

Decision Notice 107/2022

Face masks in schools

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202101430



Scottish Information
Commissioner

Summary

The Ministers were asked, in relation to Covid-19, for the specific criteria to be met before secondary pupils would no longer be required to wear face masks in school all day. The Ministers notified the Applicant, under section 17(1) of FOISA, that they did not hold this information. Following an investigation, the Commissioner was satisfied that the Ministers did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 10 August 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was in three parts (only the third part is the subject of this investigation):
 - 1) *All scientific and clinical evidence that was used to decide that it is safe for a 16 or 17 year old attending college not to wear a face mask while in classes, but unsafe for a 16 or 17 year old to attend school without wearing a mask all day.*
 - 2) *Any email correspondence between the Scottish Government and the EIS discussing the requirement for secondary school pupils to wear masks all day at the start of the autumn term.*
 - 3) *The specific criteria (rates of virus, rates of vaccination in teachers, rates of vaccination in young people) that must be met before secondary pupils will no longer be required to wear masks in school all day.*
2. The Ministers responded on 19 October 2021. In response to requests 2) and 3), they gave the Applicant notice, in terms of section 17(1) of FOISA, that they did not hold the information. In response to request 1), the Ministers relied on section 25(1) of FOISA, arguing that the information was already in the public domain. The Ministers provided the Applicant with a number of weblinks which held the information asked for in request 1).
3. On 20 October 2021, the Applicant wrote to the Ministers requesting a review of their response to request 3), on the basis that she believed the information must be held.
4. The Ministers notified the Applicant of the outcome of their review on 17 November 2021. They upheld their original response and maintained that they were right to give her notice, under section 17(1) of FOISA, that the information was not held. They explained that decisions on mitigations within secondary school settings were not linked to specific criteria as she described in the request, but instead took into account a wide range of evidence. For these reasons, the Ministers concluded that they did not hold the information asked for.

5. On 18 November 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 Ministers' review because she believed the Ministers did have an exit strategy for removing masks in schools.

Investigation

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 9 December 2021, the Ministers were notified in writing that the Applicant had made a valid application and the case was 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 Ministers were invited to comment on this application and to answer specific questions. These related to their reasons for concluding that they did not hold the information requested by the Applicant.

Commissioner's analysis and findings

9. 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 the Ministers. He is satisfied that no matter of relevance has been overlooked.

Scope of Investigation

10. As the Commissioner can only undertake an investigation into a public authority's response to an Applicant's request and requirement for review, the scope of his investigation in this case must be whether any information is held on an exit strategy for removing masks in schools.
11. The Applicant submitted that she had asked a fair question, the answers to which should be in the public domain. She did not agree that the Ministers did not hold the information requested.

Section 17 – Information not held

12. 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.
13. 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. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to this effect.

Submissions from the Applicant

14. In her application to the Commissioner, the Applicant submitted that it was difficult to accept that the Ministers did not have a "goal figure" for the number of children that had to be vaccinated before face masks could be removed in secondary schools. The Applicant noted

that the First Minister was on record as saying the initial goal for vaccination uptake in adults was 80%. The Applicant submitted that the Ministers' reasons for refusing to provide the information appeared to have changed between their first response to her information request and their response to her requirement for review. The Applicant argued that it was difficult to accept, in the circumstances, that the Ministers did not have an exit strategy for removing face masks in school.

Submissions from the Ministers

15. In their submissions, the Ministers explained that they did not hold any information in relation to an "exit strategy". The Ministers submitted that the Covid-19 Advisory Sub-Group on Education and Children's Issues considered a wide range of evidence, including clinical and public health evidence relating to vaccine efficacy, potential health harms, harms caused by public interventions, case numbers and views on risks, when providing advice on mitigations within secondary school settings. They noted that they had explained to the Applicant that both minutes of the Sub-Group's meetings and its published advice were available on the Scottish Government website.

16. The Ministers referred to the [minutes of the Sub-Group meeting held on 24 August 2021](#)¹, and the [advice on the return to school in August 2021](#)² (Mitigations in schools and ELC settings) which notes (at paragraph 35):

Subject to review of the data and evidence in September to assess any impact of the change in [isolation] policy on prevalence, serious illness and hospitalisation, schools should then move to a position where the baseline mitigations set out below are in place to reduce the risk of transmission and stop the virus resurging. All other (non-baseline) mitigations should be removed.

