

The Scottish COVID-19 Inquiry

Protocol on Public Access to Documents: Redaction etc.

1. Introduction

- 1.1 This Protocol is about redaction of information by the Inquiry from documents before they are published. It also explains the procedure to be followed if any document provider wishes information to be redacted or otherwise not provided to the Inquiry.
- 1.2 The Inquiry will seek and receive documents during its investigation. Because it is a public inquiry under the Inquiries Act 2005, there will be public access to many documents it obtains (see section 18). The Inquiry aims to be as transparent as possible.
- 1.3 Sometimes it is inappropriate for a document or everything in it to be made public. It might be necessary to redact or “black out” words for a number of reasons, for example to protect somebody’s identity, protect sensitive information, or exclude information not relevant to the Inquiry’s terms of reference. The 2005 Act also provides for some other situations in which something

might not be published by the Inquiry or withheld from it (sections 19 to 23).

- 1.4 When a document provider considers that any information it has been asked to provide to the Inquiry ought to be redacted prior to the Inquiry publishing the information, the document provider should follow the procedure set out in paragraph 4 below.
- 1.5 More detail on the type of information that the Inquiry may consider it appropriate to redact, and why, is contained in paragraph 5 below.
- 1.6 When a document provider claims, under section 21 of the 2005 Act, that it is unable to comply with a request for information, or that it is not reasonable in all the circumstances for the document provider to be required to do so, the document provider should follow the procedure in paragraph 3 below.
- 1.7 When a document provider considers public interest immunity or privilege may apply under section 22 of the 2005 Act, the document provider should act in accordance with paragraph 6 below.
- 1.8 When a document provider seeks to have restrictions imposed on disclosure or publication of information

given, produced or provided to the Inquiry, under sections 19 and 20 of the 2005 Act, the document provider should follow the procedure in paragraph 7 below.

1.9 The Appendix to this Protocol contains, among other things, a note of:

1.9.1 the definitions of terms used in this Protocol; and

1.9.2 legislation and rules relevant to this Protocol.

2. Provision of documents to the Inquiry

2.1 All documents must be provided to the Inquiry in a way that is in accordance with the Inquiry's [Protocol for Receipt and Handling of Information](#).

3. Information to be provided to the Inquiry

3.1 The Inquiry can issue written requests for information, in terms of rule 8 of the 2007 Rules.

3.2 The Chair has powers, under section 21 of the 2005 Act, to compel people to provide information to the Inquiry.

The Chair can issue notices which set out what is required, and other details such as the possible consequences of non-compliance.

- 3.3 People who receive a notice, or any other request for information, **should provide complete copies of any information requested by the Inquiry**. They should not themselves make any redaction to the information before providing it to the Inquiry unless such redaction would comply with a determination made by the Chair under section 21 or section 22 of the 2005 Act or has otherwise been agreed in advance with the Inquiry. This is because any notice under section 21 of the 2005 Act covers all of the information requested. It is not confined only to parts of the information sought that the document provider itself considers the Inquiry should see.
- 3.4 When a document provider claims under section 21(4) of the 2005 Act that they are unable to comply with a notice under section 21, or that it is not reasonable in all the circumstances to require the document provider to comply with the notice, the document provider must promptly give its reasons to the Inquiry.
- 3.5 The Chair will then determine the document provider's claim and may request further information from the

document provider to allow the Chair to do so. In determining the document provider's claim the Chair may revoke or vary the notice or may decline to do so. The document provider must thereafter abide by the determination made and conduct itself otherwise in accordance with this Protocol.

4. Redaction of information

4.1 Provision of information to the Inquiry must not be delayed on the ground that a document provider wants redactions to be made.

4.2 When a document provider wants information to be redacted prior to the Inquiry publishing the information, the document provider should:

4.2.1 provide the information to the Inquiry in a way which marks the parts of the information that the document provider wants redacted;

4.2.2 use a method of marking the information which at all times allows the Inquiry to see the content of the parts the document provider wants redacted (e.g. by highlighting those parts in yellow) and the reasons for those redactions; and

- 4.2.3 provide the information in duplicate, with one version being the clean original version and the other being the version marked with proposed redactions in accordance with paragraph 4.2.2 above.
- 4.3 Document providers should have regard to the relevant provisions of the 2005 Act when giving reasons for proposed redactions, and must take a reasonable and proportionate approach when seeking redactions or to withhold information. These decisions will be made against the background that the Chair is obliged under section 18 of the 2005 Act to take reasonable steps to ensure that the public are able to view documents provided to the Inquiry, subject to any restriction imposed under sections 19 and 20.
- 4.4 The Inquiry may seek further information or explanation from the document provider to allow it to reach a view on any proposed redaction.
- 4.5 The Inquiry will decide what information needs to be redacted and will consider representations made by providers in coming to a view.
- 4.6 In deciding whether to redact any information, the Inquiry will consider whether the release of the

information is in the public interest, proportionate, relevant to the Inquiry's [Terms of Reference](#) and lawful and reasonable. It will consider, among other things:

4.6.1 sections 18 to 22 of the 2005 Act;

4.6.2 rule 11 of the 2007 Rules;

4.6.3 the Inquiry's [Protocol for Receipt and Handling of Information](#); and

4.6.4 the Inquiry's [Privacy Notice](#).

