

<b>Report to:</b>	QSMTM
<b>Report by:</b>	Margaret Keyse, Head of Enforcement
<b>Meeting Date:</b>	11 May 2022
<b>Subject/ Title:</b>	Investigations Performance (VC168715)
<b>Attached Papers</b>	None

## Purpose of report

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- To report to the Senior Management Team (SMT) on investigations performance in Q4 of 2021/22 and in 2021/22 as a whole.

## Recommendation and actions

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- It is recommended that SMT:
  - note this report and
  - agree the recommendations regarding publication set out in “Publication” section below.

## Executive summary

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### The Commissioner’s duty under section 49(1)

- Under section 49(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), the Commissioner is required to issue a decision in all (valid) applications made to him, unless the application is frivolous or vexatious, withdrawn or abandoned.
- Consequently, the Commissioner has little, if any, control over the number of applications made to him.
- Decision notices issued by the Commissioner, including notices determining an application to be frivolous, etc., can be appealed to the Inner House of the Court of Session.

### The Applications received

- We received 626 applications in 2021/22<sup>1</sup>. This is the highest number of applications received in one year since 2005/06 (the first full financial year after FOISA came into force) and a 30% increase on the number of applications received in 2020/21. This is also 201 more applications than we received in 2016/17.
- We received 158 applications in Q4. This is slightly higher than the number received in Q3, but around average for the remainder of 2021/22.

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<sup>1</sup> The figures quoted throughout this report are based on figures available at the year end. The figures are still to go through a checking process. It is therefore possible that some of the figures in this report will differ from the final figures which will appear in the 2021/22 Annual Report.

Applications received	Number
<b>Q4 2021/22</b>	158
Q3 2021/22	145
Q2 2021/22	173
Q1 2021/22	149

8. We continue to receive a high number of applications from a small number of individuals. For example, 15 applicants made five or more applications in 2021/22, with three applicants having made 20 or more applications. One applicant made 32 applications.
9. In August 2021, we closed our appeals portal for technical reasons. The portal was designed to help applicants make a valid application to the Commissioner. It was expected that the number of applications received each year would also reduce slightly. However, the average number of applications received between (i) April 2021 and August 2021 and (ii) September 2021 and March 2022 was the same (both 52 per month). Of course, this may not be connected to the portal.

### Cases awaiting validation

10. The Commissioner can only investigate applications which comply with section 47(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), where a review has been sought from the authority and where, for example, the relevant timescales set out in Part 1 of FOISA have been complied with. We refer to the checking process as “validation.”
11. At the time of writing, we have not yet confirmed the status (valid/invalid) of a number of the applications we had received at 31 March 2022. (We aim to complete this in the next couple of weeks to assist with the preparation of the Annual Report and Accounts.) However, of the applications received in 2021/22 where a decision has been made on validity, 28% of applications have been found to be invalid. This figure is similar to previous years.
12. The main reason for an application not being valid (36%) is because the application did not comply with section 47(2) of FOISA, usually because the applicant did not set out any grounds for dissatisfaction in the application or did not specify the information request which led to the application being made.
13. In a further 25% of invalid cases, the applicant has not asked the public authority to carry out a review before applying to the Commissioner for a decision.
14. In these cases (as with all invalid cases), we advise the applicant on what action they need to take to make a valid application.
15. The high number of new applications received has obviously affected the work of the Validation Officers. At the end of April 2021, we had 20 cases waiting to be validated. This reached a high in February 2022 (61), but had reduced to 43 at the end of 2021/22.

### Applications under investigation

16. We define “applications under investigation” as any open, validated application. The cases will not always be under active investigation. Unfortunately, despite the high number of cases closed this year – discussed below – the number of applications continued to increase throughout 2021/22.

