to Respond Appeals from top 10 Authorities</th>
<th>Number of FTR appeals to the SIC</th>
<th>%age of all valid appeals to the SIC</th>
<th>Cumulative %age of all valid appeals to the SIC</th>
<th>%age valid FTR appeals to the SIC</th>
<th>Cumulative %age of all valid FTR appeals to the SIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government</td>
<td>32</td>
<td>7.8%</td>
<td>7.8%</td>
<td>29.4%</td>
<td>29.4%</td>
</tr>
<tr>
<td>City of Edinburgh Council</td>
<td>18</td>
<td>4.4%</td>
<td>12.2%</td>
<td>16.5%</td>
<td>45.9%</td>
</tr>
<tr>
<td>NHS Highland</td>
<td>8</td>
<td>2.0%</td>
<td>14.2%</td>
<td>7.3%</td>
<td>53.2%</td>
</tr>
<tr>
<td>Dundee City Council</td>
<td>4</td>
<td>1.0%</td>
<td>15.2%</td>
<td>3.7%</td>
<td>56.9%</td>
</tr>
<tr>
<td>Glasgow City Council</td>
<td>4</td>
<td>1.0%</td>
<td>16.1%</td>
<td>3.7%</td>
<td>60.6%</td>
</tr>
<tr>
<td>Scottish Prison Service</td>
<td>4</td>
<td>1.0%</td>
<td>17.1%</td>
<td>3.7%</td>
<td>64.2%</td>
</tr>
<tr>
<td>Stirling Council</td>
<td>4</td>
<td>1.0%</td>
<td>18.1%</td>
<td>3.7%</td>
<td>67.9%</td>
</tr>
<tr>
<td>Tayside Fire and Rescue Board (Inactive)</td>
<td>3</td>
<td>0.7%</td>
<td>18.8%</td>
<td>2.8%</td>
<td>70.6%</td>
</tr>
<tr>
<td>West Dunbartonshire Council</td>
<td>3</td>
<td>0.7%</td>
<td>19.6%</td>
<td>2.8%</td>
<td>73.4%</td>
</tr>
</tbody>
</table>

55. Across the two years, the proportion of FTR appeals from the top authorities accounted for comparable proportions of the Commissioner’s caseload.

(i) In 2012/13 FTR appeals accounted for 18% of all appeals; in 2013/14 they accounted for 16%, suggesting more authorities with fewer FTR appeals

(ii) In 2012/13 FTR appeals about the top authorities accounted for 73.4% of all FTR appeals; in 2013/14 they accounted for 72%

56. The most striking comparison between the two years is which the top authorities were. The volumes are small, so a change in one or two appeal numbers can have a large impact. Nevertheless, it is notable that authorities such as City of Edinburgh and Dundee City Councils, which took specific steps to address timescales, have seen significantly reduced numbers of appeals to the Commissioner.
57. **However**, relatively high FTR figures for an authority do not always reflect poor practice in FOI. They can be indicative of other issues within an authority, or be related to the requester/ type of requester asking for information.

An appeal to the Commissioner about failure to respond, that is accepted for investigation usually means the authority has failed the requester **TWICE**: at request stage and again at review stage.

### Appeals to the Commissioner about failure to respond: requesters

58. The types of requesters making FTR appeals have been consistent over the last two years.

59. As could be expected, ‘other’ (which is anyone with no stated affiliation) remains highest. Of more significance are the next two highest groups: media and prisoners.

<table>
<thead>
<tr>
<th>Requester Type</th>
<th>2012/13</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private/Commercial Enterprise</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Elected Representative (MP, MEP, MSP, Councillor)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Voluntary/Campaign Organisation</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Community Council</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Solicitor on behalf of client</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Prisoner</td>
<td></td>
<td>11</td>
</tr>
<tr>
<td>Media</td>
<td></td>
<td>24</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td>64</td>
</tr>
</tbody>
</table>

60. The proportions of appeals about any subject, compared to the proportion of appeals specifically about FTR were examined in more detail for **2013/14**. For all requester types other than media and prisoners, these were 78% (all) and 69% (FTR) respectively, i.e. 78% of all appeals were from these groups and 69% of all FTR appeals were from these groups.

