

Decision Notice 158/2020

COVID-19: data and measures

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202000697



Scottish Information
Commissioner

Summary

In March 2020, the Ministers were asked a range of questions about their handling of the COVID-19 pandemic.

The Ministers provided the Applicant with some information and they gave him notice that other information was not held. The Ministers also advised him that some information was already published.

The Commissioner investigated and found that the Ministers had partially breached FOISA in responding to the request by initially failing to notify the Applicant that they did not hold some of the information he had requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1)(b) (Notice that information is not held); 25(1) (Information otherwise accessible)

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 20 March 2020, the Applicant made the following request for information to the Scottish Ministers (the Ministers).

Please provide data proving the validity of the Gov-[measurements] to the COVID crisis, its reasons thereof, and whether the implications of said [measurements] are justifiable.

A. *The validity of the number of 'confirmed' cases:*

- 1) *Has the COVID-19 its own symptoms: and in case not: How can it be differentiated from a so-called winter flu?*
- 2) *Of the confirmed case: How many are free from other morbidities?*
- 3) *Of the confirmed case: How many of them are under the age of 75?*
- 4) *Of the 'confirmed cases': how many is done by its test, and how many been confirmed by the Doctors interpretations of patients' symptomatology: and how did the Dr count? As of the 'confirmed' cases; what or who determinate the validity?*
- 5) *What is currently COVID-19 case fatality rate (CFR: % of known infected who die), and with which tool is this calculated, and how much is it different to that the average winter flu?*
- 6) *The mortality number of 'confirmed' COVID-19 cases: How does it compare with - and how much does it affect - the mortality of the average winter flu?*

B. *Data about the validity of the current coronavirus test kit:*

- 1) *Whether it truly shows the SARS-CoV-2 [existence]: does it detect infectious virus in blood: the RNA of said virus?*

- 2) *Whether studies based on said test results; do fulfil Koch's postulates?*
 - 3) *Whether said test's false positive rate is known. And if not how much does it overestimate*
 - 4) *Whether its result sufficient proofs its relationship with the COVID-19 symptomology: fever, radiographic evidence of pneumonia, low or white-cell count or low lymphocyte count, contact with someone who is a [confirmed] case?*
- C. *Neil Ferguson advised the PM Johnson: Reducing the COVID-19 mortality number from 500,000 to 250,000, by a range of quarantine measures: How to know said 'advice' validity:*
- 1) *The peers of Dr. Ferguson did they confirm or [contest] said number?*
 - 2) *Dr. Ferguson's peers, did they agree to or [contest] his advice on how to reduce number?*
 - 3) *Why would Neil Ferguson be a more trustworthy than PM's advisor Dominic Cumming?*
 - 4) *Reg- the current quarantine measures for vulnerable people: Is there a risk assessment?*
- D. *The justifiableness of the Government's [measurements].*
- 1) *Its implications: People being bombarded by the media about the COVID-19 fatal risks, being put in isolation, their access to care being reduced; and being warned against dis-information: Why is this scenario unlikely to cause reactions that will harm peoples' lives?*
 - 2) *Reg- said measurements; Is there made sufficient risks assessment: E.g. its resulting fear compromising vulnerable peoples' immune system?*
 - 3) *And considerations towards that said fear will result in accepting vaccines that are insufficient tested and might increase viruses mutation rate: these increasing the risks?*