Applications under investigation	Number
<b>Q4 2021/22</b>	<b>253</b>
Q3 2021/22	239
Q2 2021/22	237
Q1 2021/22	201

17. In previous years, defining “applications under investigation” in this way this has not been an issue as, once cases were validated, there was little, if any, delay in them being allocated for active investigation.
18. However, as reported throughout 2021/22, the number of valid applications received has affected the speed at which these cases can be allocated to investigators: investigators are already dealing with a full caseload and we know from experience that allocating additional cases to investigators beyond a level that can reasonably be dealt with at the same time simply has the effect of slowing down the investigators’ caseloads as a whole.
19. Throughout 2021/22, we have tried to find ways to streamline our procedures wherever possible to allow us to deal with as many cases as possible as quickly as possible. Examples of some the actions taken – and planned – are set out in Appendix 1.

### Applications closed in 2021/22

20. As noted above, we received 626 applications in 2021/22. We closed 549 – the table below shows the stages at which the cases were closed:
21. This is the highest number of cases closed since 2013/14.

	Validation	Investigation	Decision notice	Total
<b>Q4 2021/22</b>	<b>52</b>	<b>44</b>	<b>45</b>	<b>141</b>
Q3 2021/22	48	38	59	145
Q2 2021/22	37	26	53	116
Q1 2021/22	48	39	60	147
			Grand total	549

### Applications closed during investigation

22. Section 49(4) gives the Commissioner the power to effect a settlement between an applicant and the authority. We effected a settlement in 122 cases during 2021/22:
- (i) 49 of these cases involved cases where the authority had initially failed to respond to the requirement for review. The cases were closed when, following our intervention, the public authority provided a response.
  - (ii) in a further 52 cases, the cases were resolved when some, or all, of the information requested was disclosed to the applicant during the investigation without the need for a decision to be issued.

### Average age of cases

23. Section 49(3)(a) of FOISA requires the Commissioner to issue a decision within four months of receipt of a valid application, or such other period as is reasonable in the circumstances. While, realistically speaking, it is not possible to close *all* cases within four months, we aim to

close cases, *on average*, within four months. We have not been able to manage that this year.

- 24. The average age of closed (valid) cases (YTD) has increased since the end of Q1. (At the end of 2020/21, the average age of open cases was 5.7 months. This has had an effect on the age of cases closed in 2021/22.)

As at	Months
<b>Q4 2021/22</b>	<b>6.3</b>
Q3 2021/22	6.3
Q2 2021/22	6.1
Q1 2021/22	5.9

- 25. Similarly, the average age of open (valid) cases (YTD) has increased since the end of Q1.

As at	Months
<b>Q4 2021/22</b>	<b>5.7</b>
Q2 2021/22	5.6
Q2 2021/22	5.3
Q1 2021/22	5.1

**KPIs**

- 26. Appendix 2 sets out our performance against each of our KPIs from Q4 of 2020/21 onwards. The KPIs work on a rolling basis, which means that the performance in one year is likely to affect the next. For example, at the end of 2020/21, only 27% of substantive cases closed were closed within four months, against a target of 50%. This means that we started off 2021/22 with an older caseload which affected the 2021/22 KPIs.

*Validation KPIs*

- 27. These KPIs focus on how long it takes for us to determine whether an application is valid.
- 28. Two of these KPIs were exceeded in 2021/22.
- 29. The third KPI was nearly met: in 67% of cases, a determination was made in less than 1.5 months against a target of 70%.

*Failure to respond (FTR) KPIs*

- 30. These KPIs focus on how quickly we close cases where the sole reason for the application being made to us is that the public authority has failed to respond.
- 31. Neither of these KPIs have been met – although both only by a small margin.
- 32. Compliance against these KPIs has been affected by the large number of new applications received (and the availability of approval resource), given that most of the FTR cases are investigated by the Validation Team.

*Substantive KPIs*

- 33. These KPIs focus on how long it takes us to close “substantive” (i.e. non-FTR cases) from the date of receipt.
- 34. None of these KPIs have been met. 89% of valid substantive applications were closed in less than 12 months, against a target of 95%, but it has proved impossible to meet the four

months KPI (only 11% of cases closed against a target of 50%) or the six months KPI (37% against a target of 75%).