61. Looking specifically at the media and prisoners, the proportions are different. In 2013/14:

   (i) the media accounted for **14%** of all appeals and **22%** of FTR appeals

   (ii) prisoners accounted for **8%** of all appeals and **10%** of FTR appeals

62. They are the only two groups where the proportions of FTR appeals are higher than for all appeals. This suggests that the media and prisoners experience more failure to respond than other requesters.
63. These two groups were examined further.
   
   (i) 12 of the 20 media FTR appeals in 2013/14 were from two journalists
   
   (ii) All prisoner FTR appeals in 2013/14 were from the same three prisoners

64. This suggests the issue is not only about FOI, but related to the wider culture of the parties and/or the relationship between them.

**Appeals to the Commissioner about failure to respond: authorities AND requesters**

65. To try to understand the issue further, FTR appeals were examined by requester, cross referenced to the number of applications they had made, and to which authorities.

66. From this analysis it emerged that there is a correlation between requesters who had made three or more FTR appeals to the Commissioner and authorities with the highest FTR appeal rates. However, it should be remembered that this analysis only identifies the correlation and does not explain the reasons for it.

   (i) In 2012/13, seven individuals made three or more FTR appeals and accounted for 37% of FTR appeals

   (ii) In 2013/14, six individuals made three or more appeals and accounted for 36% of FTR appeals

67. Three of those individuals made three or more FTR appeals in both years: two of them journalists and one a member of the public. All of these appeals were upheld by the Commissioner.

68. The top authorities by volume of FTR appeals in 2013/14 were compared with the authorities subject to FTR appeals made by the specific individuals in 2013/14. As can be seen from the next table, there is a high degree of overlap.

<table>
<thead>
<tr>
<th>Authorities by volume of FTR appeals 2013/14 (in order)</th>
<th>Authorities subject of FTR appeals by one or more of the specific individuals (not in volume order)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government</td>
<td>Scottish Government</td>
</tr>
<tr>
<td>East Dunbartonshire Council</td>
<td></td>
</tr>
<tr>
<td>NHS Highland</td>
<td>NHS Highland</td>
</tr>
<tr>
<td>Highland Council</td>
<td>Highland Council</td>
</tr>
<tr>
<td>Scottish Prison Service</td>
<td>Scottish Prison Service</td>
</tr>
<tr>
<td>Stirling Council</td>
<td>Stirling Council</td>
</tr>
<tr>
<td>Transport Scotland</td>
<td></td>
</tr>
<tr>
<td>Comhairle nan Eilean Siar</td>
<td>Comhairle nan Eilean Siar</td>
</tr>
<tr>
<td>NHS Western Isles</td>
<td></td>
</tr>
<tr>
<td>Scottish Borders Council</td>
<td>Scottish Borders Council</td>
</tr>
<tr>
<td></td>
<td>Midlothian Council</td>
</tr>
<tr>
<td></td>
<td>Police Service of Scotland</td>
</tr>
<tr>
<td></td>
<td>West Lothian Council</td>
</tr>
</tbody>
</table>
This suggests that the **issues these authorities have in relation to the specific requesters/type of requester are not just about FOI but are as much about the relationship between them or a specific single issue.**

Two other significant indicators that this may be the case include:

(i) All the FTR appeals in 2013/14 about NHS Highland were from the same individual (not media or a prisoner). Further analysis shows this was also the case the year before.

(ii) 17 of the 25 FTR appeals about the Scottish Government were from the media and of those 12 were from two individuals.

Whatever the reasons for this correlation, the FOI procedures in place in those authorities are failing to address them.

