

Decision Notice 094/2021

Covid-19 – Contingencies for a potential second wave

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202001159



Scottish Information
Commissioner

Summary

The Council was asked for any internal documents, briefing notes or reports circulated to councillors detailing plans or contingencies for a potential second wave of Covid-19/coronavirus.

The Council withheld the information at request and review but disclosed the information in full during the Commissioner's investigation.

The Commissioner investigated and found that the Council had breached FOISA in responding to the request as it had not been entitled to withhold the information under the exemption relating to prejudice to the conduct of public affairs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

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 16 July 2020, the Applicant made a request for information to City of Edinburgh Council (the Council). The information requested was that contained in any internal documents, briefing notes or reports circulated to councillors or officials detailing plans or contingencies for a potential second wave of Covid-19/coronavirus.
2. The Applicant stated that the request should cover any documents listing financial, economic, or service plans or impact assessments, or documents or reports received from Public Health Scotland, NHS Lothian, NHS Scotland or the Scottish Government, about how they and/or the Council were planning for a second wave.
3. The Council responded on 23 July 2020 asking for clarification and for the Applicant to refine his request, to allow it to identify the information requested. The Council highlighted that, in order to check for information held and falling within the scope of his request, it would have to review over 13,000 emails relating to the Chief Officer of the Edinburgh Health and Social Care Partnership alone and pointed out that this work would likely take it beyond the cost limit for requests under the legislation.
4. On 24 July 2020, the Applicant provided the Council with a refined request for, from March 2020:
 - (i) Any internal documents, briefing notes or reports circulated to councillors or officials detailing plans or contingencies for a potential second wave of Covid-19/coronavirus.
 - (ii) The request should cover any documents which list financial, economic or service plans or impact assessments, or documents or reports received from Public Health Scotland, NHS Lothian, NHS Scotland or the Scottish Government, about how they and/or the Council are planning for a second wave.
 - (iii) This excludes Edinburgh Health and Social Care Partnership.

5. The Council responded on 20 August 2020, withholding the information and claiming it was exempt by virtue of section 30(b)(ii) of FOISA, as disclosure would, or would likely, inhibit substantially the free and frank exchange of views for the purposes of deliberation. It also provided the Applicant with a weblink to a report on planning and contingency arrangements for further outbreaks of Covid-19¹. The Council advised the Applicant that information from external sources should be requested from the organisations concerned and provided weblinks to the information these organisations made available to local authorities.
6. On 24 August 2020, the Applicant wrote to the Council, requesting a review of its decision on the basis that he considered the public interest in the release of these documents overrode the Council's requirement to do business without the glare of publicity.
7. The Council notified the Applicant of the outcome of its review on 21 September 2020. It stated that the information requested remained exempt from disclosure, but now by virtue of section 30(c) of FOISA.
8. On 28 September 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 the Council's review because he did not consider the Council had correctly applied the public interest test. He considered the overriding public health aspect of the public interest in the information required it to be released to the general public.

Investigation

9. 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.
10. On 9 October 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the Council's reasons for relying on section 30 of FOISA to withhold the requested information.
12. During the investigation, the Council disclosed all of the withheld information to the Applicant as it considered the passage of time had removed the need to withhold it.
13. Although the information was disclosed to the Applicant, he did not wish to withdraw his application as he felt it important to have a decision issued to help others wishing to access similar information.

Commissioner's analysis and findings

14. 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 Council. He is satisfied that no matter of relevance has been overlooked.

Section 30(c) – Prejudice to the conduct of public affairs

15. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.” The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such a prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances.

The Council's submissions

17. In its submissions, the Council argued that, at the time of the request, the Covid-19 situation was fast evolving, the way forward being still under discussion and subject to change. It stated that successful management of the situation required full and open communication between services and partners. The Council was concerned that disclosure would impact its ability to analyse its response robustly to ensure the best service to residents, without fear such management information would be released into the public domain.
18. The Council's view was that its ability to consider its response and readiness in private was crucial and that disclosure of specific Covid-19 planning, at the time of the request or review, would have inhibited its overall response and hampered the ability of services to operate swiftly and effectively.
19. The Council also highlighted its view on the importance of clear communication in managing the situation, and its fear that clear key messages would have been confused by being set alongside draft planning documentation that might quickly become obsolete.

The Applicant's submissions

20. The Applicant refuted the Council's position that disclosure would affect its ability to operate effectively. He considered there was no evidence for this and that the Council had not provided enough explanation on how disclosure would impact front-line services.
21. The Applicant did not agree that disclosure of the withheld information would lead to a confused message. He argued that, if the information was obsolete, it should have been disclosed and that it could no longer prejudice the conduct of public affairs.
22. The Applicant pointed out that there were 997 (at the time) documents on the Scottish Government website and considered it disingenuous to suggest that disclosure would confuse an already confused situation to the point where the aim of the communication

would be lost. He considered disclosure would only add to the conversation about the handling of the pandemic.

The Commissioner's view

23. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
24. The Commissioner understands and accepts that the situation surrounding the pandemic was, and is, rapidly changing and that public authorities are making decisions in difficult circumstances. He also accepts the importance of clear messaging in these circumstances.
25. However, when the withheld information is considered, the Commissioner is not convinced that disclosure would have resulted in the harm envisaged by the Council and agrees with the Applicant that the Council has not provided sufficient evidence to support this assertion. The documents in question appear largely to reflect legislation and best practice, with nothing particularly surprising, and the extent to which they remained in development at the relevant time has not been explained
26. For these reasons, the Commissioner concludes that the Council was not entitled to withhold the information in this case under the exemption in section 30(c) of FOISA. Given this conclusion, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Decision

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 (in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant, as it was not entitled to withhold the requested information under section 30(c) of FOISA.

Given that the Council has already provided the Applicant with the information falling within the scope of the request, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the Council 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

10 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.

...

- (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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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