35. Over the past 16 months, we have received a significantly higher than usual number of new appeals. This high number of applications has added to an earlier backlog of cases arising from disruption caused in the early months of the Covid-19 pandemic. This has impacted on our team's ability to deal with cases as quickly as we would like.
36. As has been reported previously, once a case has been validated (and, where relevant, withheld information has been obtained from the public authority), there is around a three-month delay in cases being allocated to investigators. Given that our KPIs are measured from the date of receipt of an application, the delay in allocation has badly affected our performance against the KPIs.
37. Appendix 1 sets out some of the steps we have taken in an attempt to streamline our investigation procedures to allow us to progress cases more quickly, but without impacting on the quality of our investigations. Given that either party to the investigation may appeal our decision to the Inner House of the Court of Session, the quality of our investigations must remain high. As noted above, the Commissioner has very little control over the number of cases made to him.
38. During 2021/22, we discussed whether our KPIs should be amended. However, we agreed to continue with the existing KPIs to allow us to record any improvement towards the KPIs in 2022/23 as further streamlining procedures take effect and additional resources are made available to the team.

#### *"All cases" KPIs*

39. This set of KPIs look at all of the applications made to us. Although none of the KPIs have been met, mainly for the reasons set out above, they look more positive. They show that, of all the applications made to the Commissioner:
  - (i) 52% were closed in less than 4 months
  - (ii) 67% were closed in less than 6 months
  - (iii) 94% were closed in less than 12 months.
40. One of the areas I have asked the team to focus on is on ensuring, wherever possible, that cases do not go over 12 months. Some of our oldest cases involves hundreds of documents and, in practice, it is very difficult to work on these types of cases purely from home, particularly if the information can only be viewed electronically. However, with the gradual re-opening of the office premises, which started earlier this month, this will make it easier – and faster – to work on these particular cases.

## **Summary**

41. It has been an incredibly busy year for the Enforcement Team (the work of the team is not limited to dealing with applications for decision but also includes responding to enquiries, information requests, subject access requests, etc.) and the team has worked very hard. It is therefore disappointing that only two of the Investigations KPIs have been met. (As reported elsewhere, other KPIs, for example for information requests and subject access requests have been met.)
42. Nevertheless, despite the issues with the team's resources, it is worth highlighting again that we closed 549 cases – the highest number of cases closed since 2013/14. At this stage, it is

not possible to predict whether the number of applications to the Commissioner will increase again in 2022/23, but the additional resources (which should hopefully be in place in Q3 of 2022/23) will certainly help us speed up the investigation of cases.

## **Risk impact**

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43. There is a risk that, given that case journey times are not in line with set KPIs, the Commissioner will come under closer scrutiny and criticism from stakeholders. This is likely to undermine confidence in the way applications are processed.

## **Equalities impact**

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44. There are no direct equalities impacts arising as from the recommendations in this committee report.

## **Privacy impact**

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45. There are no direct privacy impacts arising from the recommendations in this committee report.

## **Resources impact**

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46. The Enforcement Team is a relatively small team with around seven FTE investigators.
47. The number of applications we received this year has placed a lot of pressure on the team and had had a negative impact on performance. The team has not been at full capacity since before the start of the pandemic.
48. At the start of February 2022, one of the two Deputy Heads of Enforcement was promoted to Acting Head of Policy and Information. While this post has now been temporarily filled, the moves impacted on the work of the team and led to a further decrease in our investigative resource.
49. However, in March 2022, the SMT agreed to recruit two additional, full-time, permanent investigators to return the level of resources in the Enforcement Team to pre-pandemic levels.

## **Operational/strategic plan impact**

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50. This committee report reflects objective 6. in the Commissioner's strategic plan for 2020-24: to be recognised as an organisation of independent and trusted experts that is run efficiently, governed effectively and is open and transparent.

## **Records management impact (including any key documents actions)**

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51. None.

## **Consultation and Communication**

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52. The DHOEs and Acting Head of Policy and Information were consulted in the preparation of this report.

## Publication

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53. I recommend that this committee report and Appendices are published in full.