**Authorities’ own (self-reported) statistics**

Appeal statistics inform us about those few cases that find their way to the Commissioner and they indicate FTR remains an issue. However, they should be considered in the wider context of the FOI experience, to test the indications from our own data that they are specific to a small number of authorities and relationships with particular types of requesters, or particular individuals.

The Commissioner, with the cooperation of authorities, established a new national FOI statistics dataset. The data is self-reported by authorities to the Commissioner through her website on a quarterly basis. The dataset was established on 1 April 2013, so we now have our first year’s data.

The aim of the database is to gather information which will promote understanding of the extent of FOI use in Scotland and encourage debate about authority and requester practice. Although we only have one year of raw data, it provides useful top-level indicative information. The full data set can be viewed via the Commissioner’s website at [http://www.itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx](http://www.itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx)

The data self-reported by authorities supports that the FOI experience in relation to FTR is not the same for all requesters and authorities.

216 authorities contribute to the database. What they tell us is how many requests they recorded processing under FOI legislation.

In 2013/14 they reported:

(i) receiving 60,476 information requests (only 1% of which reached the Commissioner on appeal)

(ii) responding on time to 53,550 requests

(iii) responding late or FTR in the first instance in 11% cases

(iv) responding late or FTR to reviews in 18% of cases

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4 The Commissioner does not currently gather data from publicly owned companies or individual community health practitioners
(v) 39% of authorities always responded on time to requests (i.e. reported no late or FTR cases)

(vi) 5% of authorities did not receive any requests

(vii) 56% of authorities responded late to one or more requests

(viii) 6% of authorities responded late in 24% or more of cases

(ix) Local government bodies recorded 62% of all the requests received, yet they report managing to respond on time to 89% of requests.

(x) By contrast, central government bodies received only 5% of all requests and managed only an 81% response rate overall. This group includes Scottish Government agencies and the SPCB. The Scottish Ministers’ own data (which includes its agencies) reported responding to only 76% of requests on time.

(xi) Higher and further education authorities reported responding on time to 94% of requests

78. The average proportion of FTR (including late responses) in the first instance was 11%. This is less than half the 24% of the proportion of FTR appeals to the Commissioner. This suggests (but does not prove) that for the majority, responses are issued on time or at least within a timescale acceptable to the requester.

79. 76% of authorities responded to 90% of information requests on time, and 91% of authorities responded to 80% of information requests on time. This supports the conclusion from the analysis of appeals, that FTR is an issue for a relatively small proportion of authorities. It is also a good indicator that FOI is alive and working well for most people in Scotland.

80. Before this type of contextual data was available, it was assumed that one of the main factors for high number of appeals to the Commissioner about a particular authority was a high number of requests received by that authority in the first place.

81. To test this, the top 10 authorities by volume of requests (as reported by the authorities) were examined. These are summarised in the next table.

<table>
<thead>
<tr>
<th>Top 10 self-reported authorities by number of requests</th>
<th>Number of requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Edinburgh Council</td>
<td>2,762</td>
</tr>
<tr>
<td>Glasgow City Council</td>
<td>2,692</td>
</tr>
<tr>
<td>Police Service of Scotland</td>
<td>2,475</td>
</tr>
<tr>
<td>Scottish Ministers (including most Government Agencies and Non-Ministerial Officeholders)</td>
<td>2,002</td>
</tr>
<tr>
<td>Scottish Fire and Rescue Service</td>
<td>1,997</td>
</tr>
<tr>
<td>Fife Council and Licensing Board</td>
<td>1,750</td>
</tr>
<tr>
<td>Aberdeen City Council</td>
<td>1,487</td>
</tr>
<tr>
<td>South Lanarkshire Council</td>
<td>1,385</td>
</tr>
<tr>
<td>Perth and Kinross Council and Licensing Board</td>
<td>1,300</td>
</tr>
<tr>
<td>Highland Council and Licensing Board</td>
<td>1,295</td>
</tr>
</tbody>
</table>
82. What is striking about the list is that the Scottish Ministers (which includes Scottish Government) is the only authority with a relatively high volume of requests, to appear in the top 10 authorities about which the Commissioner received FTR appeals in 2013/14.