2. The Ministers responded on 29 May 2020. (At this point, as a result of changes made to FOISA by the Coronavirus (Scotland) Act 2020, the Ministers had had a maximum of 60 working days to respond to the request rather than the normal 20 working days.) The Ministers gave the Applicant notice, under section 17(1) of FOISA, that they did not hold information falling within the scope of requests A5, A6, B1, B2, B3, B4, C1, C2 and C3. The Ministers provided explanations in response to requests A4, C4, D1, D2 and D3 and advised the Applicant that information fulfilling requests A1, A2 and A3 was already available online and was therefore exempt under section 25(1) of FOISA.
3. On 23 June 2020, the Applicant wrote to Ministers requesting a review of their decision on the basis that he did not accept that the information was not held, or that some of it was available to him online. The Applicant also challenged the explanations provided by the Ministers.
4. The Ministers notified the Applicant of the outcome of their review on 1 July 2020. The Ministers confirmed their original decision but with modifications. In this review, the Ministers identified one piece of information that they held and which fell within the scope of the request, and they provided the Applicant with a weblink to this information. The Ministers

noted that some of the information the Applicant had requested did not fall within the functions and core business activities of the Scottish Government. The Ministers included the contact details of organisations mentioned in their previous response, and they reiterated their reliance on section 25(1) of FOISA and reaffirmed that they did not hold the information he had requested.

5. On 2 July 2020, 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 Ministers' review because he did not accept that the information was not held, or that the weblinks they had provided related to his information request. The Applicant argued that the information he had asked for should be disclosed.

Investigation

6. 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.
7. On 6 July 2020, the Ministers were notified in writing that the Applicant had made a valid application 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 Ministers were invited to comment on this application and to answer specific questions about the searches they had undertaken and the weblinks they had provided to the Applicant.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of 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.

Information held by the Ministers

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.

Request D1

12. In relation to request D1, the Ministers argued that they had provided the Applicant with information falling within the scope of this request. Specifically, the Ministers submitted that they had provided the Applicant with information which sets out the view that they accept that the measures in place are likely to cause reactions that will harm peoples' lives. The Ministers referred to their response to the Applicant, in which they referred to three documents that were published on the Scottish Government website, "*Coronavirus (Covid-*

19): *framework for decision making*¹, published on 23 April 2020, “*Coronavirus (Covid-19): framework for decision making*²” which was published on 5 May 2020 and “*Coronavirus (COVID-19): framework for decision making - supporting evidence*³” which was published on 7 May 2020 and provided an analytical overview of key analysis and evidence that supports that framework.

13. The Ministers referred to Section 2 of “*Coronavirus (Covid-19): framework for decision making*⁴” which stated that:
 - i) The pandemic is a health crisis, a social crisis and an economic crisis that is causing harm on an unprecedented scale
 - ii) Difficult decisions are required to balance these various, inter-related harms to as to minimise overall harm.
 - iii) The harms caused do not impact everyone equally
 - iv) We will protect those most at risk and protect human rights.
14. The Ministers noted that the harms outlined in that document acknowledged the anticipated impact of the COVID-19 restrictions. The Ministers contended that they had never claimed that the restrictions would be unlikely to cause reactions that would harm peoples’ lives, although they noted that this could have been stated more clearly as a direct response to the Applicant’s question. The Ministers submitted that they have complied with request D1 in confirming that they do not consider the scenario to be “unlikely to cause reactions that will harm peoples’ lives”. The Ministers also submitted that they accept that the efforts to control the spread of Coronavirus will unfortunately impact on inter-related health, social and economic harms.
15. The Commissioner has considered the wording of request D1 along with the response provided to the Applicant by the Ministers, and the Applicant’s submissions to the Commissioner, and he is satisfied that the Ministers have provided the Applicant with evidence that indicates that the Scottish Government was aware that harm that would be caused by the restrictions put in place to reduce the spread of COVID-19.
16. The Commissioner notes that the wording of request D1 does not allow for the Ministers to disagree with the Applicant’s viewpoint, but he finds that by referring to evidence that contradicts the Applicant’s position, the Ministers have complied with request D1.

Section 17(1) - Notice that information is not held

17. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.

Submissions from the Ministers

18. During the investigation, the Ministers changed their position in relation to the responses they had provided to the Applicant. The Ministers submitted that they now wanted to rely on section 17(1) for all of the requests, apart from A1, A4 (in part) and D1. The Ministers agreed to notify the Applicant of this change and they did so on 22 September 2020.

