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# Minute Taking

**A report on how recording discussions and decisions at meetings needs to be improved to ensure the public's right to know remains robust under The Freedom of Information (Scotland) Act 2002.**

January 2018

Campaign for Freedom of Information in Scotland

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### **About CFoIS**

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. CFoIS is independent of government and relies on donations and income generated through training. For more information on our work go to <https://www.cfoi.org.uk/scotland/>

### **Thank You**

CFoIS would like to record its thanks to UNISON Scotland for funding our project on access to information, which has enabled this report to be researched and written.

## **1. Overview**

When the Campaign for Freedom of Information in Scotland (CFoIS) was founded in 1984, it was driven by the belief in the right of people to find out about how they are governed and how their services are delivered. Agreeing agendas and taking minutes are a traditional and proven way of preparing for and recording government business so that people can find out what is going on. CFoIS made a simple Fol request to the Scottish Government about transparency and accountability. We sought information on the rules or protocols for civil servants and Scottish Government Ministers on keeping notes, minutes and agendas of meetings.

In answering the Fol request the Scottish Government directed us to a range of information which supplements short guidance and is targeted at civil servants as well as Scottish Government Ministers. From the information received, we have concluded that on a day to day basis the process can be interpreted as both lacking precision, and too complex due to the spread of 'guidance' on who is responsible for what and when. This vagueness and complexity create loopholes which, without a committed culture of openness, can be exploited. Consequently, there is a negative impact on transparency and accountability. The loopholes must be plugged so that the process matches the purpose, which is to provide a record of who was there, what was discussed, what was agreed and actions to be taken by whom and when. Minutes enable accountability by providing the context to policy, funding and service decisions.

On 21 June 2017, the Scottish Parliament unanimously agreed two actions that could address cultural, practical and legal impediments to the equal enjoyment of robust Fol rights: an independent inquiry into the way that the Scottish Government deals with Fol requests; and to undertake post-legislative scrutiny of the Freedom of Information Act 2002 (FoISA) which would enable evidence to be heard on the robustness or otherwise of our current access to information rights and on how Scotland's 10,000 bodies are fulfilling their current legal obligations. Nearly six months later neither has been launched. The continued delays in initiating action are now part of the problem. The post-legislative scrutiny of FoISA is important as it enables the identification of good practice by governments elsewhere, as well as taking evidence on people's practical experiences. The latter will inform scrutiny of the Scottish Government's compliance with the law in Scotland. Therefore, both inquiries must run concurrently.

In the absence of Scottish Parliament inquiries, this report is designed to provoke debate. This report makes three recommendations and issues a call to action by those who meet with the Scottish Government, as well as those who do not. 'Get it Minuted' is a campaign which CFoIS is launching to ensure that agendas, notes and minutes of meetings are written up and published. We want your help to change the practice and culture of the Scottish Government by ensuring records are created, which can be either pro-actively published or subject to Fol requests.

## **2. The Problem**

Under FoISA, there is no duty to make a record. If a record of a meeting is not taken then there is no information to access. It used to be 'business as usual' to routinely produce agendas and take minutes of meetings. Why have we moved away from this practice? As people are concerned about colleagues in the civil service and cuts

to resources, they may perhaps feel embarrassed about adding to their workload by insisting on notice of what is to be discussed at a meeting via an agenda, and receiving an accurate record of what was agreed, and actions decided upon. Of course, some minutes also feature headline discussions which can be illuminating. Whatever the format, the purpose is clear – to deliver transparency and accountability and evidence the trail of how decisions were arrived at, acted upon and by whom.

Politicians, journalists and campaigners have repeatedly highlighted the inadequate framework for enabling scrutiny of how our elected government and its departments do business. For example, in a debate in the Scottish Parliament on 11 June, Neil Findlay MSP stated:

“... We are regularly told that meetings listed in ministerial diaries have no agenda and no minutes, and that no notes were taken because no substantive government business was discussed.”