83. This suggests that the volume of requests may not be a significant factor in FTR after all, and that other factors are the cause. If the list of the top 10 authorities appealed about is compared to the list of authorities who reported failing to respond in 25% or more of cases, different information emerges.

84. Comparisons were made between the top 10 authorities subject to a FTR appeal to the Commissioner and their self-reported failure to respond rates. While direct comparisons could not be made because of the different ways in which data is recorded, the data did support the hypothesis that failure to respond in the first instance is not always an indicator that a high number of appeals will result. For example, two of the top 10 authorities which were the subject of appeals to the Commissioner, the Scottish Prison Service and Scottish Borders Council, had very low self-reported FTR rates.

<table>
<thead>
<tr>
<th>Self-reported authorities failing to respond in 25% or more of cases</th>
<th>Number of information requests</th>
<th>Number of requests: late or FTR</th>
<th>% requests: late or FTR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ayrshire College</td>
<td>10</td>
<td>5</td>
<td>50%</td>
</tr>
<tr>
<td>University of Aberdeen</td>
<td>249</td>
<td>118</td>
<td>47%</td>
</tr>
<tr>
<td>Newbattle Abbey College</td>
<td>12</td>
<td>4</td>
<td>33%</td>
</tr>
<tr>
<td>Queen's and Lord Treasurer's Remembrancer</td>
<td>3</td>
<td>1</td>
<td>33%</td>
</tr>
<tr>
<td>Aberdeenshire Council and Licensing Board</td>
<td>1,146</td>
<td>363</td>
<td>32%</td>
</tr>
<tr>
<td>Dundee City Council and Licensing Board</td>
<td>1,110</td>
<td>303</td>
<td>27%</td>
</tr>
<tr>
<td>Stirling Council and Licensing Board</td>
<td>1,081</td>
<td>273</td>
<td>25%</td>
</tr>
<tr>
<td>Grampian Health Board</td>
<td>527</td>
<td>132</td>
<td>25%</td>
</tr>
<tr>
<td>Scottish Law Commission</td>
<td>12</td>
<td>3</td>
<td>25%</td>
</tr>
</tbody>
</table>

85. It is interesting to note that Police Service of Scotland, which records the highest number of requests, and has a self-reported FTR rate of 16% (5% higher than average) is the subject of very few appeals about FTR.

86. There are a number of reasons why this may be, for example:

(i) Good practice that means requesters are satisfied with the eventual response time (e.g. it was on day 21), or were kept informed of delay and so did not see a need to appeal

(ii) Robust review procedures that mean the authority addresses failures before they become an issue for the Commissioner

(iii) Requesters simply give up

(iv) Requesters, or types of requesters, are more likely to appeal a FTR to Scottish Government and its agencies than to other authorities.

87. Without detailed research it is impossible to say with certainty.
Getting it Right
How do we tackle the issue together?

What authorities can do

88. The risks and impact associated with failure to respond can be greatly mitigated by ensuring that systems and processes are in place to enable the authority to respond to requests within the statutory timescale limits.

89. Since the introduction of the Commissioner’s Enforcement Strategy in 2008, the FOI practices of 48 authorities have been assessed against the requirements of both FOI legislation and the associated codes of practice. This has provided the Commissioner with a comprehensive view of what helps and hinders an authority’s ability to respond to requests within 20 working days.

90. The first step is for an authority to recognise its duty to respond to requests promptly and certainly no later than 20 working days following receipt. It is essential that this requirement is acknowledged at a senior level. Experience shows us that authorities that focus on giving prompt responses, irrespective of the 20 day time limit, are most successful at mitigating risks.