¹ <https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making/>

² <https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making-further-information/>

³ <https://www.gov.scot/publications/covid-19-framework-decision-making-supporting-evidence/>

⁴ <https://www.gov.scot/publications/coronavirus-covid-19-framework-decision-making/>

19. The Ministers provided the Commissioner with details of the searches they had carried out and, where searches were not conducted, the Ministers provided an explanation.

Request A1

20. The Ministers submitted that policy officials working on the Scottish Government's response to COVID-19 confirmed that information on the symptoms of the virus were held by the Scottish Government and located in a range of guidance documents and publications available on the Scottish Government website.⁵ Therefore, there was no requirement to conduct a further search in relation to request A1. The Ministers confirmed they were relying on section 25(1) in relation to request A1.

Requests A2 to A4

21. The Ministers did not carry out searches for all of the information requested by the Applicant. They determined that requests A2, A3 and part of A4 were seeking detailed statistical information that they do not hold. The Ministers explained that the role of the Scottish Government in collecting statistical information in relation to COVID-19 is limited to more high level information required to inform the policy approach to controlling the spread of the virus and to inform the public. Officials working on the response to COVID-19 have a good knowledge of the level of detail of the statistical information held.
22. They explained that National Records of Scotland (NRS) is responsible for performing the registration and statistical functions of the Registrar General for Scotland, including administering the registration of deaths, and Public Health Scotland (PHS) is the lead national agency for improving and protecting the health and wellbeing of all of Scotland's people. A current priority for PHS is to support the management of the COVID-19 pandemic in Scotland with relevant and timely guidance and information.
23. Given the organisational responsibilities outlined above, the Ministers argued that the Scottish Government would not hold statistical information in the level of detail requested and that searches were not considered appropriate.

Requests B1 to B4

24. The Ministers explained that testing is undertaken by NHS Scotland with NHS labs operating in all 14 health board areas as well as additional UK Government capacity through the Lighthouse Lab network. They noted that PHS is responsible for the monitoring and surveillance of infectious diseases and carries out contact tracing as part of the management of incidents or outbreaks.
25. The Ministers submitted that, as this is a duty placed on PHS, further searches were not considered appropriate in this case as the Scottish Government is not responsible for this area of work.

Requests C1 to C3

26. The Ministers submitted that they did not consider it necessary to conduct further searches in relation to requests C1 to C3 as the Applicant was seeking information in relation to an exchange between Neil Ferguson and Boris Johnston and the position the UK Government took in relation to any advice provided directly to the UK Government. The Ministers argued that this is a matter which is entirely for the UK Government on which the Scottish

⁵ <https://www.gov.scot/news/update-to-coronavirus-symptoms/> and <https://www.gov.scot/publications/common-cold-and-covid-19-symptoms-advice-for-parents-and-carers/>

Government has not been sighted. The Ministers noted that in their response to the Applicant, they referred him to the UK Government.

Requests C4 and D2

27. The Ministers explained that searches were not completed at request or review which specifically addressed the point on whether risk assessments were held. For completeness, at the appeal stage they completed key word searches of their electronic management system for the period from February 2020 until 20 March 2020 (the date of the request). This time frame was considered appropriate as it covers the period from prior to when the first case was notified in Scotland and prior to the implementation of lockdown measures to which the request refers.
28. The Ministers provided details of the key words they used to interrogate the system and they submitted that, of all of the searches carried out, only two documents were identified. These documents were checked manually and were found to be outwith the scope of the request. The Ministers provided the Commissioner with evidence of the searches they had undertaken.

Request D3

29. The Ministers submitted that vaccine development was in its infancy at the time of the request (the request was made in March 2020) and was being taken forward by a number of external organisations supported by the UK Government. The Ministers argued that further searches in relation to considerations of vaccine acceptance and the implications were not considered necessary as this is not an area in which the Scottish Government had any engagement at the time of the request.