He then went on to give examples of specific meetings on 21 September 2016, 26 September 2016 and 29 October 2016 and posed a question:

“Are we seriously supposed to believe that ministers met the chief executive of ScotRail, INEOS, which wants to frack half of Scotland, COSLA, directors of the Scottish Futures Trust, the editor of one of the country’s biggest-selling newspapers and a senior lobbyist and chair of the SNP’s growth commission, and that no substantive government business was discussed? <sup>1</sup>

There is a real worry that there are many meetings which go unrecorded. Journalists, in a published letter to the Scottish Parliament, also raised this concern.<sup>2</sup>

The most recent polling by the Scottish Information Commissioner confirmed that at 85%, public awareness of FoI rights in Scotland remains high. The poll also confirmed our anecdotal evidence about what the public think: there is strong public agreement on what type of information should be made public including the reasons for the decisions public authorities make (90%).<sup>3</sup> Therefore, the agendas and minutes of who Government Ministers, Special Advisers and civil servants meet is precisely the kind of information that the public wants published so that they can understand the process as well as the outcome of decisions large and small.

### 3. The Details

CFoIS looked at several sources of general guidance before making the specific FoISA request including:

- The Section 60/62 Code which details the types of information that should be published: “Authorities are free to publish as much information, of whatever

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<sup>1</sup> Debate on 13<sup>th</sup> June 2017 at

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11003&i=100551>

<sup>2</sup> See CommonSpace website at <https://www.commonspace.scot/articles/11068/journalists-unite-open-letter-damning-scottish-government-handling-foi-requests>

<sup>3</sup> An Ipsos MORI omnibus poll in March 2017 - see Scottish Information Commissioner website at <http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

type, they wish to publish. As a minimum, to meet the requirements of section 23 of FOISA, this should include information about: their functions, how they operate (including their decision-making processes), and their performance.”<sup>4</sup>

- The civil service code includes a duty to “keep accurate official records and handle information as openly as possible within the legal framework”.<sup>5</sup>
- The Public Records (Scotland) Act 2011 which came into force on 1<sup>st</sup> January 2013 which set out a scheme for improving record-keeping across the Scottish public sector. The Scottish Government has prepared and implemented a records management plan, agreed with the Keeper of the Records of Scotland.<sup>6</sup>

In response to our request for information we received a variety of information including:

- A copy of the Scottish Government’s “guidance for civil servants about keeping minutes, or any other records, relating to meetings involving Ministers. There is no other specific guidance on keeping records of meetings. Instead, it is covered by the general guidance on records management which is provided...”.
- Direction to the “Ministerial Code paragraphs 9.27 to 9.31, 10.18 and 10.19” as it provides “guidance on contacts with commercial companies and meetings with external groups and the media, respectively.”<sup>7</sup>

The language used in the short, specific guidance issued by the Scottish Government is intriguing and lacks precision. For example: “Private Offices should arrange for a record to be taken of meetings with outside interest groups, including lobbyists, that will set out the reasons for the meeting, the names of those attending and the interests represented (see Ministerial Code<sup>8</sup> paragraph 4.22).”

CFoIS would have preferred to see ‘Private Offices must arrange...’. Similarly, the wording and therefore the obligations on civil servants is also weak in respect of ‘it should be the responsibility of accompanying officials to take an appropriate record of an event with a Minister’. We would prefer to see ‘it is the responsibility’. The terms ‘Notes’ and ‘Minutes’ are used but clearly these are different types of documents.

There appears to be an absence of ‘rules’ on ‘agendas’ which are important documents as they provide evidence of planning about the content of a meeting as well as providing advanced notice of what is to be discussed. There is clearly a great deal of discretion used by Ministers and civil servants as to whether ‘substantive government business’ is being discussed and what is a ‘decision’. Interpretation is

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<sup>4</sup> Section 3.2.1 under ‘Pro-active Publication’ in SCOTTISH MINISTERS’ CODE OF PRACTICE ON THE DISCHARGE OF FUNCTIONS BY SCOTTISH PUBLIC AUTHORITIES UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 & THE ENVIRONMENTAL INFORMATION (SCOTLAND) REGULATIONS 2004 pub. 2014 at <http://www.gov.scot/Resource/0046/00465757.pdf>

<sup>5</sup> Available at Scottish Government website <https://beta.gov.scot/publications/civil-service-code/>

<sup>6</sup> The Scottish Government’s latest records management plan, of November 2017, is available at <http://www.gov.scot/Publications/2017/11/2984/downloads>

<sup>7</sup> See Appendix 1 for more detail about the wording of the FoISA request and the answer.

