



Decision Notice 079/2024

Scientific advice regarding the end of free universal testing for Covid-19

Authority: Scottish Ministers
Case Ref: 202200674

Summary

The Applicant asked the Authority for scientific advice it held in relation to the end of free universal testing for Covid-19. The Authority told the Applicant that it did not hold any information falling within the scope of the request. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 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 21 February 2022, the Applicant made a request for information to the Authority. He asked for the scientific advice provided to the Authority by its own scientific advisers or external advice taken into account by the Authority, in relation to the potential end of free universal testing for Covid-19 (also known as lateral flow tests) and the end of legally required self-isolation.
2. The Authority responded on 21 March 2022. The Authority provided a formal notice under section 17(1) of FOISA that it did not hold the information. It explained that it was unable to

provide evidence for the potential end of a policy which, at that time, was still in place. In relation to the second part of the request, the Authority told the Applicant that it did not hold the information because self-isolation was not a legal requirement in Scotland for index cases and close contacts.

3. On 22 March 2022, the Applicant wrote to the Authority requesting a review of its decision as he did not agree that the information was not held. The Applicant stated that he was dissatisfied because he considered it was disingenuous to suggest that no advice had been received on the policy mentioned in the first part of his request. He added that the Authority's response mentioned "evidence" rather than, as he had specified in the request, "advice". He argued that the Authority said in its response that it sought advice from clinical professionals on this issue and therefore, he said, this suggested that the Authority did hold the information he asked for.
4. The Authority notified the Applicant of the outcome of its review on 21 April 2022, upholding its original decision. The Authority explained, the advice that underpinned the decisions that were made on the future of Covid-19 testing in Scotland was only provided to the Authority in the week before the 15 March 2022 announcement, and so it was not held at the time of his request.
5. On 10 June 2022 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 believed that the Authority held the information he had requested.

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 4 July 2022 the Authority was notified in writing that the Applicant had made a valid application.
8. On 26 July 2023, and in line with section 49(3)(a) of FOISA, the Commissioner invited the Authority to provide its comments.
9. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Information held by the Authority

11. 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, subject to qualifications which are not applicable in this case.
12. 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 the information an applicant believes an 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.

13. The standard of 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. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. The Applicant does not accept that section 17(1) applies to the information he has requested. He has argued that discussions about the ending of free testing were ongoing in the public domain at the time he made his request, and he considers that the Authority would be expected to have commissioned advice on the matter.
15. The Authority submitted that a lack of clarity on UK government funding arrangements and the retention of Covid testing infrastructure had meant that it had not been possible to fully consider its longer-term approach to testing at that time.
16. The Authority explained that at the time it received the request from the Applicant, advice had not been provided to Ministers on the possibility of ending the provision of free lateral flow tests or legally required self-isolation. It commented that its review response informed the Applicant that the advice to Ministers that underpinned the decision to end free lateral flow testing on 15 March 2022, was only given to Ministers in the week prior to that decision being taken. It noted that draft advice was available on 3 March 2022, and final advice was provided to Ministers on 11 March 2022.
17. The Authority submitted that it had interpreted the request to mean all advice – including scientific, public health and clinical input to that advice – that Test and Protect Policy Division officials gave and which informed decisions on the end of universal testing and the Test and Protect Transition Plan. It confirmed that no advice was commissioned externally on these topics.
18. The Authority submitted that information within the scope of the request would have been held in its electronic records management system (eRDM) and it provided the Commissioner with details of the searches it had carried out, including the search terms used and screen shots showing the results of those searches. It also provided the names and posts of the staff members involved in conducting searches.
19. The Commissioner is satisfied that the Authority has taken adequate and proportionate steps to establish whether it held any recorded information that fell within the scope of the Applicant's request. He has reviewed the evidence provided by the Authority, and he is satisfied that the searches were carried out by staff most likely to have knowledge of the existence of the information, and that the search terms used were reasonable and relevant and would have identified any information that fell within the scope of the request.
20. The Commissioner notes that the Authority has confirmed that it did hold advice, at the time the Applicant made his requirement for review, but that it was not held at the point the original request was made. The Commissioner acknowledges that there was speculation in the media about the removal of free Covid-19 testing at the time the Applicant made his

request, but he recognises that this was just speculation and it is not proof that scientific advice on the matter had already been obtained by the Authority. Based on the submissions and evidence of searches provided by the Authority, the Commissioner is satisfied that scientific advice was received after the date of the Applicant's information request.

21. In the circumstances, the Commissioner is therefore satisfied, on the balance of probabilities, that the Authority did not, at the time of the request, hold any information falling within the scope of the Applicant's request. He finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

Decision

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

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

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

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (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.
- ...

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).