



# Decision Notice 039/2024

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## Contingency plans for a potential second wave of Covid-19

**Authority: Scottish Ministers**  
**Case Ref: 202101446**

### Summary

The Applicant asked the Authority for any internal documents, briefing notes or reports circulated to the First Minister or Health Secretary or detailing plans or contingencies for a potential second wave of Covid-19.

The Authority withheld some information at request and review, but disclosed it to the Applicant during the Commissioner's investigation.

The Commissioner investigated and found that the Authority had breached FOISA in responding to the request as it failed to comply with the statutory timescales, and had wrongly withheld information under the exemption relating to prejudice to the effective conduct of public affairs.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 30(b)(ii) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

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

1. On 6 June 2021, the Applicant made a request for information to the Authority. He asked for;

- (i) Any internal documents, briefing notes or reports circulated to the First Minister or Health Secretary or detailing plans or contingencies for a potential second wave of Covid-19 (Coronavirus) between the date of July 15 and August 31, 2020.
  - (ii) The request should cover any documents or reports received from Public Health Scotland, NHS health boards, NHS Scotland or local authorities about how they are planning for a second wave.
2. The Authority responded on 14 October 2021. It provided the Applicant with most of the information he had requested, but withheld some information under sections 30(b)(ii) and 38(1)(b) of FOISA. The Authority also apologised for the late response.
3. On 25 October 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he disagreed with the application of the exemptions, and was unhappy with the amount of time he had waited for a response.
4. The Authority notified the Applicant of the outcome of its review on 22 November 2021. It reiterated its apology for the delay in its initial response and maintained its reliance on the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA.
5. On 23 November 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not accept the Authority's application of section 30(b)(ii) of FOISA, and he argued that the public interest favoured disclosure.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 22 December 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its reasons for relying on the exemption contained in section 30(b)(ii) of FOISA.

## **Commissioner's analysis and findings**

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### **Scope of the investigation**

10. The information withheld under section 30(b)(ii) of FOISA was contained in a single email, numbered document 5.

11. During the investigation the Authority provided the Applicant with the information it had redacted under section 30(b)(ii) of FOISA, but it maintained that it had properly withheld this information at the time of the request.
12. The Applicant asked the Commissioner to reach a view on whether the information in document 5 was correctly withheld under section 30(b)(ii) of FOISA, at the time he made his request for information.
13. The Applicant is not challenging the redactions made under section 38(1)(b) of FOISA, so the Commissioner will not consider the application of this exemption in this decision notice.

***Section 30(b)(ii) of FOISA – substantial inhibition to free and frank exchange of views***

14. In order for the Authority to rely on this exemption, it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. In applying the exemption, the chief consideration is not whether the information constitutes views or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be, or must be likely to be, substantial and therefore of real and demonstrable significance.
16. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring.

*Factors to consider*

17. The Commissioner's [guidance](#)<sup>1</sup> states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
  - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that views were passed from one person to another, depending on the relationship between those parties. Where views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.
  - (ii) The circumstances in which the views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
  - (iii) The sensitivity of the views. The subject matter and content of the views and opinions, as well as the way in which the views are expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken. The degree to which a person will be, or is likely to be,

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<sup>1</sup> [https://www.itspublicknowledge.info/sites/default/files/2023-05/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs\\_25.5.23.pdf](https://www.itspublicknowledge.info/sites/default/files/2023-05/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs_25.5.23.pdf)

inhibited in expressing themselves has to be of some real and demonstrable significance.

*Authority's submissions on section 30(b)(ii) of FOISA*

18. The Authority submitted that at the time the request was received, the response to the Covid-19 pandemic was very much still live and ongoing and that the exemption was therefore, correctly applied.
19. It noted that the section 30(b)(ii) exemption recognises the need for officials to have a private space within which to develop, discuss, test and revise lines and handling plans before arriving at a final settled position. The Authority submitted that it is necessary to have a free and frank exchange of views before reaching a final agreed position, and if the means by which such a position was arrived at were to be disclosed, everyone involved in the process would be substantially inhibited from giving their views freely in the future. It argued that its ability to test robustly proposed positions before using them publicly would be compromised substantially if every preliminary thought that had been recorded had to be disclosed.
20. The Authority claimed that it must be able to engage in discussion on the future development of a whole range of matters in relation to the health system, in order that any issues are supported as robustly as possible and that sufficient research is undertaken, sought, communicated and developed to ensure that an acute response to a pandemic remains credible and valid.
21. The Authority explained that the individuals providing the views withheld under this exemption, are officials and professional advisers. It noted, that while these individuals were representing their organisation, their views may be on areas where they have indicated that disclosure would prejudice their ability to implement decisions on approach to the pandemic response to the second wave of Covid-19. The Authority argued that release of these views, at the time of the request could, therefore, have substantially inhibited the willingness to express an opinion and the openness of the views shared. It argued that such inhibition would impact on Ministers' ability to take fully informed policy decisions in future.
22. The Authority submitted that the relationship between the persons providing the views are policy officials and cabinet members. Whilst the government deals with sensitive issues all the time, subject matters such as shielding during a pandemic is not a usual day to day subject matter

