



# Decision Notice 196/2024

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## Requisitioning of ice rinks as mortuaries

**Authority: Scottish Ministers**

**Case Ref: 202400405**

### Summary

The Applicant asked the Authority for information relating to a meeting in February 2020 (and actions following that meeting) where it was claimed that the then Chief Medical Officer (CMO) had told attendees that the Authority had started requisitioning private and commercial ice rinks to alleviate anticipated pressure on mortuaries. The Authority informed the Applicant it did not hold the information requested. 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 11 November 2023, the Applicant made a request for information to the Authority. The Applicant referred to [the media reporting](#)<sup>1</sup> that in February 2020 the then CMO had said at a “high-level” meeting that the Authority had started requisitioning private and commercial ice

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<sup>1</sup> [Opinion piece \(1 November 2023\) - Alex Cole-Hamilton \(scotsman.com\)](#)

rinks to alleviate anticipated pressure on mortuaries. Specifically, the Applicant asked the Authority to:

- (a) provide a record of the above meeting
  - (b) state the number of Scottish Government meetings at which this topic was discussed prior to and after the above meeting
  - (c) state how many ice rinks were requisitioned and for which periods
  - (d) provide a list of ice rinks that were used as temporary mortuaries
  - (e) state how much compensation was paid to ice rink owners.
2. The Authority responded on 7 December 2023 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that it had found no record of any discussion of the potential requisition of ice rinks during any meeting attended by the then CMO during the period specified in the request. The Authority also stated that there was no record of any ice rinks being requisitioned by the Authority. The Authority explained that, in this potential resilience situation, local authorities, under the Public Health etc (Scotland) Act 2008, have a duty to prepare for and deliver any such actions, with the Authority only becoming involved if needed.
  3. On 9 December 2023, the Applicant wrote to the Authority requesting a review of its decision because he did not agree that the information requested was not held. The Applicant asked the Authority to consider if the opposition politician (Alex Cole-Hamilton MSP) who had published the story that prompted his request had misremembered the meeting or whether no record was kept of the meeting.
  4. The Authority notified the Applicant of the outcome of its review on 9 January 2024, fully upholding its original decision for the reasons previously stated.
  5. On the 16 March 2024, the Applicant wrote to the Commissioner applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied because he did not believe that the Authority did not hold the information requested. Specifically, the Applicant explained that:
    - he did not believe that no record was held of the meeting referred to by the opposition politician
    - he did not consider that the searches undertaken were sufficient
    - recent events had established that it was more than likely there was a “culture of poor formal record keeping at the time”, but he considered that there would be electronic traces of the meeting referred to.

## **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 27 March 2024, 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. On 15 May 2024, and in line with section 49(3)(a) of FOISA, the Authority was invited to provide its comments on the application and to answer specific questions.

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

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

### ***Section 17(1) – Notice that information is not held***

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, 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. The qualifications contained in section 1(6) are not applicable 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) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. 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 must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
13. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request)

### ***The Applicant's submissions***

14. As rehearsed earlier, the Applicant stated that he did not believe that there was no record of the meeting referred to by Alex Cole-Hamilton MSP in the article he published on 1 November 2023.
15. While recent events had established that it was more than likely that there was a "culture of poor formal record keeping at the time", the Applicant considered that there would be electronic traces of the meeting.
16. The Applicant also queried whether the searches carried out were sufficient to identify information relevant to his request.

### ***The Authority's submissions***

17. The Authority stated that the official who handled the initial request worked in the Resilience Division, which was the relevant business area and that he understood the subject matter and where information was likely to be saved if it were held.
18. The Authority explained that the official also consulted a number of colleagues from relevant departments, including:

- the Resilience Division, who were involved in COVID-19 additional deaths work;
  - the Communications Department, regarding the article referred to by the Applicant; and
  - the Office of the CMO, who handled the CMO's diary and meeting requests.
19. The Authority explained that it undertook searches of its corporate record system (eRDM) using the following keywords: "ice rink mortuary"; "additional mortuary spaces"; "ice rink requisition" "requisition of private and commercial ice rinks"; "CMO meetings February 2020".
  20. The Authority stated that these searches were refined to items created in 2020, as this was the time period when the pandemic pressures were most acute and, had the subject in question been discussed, it would have been discussed during this period. The Authority then ordered the results by relevance, with a manual review undertaken for any relevant results. The Authority stated that no items relevant to the request were returned.
  21. The Authority also undertook searches of eRDM using the following exact phrase searches: "ice rink mortuary"; "additional mortuary spaces"; "ice rink requisition" "requisition of private and commercial ice rinks"; "CMO meetings February 2020". The Authority stated that no items relevant to the request were returned.
  22. The Authority explained that it had also conducted a search using "ice rink" and "mortuary\*" to ensure nothing was missed from the focused phrase searches and the broader keyword searches. The Authority stated that no items relevant to the request were returned.
  23. However, the Authority explained its searches had identified a briefing prepared in advance of a meeting held at the Scottish Parliament on 27 February 2020 at which the then CMO and Alex Cole-Hamilton MSP were both present. The Authority advised that the briefing note (which it provided to the Commissioner) contained no mention of the requisitioning of ice risks, nor was it a record of a meeting. The Authority therefore considered it fell outwith the scope of the Applicant's request.
  24. The Authority explained that it had undertaken searches for a minute of the 27 February 2020 meeting, but these had been unsuccessful. The Authority stated that it was possible that any record taken of the meeting was not retained "as it ought to have been". The Authority noted that this was "regrettable" but explained that it may reflect the exceptional pressures under which its officials were working at the time.
  25. The Authority also asked the official who supported the CMO on 27 February 2020 for his recollection of the meeting. The Authority stated that the official had no recollection of any discussion at the meeting on the potential use of ice rinks as mortuaries but recognised that the meeting was now more than four years ago.
  26. In addition to the searches undertaken of its corporate record, the Authority asked the Office of the CMO to search for correspondence regarding the February 2020 meeting, particularly for any mention of the requisition of private and commercial ice rinks. The Office of the CMO confirmed that it identified no relevant information.
  27. The Authority also explained that it was probable that in February 2020 only in-person meetings took place, which would have been arranged by email, not by WhatsApp or other communication tools. The Authority stated that no check of visitor records was conducted, as the only meeting attended by Alex Cole-Hamilton MSP and the CMO in February 2020 had been identified. The Authority further explained that Microsoft Outlook does not retain appointments or meeting requests beyond a six-month period.

28. During the investigation, the investigating officer asked the Authority to undertake searches of WhatsApp messages, text messages and any other information communication tools for any information relevant to the Applicant's request.
29. The Authority confirmed that it had contacted staff members who still worked for the Authority who had been seconded to the COVID-19 Additional Deaths team during 2020. The Authority explained that the staff members had confirmed that WhatsApp or other informal messaging tools were not used by the team for this work during 2020.
30. The Authority explained that it had also contacted the Office of the CMO who confirmed that anything relating to government business held by the CMO would have been transferred to eRDM when she left her post.
31. The Authority stated that, should any relevant information have been held on WhatsApp or other informal messaging tools, then that information would have been transcribed and saved to eRDM. The Authority explained that the searches it had already carried out of eRDM (rehearsed at paragraphs 19 to 22) would have identified any such information saved there.
32. The Authority noted that information is saved to eRDM by topic, with the medium or format not necessarily recorded. The Authority explained that it had not specified "WhatsApp" as a keyword as doing so would have limited results. However, for completeness, the Authority conducted a global search of eRDM using "WhatsApp" in addition to the keywords rehearsed earlier, which returned no items relevant to the request.
33. The Authority stated that there was no record of any ice rinks being requisitioned by the Authority, so there was no list of ice rinks used as temporary mortuaries and no compensation paid to ice rink owners.
34. The Authority explained that, had the requisitioning of private and commercial ice rinks to alleviate anticipated pressure on mortuaries been discussed, it would be a matter for local authorities in the first instance.
35. The Authority confirmed its position was that it therefore held no information relevant to the Applicant's request.

#### *The Commissioner's view*

36. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps to establish whether it held any recorded information that fell within the scope of the request. He is satisfied, on balance, that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
37. The Commissioner considers that the Authority's searches were reasonable in the sense of who it asked to carry out the searches, the locations searched, the search terms that were used and the personnel consulted; he finds that they would be capable of locating the information requested, if it was held.
38. The Commissioner has considered the specific terms of the request. It sought, among other things, a "record" of a meeting where a specific subject matter was discussed. It does not request information relating to "traces" of such a meeting, nor does it request a record of a meeting where that specific subject matter was not discussed.
39. Having reviewed the terms of the request and the briefing note prepared in advance of a meeting held at the Scottish Parliament on 27 February 2020 at which the then CMO and

Alex Cole-Hamilton MSP were both present, the Commissioner agrees with the Authority that the briefing note does not fall within the scope of the request.

40. While the Applicant believed and expected the information relevant to his request to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
41. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.
42. The Commissioner notes that the Authority's searches for a minute of the meeting on 27 February 2020 at which the then CMO and Alex Cole-Hamilton MSP were present had been unsuccessful, which the Authority said indicated that the minute had not been retained "as it ought to have been".
43. The Commissioner welcomes the regret the Authority has expressed at this and the changes it has stated it has made to strengthen the process for recording meetings. However, he considers that the Authority should, as part of its duty under section 15 of FOISA, have advised the Applicant of the 27 February 2020 meeting in its initial response or review outcome.

## **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 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.

**Cal Richardson**

**Deputy Head of Enforcement**

**6 September 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).