<sup>8</sup> The Scottish Ministerial Code is published on the Scottish Government website at: <http://www.gov.scot/Publications/2016/08/1393>.

key to what happens on whether a record is taken. Even if decisions have not been taken within the meeting, deciding to hold a meeting with an individual or an organisation is a deliberate act and is therefore an interesting piece of information. According to the guidance, for some meetings there may be a record of who attended and there may not.

Overall, the impact on transparency and accountability is negative as there is a danger that records are not made in the first place. The record is the gateway to affording external scrutiny. Therefore, CFoIS calls for more robust, co-ordinated guidance to be developed on producing agendas and taking minutes when Scottish Government Ministers attend meetings whether they last for five minutes or five hours, and regardless of venue as it is the presence of the Minister and civil servants that are key rather than the location. There also needs to be a common understanding of what a 'note' is so there is an understandable reason for a 'note' being taken as opposed to a 'minute'.

The FoI answer is helpful as it provides direction on what types of information exist. For example, the 'Scottish Government File Type Guidance' is interesting as the contents paint a picture of how the Scottish Government carries out its functions and provides direction on what types of documents people may want to request under FoISA to find out about decisions and how they were made, e.g. what factors were taken into consideration.

#### **4. Scottish Parliament Motion**

The Scottish Parliament in the motion unanimously passed on 21 June 2017 agreed concrete actions that would address the problem:

*That the Parliament condemns the Scottish Government's poor performance in responding to freedom of information requests; calls for an independent inquiry into the way that it deals with these, and agrees to undertake post-legislative scrutiny of the Freedom of Information Act 2002, and welcomes commitments by the Scottish Government to adopt a policy of pro-actively publishing all material released under FoI to ensure that it is as widely available as possible.<sup>9</sup>*

Although the Scottish Parliament welcomed "commitments by the Scottish Government to adopt a policy of pro-actively publishing all material released under FoI to ensure that it is as widely available as possible", we believe the Scottish Government should go further and pro-actively publish information without waiting for FoI requests in the first place. For example, unless a minute is taken, it is the subject of a FoISA request and it is then released then no one will know what was discussed during the meeting. The public should be asked about the kinds of information it would routinely like to access, to inform the pro-active publication of information.

A planned programme of publication that is accessible is simpler and affords greater accountability, is what the public wants. According to the latest research from the Office of the Scottish Information Commissioner:

- 94% agreed ("strongly" or "tend to") that it is important for the public to be able

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<sup>9</sup> Available on Scottish Parliament website at [http://www.parliament.scot/Chamber\\_Minutes\\_20170621.pdf](http://www.parliament.scot/Chamber_Minutes_20170621.pdf)

to access information.

- 77% would be more likely to trust an authority that publishes a lot of information about its work.<sup>10</sup>

Therefore, there are considerable reputational, confidence-building and trust gains for a programme of pro-active publication. These gains are for the public sector as a whole. Whilst concerns are registered about the Scottish Government's practice of producing agendas, minutes and notes, it is not clear if the problem extends to some public sector bodies too. That is a matter to be addressed by the Scottish Parliament in the post legislative scrutiny of FoISA, which may discover good practice by some public bodies which can be replicated by the Scottish Government.