91. The next step is for an authority to look at its own procedures and practices. The Commissioner’s Good Practice Assessment Programme has provided considerable insight into the practical measures which help authorities respond to requests within 20 working days.

92. Full details of the Commissioner’s findings in each assessment can be found on the Commissioner’s website. What is clear is there are consistent themes.

93. The themes and tips are summarised on the following pages. They are not exhaustive, but each can have a positive impact on an authority’s ability to respond to requests promptly and in any case within 20 working days.
Themes and tips for authorities

94. **Leadership and commitment:** Increase chief executive and management buy-in to the principles of FOI and integrate them into the organisation’s corporate information management and governance arrangements

Organisational culture is established by the Chief Executive and management team. The most effective organisations are those that clearly understand their obligations under the legislation and put in place a framework to ensure that the most effective procedures and practices are established to deliver on those obligations.

In Audit Scotland’s good practice assessment, it was found that its risk-based approach to compliance had supported the development of appropriate structures and activities. The authority demonstrated strong FOI governance arrangements, supported by appropriate structures and appropriate levels of accountability by senior management. There was a demonstrable senior management focus on handling requests efficiently and effectively at the first stage, with a view to reducing the risk of future reviews and applications to the Commissioner.

95. **Monitor and manage:** set targets for response and have robust performance reporting systems, including reporting at a senior level

Clear focus on performance management at a senior level is vital to ensure that issues are both identified at as early a stage as possible, and appropriate remedial action is taken.

Aberdeen City Council introduced a corporate reporting system providing information about request handling practice. FOI performance is reported in quarterly activity reports to the Council’s Corporate Management Team (this comprises all Directors and the Chief Executive). Reports provide analysis of performance against set indicators, key areas for improvement and improvement action. When necessary, FOI issues are also reported to the Council’s Corporate Policy and Performance Committee.

Although introduced as one element of a wider package of changes made to its FOI arrangements, since the introduction of the new reporting system the Council has seen a marked improvement in the number of requests it now responds to within 20 working days and a reduction in FTR appeals to the Commissioner.

96. **Define FOI roles and responsibilities for all staff within the organisation**

No matter what structure the organisation has in place to deal with requests it is vital that all members of staff, not just those directly involved in dealing with requests, are fully aware of their responsibilities.

**All staff** must be able to recognise a request (including a request for environmental information) and know to whom to direct the request if it is not their responsibility to respond.

It is essential that roles and responsibilities of staff **directly involved** in responding to information requests and reviews are clearly defined at all levels, and established in procedure.

It is also important that strategic responsibility for FOI is delegated to a senior member of
staff and that the FOI officer (or equivalent member of staff) with primary responsibility for responding to requests, has a clear understanding of the staff they are required to rely on at each stage in the life cycle of a request.

For example, South Ayrshire Council has put in place comprehensive and documented arrangements that cover all key FOI roles and responsibilities within the authority, from the member of staff with strategic responsibility for FOI to a list of staff providing cover in the event of staff absence.

97. **Have clear, authoritative administrative arrangements to enable FOI officers to escalate issues to senior management**

In addition to establishing clear FOI roles and responsibilities, it is critical to ensure that there are suitable escalation procedures in place. These should give the FOI officer (or equivalent) the confidence and authority to raise issues at a senior level when necessary. Although informal arrangements are often in place, it is important that the FOI officer has access to recognised procedures which enable problems to be resolved, which in turn will enable a response to be issued within 20 working days.

Formal research has not been done to establish precisely what performance improvement can be made but where authorities have formalised escalation arrangements, improvements in performance have been achieved.

98. **Have mandatory logging and tracking systems to ensure that relevant management information can be easily obtained and issues can be identified early**

Effective systems must be put in place to log and monitor requests. Depending on the organisation’s structure and requirements, these systems do not necessarily need to be complex or sophisticated.

