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Commissioner  
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# Decision Notice 055/2023

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## Incident Management Team: Nike conference Covid-19 outbreak

**Authority: Public Health Scotland**  
**Case Ref: 202101255**

### Summary

The Applicant asked the Authority for information relating to the Incident Management Team response to the Nike conference outbreak of Covid-19. The Authority acknowledged that it held relevant information, but refused to disclose it as it intended to publish the Incident Management Report within 12 weeks. The Commissioner investigated and found that the Authority had not been entitled to rely on the exemption relating to future publication for withholding information from the Applicant and, while he accepted that it did not hold some of the information, the Commissioner found the Authority had breached statutory timescales in the time taken to respond to the Applicant's requirement for review.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 21(1) (Review by a Scottish public authority); 27(1) (Information intended for future publication); 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 14 July 2021, the Applicant made a request for information to the Authority. She asked:
  - a) *Please provide copies of all Incident Management Team correspondence, assessments and reports etc related to the Nike conference investigation outbreak.*
  - b) *“Management of Public Health Incidents – Guidance on the Roles and Responsibilities of NHS led Incident Management Teams” – Please provide copies of all reports/correspondence that were generated to comply with the above document.*
  - c) *Please provide a copy of the below document*  
  
*“This document should be completed by IMTs chair as soon as possible following the end of an incident in the interim before a full IMT report is produced. This is to capture initial lessons learnt immediately (a “hot debrief”), recognising that some IMT reports take months/years to be published”*
  - d) *Please provide all documentation relating to the recommendations from the Incident Management Teams and PHS, and actions taken to date to progress implementation of them.*
2. The Authority responded on 3 August 2021. The Authority acknowledged that it held information falling within scope of the request, but relied on section 27(1) of FOISA to withhold that information, on the basis that it intended to publish the Incident Management Team (IMT) report within 12 weeks.
3. The Authority explained that this report would include a summary of the information requested, lessons learned, and any recommendations. Having considered the application of the public interest test, the Authority concluded that there was an overriding public interest in adhering to the planned schedule for release, by making the requested information available to all stakeholders at the same time.
4. On 24 August 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because:
  - a) The Authority had provided no written information which existed prior to receiving her request that confirmed a pre-existing intent to publish by 4 October 2021.
  - b) The Authority’s assertion that a “planned schedule for release” existed was not supported by the content of its own website, which did not list the publication of the IMT report of the investigation as a forthcoming publication for October 2021, or earlier.
  - c) The request was for a range of original documentation and correspondence, and clearly not just for the Authority’s interpretation of the information requested to be provided as a summary.
  - d) The request was for a range of information, including the “hot debrief” document that would have been completed in probably “H1 2020” and widely disseminated to stakeholders. The Authority had advised that the delay was also to ensure all stakeholders received information at the same time. The document "Management of Public Health Incidents: Guidance on the Roles and Responsibilities of NHS Led Incident Management Teams" repeatedly, the Applicant claimed, required the "hot debrief" document and other related documents to have already been widely shared and to be accessible to stakeholders. Thus, withholding all information requested,

including any “hot debrief” documentation, from the general public for 12 weeks was not justified, and not in the public interest

- e) The Edinburgh Nike Conference outbreak was in February 2020, and the “Management of Public Health Incidents: Guidance on the Roles and Responsibilities of NHS led Incident Management Teams” required dissemination of practice and learning from the Covid outbreak to be carried out during and as soon after the outbreak to relevant stakeholders (including Health Boards and Councils). It was thus in the public interest that the same information was now more widely circulated and also made available to the public, so the public could inform its government’s policy and practice response.
  - f) The Authority had not identified or set out in its response any competing arguments as to why the public interest would be served by publication now of the different strands of information requested.
5. The Authority notified the Applicant of the outcome of its review on 4 October 2021, upholding its original response. The Authority explained that the decision to publish was made in early 2021, and provided the Applicant with a copy of an email it considered to evidence this. The Authority went on to explain that information from the documents associated with the incident would be including within the IMT Report.
6. With regard to information which would fulfil parts c) and d) of the Applicant’s request, the Authority commented that “Management of Public Health Incidents: Guidance on the Roles and Responsibilities of NHS Led Management Teams” was guidance and not mandatory. The Authority explained that it had reviewed the activity from the IMT and a specific hot debrief did not take place for this incident and no formal recommendations from the IMT were available.
7. On 5 October 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority’s review because:
- a) The response to her request for review was late.
  - b) Her request for information went far beyond just receiving publication of a summarised IMT report.
  - c) No correspondence or process documentation as the IMT progressed, as requested, had been disclosed.
  - d) No documentation or correspondence had been disclosed regarding recommendations or actions to progress implementation of recommendations, such as to the wider NHS, Government and Councils.
  - e) The copy of the email provided as evidence of the Authority’s intention to publish the information in 12 weeks did not demonstrate such an intention, and did not in any way substantiate or support legitimate use of section 27(1).
  - f) Some of the information requested had to be published by 5 October 2021 (12 week rule), even if the Authority’s use of section 27(1) was valid. There was still no intended specific date for publication mentioned in the Authority’s reply.

