



Decision Notice 017/2024

Scientific evidence for the ongoing use of masks in NHS settings

Authority: Healthcare Improvement Scotland
Case Ref: 202200634

Summary

The Applicant asked the Authority for the scientific evidence which justified the ongoing requirement for the use of masks in NHS settings. The Authority notified the Applicant that it did not hold any information covered by the request. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that information was not held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 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 18 May 2022, the Applicant made a request for information to the Authority. They asked for the scientific evidence which justified the ongoing requirements for the use of masks in NHS settings.
2. The Authority responded on 24 May 2022. The Authority issued a notice to the Applicant under section 17(1) of FOISA, and stated that it did not hold the information the Applicant requested. However, it did explain that because the guidance for the ongoing use of masks

had been provided by the Scottish Government, they might be able to provide the evidence for this. A link was provided to a webpage to enable the Applicant to make their request to the Scottish Government. Links to sources of information regarding evidence around the use of masks were also provided to the Applicant. These links were all for bodies other than the Authority.

3. On 29 May 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because, having searched the database resources provided, there was no clear scientific evidence that masks afforded protection against SARS Covid-2 in general. The Applicant questioned why the mask mandate should continue in clinical settings when it was not enforced in any other settings, as they considered this to make no logical sense and noted that they could find no scientific evidence to support the practice. The Applicant commented that they did not think a request to the Scottish Government would be appropriate, because the policy makers followed the science and it was the Authority who promulgated this science. As such, the Applicant indicated that they would be interested to see the science the Authority provided to the Scottish Government for them to generate policy.
4. The Authority notified the Applicant of the outcome of its review on 1 June 2022. The Authority explained that the Scottish Government had not made a request to it for the provision of evidence to support the decision for continuing mask use in clinical settings. For that reason, it upheld its decision to rely on section 17 of FOISA.
5. On the same date, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they did not agree that the Authority did not hold information covered by their request. The Applicant noted their understanding that the Scottish Government followed the science when creating Covid policy and that all the policy directives were applied by this Authority, who also advised the government on policy matters relating to health. The Applicant therefore questioned where the science arose from, if not from this Authority.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 June 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority provided some comments about its handling of and response to the Applicant's request, and the application was then 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 Authority was invited to provide further comment on this application and to answer specific questions. These related to a request for evidence to support the submissions made earlier by the Authority as to why it did not hold relevant information, as well as to provide a description of the role of a specific service area within the Authority.

Commissioner's analysis and findings

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

Section 17 – (Notice that information is not held)

10. 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.
11. 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. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant a notice in writing to that effect.
12. The Applicant believed that information falling within scope of their request was held by the Authority, because they understood that the Authority advised the Scottish Government on any policy matters relating to health, and that the Scottish Government followed the science when creating Covid policy.
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 of probabilities 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 reason 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 about what the authority should hold, ultimately 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 authority.

The Authority's submissions

14. In its submissions, the Authority explained that its Directorate of Evidence provides advice and guidance on a range of medicines and health technologies. This work is, the Authority explained, derived from Government commissions and topics generated from NHS Scotland planning and clinical forums, which align with the statutory functions of the Directorate and the Authority's strategy.
15. Because the Applicant's request was specific to the Evidence Directorate, staff within that service area were asked to consider the request. The Authority stated that it is the role of the Evidence Directorate to develop evidence-based advice, guidance and standards, sometimes known as secondary research, for health and care professionals to provide safer and more effective care.
16. In terms of the original question regarding origins of the science base for face coverings, the Authority considered it to be a legitimate assumption that it would hold this information, given that the teams within the Evidence Directorate undertake reviews and analysis of science-based research relating to a range of health conditions and technologies. However, the Authority submitted that the Director of Evidence (who considered the request) informed the Information Governance Team within the Authority that it had not been commissioned to

provide any evidence-based guidance on this topic. The Authority provided extracts from its workload planning system and monthly reports to support this assertion.

17. The Authority explained that its other Directorates carry out different roles which are not focused on establishing a research evidence base. The Authority provided a description of the roles of each of the other Directorates.
18. The Authority commented that no searches were undertaken for relevant information falling within scope of the request, because evidence production of this nature was not commissioned to the Authority during the pandemic.
19. The Authority explained that Public Health, Infection, Workplace etc. issues are the remit of Public Health Scotland (PHS), but the taskforces linked to the evidence production fed to the Scottish Government advisers were not known by the Authority. It was for this reason that the Authority suggested that an information request should be sent to the Scottish Government, as they would have likely derived a policy decision from various sources which were commissioned to support the management of the pandemic.
20. In terms of whether there would have been any expectation that the Authority may hold information covered by the request, the Authority acknowledged that it was reasonable to assume that it may have undertaken work in this area, given the existence of the Evidence Directorate. However, the remits of the National Boards are specific and public health measures are not part of the Authority's Evidence remit.
21. The Authority explained that in its initial response to the Applicant's request it had included links to sources of information it felt were appropriate, but it acknowledged that it did not inform the Applicant of the role of PHS.
22. The Authority considered that given its role, PHS would be better able to direct the Applicant to information relevant to the request, if it did not in fact hold it.

The Applicant's submissions

23. As mentioned above, the Applicant did not agree that the Authority did not hold the information covered by their request. The Applicant understood that the Scottish Government followed the science when creating Covid policy and all policy directives were applied by the Authority, who also advised the government on policy matters relating to health. As such, the Applicant queried where the science arose from if not this Authority.
24. The Applicant also provided the Commissioner with a number of scientific articles relating to the efficacy of the use of mask wearing to protect against SARS- CoV-2, COVID-19 and other respiratory viral infections. In highlighting the content of these articles, the Applicant explained that they were interested to see which scientific evidence the Scottish Government's mask policy was based on.

The Commissioner's view

25. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that although the Authority did not carry out searches for information covered by the Applicant's request, it did undertake adequate and proportionate steps in the circumstances to establish whether it held any information falling within scope of the Applicant's request.
26. The Commissioner is also satisfied that the Authority consulted appropriate personnel within relevant service areas to determine whether information was held which would fulfil the

request. The Commissioner also accepts, from reading the extracts provided from its workload planning system and monthly reports, the Authority's assertion that it was not commissioned by the Scottish Government to undertake work which would lead to information of the kind covered by the Applicant's request being held.

27. Given the nature of the information requested, and the explanations provided by the Authority, the Commissioner is satisfied that the submissions provided by the Authority sufficiently explain why it would not expect to hold the information requested.
28. In the circumstances, the Commissioner is therefore satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of the Applicant's request. He finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

Section 15(1) – Duty to advise and assist

29. Section 15(1) of FOISA provides that a Scottish public authority must, as far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
30. Whilst the Authority did not hold information related to the specific request made by the Applicant, it did, in response to their request, provide advice to them to consider making an information request to the Scottish Government, which they considered would be more likely to hold relevant information. The Commissioner concludes that, in the circumstances, the Authority provided reasonable advice and assistance to the Applicant and therefore it complied with section 15(1) of FOISA.

Other matters

31. As noted above, in its submission to the Commissioner, the Authority has commented that it is likely that PHS would be able to direct the Applicant to relevant information, if it did not actually hold information relevant to the request. Based on this guidance from the Authority, the Commissioner would therefore recommend that the Applicant may wish to consider making a request to PHS for the information they are seeking.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

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.

Euan McCulloch
Head of Enforcement

1 February 2024

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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- ...

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.
- ..

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).

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