In the meantime, the Scottish Information Commissioner should ensure all designated bodies under FoISA are meeting good practice standards, to deliver accountability and transparency in how they operate and in their decision-making processes.<sup>11</sup>

### **5. Action by the Public Audit and Post-legislative Scrutiny Committee**

The Public Audit and Post Legislative Scrutiny Committee of the Scottish Parliament has shortlisted FoISA as one of five Acts that could be taken forward for post legislative scrutiny but has decided to await the outcome of discussions between the Scottish Information Commissioner and the Minister for Parliamentary Business before finally deciding<sup>12</sup>. On 5<sup>th</sup> December 2017, the Committee wrote to the Scottish Information Commissioner about the nature of his enforcement action, announced in November<sup>13</sup>, in respect of the Scottish Government<sup>14</sup>. In a letter to the Committee of 18<sup>th</sup> December, the Commissioner stated he was assessing the Scottish Government's FoI performance in light of the concerns expressed in the open letter signed by 23 journalists, and was seeking further information from the signatories to that letter by 12<sup>th</sup> January 2018.<sup>15</sup> The impact of his decision is to narrow the sources of opinion and evidence which will inform the precise nature of the Commissioner's enforcement action.

The process should be opened to all those who have an opinion on what the enforcement action should look like. For example, in the landmark decision of the

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<sup>10</sup> See OSIC website

<http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>

<sup>11</sup> For example, section 44 of FoISA 'Recommendations as to good practice' at

<http://www.legislation.gov.uk/asp/2002/13/contents>

<sup>12</sup> List available on the Scottish Parliament website at

<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105094.aspx>

<sup>13</sup> Letter from the Scottish Information Commissioner to the Minister for Parliamentary Business available from OSIC website at

<http://www.itspublicknowledge.info/home/News/20171116CommissionerlettertoMinisterforParliamentaryBusiness.aspx>

<sup>14</sup> Letter from the Committee to you available at

[http://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/20171205\\_Letter\\_to\\_information\\_commissioner\\_-\\_FOI\\_PLS.pdf](http://www.parliament.scot/S5_Public_Audit/General%20Documents/20171205_Letter_to_information_commissioner_-_FOI_PLS.pdf)

<sup>15</sup> Letter available on OSIC website at

<http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

Grand Chamber in the case of Magyar Helsinki Bizottsag v. Hungary<sup>16</sup> it was ruled that NGOs, Bloggers and journalists have a key role in informing the public on issues of public interest. Therefore, their access to information rights are in effect 'elevated' because of their ability to ask questions of public interest and to widely cascade the answers and analysis. They too will be a good source of information on how the system is working in practice so should have the opportunity to influence the Commissioner's enforcement action. This case is helpful as OSIC is covered by the Human Rights Act 1998, as well as compliance with human rights law being explicit in the Scotland Act 1998.

The motion that was unanimously approved by MSPs on 21<sup>st</sup> June made no mention of the journalist's letter, so the Commissioner is not constrained on whom he consults with and there are likely to be several NGOs, civil society organisations such as trade unions and some Bloggers who can share their experiences and make specific recommendations on areas for Scottish Government improvement.

## **6. Conclusions and 4 Next Steps**

Three actions arise from this report which require to be undertaken by the Scottish Government, the Scottish Parliament and those bodies designated under FoISA and to which the Environmental Information (Scotland) Regulations (EIR(S)s) apply. In making these calls, CFoIS understands that this will be a fundamental cultural and operational change in how government and some public sector bodies do business. We are conscious that with cutbacks, levels of staffing have been reduced with consequent pressures on sufficient time for staff to do their day to day work. However, recording the business of government as well as that of public sector bodies and those delivering services of a public nature, needs to be understood and accepted as essential to delivering accountable government.

**1. Inquiries** The issue of minute taking can be scrutinised in both inquiries agreed by the Scottish Parliament. The inquiries should be established as a matter of urgency given that the will of the Scottish Parliament was unanimously agreed on 21<sup>st</sup> June 2017, over six months ago, to a fanfare of publicity.

**2. Log of Information Held by Designated Authorities** It is important that requestors are given better information to help them formulate requests.<sup>17</sup> Although there is a duty for public authorities to 'advise and assist when someone make a request', very often people have no idea of what information exists so their Fol request lacks precision. Access to a register to find out what type of information is gathered is the gateway to selecting what is relevant and for refining an Fol request. Therefore, the requester can understand how the decision was made and decide if the proper process was followed. This register would be more specific than the current 'publication scheme'.

