

# Decision Notice 062/2021

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## Mental Health Strategy: Action 15

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**The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 201902106**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for the most recent integration reports from each Integration Authority, in relation to Action 15 of the Ministers' Mental Health Strategy.

The Ministers withheld the information on the basis that it related to the development of Scottish Government policy and disclosure would prejudice the effective conduct of public affairs.

The Commissioner found that the Ministers were not entitled to withhold the integration reports. He required the Ministers to disclose the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. Action 15 within the Mental Health Strategy 2017-27 outlines the Scottish Government's commitment to funding 800 additional mental health workers in key settings over the period 2018-2019 to 2021-22.<sup>1</sup>
2. On 12 August 2019, the Applicant made a request for information to the Ministers. The Ministers asked for clarification which was subsequently provided on 4 September 2019. The Applicant requested the 31 most recent reporting templates (integration reports) from each Integration Authority (IA). These templates include each area's information on the roles being recruited for as well as their projections for each setting of the commitment up to 2022.
3. The Ministers responded on 4 October 2019 and withheld the information under section 29(1)(a) of FOISA.
4. On 11 October 2019, the Applicant wrote to the Ministers requesting a review of their decision. The Applicant argued that the policy was already in the public domain, and quoted the Government's published intention to "...over the next 5 years increase additional investment to £35million for 800 additional mental health workers in key settings" and that any debate would be undertaken within the context of that public commitment. The Applicant also highlighted that the Ministers had committed to publishing quarterly updates on the development of Action 15. The Applicant argued that ongoing scrutiny of the progress made towards the target plays an important part in ensuring that the work moves forward effectively.

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<sup>1</sup> <https://www.gov.scot/publications/mental-health-strategy-2017-2027/>  
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5. The Ministers notified the Applicant of the outcome of their review on 7 November 2019 which upheld their application of section 29(1)(a) of FOISA. The Ministers directed the Applicant to their published quarterly updates on Action 15 which confirms the total number of mental health workers recruited per quarter in each setting.
6. On 15 November 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Ministers' review because she did not believe section 29(1)(a) should be applied and she felt that it was in the public interest for robust scrutiny of the policy to ensure it was being properly fulfilled.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 20 November 2019, the Ministers were notified in writing that the Applicant had made a valid application. They were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions. These related to their reasoning for applying section 29(1)(a) of FOISA to the withheld information.
10. The Applicant was also asked for any submissions she wished to make in support of her application.
11. Both the Applicant and the Ministers provided submissions to the investigating officer. In their submissions the Ministers stated that they also wished to apply section 30(c) of FOISA to the withheld information in addition to section 29(1)(a). The Applicant provided comments on the Ministers' application of section 30(c) of FOISA on 6 February 2020.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Section 29(1)(a) - Formulation of Scottish Administration policy etc.**

13. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy.
14. The Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or

amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.

15. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation and when.

#### *Background information from the Ministers*

16. The Ministers explained that funding for Action 15 activity is initially directed to Health Boards, who then distribute it among the IAs in their area. 2019-20 is the second year of the original four year funding stream, with collection of data regarding new recruitment of mental health workers undertaken on a quarterly basis.
17. At the time of the Applicant's appeal to the Commissioner, Government policy officials were in the process of collecting and collating information for the quarter 2 October 2019 – 1 January 2020.

