

Decision Notice 001/2022

Forecasting analysis for a potential second wave of Covid-19: potential death and case numbers

Applicant: the Applicant

Public authority: Scottish Ministers

Case Ref: 202100092



Scottish Information
Commissioner

Summary

The Ministers were asked for the forecasting analysis for a potential second wave of Covid-19, specifically potential death and case numbers. The requested information was withheld on the basis that it related to the development of Scottish Government policy.

The Commissioner found that the exemption applied, but the public interest favoured disclosure and required the Ministers to disclose the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 29(1)(a) (Formulation of Scottish Administration policy etc.)

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 4 September 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested any forecasting analysis undertaken by the Scottish Government for a potential second wave of Covid-19 (Coronavirus) in Winter 2020 or in 2021 which detailed:
 - (i) the overall financial impact
 - (ii) the potential death and case numbers
 - (iii) the impact on care homes, schools, hospitality, the tourism industry and local authorities
2. The Ministers responded on 12 November 2020. They apologised for the delay in responding and notified the Applicant that no information was held with regard to parts (i) and (iii). With regard to part (ii), the Ministers withheld the information on the basis that it related to the formulation or development of government policy.
3. On 18 November 2020, the Applicant wrote to the Ministers requesting a review of their decision. The Applicant was dissatisfied with the Ministers' response to part (ii) of the request. He did not accept that the exemption applied and did not accept that the public interest test had been applied correctly.
4. The Ministers notified the Applicant of the outcome of their review on 15 January 2021. They confirmed that the exemption applied, as the information comprised advice to Ministers and should be considered to be a basis for policy formulation. With regard to the public interest test, although acknowledging the strong public interest in how government respond to the pandemic, they pointed the Applicant towards information already published on their and Public Health Scotland's websites. They stated that Ministers and officials must be able to discuss a range of options before settling on a public view, particularly during a fast moving and changing situation such as the Covid-19 pandemic, where multiple scenarios must be considered across a range of policy portfolios.

5. On 19 January 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 Ministers' review because he did not consider section 29(1)(a) applied and the public interest favoured disclosure of the withheld information. The Applicant was also dissatisfied with the time taken to respond to his request for review.

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 1 February 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant, which they did so, 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. These related to searches conducted for the requested information and their reasoning for applying section 29(1)(a) of FOISA to the withheld information.
9. The Applicant was also asked for, and provided, submissions in support of his application, in particular why he considered the public interest supported disclosure.
10. Aspects of the Ministers' submissions were clarified during the investigation; specifically, whether further information fell within scope of the request and on the public interest.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and 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 falling in scope of request

Searches

12. The Ministers provided a copy of one paper, which related to the request, and identified information within the paper that was considered to fall within scope of the request.
13. The Commissioner was concerned about the lack of information identified. The Ministers were therefore asked for, and provided comments, on the searches they had conducted to identify the requested information.
14. They explained that the terminology used to search their electronic Records Management systems (eRDMs) included the words forecasting and second wave, together with the words separately "financial impact / care home impact / schools impact / hospitality impact / tourism impact / local authority impact." They confirmed that searches encompassed the time period from January 2020 to 4 September 2020.
15. The Ministers stated that 766 results were returned, which were reviewed to determine whether the documents were in-scope, initially by reviewing the titles and introductory text.

They concluded that, although a large number of documents were identified, only one paper fell within scope of the request.

16. In parallel with the eRDMs searches, the Ministers stated that Covid hubs and senior officials in relevant areas were identified and contacted to enquire if relevant information was held in relation to the request.
17. The Ministers submitted that they were satisfied that all of the relevant information had been identified, as only the modelling coronavirus team provided estimates of the potential second wave due to the spread of the virus with the impact in terms of cases and deaths. Officials in the other areas received this work and interpreted the results to develop contingency plans, but they had not undertaken any forecasting analysis.
18. Having considered the submissions from the Ministers, and the explanations provided, the Commissioner is satisfied that the Ministers have identified the relevant information falling in scope of the request.

Information within the paper

19. When the Ministers provided a copy of the paper, they identified information within the paper that they considered fell within scope of the request.
20. Having considered the paper, the Commissioner questioned whether further information should fall within scope of the request. This view was put to the Ministers, who did not consider such information fell within scope, but if it did, then they considered this information to be exempt under section 29(1)(a) of FOISA.
21. The Commissioner cannot state what this specific information is, as this would, in effect, disclose withheld information. However, having considered the information in detail, he is satisfied it does fall within scope of the request, and will consider whether the exemption applies to this information together with the remaining information identified as falling within scope of the request.