**3. Interim Guidance** should be issued by the Scottish Government to its staff, Scottish Government Ministers and Special Advisers, until both inquiries report back to the Scottish Parliament.

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<sup>16</sup> For further information on the decision issued on 8<sup>th</sup> November 2016 see <http://www.ijrcenter.org/2016/11/15/ecthr-government-obligated-to-impart-information-beneficial-to-public/>

<sup>17</sup> Help is also available from OSIC at <http://www.itspublicknowledge.info/YourRights/YourRights.aspx>

1. A central log of **all** minutes and notes of meetings involving Scottish Government Ministers, is proactively published within two weeks of the meeting.
2. Definitions published of what an agenda, minute and note are. This must also detail the responsibilities attached to each, e.g. the published agenda must include all the business to be discussed and state clearly if a report is expected to be tabled at the meeting. This would avoid a situation where vague headings mean that agendas are less helpful.
3. Agendas published with links to reports/list of documents tabled in advance.
4. Even if there is an exemption to FoISA that prevents the full minute/note being published, some parts of the minute should be published in real time. Of course, a decision to redact part of a minute or note will be subject to an internal review under FoISA and ultimately an appeal to the Scottish Information Commissioner<sup>18</sup>.
5. With the publication of the note or minute, there should be links to any reports presented at the meeting.

Given that the Scottish Information Commissioner has announced a second statutory intervention with the Scottish Government using his powers under FoISA<sup>19</sup>, the contents of the final version of the Guidance can be agreed with him.

#### **4. Get it Minuted Campaign - Year Long Campaign 'Stand Up for Your Rights'**

To mark the 16<sup>th</sup> Anniversary of the passing of FoISA, CFoIS is launching the 'Get it Minuted' Campaign with two actions which can be taken up by the public as well as organisations, staff members, volunteers, those who govern and those who manage:

- People and organisations should ask and insist that there are agendas, notes and minutes for any meetings they participate in with the Scottish Government. This will help organisations too as it stops them going around in circles repeatedly discussing the same matters at meetings.
- Add your voice to the call that all meetings must be minuted or a 'note' taken. By changing culture and practice, recording discussions and decisions at all meetings will be understood as an obligation of good government which cannot be ignored.

'Get it Minuted' was launched as CFoIS's contribution to the UN's year-long campaign to mark the 70<sup>th</sup> Anniversary of the Universal Declaration of Human Rights<sup>20</sup>. Article 19 includes the 'right to access information' so it is useful to remember that we are still trying to make that right effective in Scotland today. The UN is calling on people to 'Stand up for Human Rights' with a gain for individuals as well as their families and communities. CFoIS believes that increased transparency and therefore accountability, benefits us all so please support our campaign.

**For more information on our work go to <https://www.cfoi.org.uk/scotland/>**

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<sup>18</sup> For more information on the process see the OSIC website at <http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>

<sup>19</sup> Commissioner's letter to the Minister for Parliamentary Business - <http://www.itspublicknowledge.info/home/News/20171116CommissionerlettertoMinisterforParliamentaryBusiness.aspx>

<sup>20</sup> For more information go to <http://www.un.org/en/events/humanrightsday/>

## **Appendix 1 - The Background Detail**

In making this information request, we focused on the role of civil servants as they are the paid, neutral staff at the Scottish Government.

I request a copy of the rules or protocols for civil servants or Scottish Government Ministers on keeping, notes, minutes and agendas of meetings. I note that the civil service code includes a duty to “keep accurate official records and handle information as openly as possible within the legal framework” <https://beta.gov.scot/publications/civil-service-code/> Also can you advise how long such records and information are kept?