#### *Submissions from the Ministers on 29(1)(a)*

18. The Ministers argued that section 29(1)(a) was applicable in relation to all of the withheld information (all of the integration reports for the period in question). They considered that all of the information related to the development of the policy with respect to the commitment to provide an additional 800 mental health workers. They stated that at the time of the request (as well as at the time of the requirement for review) this was very much a 'live' matter which remained under local development.
19. The Ministers stated that the use of the words "relates to" in the 29(1)(a) exemption widens the scope of the exemption to include the work being carried out by the IAs to consider options when reviewing workforce strategy, to identify the most effective approach to achieving the policy objective, and the work carried out by the Scottish Government (to monitor the development of the policy against the commitment to provide an additional 800 mental health workers across Scotland).
20. The Ministers explained that they had agreed projections with IAs for each health board in order to achieve the overall policy objective. Whilst the Ministers accepted that there was a clear fixed national target of 800 mental health workers, they argued that at a local level the policy was continuing to develop to respond to local needs.
21. The Ministers stated that the agreed projections in the integration reports reflected workforce planning assumptions were at a local level and that these planning assumptions continued to evolve each quarter. IAs were reflecting on the ongoing impact and are continuing to review and determine the most appropriate location, grade and occupation of additional staff. IAs were taking an iterative approach and required flexibility at a local level to take account of changes in provision, for example within the third sector or within different locations.
22. The Ministers submitted that the *projections* in the integration reports (which set out the IAs' early thinking in relation to role types, location and settings of posts etc.) could lead to their being portrayed as *targets*. The Ministers were concerned that this would hinder planning adaptability to respond to changes in local circumstances and discourage IAs from changing practice as a result of shared learning.
23. It was the view of the Ministers that the withheld material related to the development of an approach to meeting the objective of increasing mental health care capacity, overseen by the

IAs. The integration reports, which the Ministers described as principally projections and quarterly updates prepared by the IAs were, the Ministers submitted, important in supporting the Scottish Government's ability to monitor the policy commitment and in turn deliver improvements in Mental Health care for the people of Scotland. It was the Ministers' view that potential misinterpretation of these projections as targets could limit local flexibility and could act against the public health objective.

*The Commissioner's findings on whether the exemption at 29(1)(a) applies*

24. As previously noted the Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
25. The information only has to "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation and when.
26. The Commissioner is not persuaded that the information being withheld in this case is the formulation or development of government policy. He notes that the government's overall policy (Action 15 of the Mental Health Strategy) has already been formulated and developed and the integration reports are periodic updates on how the rolling out of the formulated policy is affecting the resources in each individual IA. The Commissioner is of the view that this can be seen as a process of actions being taken in order to *implement* a policy which has already been formulated. It is his view that these reports are monitoring how the policy is being implemented as opposed to the monitoring of how effectual the policy is. The Ministers have stated that they have agreed projections with IAs for each health board in order to achieve the policy objective.
27. The Commissioner notes that the integration reports reflect how the IAs are projecting to use the resources available. It is the Commissioner's view that as such they reflect the operational decisions of the specific authorities albeit driven by an agreed Scottish Government policy objective. He does not accept that the projected deployment of resources by the IA equates to the development of government policy.
28. Although the information need only "relate to" the formulation or development of policy, this does not extend to all information associated with the delivery of an agreed policy. The Commissioner accepts that policy can develop over a period of time, but development does not extend to all information related to the monitoring of implementation.
29. As such it is the Commissioner's view that the withheld information does not relate to the formulation or development of Scottish Administration policy and so it does not fall within the exemption at section 29(1)(a) as claimed by the Ministers.

**Section 30(c) - Prejudice to effective conduct of public affairs**

30. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would be caused to the

conduct of public affairs by release of the information, and how that harm would be expected to follow from release.

31. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers that the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur; therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

