

Decision Notice 087/2021

Infections and deaths linked to Covid-19 in Caithness

Applicant: The Applicant

Public authority: Highland Health Board

Case Ref: 202001388



Scottish Information
Commissioner

Summary

NHS Highland was asked for the total number of infections and deaths attributed to Covid-19 in the Caithness area.

NHS Highland disclosed information in response to both parts of the request.

The Commissioner found that NHS Highland had carried out thorough and adequate searches and disclosed all relevant information held.

However, the Commissioner found that NHS Highland did not carry out a review within the timescales set down by FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(1) (Review by Scottish public authority)

Coronavirus (Scotland) Act 2020, Schedule 6, Part 2, paragraph (6) (Commissioner's ability to take account of the impact of coronavirus)

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 7 October 2020, the Applicant made a request for information to Highland Health Board (NHS Highland). The information requested was:
 - a) The total number of Covid-19 cases recorded in Caithness between 24 August 2020 and 7 October 2020.
 - b) The total number of deaths attributed to Covid-19 that occurred in Caithness between 24 August 2020 and 7 October 2020.
2. NHS Highland responded on 15 October 2020. It advised the Applicant that there had been 17 confirmed cases of Covid-19 and no deaths identified in the Caithness Community Partnership area between 24 August 2020 and 7 October 2020. In addition, NHS Highland signposted the Applicant to the Covid-19 daily dashboard produced by Public Health Scotland (PHS) (which records cases of Covid-19 at neighbourhood level) and a publication from the National Records of Scotland (NRS) which records rates of deaths involving Covid-19.
3. On 17 October 2020, the Applicant wrote to NHS Highland requesting a review of its decision, on the basis that the information disclosed did not provide him with the sufficiency of detail requested, which he believed was currently available from recorded information processed by NHS Highland.
4. The Applicant also commented that information available on the PHS Interactive Dashboards Map identified three areas making up the Caithness Community Partnership and, in line with this, a breakdown of the recorded information, in terms of the actual number of cases diagnosed in that area between 24 August and 7 October 2020 should have been furnished

to him for each of the three areas. The Applicant asked that his requirement for review be interpreted in those terms.

5. NHS Highland notified the Applicant of the outcome of its review on 19 November 2020. NHS Highland apologised for the delay in responding and upheld its original response. It also referred to the links it had provided to the PHS website.
6. On 22 November 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 NHS Highland's review for the following reasons:
 - a) No reasons or reason was provided by NHS Highland as to why a delay occurred in responding to the review within the statutory timescale.
 - b) The Applicant strongly disagreed with NHS Highland's reasons for not providing the information. He contended that the stance of PHS and the Scottish Government, as adopted by NHS Highland in relation to the disclosure of the requested information, was inconsistent and did not comply with section 1(1) of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 17 December 2020, NHS Highland was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Highland was invited to comment on this application and to answer specific questions. These related to the nature of searches carried out to establish what recorded information it held falling within scope of the Applicant's request. Comments were also sought from NHS Highland on the reasons for the delay in its response to the Applicant's requirement for review.

Commissioner's analysis and findings

10. 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 NHS Highland. He is satisfied that no matter of relevance has been overlooked.
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, 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.
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 information an applicant believes the authority should hold.
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 and thoroughness and results of the searches

carried out by the public authority. 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.

Request – Total number of infections and deaths attributable to COVID-19

Applicant's submissions

14. In his application, the Applicant argued that the stance taken by NHS Highland in relation to disclosure of the information he requested was inconsistent and did not comply with section 1(1) of FOISA.

NHS Highland's submissions

15. In its submissions, NHS Highland outlined the sources from which it accessed information about incidences of Covid-19 and deaths caused by Covid-19. NHS Highland identified the following data sets as being the primary sources for reporting on Covid-19 testing and mortality:
 - a) Results of testing are recorded in NHS Scotland Electronic Communication of Surveillance in Scotland (ECOSS) data, which is provided to NHS Boards
 - b) NRS record death registration data and this is provided to NHS Highland each week.
16. Prior to responding to the Applicant's request, NHS Highland identified positive Covid-19 cases in ECOSS data using the postcode attached to the test result along with the specimen date of the test. Death rates were identified, NHS Highland explained, from extracting data from the NRS mortality files, where the death certificate mentioned Covid-19. NHS Highland commented that a number of diseases, conditions or events which caused or contributed to death can be specified on a death certificate. Any mention was where the disease or injury was mentioned on the death certificate, either as the underlying cause of death or a contributory cause. NHS Highland submitted that NRS records were searched by residential postcodes within the Caithness area, Caithness being defined as the area covered by the Caithness Community Planning Partnership.
17. Records searched by NHS Highland covered the time period of the request, based on the specimen date of the test in relation to infection rates, and the date on which a death occurred in relation to death rates.
18. NHS Highland informed the Commissioner of the team involved in the searches and gathering the data to fulfil the Applicant's request, along with why they were considered the most appropriate personnel to undertake this work.