- g) The information requested related to key aspects of the pandemic response, so using the impact of the pandemic as reasoning for significantly delayed publication of the IMT response of 2020 was both perverse and weak reasoning.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 22 November 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its application of section 27(1) of FOISA, as well as seeking confirmation as to whether the Authority was seeking to rely on section 17(1) of FOISA for information which would fulfil parts c) and d) of the Applicant's request (as the review outcome appeared to suggest). Questions were asked about the nature of the searches carried out by the Authority which led it to conclude that it held no recorded information for these parts. An explanation was also requested regarding the delay in responding to the Applicant's requirement for review.

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

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

### ***Background***

12. This appeal relates to a conference which took place in Edinburgh in early 2020 (now commonly referred to as the "Nike Conference"), following which there was an outbreak of Covid-19.

### ***Section 27(1) – Information intended for future publication***

13. Section 27(1) of FOISA provides that information is exempt from disclosure where the following tests are met:
- (i) the information is held with a view to its being published, by a Scottish public authority or any other person, at a date not later than twelve weeks after that on which the request for information is made;
  - (ii) when the request is made, the information is already being held with a view to its being published, and
  - (iii) it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.

14. Section 27(1) recognises that, where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with necessary preparation, administration and context of publication.
15. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
16. Under the exemption, information intended for publication within twelve weeks is exempt from disclosure where it is “reasonable in all the circumstances” to withhold the information until the planned publication date. The authority should be able to demonstrate that a publication timetable has already been decided and it is not simply delaying the release of information for twelve weeks.
17. In order for section 27(1) to be upheld, the Commissioner must consider whether all of the tests required by this exemption can be met in the circumstances of a particular case.

*Was the information held with a view to publication at the time of the request?*

18. It is key to the application of this exemption that the Authority must be able to establish that it already intended to publish the information when it received the request. The information must have been held with a view to publication (within 12 weeks) at that time.
19. In her submissions to the Commissioner, the Applicant commented that the email provided to her as proof of the Authority’s prior intention to publish the information, and a prior intention to publish within 12 weeks of her FOI request dated 14 July 2021, did nothing of the kind, and did not in any way substantiate or support legitimate use of section 27(1).
20. In its submissions, the Authority explained that the write up of the incident report was not a priority with all the other work it was undertaking to support the national response to the Covid-19 pandemic. It also noted that there had been a change in the personnel involved in writing up the report.
21. The Authority submitted that the redacted email provided to the Applicant was provided to show that there was intent by the organisation to publish an incident report.
22. Having read the content of the email provided to the Applicant, the Commissioner agrees with the Applicant that there is nothing within this email which indicates an intention on the part of the Authority to publish the relevant IMT Report. The email demonstrates an intention to discuss the preparation of the report in February 2021, nothing more. Furthermore, it is unclear from the submissions made by the Authority how far along the process of writing the report it was when the Applicant made her request. In these circumstances, the Commissioner cannot accept that the information requested was held with a view to publication by the Authority not later than 12 weeks after the request.
23. Given that the first part of the test in section 27(1) cannot be met by the Authority, the Commissioner finds that the Authority was not entitled to rely on the exemption in section 27(1) of FOISA for withholding the information in the IMT Report.
24. As the Commissioner is not satisfied that the Authority was entitled to rely on the exemption in section 27(1) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

**Section 1(1) of FOISA**

25. 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 here.

26. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
27. The Applicant's information request in this case covered the information set out in paragraph 1 above. As mentioned already, in response to her information request, the Authority relied on the exemption in section 27(1) of FOISA for withholding a summary of the information she had requested which was contained in the IMT Report. This was, the Authority explained, a summary of the information requested, lessons learned and any recommendations.
28. In her submissions to the Commissioner, the Applicant has made it clear that her request for information went far beyond just receiving publication of a summarised IMT report from the Authority. The Applicant commented that the Authority had disclosed no correspondence or process documentation as the IMT progressed. She also explained that no documentation or correspondence has been disclosed regarding recommendations or actions to progress the implementation of recommendations, such as to the wider NHS, Government and Councils.
29. In its submissions, the Authority explained that information contained within various documents was used to inform the narrative of the IMT Report, and provided examples.
30. On the basis of the submissions received from the Authority, the Commissioner is not satisfied that the information in the IMT Report, which was published on the Authority's website, satisfied the terms of parts a) and b) of the Applicant's request.
31. Therefore, even if the Commissioner had accepted (which he has not) that the Authority was entitled to rely on the exemption in section 27(1) of FOISA for the IMT Report, he must still find that the information in the report did not fulfil parts a) and b) of the Applicant's request. As a consequence, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA in responding to the Applicant's request.