#### *Submissions from the Ministers on 30(c)*

32. The Ministers explained that the information in the integration reports was collected with the understanding from IAs that it would not be published (albeit that they did not provide any supporting evidence from the IAs that this was in fact the case). While the Ministers accepted that some IAs may choose to make their information available, they believed that general release of the information by Ministers could damage relations between IAs and Scottish Government, hindering future policy development and implementation.
33. IAs and local stakeholders play a central role in the development of this policy, the Ministers stated, and maintaining good relations with them was crucial to a successful outcome. The Ministers considered that release of the projections and quarterly updates, reflecting the fluid position, could substantially prejudice their relationship with the IAs.
34. It was the Ministers' view that this relationship relied on a high level of trust between them and their stakeholders and key to this was the understanding that such discussions can occur in an environment supportive of open debate and in the expectation of a degree of confidence. The Ministers considered that if the projections were subject to early or premature release the likelihood of stakeholder co-operation in future would be prejudiced with external parties less willing to engage with the Ministers or the IAs in the development of policy.
35. Additionally, the Ministers submitted, releasing the projections and update reports would substantially inhibit the IAs' ability to progress the improvements required to achieve the Scotland wide government target as efficiently and effectively as possible. They believed this to be the case because local decisions had yet to be finalised in relation to the implementation of the National policy. The Ministers argued that releasing information which provided a full breakdown of projected additional resource by setting type, including narrative information given, would inhibit the flexibility across IAs in the relocation of workers on where there is the greatest need.
36. The Ministers reiterated that previous forecast numbers could be interpreted as targets and any deviation could be taken negatively to suggest the policy commitment was not being fully met. The Ministers believed that IAs may then need to divert some of their resources to deal with enquiries about where positions were located and the importance (or otherwise) that would appear to be given to a specific area. This would, according to the Ministers, substantially inhibit the IAs' ability to progress the process effectively as it would cause disruption to the implementation schedule.

#### *The Commissioner's findings on whether the exemption at 30(c) applies*

37. The Commissioner believes that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that information of a particular type will be routinely released in future. The

circumstances of each case, including the content of the specific information being considered, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.

38. In reaching his findings on this point the Commissioner has considered the context of the relationship between the Ministers and the IAs. He cannot accept that disclosure of the information would cause the level of harm described by the Ministers in relation to their relationship with the IAs.
39. The Ministers argued that IAs may be unhappy if any deviation from the projections contained in the integration reports were to occur because people may think that the projected figures are target figures. However, the Commissioner notes that the Summary sheets clearly recognise that there is the potential for fluctuation in the projections provided and that the projections should not be viewed as targets or milestones.
40. The Ministers envisaged IAs as having to divert resources from core services to deal with enquiries relating to the projections being interpreted as targets, with this in turn prejudicing the effective conduct of public affairs in the working relationship between the Ministers and the IAs. The Ministers did not provide the Commissioner with evidence from any of the IAs that this might be the case.
41. In reaching his conclusions on this point the Commissioner had taken cognisance of the previous Commissioner's Decision 064/2014.<sup>2</sup>
42. Decision 064/2014 highlights that disclosure of information under FOISA does not prohibit an authority from disclosing further explanatory information to aid understanding or comprehension, where this is considered useful. Even if there was potential for misunderstanding, it is in the Ministers' gift (as it would be for any public authority) to provide contextual explanation if they considered it necessary to assist understanding of the information disclosed.
43. Recognising that there will usually be scope for an authority to mitigate the potential for information being taken out of context, Decision 064/2014 concluded that disclosure of the withheld information, would not have been likely to cause harm to any significant degree, and any adverse effects of disclosure (in terms of the public interest) would be outweighed by the benefits likely to follow disclosure of the information.
44. In conclusion, the Commissioner is not satisfied that the Ministers were correct to withhold the information in the integration reports under the exemption in section 30(c) of FOISA and is of the view that steps to mitigate any misunderstanding could reasonably have been taken.
45. Consequently, he does not accept that disclosure of the information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
46. The Commissioner requires the Ministers to disclose to the Applicant the withheld integration reports, with the redaction of any of the information which constitutes the personal data of third parties.

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<sup>2</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201300704.aspx>

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

He finds that by withholding the integration reports under sections 29(1)(a) and 30(c) of FOISA, the Ministers failed to comply with Part 1 and, in particular section 1(1) of FOISA.

The Commissioner requires the Ministers to disclose the relevant information, subject to the redaction of any third party personal information, **by 15 June 2021**.

## Appeal

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Should either the Applicant or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**30 April 2021**



### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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