Submissions from the Applicant

30. On 6 October 2020, the Applicant contacted the Commissioner and provided his comments on the Ministers' decision to rely on section 17(1) for all but three of his requests. The Commissioner will not summarise all of the Applicant's comments in this decision, but he notes that the Applicant provided extensive submissions and that he did not accept that the information was not held and he argued that it should be disclosed.
31. The Applicant has argued that section 17(1) cannot be used by the Ministers to eschew their duty to provide data. He argued, among other things, that the Ministers' reliance on section 17(1) of FOISA means that the public has no access to data to verify the official government narrative and that this raises suspicions that the Ministers are hiding the true data about SARS VoC-2.

Commissioner's findings on section 17(1) of FOISA

32. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
33. The Applicant clearly believes that the Ministers hold information they have told him they do not hold. He wants this information to be disclosed. However, just because an applicant expects information to be held by an authority does not mean that the information is held.

The Commissioner must base his findings on the evidence presented to him, not on the expectations of the Applicant.

34. In this case, the Ministers have provided details of the searches they have carried out. These returned no relevant results. Where searches were not conducted, the Ministers provided explanations, referring to the information requested and noting, in general, that this is not information that they would hold. The Ministers have acknowledged that they failed to make it clear in their review outcome that some information was not held and they apologised for this lack of clarity.
35. The Ministers withdrew their reliance on section 25(1) of FOISA in relation to requests A2, A3, A4 (in part) and they submitted that this information is, in fact, not held by them, and that section 25(1) was applied in error. The Ministers also contended that they did not hold information falling within the scope of requests C4, D2 and D3. The Ministers noted that in their response to the Applicant they had provided him with links to information on external websites, but they now acknowledged that these links had failed to address the specific points raised by the requests. The Ministers submitted that they do not hold any information that meets the terms of requests C4, D2 and D3.
36. The Commissioner has considered the explanations and evidence of searches provided by the Ministers and he is satisfied that, on the balance of probabilities, they do not hold any information falling within the scope of requests A5, A6, B1, B2, B3, B4, C1, C2, and C3. The Commissioner finds that the Ministers correctly notified the Applicant, under section 17(1) of FOISA, that they did not hold this information.
37. The Commissioner is also satisfied that the Ministers do not hold any information falling within the scope of requests A2, A3, A4 (in part), C4, D2 and D3. He notes that the Ministers' review outcome failed to notify the Applicant that this information was not held. He therefore finds that the Ministers failed to comply with section 1(1) when they responded to the Applicant's request and requirement for review.
38. As the Ministers have since notified the Applicant, in line with section 17(1) of FOISA, that no recorded information is held, the Commissioner does not require them to take any further action in relation to this breach.

Section 25(1) of FOISA – information otherwise accessible

39. Under section 25(1) of FOISA, information which a requester can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.
40. The Ministers are relying on section 25(1) to withhold information falling within the scope of request A1 and part of request A4.

Request A1

41. In this request, the Applicant asked whether COVID-19 has its own symptoms, and if not, how can it be differentiated from a winter flu?
42. In their original response to the Applicant, the Ministers referred to information published on the NHS Inform website⁶, and argued that they did not have to provide him with this

⁶ <https://www.nhsinform.scot/illnesses-and-conditions/infections-and-poisoning/coronavirus-covid-19/coronavirus-covid-19-general-advice>

information as it was reasonably accessible to him (and section 25(1) of FOISA therefore applied). In their submissions to the Commissioner, the Ministers confirmed that they hold information falling within the scope of request A1, and this information is also published online by NHS Scotland and other websites. The Ministers provided the Commissioner with information on the symptoms of COVID-19 and they maintained that they were right to apply section 25(1) of FOISA to this information, as it is publicly available.