The Commissioner's conclusions

19. The Commissioner has considered the terms of the Applicant's request and concludes that it seeks the total number of Covid-19 cases and deaths attributable to Covid-19 that occurred **in the Caithness area** between 24 August 2020 and 7 October 2020. The Commissioner is satisfied that this relates to the whole Caithness regional area and the Applicant had not, at the time of his request, stipulated that he wished this to be broken down into smaller ward areas (even if PHS or any other body chose to make a smaller breakdown at any point). The Commissioner has considered the information disclosed by NHS Highland and concludes (on the basis of the submissions provided) that NHS Highland provided the Applicant with the information it held which fell within scope of the request.
20. Having considered the responses provided to the Applicant by NHS Highland and the submissions from both parties during the investigation, the Commissioner is satisfied that

NHS Highland took adequate, proportionate steps to establish what information it held falling within scope of the request. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that NHS Highland provided the Applicant with the recorded information it held at the time it received his request which would fulfil both parts of his request.

21. The Commissioner is therefore satisfied that NHS Highland did comply with section 1(1) of FOISA in responding to the Applicant's request.

Timescale for compliance

22. As mentioned above, the Applicant expressed dissatisfaction with the time taken by NHS Highland to respond to his requirement for review.
23. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
24. It is a matter of fact that NHS Highland did not provide a response to the Applicant's requirement for review within 20 working days.
25. In its submissions, NHS Highland explained that the delay in providing the response was caused by the pressure of work relating to annual leave and a backlog of cases.
26. In Part 2 of Schedule 6 of the Coronavirus (Scotland) Act 2020, paragraph 6 allows the Commissioner to find that a Scottish public authority has not failed to comply with section 21(1) of FOISA, where he is satisfied that the failure was due to, inter alia, the effect of coronavirus on the authority generally or its ability to carry out its functions, and was reasonable in all the circumstances. In considering what is reasonable, the primary consideration for the Commissioner is the public interest in responding promptly.
27. Guidance issued by the Commissioner¹, "Coronavirus (Scotland) Act 2020: Determining the effects of the Coronavirus on an authority's ability to respond to requests", makes it clear that public authorities will need to provide the Commissioner with evidence as to the effects of the Coronavirus on their ability to respond within the maximum 20 working day timescale to individual requests (paragraph 10). The guidance sets out what evidence the Commissioner will require from an authority to allow him to make a determination (paragraph 16) and makes a number of recommendations to authorities about what information they should document in order to record the effects of the coronavirus on their ability to respond to requests (paragraph 18).
28. As noted above, NHS Highland told the Commissioner that the delay in providing the response was caused by the pressure of work relating to annual leave and a backlog of cases.
29. In the absence of any evidence from NHS Highland relating specifically to the impact of the pandemic on its staff regarding its handling of this particular requirement for review, the Commissioner does not consider paragraph 6 of Part 2 of Schedule 6 to the 2000 Act applies in this case. As such, the Commissioner is not satisfied that NHS Highland's failure to respond to the requirement for review in this case was caused by the effects of the Coronavirus on its ability to carry out its functions.

¹ <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Covid-19AuthorityGuidance.aspx>

30. The Commissioner therefore finds that, in failing to provide a response to the Applicant's requirement for review within 20 working days, NHS Highland failed to comply with section 21(1) of FOISA.
31. As NHS Highland provided the Applicant with a response to his requirement for review, the Commissioner does not require it to take any action in relation to this breach.

Decision

The Commissioner finds that Highland Health Board (NHS Highland) 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 the information it held at the time it received his request, NHS Highland complied with section 1(1).

However, by failing to provide a response to the Applicant's requirement for review within 20 working days, NHS Highland did not comply with section 21(1) of FOISA. The Commissioner does not require it to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or NHS Highland 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

1 June 2021

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.
- ...

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.
- ...

Coronavirus (Scotland) Act 2020

Schedule 6 - Functioning of public bodies

Part 2 - Freedom of Information

6 Commissioner's ability to take account of impact of coronavirus

- (1) This paragraph applies in relation to an application made under section 47(1) (which is not excluded by section 48) in respect of which there is a failure of the Scottish public authority to comply with a relevant period.
- (2) Despite section 49(6), the Commissioner may decide that the Scottish public authority has not failed to comply with Part 1 by reason only of its failure to comply with a relevant period if the Commissioner is satisfied that the failure was -
- (a) due to
- (i) the effect of coronavirus on the authority generally or its ability to carry out its functions (including any action it had to take to better utilise its resources to deal with the effect of coronavirus), or
- (ii) the authority operating under requirements of Part 2 of this schedule that were subsequently repealed before the end of the period during which Part 1 of this Act is in force.
- (b) reasonable in all the circumstances.

- (2A) In considering whether the failure was reasonable in all the circumstances, the Commissioner must regard the public interest in section 1(1) being complied with promptly as the primary consideration.
- (3) For the purposes of this paragraph, "relevant period", in relation to a request for information (or a subsequent requirement for review) means a period specified in section 10(1) or section 21(1), either as it has effect by virtue of paragraph 3 or otherwise.

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