4.7 Subject to any restriction imposed under sections 19 and 20 of the 2005 Act, and to the operation of rule 11 of the 2007 Rules, information which may be put in evidence in the Inquiry will be:

4.7.1 disclosed to any core participants under such redactions as may have been made by the Inquiry;

4.7.2 available for use in evidence in such redacted form; and

4.7.3 liable to be published on the Inquiry's website in such redacted form.

5. The type of information the Inquiry might redact

5.1 Personal data, irrelevant information, and information which if disclosed might give rise to a risk of harm, are all types of information that might be redacted by the Inquiry.

Personal data

5.2 The Inquiry will not itself routinely redact personal data, although it may redact the following categories of information where necessary:

5.2.1 information which identifies those under the age of 16 years. This approach takes into account the likelihood of such persons being less aware of the consequences and long-term implications of being named and identified publicly in the context of the Inquiry's investigations together with their likely inability to make applications for redaction or restriction on their own behalf. Those with responsibility for any core participants or witnesses under the age of 13 years will be consulted on their views and wishes regarding the redaction of the child's identity and such views and wishes will be taken into account before redactions are applied. Where information identifies those between

the ages of 13 and 16 years, the person so identified may also be consulted on their own views regarding the redaction of their identities and such views will be taken into account before any redactions are applied;

- 5.2.2 residential addresses;
 - 5.2.3 dates of birth. Ages, where referred to, may remain un-redacted in order to provide relevant context;
 - 5.2.4 personal contact details, including telephone numbers and email addresses, unless they have significance for the Inquiry's investigations (in, for example, establishing who sent an email to whom). Contact details of individuals acting in a professional capacity may remain un-redacted given the limited risk to individuals in question;
 - 5.2.5 copy signatures;
 - 5.2.6 medical information which identifies individuals, or other information that may be considered to be sensitive, and such individuals are not core participants or witnesses.
- 5.3 Document providers should ensure that all personal data is identified in documents they provide to the Inquiry.

That should be done in the way described in paragraph 4.2 above.

Irrelevant information

5.4 There may be instances where information is not relevant to the Inquiry's Terms of Reference and, if released, may compromise a reasonable expectation of privacy. Some examples are:

5.4.1 medical information of individuals where the release of that information is not necessary for the fulfilment of the Inquiry's [Terms of Reference](#); and

5.4.2 names and contact details of individuals acting in a professional capacity where the release of those details is not necessary for the fulfilment of the Inquiry's [Terms of Reference](#). For example, it is possible that the names and identities of junior members of staff who were only copy recipients of correspondence (where they can be identified as such) may properly be considered by the Inquiry to be irrelevant and suitable for redaction by the Inquiry.

Risk of harm

- 5.5 In situations where the risk of harm, including physical, emotional, or psychological harm, would outweigh the public interest in disclosure, the Inquiry will apply redactions to the compromising information. If a document provider considers that harm may be suffered as a result of disclosure of information, they should provide that information to the Inquiry together with an explanation of the harm it claims may occur and the risk of that happening.
- 5.6 In addition to the risk of physical, emotional, or psychological harm, the Inquiry will consider making redactions to protect other interests that may be harmed by disclosure. For example, where a document provider has reasonable grounds for believing that an employer may take action against the document provider for being involved with, or sharing information with, the Inquiry, information identifying the document provider may be redacted, or it may be suggested to them that they consider applying for a restriction order under sections 19 and 20 of the 2005 Act.
- 5.7 In all cases, where the Chair is satisfied that there is a risk of harm, she will balance the risk and effect of any harm with her general duty under section 18 of the 2005 Act to secure public access to inquiry proceedings and information.

6. Withholding or redacting privileged and public interest immunity information

- 6.1 When a document provider considers, on the basis of privilege under section 22(1) of the 2005 Act, that it is entitled to withhold information, or a document should be redacted to exclude such information, the Inquiry expects and requires the document provider to give careful consideration to waiving any privilege that may be considered to arise, given the importance and breadth of the matters the Inquiry requires to investigate under its [Terms of Reference](#).
- 6.2 When a document provider considers, on the basis of public interest immunity under section 22(2) of the 2005 Act, that it ought to withhold information or that a document should be redacted to exclude such information:
- 6.2.1 the document provider should give to the Inquiry the reasons why it considers public interest immunity applies, taking account of the balance of the relevant interests; and

6.2.2 the Chair will determine the balance of relevant interests and whether public interest immunity applies, and whether the document provider is entitled to withhold the information or it should be redacted from documents.

