

# Decision Notice 170/2021

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## Independent Test Report

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**Applicant: The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 202100035**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for a copy of an independent test report concerning stocks of FFP3 Respirators. The Ministers advised the Applicant to make his request to the UK Government's Department of Health and Social Care (the DHSC) which had commissioned the report. The Ministers also stated that the DHSC had instructed them not to share the report as it was confidential.

The Commissioner investigated and found that the Ministers had failed to treat this request as a request for information subject to FOISA. As a response was provided to the Applicant during the investigation, which disclosed the information requested, the Commissioner does not require the Ministers to take any further action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 16(1) and (6) (Refusal of request); 19 (Content of certain notices); 21(5), (9) and (10) (Review by Scottish public authority)

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

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1. On 7 January 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested an independent test report related to out of date FFP3 respirators, referred to in a letter issued on 25 March 2020.
2. The Ministers wrote to the Applicant on 8 January 2021. The Ministers stated that the Applicant should direct the request to UK Government's Department of Health and Social Care (DHSC), which commissioned the report.
3. On the same day, the Applicant wrote to the Ministers requesting a review of their decision on the basis that the letter in question indicated that the Ministers had received the report, and presumably still retained a copy. The Applicant stated that he had not been provided with a valid reason as to why the Ministers should not provide him with the report instead of directing him to the DHSC. He asked the Ministers to review their initial decision.
4. Again, on the same day, the Ministers wrote to the Applicant stating that:  
*Colleagues have advised that when the Scottish Government received the report from DHSC it was with strict instructions to not share further. I am afraid it is not our report to release and as such any request for the report should be directed to DHSC.*
5. On 8 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He was dissatisfied because he had not been provided with the report he had asked for. He stated that the Ministers had acknowledged that they held a copy of the report, and he did not believe that the instructions not to share it complied with FOISA.

## Investigation

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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 29 January 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the report withheld from the Applicant.
8. On 12 February 2021, the Ministers advised the Commissioner's office that they had now disclosed the information to the Applicant, subject to the redaction of a small amount of personal data.
9. On 18 February 2021, the Applicant advised that he wished to continue with his application to the Commissioner as he felt it was in the public interest to do so.
10. 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 their reasoning for not dealing with the Applicant's request and review requirement under the terms of FOISA.
11. Both the Ministers and the Applicant provided the Commissioner with their submissions.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered 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.

### *Submissions from the Applicant*

13. The Applicant stated that, while he was satisfied as to having received the information, he was unhappy with the way his request had been handled. He did not believe that it was right that his initial request for information had been denied without any appropriate reasons. Also, he did not believe that it was right for his requirement for review to be denied on the grounds that the Ministers had been issued strict instructions to not share further.
14. The Applicant stated that he found it troubling that the Ministers would agree to keep the report confidential in the first place and could not see a justifiable reason why it should have been deliberately withheld from the public. He wondered what other information the Ministers may have agreed to keep confidential without a valid reason. He stated that he would like the Commissioner to investigate the policies and culture within the Ministers' Chief Nursing Office Directorate (CNOD) (and if need be, the wider Scottish Government) in respect of their agreeing to keep information confidential at the request of another government department, without first satisfying themselves as a public body that the confidentiality was justifiable.

### *Submissions from the Ministers*

15. The Ministers explained that the Applicant's request had been received directly into the CNOD and that unfortunately it had not been recognised as an FOI request at the time. As such, a "business as usual" approach had been taken in responding to it. As the official dealing with the request was aware that the report was commissioned and owned by Public Health England (PHE), and had been provided to the Scottish Government in confidence,

they advised the Applicant to contact the DHSC of the UK Government to obtain a copy of the report.