### **Answer from Scottish Government**

I enclose, at Annex A, a copy of our guidance for civil servants about keeping minutes, or any other records, relating to meetings involving Ministers. There is no other specific guidance on keeping records of meetings. Instead, it is covered by the general guidance on records management which is provided in response to your question 5 below, which includes the guidance on how long records are retained. As you will see, this covers casework and subject-related file types, rather than focusing on particular types of document. This is because it is important that records contain the information necessary to tell the story of how a particular subject or issue was dealt with, rather than retaining information simply because it is contained in a document.

#### **ANNEX A**

### **Guidance for civil servants about when minutes of meetings, or any other records, should be kept of meetings involving Ministers**

A record should be kept of official meetings that deal with substantive government business. Private Offices should arrange for a record to be taken of meetings with outside interest groups, including lobbyists, that will set out the reasons for the meeting, the names of those attending and the interests represented (see Ministerial Code<sup>21</sup> paragraph 4.22). Specific rules also apply to recording formal and informal discussions held during overseas visits (see Ministerial Code paragraphs 9.14 to 9.16);

We would not generally take minutes of goodwill visits, hospitality events, or courtesy conversations where no policy decisions arise and where it may be sufficient to record within the official diary that the meeting has taken place.

Where a Minister is involved in a meeting, conversation or exchange with external organisations which raises substantive issues relating to Government decisions or contracts, and where no Private Secretary, adviser or official is present, they should inform their Private Office, who will arrange for the basic facts to be recorded (see Ministerial Code paragraph 4.23).

As a rule, it should be the responsibility of accompanying officials to take an appropriate record of an event with a Minister. Notes of meetings should be agreed through the relevant Private Office and, once agreed, stored by the policy area. In many instances, the Private Secretary will simply record action points quickly after a

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<sup>21</sup> Note: the Scottish Ministerial Code is published on the Scottish Government website at: <http://www.gov.scot/Publications/2016/08/1393>.

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meeting. This may be in advance or instead of a more substantial minute. Officials will be best placed to record technical matters. In all cases, care should be taken in deciding who to include on distribution and copy lists, with equal care needed in forwarding or passing papers to people who are not on those copy lists.

The appropriate policy or corporate support area (and not Private Office) is responsible for retaining and managing full and accurate official records, in line with records management guidance. Similarly, Cabinet Secretariat will hold the official record of all final Scottish Cabinet documents and decisions. However, Private Offices are responsible for providing policy and corporate colleagues with sufficient material to explain policy decisions, communicate views accurately, and demonstrate Ministerial accountability.

The Ministerial Code paragraphs 9.27 to 9.31, 10.18 and 10.19, provide guidance on contacts with commercial companies and meetings with external groups and the media, respectively.

## **Appendix 2 - Related Documents Provided by Scottish Government**

The additional documents supplied by the Scottish Government did not state they were extracts of policies.

Records Management Policy May 2015 - We learn that the aim of this policy is to define a framework for managing the Scottish Government's records to ensure that we 'Create and capture accurate, authentic and reliable records...' (Annex B in Fol answer)

Scottish Government Casework File Type Guidance – the 78 pages of guidance list individual types of casework including 'transport construction casework' (pg. 66) and 'school closure casework' (pg. 68) This is helpful in guiding the public to make Fol requests so that can be more precise in the information required.

Scottish Government File Type Guidance - the 53 pages of guidance covers a range of topics including 'correspondence' and the scope of that definition is "Correspondence relating to the SG's policies or position on X. Use for correspondence of a generally ephemeral nature -eg Requests for information on policy relating to X." Such files are retained for one year and then closed; the files are destroyed 5 years "after closure".

In respect of "Internal Committees" the scope of which is defined as: Documents and records pertaining to XXX Committee or Working Group, including terms of reference, agendas, papers, minutes etc.). NB: Use for committees whose membership does not extend beyond the Scottish Government and its associated public bodies." In terms of managing such records the rules are to "Close after 5 years" and "Archive 10 years after closure". There are also helpful definitions of what is "Office administration".

Of course, we must be mindful of FoISA exemptions but there is nothing to stop the Scottish Government providing the information reactively or pro-actively. However, they can cite the wide range of exemptions under FoISA to prevent disclosure on a case by case basis.