## **Appendix 1: Steps taken to streamline investigation procedures**

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There are only two factors which we can influence – the quality and quantity of the investigations. As noted elsewhere, the Commissioner has very little influence over the number of applications made to him. Given that all of the notices issued by the Commissioner can be appealed to the Inner House of the Court of Session, it is essential that the quality of our investigations remains high. This gives us little room for manoeuvre.

However, the following are some of the steps taken to streamline investigation procedures with the aim of speeding up the time in which cases are closed in the last year. In addition, for the past year, there has been more proactive management of the caseload to try to ensure that related cases can be investigated at the same time to ensure a speedier overall resolution for the cases. We have also, temporarily, cut back on some of the work carried out by the team, e.g. quality assurance and intervention work.

We will continue to try to find ways of further streamlining our procedures and the way we carry out investigations with the aim of speeding up the throughput of cases.

### **Changes to Scheme of Delegation**

Changes have been made to the Scheme of Delegation to give the DHOEs, Investigators and Validation Officers additional powers to act on behalf of the Commissioner – for example, investigators can now, without the approval of their line manager, issue certain formal notices finding applications to be withdrawn.

The number of investigators with the authority to approve “failure to respond” cases has been increased, releasing resource for the Deputy HOEs to focus on “substantive” cases.

Queries from the Validation Officers regarding validity of applications are now dealt with by investigators as opposed to by the HOE/DHOEs.

### **Communications with applicants – reducing ad hoc enquiries**

Given the number of requests for updates we were receiving, and the time taken to deal with these, we have increased our contact with applicants to ensure they are clear when they are next likely to hear from us.

In addition, we now publish much more information about our caseload on our website. This allows applicants – and public authorities – to check the status of their case(s) – e.g. awaiting validation, under investigation, draft decision submitted for approval. Although the report is published monthly, now we have moved to our new website, we intend to move to fortnightly updates.

Over the past month, the Commissioner has personally written to applicants waiting for their case to be allocated to an investigator, explaining the reasons for the delay.

### **Simplification of procedures**

Covering letters for decisions have been significantly simplified and no longer need to be approved or signed by person approving the decision.

Procedures at case closure (e.g. regarding the publication of decision notice; alerting the team to issues raised by case) have been simplified.

We are making changes to the formatting of our decision notice template to ensure that they are simpler to complete and upload on to our decisions database.



The requirement to carry out “triage” during an investigation in all cases has been removed to allow decisions to be drafted in straight forward cases without the need for an initial discussion with a line manager.

Changes have been made to the Investigations Handbook to reflect that fact that, as the office gradually reopens, the vast majority of files will be electronic only. (Prior to the pandemic, hard copy files were prepared for every case.) This change means that, except where necessary, time will not need to be spent opening up hard copy files or printing documents to add to the hard copy.

### **Forthcoming changes**

The following actions have been agreed and will be introduced in Q2 of 2022/23.