43. The Ministers noted that the second part of Request A1 is only relevant if the response to the first part is “no”. They argued that the response to the first part of Request A1 is “yes”, and they noted that while all viruses will have their own symptoms, these symptoms may not be exclusive to one virus. The Commissioner accepts this point.
44. The Commissioner has viewed the information on the NHS Inform website to which the Applicant was directed in the Ministers response, and he has also considered the information provided to him by the Ministers. The Commissioner accepts that the Ministers do hold information that fulfils part one of Request A1, and that this information is also published on the NHS Inform website, among others.

Request A4 (in part)

45. In Request A4, the Applicant asked:

Of the ‘confirmed cases’: how many is done by its test, and how many been confirmed by the Doctors interpretations of patients’ symptomatology: and how did the Dr count? As of the ‘confirmed’ cases; what or who determinate the validity?

46. The Ministers indicated the parts of Request A4 that they were withholding under section 25(1) of FOISA. The Ministers submitted that information relating to the number of cases that are determined by test, and what or who determines the validity of the confirmed cases, is information that is published and is therefore accessible to the Applicant.
47. The Ministers acknowledged that along with the statement “confirmed cases are published on the Scottish Government website” they could have been more helpful in providing the Applicant with a direct link to the confirmed cases by test.⁷ The Ministers also acknowledged that they could have more clearly set out that the validity of these “confirmed cases” was determined by a positive NHS Laboratory test result.
48. The Ministers explained that they provided information in relation to the reports available from PHS and NRS as the Scottish Government does not hold information on the wider cases where no test has been confirmed, or how or who determines validity in these cases because responsibility falls to PHS and NRS. The Ministers acknowledged that their response could have been more helpful in providing direct links to the publications themselves, even if the publications did not contain everything the Applicant was looking for.
49. During the investigation, the Ministers contacted the Applicant and explained that they were relying on section 25(1) of FOISA in relation to specific parts of Request A4, and they provided the Applicant with links to websites and online documents that held information in relation to those parts.
50. It is good practice for authorities to provide requesters with links to specific online information rather than just referring them to a website, which may be large and where the information may not be obviously held. Indeed, the Ministers’ Code of Practice on the discharge of

⁷ <https://www.gov.scot/publications/coronavirus-covid-19-daily-data-for-scotland/>

functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004⁸ notes, at paragraph 9.5.2:

The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information...

51. The Commissioner notes that the Ministers have acknowledged their original response to the Applicant could have been better and that they have since contacted the Applicant and provided him with direct links to the information.
52. In his submissions, the Applicant has questioned the application of section 25(1) of FOISA, arguing that the information should be disclosed and that preventing access to this information prevents the public from being able to take an informed view on the Scottish Government's handling of the pandemic.
53. The Commissioner would note that section 25(1) is not designed to withhold information from the public, but instead it exists to prevent authorities from having to spend time and resources providing information that is already accessible to a requester in a different way. For example, the requester may possess the information himself (in an email or letter) or it may be published on a website or in a report. The Commissioner will only uphold the application of section 25(1) of FOISA if he is satisfied that the Applicant can obtain the information, other than by requesting it under section 1(1) of FOISA.
54. Having considered all of the submissions from the Ministers and the Applicant, the Commissioner is satisfied that information fulfilling the whole of Request A1 and parts of Request A4 was reasonably obtainable by the Applicant otherwise than by making a request for the information under section 25(1) of FOISA. Therefore, he is satisfied that the Ministers were entitled to withhold this information under section 25(1) of FOISA.

Decision

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

The Commissioner finds that by providing the Applicant with some information and by correctly notifying him that some information was not held and that other information was publicly available, the Ministers complied with Part 1.

However, by failing to notify the Applicant that they did not hold information falling under the scope of requests A2, A3, A4 (in part), C4, D2 and D3, the Ministers failed to comply with section 17(1) of Part 1 of FOISA.

Given that the Ministers have since contacted the Applicant and notified him that this information is not held, the Commissioner does not require the Ministers to take any action in respect of this failure in response to the Applicant's application.

⁸ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Appeal

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.

Margaret Keyse
Head of Enforcement

7 December 2020

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

...

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info