16. When the request for review was received, it was again not recognised as a requirement for review, and a further response was issued under “business as usual” again confirming that, as the report had been received from the DHSC with instructions not to share it any further, the Applicant should direct his request to the DHSC.
17. The Ministers conceded that the Applicant’s request was for recorded information held by them and would not fall within the criteria required to be treated under a “business as usual” approach, and they acknowledged that the initial request and review should have been considered under FOISA from the outset. They also acknowledged that, by taking the approach they did, that they had not given the appropriate consideration to the potential impact on the Applicant’s right to review and appeal.
18. When the Applicant’s appeal had been received by the Minister’s FOI Unit, they attempted to rectify the matter at that point by providing him with a further response (as noted above, on 12 February 2021). At this stage, they also became aware that PHE had subsequently released a copy of the report into the public domain and so it no longer held the quality of confidence it was provided to the Ministers under. The Ministers stated that they had apologised to the Applicant that their initial responses to his request and review did not meet the requirements set out under FOISA, and that they had also provided him with a copy of the report requested, with a small amount of information withheld under section 38(1)(b) of FOISA (Personal information).
19. The Ministers also apologised to the Commissioner for not adopting a more formal approach to the request and review, as required under FOISA, from the outset, and also for failing to fully consider the impact of the approach taken on the requester. The Ministers stated that they had learnt lessons from this case and members of staff within the CNOD had subsequently received formal FOI training and the CNOD were also in the process of reviewing their team structure to incorporate FOI awareness into their induction process, to ensure that all future requests for information were recognised as such and dealt with formally under FOISA, and a “business as usual” approach was only considered where it would be appropriate.
20. The Ministers noted the Applicant’s concerns that the CNOD had agreed to keep information confidential without a valid reason, and whether other FOI requests had been declined on the same grounds. They reiterated that the request had not initially been recognised as an information request falling to be responded to under FOISA, and consequently it was automatically refused on the basis that the information had been provided by PHE in confidence, without giving full consideration to the provisions of FOISA.
21. However, the Ministers confirmed that this was not the CNOD’s, nor the wider Scottish Government’s, standard approach to all information requests received. They stated that they were aware that under FOISA they were only permitted to withhold information in response to a request if a relevant provision or exemption of FOISA applied to that information. Their standard approach was therefore to consider each request individually on its own merits and in all the circumstances of the case, and to ensure full consideration was given to the provisions of FOISA when determining whether information should be withheld, and that the relevant tests for each exemption should be worked through to confirm whether it could be applied, irrespective of whether the information was initially provided in confidence.

### *The Commissioner's findings*

22. 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.
23. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications.
24. The Commissioner notes that, in responding to the Applicant's request and requirement for review, the Ministers made no reference to any provision of FOISA. The Ministers did not inform the Applicant of his rights to request a review or of his rights to apply to the Commissioner.
25. Section 16(1) of FOISA requires that, where an authority holds information which is subject to a request under section 1(1) of FOISA, and which it intends to withhold under any exemption, the authority must give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons).
26. Section 16(6) of FOISA also makes it clear that a notice in terms of section 16(1) is subject to section 19 of FOISA, which requires the authority to include details of the right to seek a review and apply to the Commissioner.
27. Section 21(10) of FOISA states that a Scottish public authority's response to the Applicant (under section 21(5)) following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively.
28. The Commissioner finds that, by failing to inform the Applicant with an appropriate notice, the Ministers failed to comply with Part 1 of FOISA (in particular, sections 16(6), 19 and 21(10)).
29. The Commissioner requires no further action to be taken by the Ministers in respect of this decision given that the Applicant has now been provided with the information which he requested. However, the Commissioner has noted the Ministers' failures in this case and will be taking account of this case as part of his current ongoing assessment of FOI practice at the Scottish Government.

## **Decision**

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply 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 the Ministers failed to comply with section 1(1) and in particular sections 16(1) and (6), 19 and 21(10) of FOISA, in failing to recognise and respond to the Applicant's request as a valid information request.

Given that the Applicant has now received a copy of the information from the Ministers, the Commissioner does not require any action in response to the Applicant's application.

## **Appeal**

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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.

**Margaret Keyse**  
**Head of Enforcement**

**20 October 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

#### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

#### 19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

#### 21 Review by Scottish public authority

...

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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