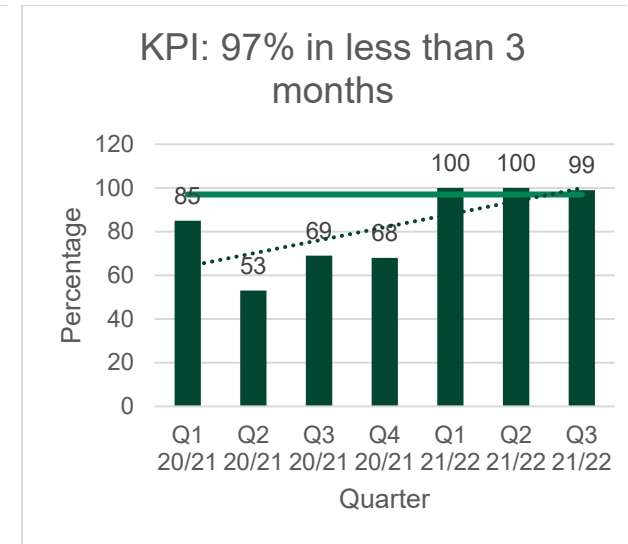
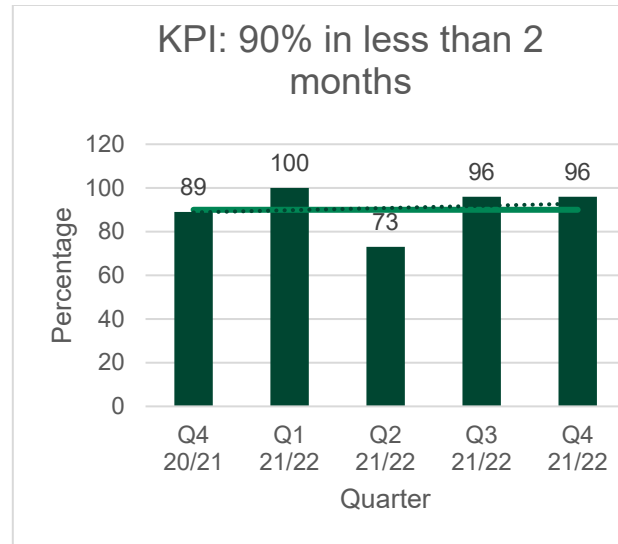
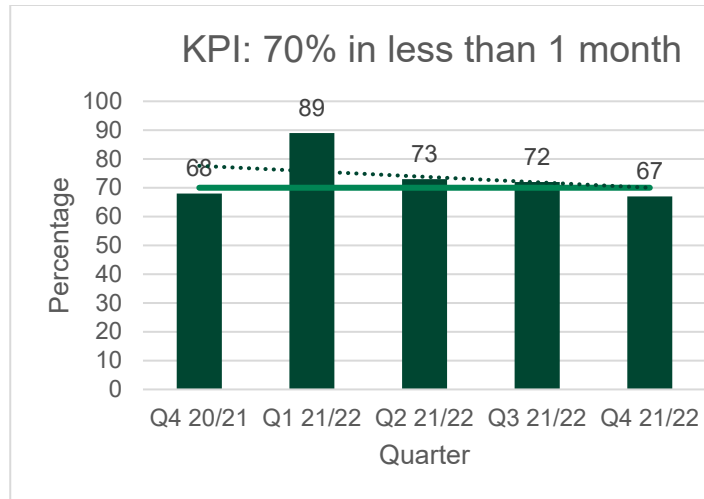
Additional training will be carried out on resolution (“effecting settlement”) with the aim of increasing team confidence in resolving cases. Resolution often means that the applicant can obtain the information they originally requested more quickly than by waiting for a decision to be issued – or can allow us to identify issues which would be better dealt with under our Intervention Procedures. (We will only attempt resolution where we believe this is the best approach. As our Investigations Handbook notes, in attempting resolution, we must always consider the applicant’s interests.)

We will appoint an investigator to focus on cases awaiting allocation to determine whether it would be appropriate to attempt to resolve a case without having to wait for it to be allocated to an investigator.

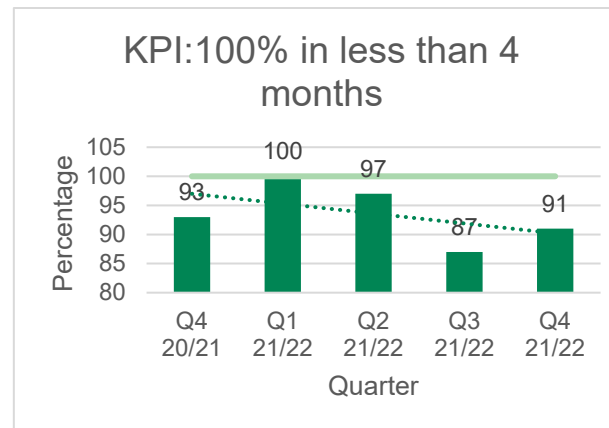
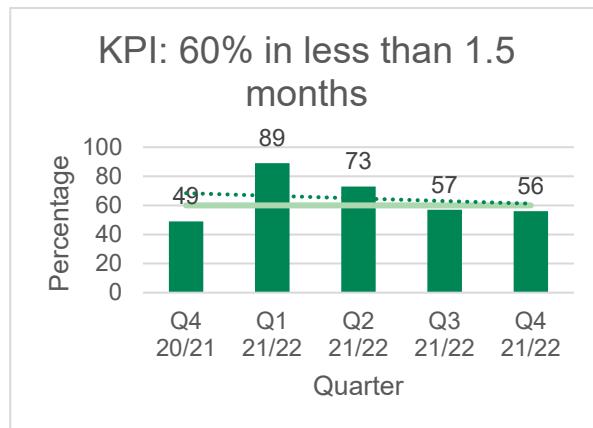
We will obtain comments at an earlier stage from public authorities on certain types of cases (e.g. excessive costs; information not held) so that when the case is allocated to an investigator, they will have information they need to proceed available to them.