The Scottish Legal Aid Board maintains a simple central database for the collation of FOI request details with a reporting tool capable of producing information to monitor the journey times of requests. The arrangements reflect the requirements of the organisation and are both simple and effective.

99. **Deliver training tailored to the differing requirements of staff within the organisation**

It is essential that an authority has sound basic training arrangements in place to ensure that, as a minimum, all staff can identify information requests and know who to contact for guidance when required or to whom to pass requests for processing.

More detailed training is required for staff who deal directly with requests. It is important that these staff understand how the legislation works and how to apply exemptions effectively, taking into consideration the public interest test (when applicable).
Having robust and effective training arrangements in place, coupled with confident and knowledgeable staff, increases the likelihood that requests will not only be identified correctly, but will also be dealt with more quickly. Ultimately this will impact positively on the number of requests an authority responds to within statutory timescales.

East Lothian Council introduced a new FOI e-learning training package, which includes a short test upon completion. All new entrants to the Council are required to go through the training and the Council has made it a mandatory requirement for all members of staff to go through the training every two years.

Success is possible

“East Lothian Council was keen to improve on its FOI/EIR response times which have ranged from 82% to 89% since the introduction of the legislation in 2005. A decision was taken at one of our FOI Working Group meetings to revise our procedures and ask departments to provide requested information to the FOI Officer no later than 5 working days before the 20 working day deadline i.e. by the 15th working day. This has proved to be a successful exercise with over 92% of information requests being responded to on time during 2013 and, compared to previous years, fewer requests for internal review.”

Shelley Neville,
Data Protection and FOI Compliance Officer, East Lothian Council

100. Following an assessment of NHS Fife’s FOI arrangements in 2012, the authority put measures in place which resulted in a significant improvement in its performance in relation to responding to requests within 20 working days, lifting the authority’s performance from 60% in 2009/10 to a response rate of over 90%.

101. East Lothian Council was assessed in December 2012 following a dip in response rate performance to 75% in the second half of the year. The Council put in place an action plan following the assessment as a result of which a number of changes to its FOI arrangements were introduced. These measures were aimed directly at improving compliance with FOI timescales. The Council has subsequently reported improved response rates.

102. As these examples demonstrate, there a number of measures and actions an authority can take to improve its ability to respond to requests within statutory timescales.

103. The actions that can be taken will vary depending on the authority. Some will be relatively easy to put in place, but the key success factor to effective change is Chief Executive and management commitment, and support at all levels.
What can requesters do?

104. The onus is on the public authority to respond to a request on time, but there are some simple actions requesters can take.

105. The first is the most fundamental

Know and exercise your rights

106. But there are more actions that can be taken to hold the authority to account

(i) Note the date the request was made, then calculate the date by which a response should be received. Use the Commissioner’s on-line calculation tool (available at www.itspublicknowledge.info/YourRights) to give an indication of the date a response should be sent, or contact the authority and ask for assistance. (Good authorities will send an acknowledgement setting out the response date.)

(ii) If there is no response by the expected date, call the authority and find out if one has already been sent, but not received.

(iii) If it has not been sent, or is not due to be sent out, write and request a review.

(iv) Repeat (i) and (ii) in respect of the review request.

(v) If no response to the review is forthcoming, appeal in writing to the Scottish Information Commissioner.

107. While this is far from satisfactory from a requester’s perspective, it will at least keep the request active and, as importantly, ensure the Commissioner is able to detect, monitor and address poor practice.

What is the Commissioner doing about the issue?

108. The Commissioner’s Strategic Plan 2013-16: Improving Access to Information by Adding Value (www.itspublicknowledge.info/home/AboutSIC/StrategicPlan) sets out her strategic aims under an overarching theme: improving access to information through adding value:

(i) We will enable and support Scottish public authorities to develop and maintain high standards of FOI policy and practice through a combination of regulation, advice and assistance, and appropriate collaboration.

