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Commissioner  
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# Decision Notice 100/2024

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## Daily clinical advice or COVID-19 briefings provided to the First Minister and others

**Authority: Scottish Ministers**  
**Case Ref: 202200346**

### Summary

The Applicant asked the Authority for the daily clinical advice or COVID-19 briefings provided to the First Minister, Health Secretary and/or COVID Recovery Secretary for every day between 13 December 2021 and 5 January 2022. The Authority stated that complying with the request would exceed the £600 cost limit, so it was not obliged to comply. Following an investigation, the Commissioner accepted this, but found that the Authority did not provide adequate advice and assistance.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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 5 January 2022, the Applicant made a request for information to the Authority. The Applicant asked for the daily clinical advice or COVID-19 briefings provided to the First

Minister, Health Secretary and/or COVID Recovery Secretary for every day between 13 December 2021 and 5 January 2022.

2. The Authority responded on 28 January 2022, refusing the request in terms of section 12(1) of FOISA as it considered the cost of complying would significantly exceed the specified limit of £600. The Authority suggested to the Applicant that he reduce the scope of his request by identifying the piece of advice or briefing he required.
3. On 2 February 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered it another example of the cost limit being applied without indicating the justification, and he believed the Authority had deliberately interpreted his request too widely.
4. The Authority notified the Applicant of the outcome of its review on 2 March 2022, upholding its original decision. The Authority explained that the First Minister, Health Secretary and COVID Recovery Secretary received in excess of 10,000 emails a week and clinical advice is received in a number of formats and is not always signposted. The Authority stated it would therefore have to locate and review approximately 40,000 emails (some of which may require redaction) and suggested the Applicant may be able to reduce the scope of his request by indicating the specific information or subject matter he is interested in.
5. On 22 March 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 did not believe the cost limit had been applied appropriately and considered the Authority had deliberately interpreted his request too widely to ensure compliance would exceed the cost limit.

## **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 April 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently 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 how the Authority established what information it held which was covered by the Applicant's request, the searches carried out, the estimated cost of complying with the request and the advice and assistance it provided to the Applicant.

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

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

### ***Section 12(1) – Excessive cost of compliance***

10. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant

amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.

11. The projected costs a Scottish public authority can consider in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it is likely to incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA. The maximum hourly rate the authority can charge for staff time is £15 per hour. The authority may not charge for the cost of determining (i) whether it actually holds the information, or (ii) whether or not it should provide the information.

#### *The Authority's submissions*

12. The Authority confirmed it wished to continue to rely on section 12(1) of FOISA.
13. The Authority stated that, when responding to the Applicant's initial request and at request for review stage, searches were conducted of its electronic filing system (eRDM) where the information would be expected to be saved.
14. The Authority explained the case handler and reviewer considered whether searches could be limited to particular files or areas within eRDM but, given the all-encompassing nature of its response to the pandemic, global searches of the system were conducted.
15. Advice on COVID, which the request asked for, could have come from any part of the Authority, so searches could not be limited to, for example, health policy files. Provision of "clinical advice" or "COVID briefings" to Ministers are also not specifically labelled or categorised as such and can be submitted in a number of formats, but the Authority conducted searches of eRDM using the following search terms:
  - First Minister – 5,252 documents returned;
  - Nicola Sturgeon – 1,449 documents returned;
  - Humza Yousaf – 1,058 documents returned;
  - COVID – 38,234 documents returned;
  - John Swinney – 713 documents returned;
  - Clinical Advice – 1,913 documents returned;
  - Briefing – 28,985 documents returned.
16. The Authority carried out a cost calculation based on the total number of documents returned by the above searches, which estimated the upper cost of £600 would be significantly exceeded.
17. On reflection, the Authority acknowledged it should have considered searching the mailboxes of the Ministers involved rather than solely relying on keyword searches of eRDM and that its searches could have been more focused to reduce the number of results and associated costs. As a consequence, revised searches were carried out by the Authority during the course of the investigation.

18. The Authority explained that it had been unable to search the relevant Ministers' mailboxes as part of the revised searches, as emails are not retained in those mailboxes for longer than three months. However, information required beyond that period is saved by the relevant business area to eRDM.
19. The Authority therefore carried out further searches using a revised search methodology:
  - "First Minister" OR "Deputy First Minister" OR "Cabinet Secretary for Health" AND "Covid advice" OR "Covid briefing" OR "covid".
20. The results from these searches were then refined to limit them to the time period covered by the request, which resulted in 6,440 documents being returned. The Authority submitted that these documents would require to be reviewed to determine whether or not they are within scope.
21. The Authority carried out a revised cost calculation on those results:
  - Search time = 20 minutes;
  - Sifting time: 6,440 x 30 seconds = 53 hours and 40 minutes;
  - Cost of sifting: 54 hours x £15 = £810.
22. The Authority explained it applied the maximum hourly rate under FOISA because the sift would need to be completed by a grade of staff with some knowledge of briefings and the subject matter. The Authority identified that the grade of staff that would be needed to undertake this task would be grade B1 (whose hourly rate is more than £15).
23. The Authority stated it did not go on to consider the further costs that would be incurred to comply with the request because the cost of the sift alone would exceed the cost limit.

#### *The Applicant's submissions*

24. The Applicant stated he did not believe the Authority had appropriately applied the cost limit.
25. The Applicant explained he fundamentally believed the Authority had deliberately applied as wide a scope as possible to his request to ensure that it exceeded the cost limit, which he considered an example of the Authority choosing to deliberately stonewall information requests under FOISA.