## Appendix 2: KPI trends

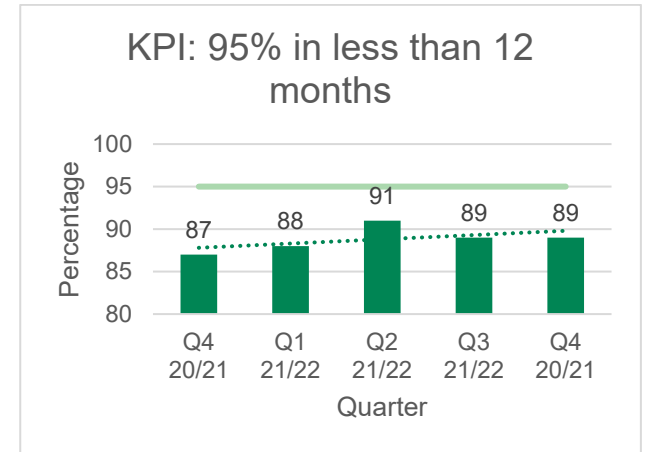
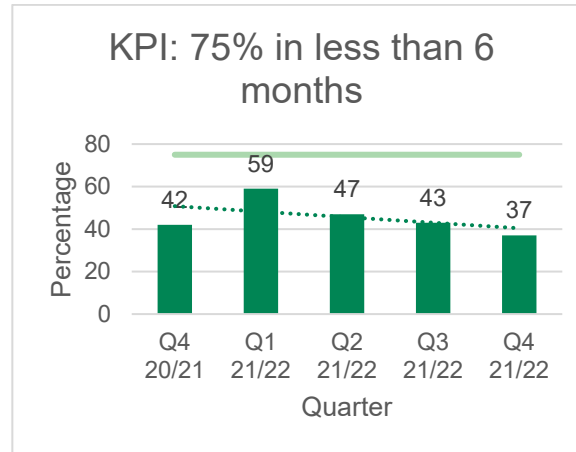
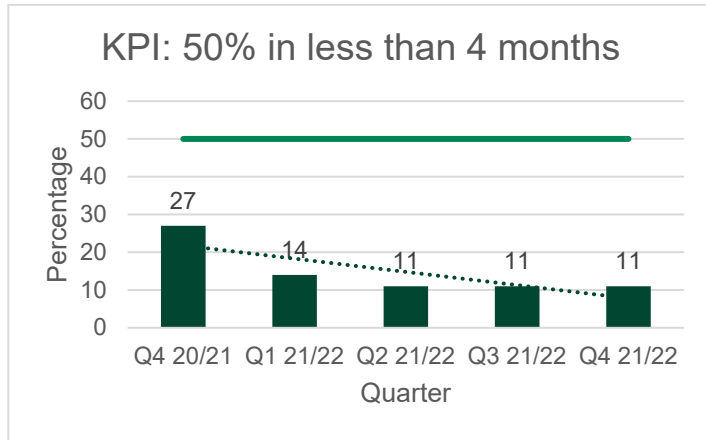
### Validation



### Failure to respond



**Substantive**



**All**