(ii) We will influence positively cultural change in Scottish public authorities’ approaches to meeting their FOI duties.

(iii) We will encourage effective and responsible use of FOI rights by a range of stakeholders through support, education and promotion.

(iv) We will influence and support the development of Scottish information law and policy to ensure it remains fit for purpose and enables effective communication.
We will be recognised as an organisation of accessible experts, that is run efficiently, governed effectively and leads by example.

109. These high level strategic aims are delivered through a range of projects, including interventions to improve authority practice. The Commissioner’s interventions include direct action to raise public authority awareness of the extent and impact of failure to respond and the remedies available.

**Direct support and intervention**

110. It should be remembered that, ultimately, addressing failures to respond is in the authority’s gift, not the Commissioner’s. But the Commissioner can, and does, exert pressure on authorities to resolve such issues and can provide support.

111. Where it is apparent that an authority is failing to respond to information requests on time, the Commissioner has several powers at her disposal.

112. In many cases, an informal intervention under section 43(1) of FOISA (promotion of good practice) is sufficient to alert the authority to the issue. For example:

(i) In 2013, the Commissioner contacted the Chief Executive of City of Edinburgh Council about the large volume of appeals arising from concern about property repairs. As a result, the Council decided to publish two management reports about the matters. The Commissioner provided technical expert support to enable the authority to publish redacted copies and the Commissioner met the Council’s Corporate Management Team to discuss future actions.

(ii) In 2014 the Commissioner is providing support to the Scottish Government by helping them to formulate an approach for self-assessment of their review procedures. Following that review, the Commissioner and her staff have offered to provide further input if needed.

113. In other cases, the Commissioner may consider it more appropriate to assess whether the authority is following good practice, using her powers under section 43(3) of FOISA.

114. Assessment and direct support also provide learning to inform the development of self-assessment tools for the future (see below).

115. In the event that the Commissioner is not satisfied that the less formal approach is effective within acceptable timescales, the Commissioner may issue a practice recommendation (under section 44 of FOISA) to the authority. Practice recommendations are not enforceable, but carry significant weight. The Commissioner has, to date, issued only two practice recommendations (in relation to Scottish Borders Council and the University of the Highlands and Islands).

116. Ultimately, if she remains concerned that the authority is not taking, or intending to take, action to improve response times, the Commissioner could issue an enforcement notice directing action: such a notice has the advantage of being enforceable through the courts.
Learning and development for authorities

117. The Commissioner published the findings from her Learning and Development (L&D) survey in April 2013 and has developed an L&D strategic framework (The FOI Learning and Development Strategic Framework 2013 to 2016) in response to the findings.

118. Key principles of the Framework are to promote the value of FOI amongst Scotland’s public sector leaders; help authorities share their FOI resources; provide more self-assessment tools; run specialised events and explore ways to accredit learning and provide more guidance on the Environmental Information Regulations (EIRs).

FOI seminars, conferences and roadshows

119. The Commissioner organised two annual FOI Practitioners’ Conferences for the Centre for FOI at the University of Dundee. These events provided opportunities for practitioners to learn about new developments, particularly in FOI practice and to share experience.

120. Through a series of seminars, participants identified solutions to common problems.

(i) In 2013, a seminar provided learning from Audit Scotland’s and the University of Stirling’s experiences of responding to information requests “right first time”.

(ii) In 2014 the City of Edinburgh Council’s FOI team led a seminar on searching and locating requested information.

121. The annual conferences have proven very popular, with strong participant feedback. Feedback from the May 2014 event indicated that 92% of delegates had learned something that will help them to respond to requests.

122. In 2013/14 the Commissioner’s regular roadshow events were extended to public authority audiences (previously they were aimed only at the public and journalists). Events in the Aberdeenshire and Ayrshire areas attracted more than 160 delegates from a wide range of different authorities (including local government, health and higher education bodies) to learn more about getting requests right first time and the practical operation of FOI legislation. Feedback indicates that the events were highly successful in both increasing practical FOI knowledge and in increasing confidence in handling requests.