*Applicant's submissions on 30(b)(ii) of FOISA*

23. The Applicant challenged the Authority's decision to withhold information in document 5 under 30(b)(ii) of FOISA. He referred to the Authority's review outcome, where it explained that it had redacted information under this section because of the "chilling effect" principle; that information disclosed would see civil servants inhibited in the way they provide advice in future. The Applicant argued that this cannot apply to correspondence between civil servants that covers the views of Ministers, which is how it has been applied in the case. The Applicant argued that that section 30(b)(ii) of FOISA cannot be used to redact emails where civil servants are merely passing on the views of Ministers.
24. The Applicant acknowledged that the Authority had since disclosed the information in document 5, but he queried why he was not provided with the information at the time of the request, and he alleged that the Authority had deliberately delayed the disclosure.

*The Commissioner's view about section 30(b)(ii) of FOISA*

25. The Commissioner has taken account of all of the relevant submissions, together with the information that was redacted under section 30(b)(ii) of FOISA.
26. The Commissioner understands and accepts that the situation surrounding the pandemic was rapidly changing and that public authorities were making decisions in difficult circumstances. He also accepts the importance of officials being able to communicate free and frankly in order for Ministers to reach an informed view, and he understands the importance of clear messaging in these circumstances.
27. However, when the information withheld from document 5 is considered, the Commissioner is not convinced that its disclosure would have resulted in any of the harms envisaged by the Authority. The information that was withheld in document 5, and which has since been released, is a summary of the Cabinet Secretary's views as relayed by an official, and it dates from 17 July 2020. The views contained in the email discussed issues around shielding, but in the Commissioner's view, the information was arguably obsolete by the time the Applicant submitted his request in June 2021.
28. As the Commissioner has acknowledged above, the landscape of the Covid-19 pandemic was rapidly changing and the circumstances regarding shielding in June 2020 were significantly different from those on 6 June 2021, when the Applicant submitted his information request. Furthermore, the Authority has argued that disclosure at that time would have substantially inhibited officials from sharing free and frank views and that this would have harmed the Ministers' ability to reach an informed decision. However, the comments that have been withheld in document 5, are the views of a Cabinet Secretary, not those of a civil servant. The Commissioner cannot accept that disclosure of these comments at the time of the request would substantially inhibit any future Minister from sharing their views with officials.
29. Furthermore, the submissions made by the Authority appear to be generalised, formulaic arguments in support of the exemption, and do not focus on the actual content of the information that was redacted under 30(b)(ii).
30. For these reasons, the Commissioner concludes that the Authority was not entitled to withhold the information in this case under the exemption in section 30(b)(ii) of FOISA. Given this conclusion, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

**Section 10(1) – Time for compliance**

31. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
32. In his application to the Commissioner, the Applicant was dissatisfied with the Authority's failure to respond to his original request within the 20 working days specified in section 10(1) of FOISA. He argued that this was another example of the Authority taking months to respond to freedom of information requests on issues that are of timely interest to the public and which are on significant areas of public interest.
33. In its submissions, the Authority explained that the delays to the original response were because there were issues allocating the request, and once it was allocated, the complexity of the request, staff absence and workload barriers prevented it from responding timeously.

34. The Commissioner notes that the Applicant submitted his information request on 6 June 2021, and the Authority did not provide him with a response until 14 October 2021, some four months after the request was made. He has taken account of the Authority's arguments in relation to case allocation and the complexity of the case, but he is not convinced by them. The information identified does not appear to be voluminous and there is nothing within the Authority's submissions on searches, that allude to difficulties or complex information retrieval processes.
35. He would note that even when timescales were extended to allow authorities additional time to cope with the pressures of the early phase of the pandemic, they did not extend to four months. Furthermore, the extended timescales were not designed to thwart legitimate reporting on the pandemic they related to.
36. It is a matter of fact that the Authority did not provide a response to the Applicant's original information request of 6 June 2021 within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA.

## **Decision**

The Commissioner finds that the Authority 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, as it was not entitled to withhold the requested information under section 30(b)(ii) of FOISA. Furthermore, the Authority failed to comply with section 10(1) of FOISA by not responding to the initial request within statutory timescales.

Given that the Authority has since disclosed the information to the Applicant, the Commissioner does not require the Authority to take any action in response to these failures in response to the Applicant's application.

## **Appeal**

Should either the Applicant or the Authority 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.

**David Hamilton**  
**Scottish Information Commissioner**

**20 March 2024**

## **Appendix 1: Relevant statutory provisions**

### **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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

#### **10 Time for compliance**

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

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

Information is exempt information if its disclosure under this Act-

- ...
- (b) would, or would be likely to, inhibit substantially-
  - ...
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- ...

## 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).