### **Section 17(1) - Information not held**

#### *Parts c) and d) of information request*

32. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing that it does not hold the information.
33. In parts c) and d) of her information request, the Applicant asked for a copy of a "hot debrief" document, and all documentation relating to the recommendations from the IMT and the Authority, and actions taken to date to progress implementation of them.
34. In the Authority's response to the Applicant's requirement for review, it explained that "Management of Public Health Incidents: Guidance on the Roles and Responsibilities of NHS Led Management Teams" was guidance and not mandatory. The Authority commented that it had reviewed the activity from the IMT and a specific hot debrief did not take place for this incident and no formal recommendations from the IMT were available.
35. In response to the Commissioner's request for submissions, the Authority confirmed that it was seeking to rely on section 17(1) of FOISA in relation to this information.
36. The Authority submitted that staff who had originally worked on the incident had left and, following receipt of the request, a meeting was arranged with COVID Incident Directors and

the member of staff responsible for writing the IMT Report. During this meeting, clarification was received that no hot debrief had taken place for this incident: as a consequence, no searches were undertaken.

37. The Authority stated that there is no legal duty placed upon it to hold information which would fulfil parts c) and d) of the Applicant's request.
38. Whilst the document "Management of Public Health Incidents: Guidance on the Roles and Responsibilities of NHS Led Incident Management Teams" refers to hot debriefs at various points as a way to capture initial lessons learnt immediately, the Authority submitted that this guidance states it this is not prescriptive.
39. With regard to information which would be covered by part d) of the Applicant's request, the Authority explained that any recommendations of that nature would be outlined in a hot debrief as a matter of standard practice. Because no hot debrief was held in relation to this case, it held no information of the nature covered by part d).

#### *Commissioner's conclusions*

40. 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, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what information is actually held by the public authority (or was, at the time the request was received).
41. Having considered all of the submissions, the Commissioner acknowledges that the guidance document referred to by the Authority in paragraph 35 above states that "it is intended to be strategic but not prescriptive".
42. Although no formal searches were carried out by the Authority to determine whether recorded information was held which would fulfil parts c) and d) of the Applicant's request, the Commissioner is satisfied that the personnel approached were the most likely to know whether such information existed and was held by the Authority.
43. The Commissioner also recognises that there appears to be no legal requirement or internal or external guidance which requires the Authority to create a "hot debrief" document or information relating to recommendations from the IMT Team, and actions to progress implementation of them.
44. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received from the Applicant) hold recorded information which would fulfil parts c) and d) of the Applicant's request. The Authority was therefore entitled to rely on section 17 of FOISA, on the basis that it did not hold information which would fulfil parts c and d of the Applicant's request.
45. However, in failing to notify the Applicant clearly that it was relying on section 17(1) of FOISA in relation to information which would fulfil parts c) and d) of her request, on the basis that it held no relevant information, the Authority failed to comply with Part 1 of FOISA.

### ***Failure to comply with timescales in FOISA***

46. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review, subject to exceptions which are not applicable in this case.
47. The Applicant submitted a requirement for review on 24 August 2022. The Authority did not notify the Applicant of the outcome of its review until 4 October 2022.
48. The Commissioner finds that the Authority failed to respond to the Applicant's requirement for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale, the Authority failed to comply with Part 1 of FOISA.
49. Given that the Authority did provide a response to the Applicant's requirement for review, the Commissioner does not require the Authority to take any further action in relation to this particular breach, in response to this decision.

### **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the Applicant's information request.

The Commissioner finds that the Authority was entitled to inform the Applicant that information was not available which would fulfil parts c) and d) of her request. By failing to notify the Applicant clearly, in line with section 17(1) of FOISA, that it held no recorded information falling within scope of parts c) and d) of her request, the Commissioner finds the Authority failed to comply with Part 1 of FOISA.

The Commissioner also finds that the Authority was not entitled to rely on section 27(1) of FOISA for withholding information from the Applicant, and that it failed to comply with section 21(1) of FOISA in relation to the time taken to respond to the Applicant's requirement for review.

The Commissioner therefore requires the Authority to issue a revised review outcome to the Applicant (otherwise than by applying section 27(1) of FOISA), in line with section 21(4)(b) of FOISA, by **17 July 2023**.

### **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.



## **Enforcement**

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

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

**1 June 2023**

## **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.”
- ...
- (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.
- ...

#### **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.
- ...

#### **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.
- ...

## **27 Information intended for future publication**

(1) Information is exempt information if-

- (a) it is held with a view to its being published by-
  - (i) a Scottish public authority; or
  - (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...

## **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).

...