17. The Ministers also referred to the [Sub-Group meeting on 8 February 2022](#)³, which discussed the relaxation of mitigations, including the removal of the requirement to wear face coverings in secondary schools:

The sub-group considered their advice on mitigations in schools, including whether it remained appropriate and proportionate to retain the requirement for face coverings to be worn in classrooms by secondary age pupils. A series of key factors were highlighted which demonstrated that it was the right time to relax advice on some mitigations, including that: case rates were falling for secondary-aged young people; hospitalisation rates were falling across all age categories; and the estimated R rate was below 1 and decreasing.

18. Whilst acknowledging that these minutes fall outwith the scope of the request, the Ministers argued that they demonstrated that the Covid-19 Advisory Sub-Group on Education and Children's issues consider a wide range of evidence when providing advice on mitigations within secondary settings. They submitted that policy officials have confirmed that the Ministers take account of this advice when making their decisions.

19. The Ministers maintained that there were no specific criteria in terms of the rates of virus, rates of vaccination in teachers, rates of vaccination in young people or other measure which would trigger the relaxation of wearing face masks in schools, because these decisions were

¹ <https://www.gov.scot/publications/coronavirus-covid-19-advisory-sub-group-on-education-and-childrens-issues-minutes-24-august-2021/>

² <https://www.gov.scot/publications/coronavirus-covid-19-advisory-sub-group-on-education-and-childrens-issues-return-to-school-in-august-2021/pages/mitigations/>

³ <https://www.gov.scot/publications/coronavirus-covid-19-advisory-sub-group-minutes-8-february-2022/>

informed by a range of evidence, including the advice provided by the Covid-19 Advisory Sub-Group on Education and Children's Issues. The Ministers reiterated that they do not, therefore, hold any information setting out the specific criteria in terms of the information requested. The Ministers submitted that the Applicant had asked for information which did not exist, and that they were correct to give her notice under section 17(1) of FOISA.

20. The Ministers were questioned about the searches they had conducted and explained that they had searched the advisory sub-group folders and inbox with the terms "face covering", together with "remove" and "relax". They submitted that staff in the Covid Education Recovery Group Secretariat also undertook searches of their inboxes and files.
21. As a result of these searches, the Ministers identified seven documents which contained related information (in part) and they provided the Commissioner with copies of these documents. The Ministers noted that, while none of these seven documents fell within the scope of the request, the content of these documents supported their view that there were no set criteria that determined whether or not secondary school children should wear face masks in schools.

Commissioner's conclusions

22. The standard of proof to determine whether a Scottish public authority holds information is the civil standard on the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the 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. Ultimately, however, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
23. Having considered all of the relevant submissions and the terms of the request and scope of the investigation in this case, the Commissioner accepts that the Ministers interpreted the scope of the Applicant's request correctly in this case. He also accepts, on the basis of the submissions received, that it took adequate and proportionate steps in the circumstances to establish if the information was held. The Commissioner has reviewed the content of the seven documents identified by the Ministers and he is satisfied that they do not fall within the scope of the request, and that they do, in fact, provide documentary evidence that supports the Ministers' view that there are no set criteria which will determine the rules around mask-wearing in secondary schools.
24. Given the explanations and submissions provided, the Commissioner is satisfied that at the time of this request, the Ministers did not hold the information requested by the Applicant. The Commissioner accepts that the decisions made by the Covid-19 Advisory Sub-Group on Education and Children's Issues considered a wide range of evidence when providing advice on mitigations within secondary school settings, as explained by the Ministers, rather than being guided by set criteria.
25. Therefore, the Commissioner concludes that the Ministers were correct to give the Applicant notice, in terms of section 17(1) of FOISA, that they held no such information. Although the Applicant believed and expected the specified information to be held by the Ministers, the Commissioner is satisfied that this was not the case.

Decision

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

Appeal

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

24 October 2022

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.

...

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info