#### *The Commissioner's findings*

26. The Commissioner has carefully considered the submissions from both parties, along with the terms of the request.
27. The *Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004*<sup>1</sup> (the Section 60 Code) states, at 9.4.2, that authorities should create an estimate of how the cost of complying with the request would exceed the cost limit under FOISA.
28. The Authority did not originally create an estimate but stated it would have to locate and review approximately 40,000 emails, which would "significantly exceed" the cost limit.
29. As part of its submissions, the Authority identified that the searches it carried out could have been more focused to reduce the number of results and associated costs. It provided, as

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<sup>1</sup> [Code of Practice under section 60 of FOISA \(www.gov.scot\)](http://www.gov.scot)

part of a revised search methodology, a new estimate based on having to locate and review 6,440 documents – a significant difference from its initial estimate.

30. The Commissioner therefore agrees with the Applicant that the Authority interpreted his request too widely in terms of the searches it carried out, although he cannot consider it did so deliberately.
31. The Commissioner considers the revised estimate provided by the Authority to be reasonable. Taking account of the work that would have to be undertaken to locate and retrieve information falling within scope of the Applicant's request, together with the number of documents involved, all of which the Commissioner accepts as reasonable in the circumstances, the Commissioner is satisfied that the cost of complying with the Applicant's request, in terms of simply locating and retrieving the information, would exceed £600.
32. The Authority has not provided the Commissioner with any calculation as to the steps it would need to take to be able to produce the information to fulfil the Applicant's request. However, as the Commissioner has found that the cost of carrying out the steps to locate and retrieve the information would exceed £600, he is satisfied that the further work required to comply with the Applicant's request would significantly exceed that limit.
33. The Commissioner is therefore satisfied, in all the circumstances, that the Authority could not have complied with the Applicant's request within the £600 cost limit. Consequently, he finds that the Authority was entitled to rely on section 12(1) of FOISA and was under no obligation to comply with the request.

#### ***Section 15 – Duty to advise and assist***

34. Section 15(1) requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
35. Section 15(2) states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms to the Section 60 Code, is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
36. The Section 60 Code provides guidance to Scottish public authorities on the practice which Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under FOISA. At 9.4.3, the Section 60 Code provides:

"When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice [the authority] may wish to take account of how much the cost limit has been exceeded. Any narrower request would be a separate new request and should be responded to accordingly."

#### ***The Commissioner's findings***

37. The Authority advised the Applicant in general terms on how to reduce the scope of his request in its responses to his initial request and his request for review. It did this by recommending he consider identifying specific information, subject matter or type of advice or briefing and by providing a link to the Commissioner's guidance on how to request information under FOISA.

38. However, the Authority did not, at either of the above stages, provide an estimate of costs to the Applicant, and instead only stated that complying with his request would “significantly exceed” the upper cost limit under section 12(1) of FOISA.
39. The Commissioner questions the utility of the general advice provided by the Authority, given it did not make clear that the initial sift of the documents alone would exceed the upper cost limit, and the lack of an estimate of costs did not provide the Applicant with the opportunity to understand what effect any refinement of the scope of his request might have had.
40. The Commissioner considers that where section 12(1) is engaged, the duty to provide advice and assistance is particularly important in order to enable a requester (who will not necessarily understand how information is held or organised) to effectively narrow the scope of their request.
41. In this case, the Authority’s approach was to ensure its searches were as comprehensive as possible while providing the Applicant with fairly generic advice and assistance. Ultimately, however, this resulted in no information being disclosed to the Applicant.
42. Should similar situations arise in the future, the Commissioner would urge the Authority to fully engage with requesters, in line with its duty under section 15 of FOISA, to enable requesters to understand how information is held and how they might narrow the scope of their requests to either obtain all of the information they are seeking or at least some of it.
43. In its submissions to the Commissioner, the Authority stated that it could have provided more advice and assistance to the Applicant to allow him to bring his request under the cost limit.
44. In the circumstances, the Commissioner accepts that the advice and assistance in the Authority’s responses to the Applicant at initial request and request for review stage went some way to discharging its duty under section 15 of FOISA.
45. However, for the reasons set out above, the Commissioner considers that the Authority should have provided more advice and assistance to the Applicant to help bring his request under the cost limit.
46. The Commissioner therefore finds that the Authority failed to comply with the duty under section 15(1) of FOISA to provide advice and assistance. The Commissioner requires the Authority to provide advice and assistance to the Applicant on how he might make a new, refined request, within the cost limit, should he wish to do so.

## **Decision**

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant, in particular by refusing to comply with the request on the basis that section 12(1) of FOISA applied.

The Commissioner is not satisfied, however, that the Authority met its duty to provide advice and assistance in responding to the request, as required under section 15(1) of FOISA.

The Commissioner therefore requires the Authority to provide advice and assistance to the Applicant on how he might make a new, refined request, within the cost limit, should he wish to do so, by **12 July 2024**.

## **Enforcement**

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

## **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**

**28 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.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **12 Excessive cost of compliance**

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- ...

#### **15 Duty to provide advice and assistance**

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

#### **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).

## **Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004**

### **3 Projected costs**

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
  - (a) no account shall be taken of costs incurred in determining-
    - (i) whether the authority holds the information specified in the request; or
    - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
  - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

### **5 Excessive cost - prescribed amount**

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.