7. Restrictions on disclosure or publication of information provided

7.1 A document provider may, under sections 19 and 20 of the 2005 Act, apply to the Chair for a restriction order (or variation of a restriction order) imposing restrictions on disclosure or publication of information given, produced or provided to the Inquiry. In doing so, the document provider must give its reasons to the Inquiry in support of its application, having regard to the terms of sections 19 and 20 of the 2005 Act. The Chair will then determine the document provider's application and may request further information from the document provider to allow the Chair to do so. The document provider must abide by the determination made and conduct itself otherwise in accordance with this Protocol.

8. Appendix

Definitions

8.1 In this Protocol:

'2005 Act' means the [Inquiries Act 2005](#).

'2007 Rules' means [The Inquiries \(Scotland\) Rules 2007](#).

'Chair' means the Chair of the Inquiry.

'core participant' means a person designated as such under rule 4 of the 2007 Rules.

'cipher' means a three letter code used in substitution for the name of a person.

'document provider' means a party who has been requested to provide, or has provided, information to the Inquiry, whether voluntarily or in compliance with a section 21 notice.

'information' means information recorded in any form, and for the avoidance of any doubt and without prejudice to that generality: (1) includes any document; and (2) where it relates to producing or providing information

which is recorded otherwise than in legible form is to be read as a reference to producing or providing a copy of the information in legible form.

'Inquiry' means the Scottish COVID-19 Inquiry.

'personal data' means any information which is capable of identifying directly or indirectly a living natural person.

'redaction' means the removal of any part of any information, and for the avoidance of any doubt and without prejudice to that generality, includes both the blacking out of words or images and the use of a cipher. *'redact'* and *'redacted'* are to be construed accordingly.

'section 21 notice' means a notice issued pursuant to section 21 of the 2005 Act.

Legislation and Rules

- 8.2 The Inquiry is a statutory inquiry established under the 2005 Act. As a result, it has statutory powers to request and receive information relevant to its investigations and other functions.

8.3 In addition, the 2007 Rules, made under section 41 of the 2005 Act, make further provision relevant to the conduct of the Inquiry.

8.4 A brief summary of some of the key provisions of the [2005 Act](#) and [2007 Rules](#) is set out below. The summaries are not exhaustive and the provisions themselves should be looked at for their full terms.

2005 Act

8.4.1 Under section 17 the procedure and conduct of the Inquiry are such as the Chair may direct.

8.4.2 Under section 18 the Chair must take such steps as the Chair considers reasonable to ensure that members of the public are able to view information provided to the Inquiry.

8.4.3 Sections 19 and 20 make provision, among other things, for the imposition of restrictions on disclosure or publication of any information provided to the Inquiry. A restriction order imposed by the Chair under section 19 can specify only such restrictions:

- as are required by any statutory provision, retained enforceable EU obligation or rule of law; or

- as the Chair considers to be conducive to the Inquiry fulfilling its [Terms of Reference](#) or to be necessary in the public interest, having regard in particular to the following matters:
 - the extent to which any restriction might inhibit the allaying of public concern;
 - any risk of harm or damage that could be avoided or reduced by any such restriction;
 - any conditions as to confidentiality subject to which a person acquired information that the person is to give, or has given, to the Inquiry;
 - the extent to which not imposing any particular restriction would be likely;
 - to cause delay or to impair the efficiency or effectiveness of the Inquiry; or
 - otherwise to result in additional cost (whether to public funds or to witnesses or others).

8.4.4 Section 21 empowers the Chair to require a person by notice, within such period as appears to the Chair to be reasonable, to provide information to the Inquiry. In terms of section 21(4) the Chair determines any claim by a document provider that:

- the document provider is unable to comply with a notice under section 21 of the 2005 Act; or

- that it is not reasonable in all the circumstances to require the document provider to comply with the notice.

8.4.5 Section 22 lists exemptions to section 21 so that certain privileged information is excluded from what may be required to be produced under section 21. In summary those exemptions are:

- Information a person could not be required to produce if the Inquiry were civil court proceedings in Scotland (section 22(1)(a)).
- The requirement to produce information would be incompatible with a retained EU obligation (section 22(1)(b)).
- Public interest immunity applies (section 22(2)).

8.4.6 Section 35 provides it is a criminal offence for a person to fail without reasonable excuse to do anything that they are required to do by a notice under section 21.

2007 Rules

8.4.7 The Chair has powers under rule 8 to send written requests to any person in relation to the provision of information.

8.4.8 Rule 11 provides that any evidence or other information which is the subject of an outstanding application for a restriction notice or order under section 19 of the 2005 Act is generally to be subject to the same restrictions as it would have been if the application had been granted.

Further details

8.5 If you have any questions about any of the above, or any other matter related to the provision of information, please email the Solicitor to the Inquiry at joanna.bain@covid19inquiry.scot .

Version control

8.6 This is the first version of the Protocol on Public Access to Documents: Redaction etc. It was approved on 27 June 2022 and is issued under the authority of the Chair.

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