Section 29(1)(a) - Formulation of Scottish Administration policy etc.

22. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy.
23. "Formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
24. For information to fall under this exemption, it need only "relate to" the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation and when.

Submissions from the Ministers on section 29(1)(a)

25. The Ministers argued that section 29(1)(a) applied to the withheld information as it describes the approach to developing the Scottish Government's response to the Covid-19 pandemic,

which remains an active area of policy formulation. This is a wide-ranging area that includes questions of timing as well as consideration of the fluid circumstances under which decisions are taken to protect the people of Scotland.

26. The paper relates to three scenarios for possible resurgence of Covid, intended to support a development exercise under different assumptions to explore estimates of what might happen. The paper did not forecast what would happen, but projected forward what might happen on the basis of different scenario- based assumptions. The Ministers submitted that, when forecasting beyond two weeks, estimates become much more uncertain because of the large differences that can result from the influence of small deviations in estimated growth rates and current incidence.
27. The Ministers explained that the withheld paper was written in August 2020, when Scotland was in Phase 3 of the route map, which was the lowest level of restrictions reached since lockdown began. The scenarios were presented on the basis of that level of restriction. If a rise in cases was observed, then measures would be re-introduced, to prevent that increase and subsequently included in the scenarios. Therefore, the Ministers submitted, the data provided in the report cannot be considered to be forecasts, predictions or projections, but rather comprises advice.
28. The paper summarises the wide range of effects that certain assumptions (universities re-opening, compliance with restrictions, etc.) might have on the spread of the virus into three scenarios. The Ministers did not consider that the paper sets out factual or statistical information, they considered it to be a think piece which was produced to underpin advice in order to support Ministers when considering their policy options and approach to a potential second wave.
29. The resurgence scenarios paper sets out a range of potential impacts of a second wave in Scotland and provides advice for taking forward policies to help minimise that impact, allowing Ministers to make informed policy decisions based on the potential resurgence scenarios.
30. The introduction of policies to suppress any potential second wave remained under consideration and no decisions on them had been taken at the time the initial request (and review) were received.
31. During the investigation, the Ministers explained further that the paper was part of a development exercise, based on speculative policy options and selected analytical assumptions and was supplied by analysts to policy officials and ministers to inform discussion about both the underpinning assumptions and the policy changes which might be implemented in response to the projections.
32. The Ministers explained that it is not an academic paper, based exclusively on the science, but it is a hybrid of modelling research and policy. The Ministers submitted that they and officials needed to be able to discuss and change assumptions in order to reach a consensus internally, informed by the latest research.

The Commissioner's conclusions

33. For information to be exempt under section 29(1)(a) of FOISA, it only has to "relate to" the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Ministers, who will subsequently determine which of these should be translated into political action and when.

34. Having considered the withheld information, the Commissioner is satisfied that it relates to the formulation or development of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged: the information provides the Ministers with a range of options to consider as to potential scenarios for a second Covid wave.
35. The Commissioner accepts that this information was intended to assist Ministers and officials in formulating or developing policy in relation to the consideration of the second Covid wave.
36. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest

The Ministers' public interest submissions

37. The Ministers recognised the public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, they also recognised a greater public interest in high quality policy and decision-making, and in properly considering the implementation and development of policies and decisions.
38. They submitted that they need to consider all available options and their possible implications, particularly during a fast moving and changing situation such as the Covid-19 pandemic where multiple scenarios must be considered across a range of policy portfolios.
39. Premature disclosure, they submitted, would seriously undermine internal debate on the options available to prevent or minimise the impact of a second wave in Scotland, which in turn will undermine the quality of the policy making process. This, they argued, would not be in the public interest.
40. In support of their position (i.e. that the public interest favoured withholding the requested information), they referred to a published paper on the projection of cases for the second wave (7 October 2020) – figure 13¹.
41. The Ministers considered that disclosure of the withheld information could compromise the information supplied to support internal debate, especially if all think-piece publications of this type were disclosed, even when the underpinning assumptions were speculative. In this case, some of the projected scenario numbers could be misinterpreted as something which was likely to happen, whereas the government could respond to increases in cases and implement restrictions to reduce transmission to minimise the likelihood of such an occurrence.
42. The Ministers stated that they supported the release of the science and research supporting decisions, when policy has been determined. Supporting this point, the Ministers referred to the published information illustrating the spread of the disease in Scotland (Coronavirus (COVID-19): modelling the epidemic, informed by SPI-M and SAGE, every week since 21 May 2020. These documents include the latest SAGE modelling estimates in the short and medium term, normally between two and six weeks; beyond two weeks forecasts are more uncertain.