123. This year, events will focus on failure to respond, from both the authorities’ and requesters’ experience, and will aim to develop a better understand of why authorities fail to respond to requests within statutory timescales. FOI practitioners and senior managers will be encouraged to exchange views and share practice with their peers and discuss the issues with staff from the Commissioner’s office.
Decisions Round-up

124. The Commissioner’s decisions round-up is a weekly update, issued via email, that provides a summary of each decision issued by the Commissioner and a summary of the key learning points coming out of those decisions. Learning points are directed at both authorities and requesters.

125. Since it was introduced the weekly decisions round-up has proved to be very popular with FOI practitioners and other interested parties such as the media. It is the most frequently accessed page on the Commissioner’s website and has a diverse readership. Anyone can receive it, and currently there are over 900 subscribers.

126. Highlighting key learning points from decisions is intended to help authorities improve their FOI practices and procedures. It can also help requesters understand the quality of service and responses they can expect and what they can do to make more effective requests. These learning points frequently focus on failure to respond.

“I think the weekly round-up is very useful. The round-up for the week 4-8 November was especially useful, containing the bullet point list of areas which can increase the likelihood of responding within FOI timescales. I have therefore taken these 7 key areas and suggested that in NHSGGC we should do a mini ‘self-assessment’ of how we measure up against those points and identify what we can improve or develop. It has been nearly 3 years since our formal assessment from OSIC and although we had a good assessment then, there is always room for improvement.”

   Alison Flynn, Freedom of Information Manager, NHS Greater Glasgow and Clyde

FOI self-assessment toolkit

127. In 2014-15 the Commissioner is developing an online FOI self-assessment toolkit, designed to be used by Scottish public authorities to help them evaluate, develop and monitor their FOI procedures and practices. The toolkit development will be influenced by learning from the Commissioner’s Assessment Programme and from discussions with FOI practitioners and staff at events such as conferences, roadshows and training events.

128. The toolkit will be available to everyone and can also be used by requesters as an indicator of what good FOI service looks like.

Advice, assistance and promotion of rights

129. The Commissioner reviews her guidance for requesters, *Your Right to Know* (http://www.itspublicknowledge.info/YourRights/YourRights.aspx) periodically. In addition to this, and other guidance on her website, the Commissioner and her staff deliver a range of ad-hoc advice, assistance and training to a range of stakeholders.
Conclusions
What have we learned?

130. Failure to respond is a problem which threatens to undermine Scotland’s highly-respected FOI regime. Many public authorities have shown that it is possible to respond on time to large volumes of requests, but too many authorities are still not doing so. Delays and obfuscation are not only damaging to authorities’ relationships with individual requesters but also Scotland’s reputation for openness and transparency.

131. What we found was:

(i) The FOI experience is not consistent for all requesters or types of requesters.

(ii) Failure to respond is an issue, but is not uniform across all Scottish public authorities. Issues are more acute in some authorities than others.

(iii) In the authorities where the issue is most acute, it appears there are specific underlying issues in terms of:
   - The relationship between the authority and the requester or type of requester
   - Single issues which drive particular behaviours or high volumes of requests

(iv) While FOI practice may not of itself be the issue, the data suggests that these authorities are not putting in place effective FOI practices to address underlying problems.

(v) Data suggests there is little correlation between the size of an authority, the volume of requests it receives, and failure to respond rates.

132. What we learned was:

(i) Improvement must come from within authorities, but requesters also have their part to play.

(ii) The example of some authorities has shown that positive action, with commitment from the top, can lead to significant improvement, even when there are high request numbers.

133. To achieve improvements, authorities must understand the factors that drive their own performance. To achieve that understanding, as a minimum it is recommended they monitor and review their own performance as a matter of routine, embedding it in their governance and management systems.