¹ [Coronavirus+COVID-19%29+-+evidence+paper+-+7+October+2020-.pdf \(www.gov.scot\)](https://www.gov.scot/Resource/0045/04/01_01363.pdf)

43. Given the levels of uncertainty, the Ministers stated they use modelling outputs from a number of different academic groups to validate estimates of the R value, growth rate and incidence of cases for Scotland with outputs being brought together to reach a consensus view. The information in the Scottish Government publication is closely aligned with SPI-M and SAGE publications. The “modelling the epidemic” series of published information discloses what the Ministers understand about the progress of the epidemic, based on a range of sources and is available weekly to all interested parties for consideration. They also noted that the Scottish Government provides a dedicated contact address for enquiries through which individuals can correspond widely on the matters raised in the publication.

The Applicant's public interest submissions

44. The Applicant submitted that the public have a right to have a fuller understanding of the Scottish Government's handling of Covid-19 pandemic. In his view, the release of Covid-19 death forecasts would provide a level of accountability and transparency that would otherwise be unavailable to the public.
45. He considered that this is a key tenet of any public interest test, and that to keep this information secret would see the Scottish Government's record on Covid-19 be defined solely by their version of events, rather than based on publicly available scientific data. For that reason, given the high-profile nature of the pandemic, and the significant public interest in releasing anything connected with the response to the pandemic, the Applicant submitted that the public interest clearly fell on the side of disclosure.

The Commissioner's conclusions of the public interest

46. The Commissioner has considered carefully the representations made by both the Applicant and the Ministers when balancing the public interest both for and against disclosure of the information. The Commissioner is required to consider the position at the time of the review (15 January 2021), when the situation was different from the position at the date of the request (4 September 2020).
47. The Commissioner acknowledges that there is considerable public interest in allowing Ministers space to prepare for developments in the pandemic, particularly where forecasting analysis such as this helps the development of policy and responses which include measures relating to public safety and life, and direct interference with fundamental human rights. However, given the serious consequences of the potential measures, the public interest in disclosure also carries considerable weight. Disclosure of the Ministers' analysis would allow other interested parties to draw attention to any perceived errors or other issues which may not have been considered, the result of which could be to improve the baseline evidence from which policy was being developed.
48. The Commissioner has carefully weighed the public interest in both disclosing the information and in maintaining the exemption. In all the circumstances of this case, he is satisfied that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. There is a strong public interest in allowing the public to analyse the forecasts to allow for further input, with the potential of improving the baseline and driving up the quality of decision making.
49. As noted above, the Commissioner is required to consider the position at the time of the review. However, the Commissioner would also comment that, if he had been required to consider the position as at the time of the request, he would also have concluded that the public interest in maintaining the exemption was outweighed by the public interest in disclosing the information.

50. As the public interest in maintaining the exemption is outweighed by that in disclosure of the information, the Commissioner must find that the Ministers were not entitled to rely on section 29(1)(a) of FOISA in responding to this request.

Time to respond

51. The Applicant was dissatisfied with the time taken by the Ministers to respond to his requirement for review within the statutory timescales.
52. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to qualifications which are not relevant in this case.
53. It is a matter of fact that the Ministers did not provide a response to the Applicant's requirement for review of 18 November 2020, until 15 January 2021, thereby missing the 20 working day deadline.
54. The Ministers acknowledged their failure to respond on time and explained that the Covid-19 pandemic had impacted their ability to deal with requests. They explained that the public interest in the pandemic had been unprecedented and responses to enquiries were delayed due to competing resource demands for both planning the response to the crisis and responding to requests for information.
55. The Ministers advised the Commissioner that, since this request and review, additional FOI correspondence personnel have been appointed to reduce the response times.
56. In the circumstances, the Commissioner must find that the Ministers failed to comply with section 21(1) in this case.

Decision

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

The Commissioner is satisfied that the information covered by request (ii) (including the additional information he identified during the investigation) is exempt from disclosure under section 29(1)(a) of FOISA, but that, on balance, the public interest favours disclosure of the information.

He requires the Ministers to disclose all of the relevant information (including that identified as falling within scope during the investigation) to the Applicant **Monday, 28 February 2022**.

The Commissioner also finds that the Ministers failed to adhere to the timescale set out in section 21(1) of FOISA.

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.

Enforcement

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

Daren Fitzhenry
Scottish Information Commissioner

13 January 2022

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.

...

- (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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;

...

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