

Our ref: Fol/18/03424

J Stewart

request-533496-dc06383e@whatdotheyknow.com

8 February 2019

Dear J Stewart

Request for review of original response

Thank you for your request of 17 December 2018 for a review of our response to your request under the Freedom of Information (Scotland) Act 2002 (FOISA).

As mentioned in my initial acknowledgement to your review request, I have been asked by the Chief Executive of National Records of Scotland, Paul Lowe, to carry out the review because I was not involved in handling your original request.

Your review request

You asked us to “review your responses and provide copies of documents that address the following points:

3. It is proposed that the 2021 Census question 'What is your sex?' will have more options to choose i.e. Female, Male or Other, as biological sex is binary will this question actually be asking about a person's gender identity and not sex? What are your definitions of these terms?
4. As Sex is a protected characteristic within the Equality Act 2010 why are the National Records of Scotland no longer collecting this information? What assessments have been carried out to reveal the impact this will have?
5. “How will the National Records of Scotland ensure they comply with the Public Sector Duty as set out in the Equality Act 2010 if they no longer record the basic information on biological Sex?”

Review response

I have reviewed the original response and am satisfied that the substantive answers are correct. However, I have also identified potential for further clarification, an unpublished document which describes the definitions we are using for Scotland's Census 2021, and other documents which are technically exempt under Section 25

of the Freedom of Information (Scotland) Act (FOISA), as they are already otherwise available, but which it would nevertheless be helpful to make you aware of.

3. "It is proposed that the 2021 Census question 'What is your sex?' will have more options to choose i.e. Female, Male or Other, as biological sex is binary will this question actually be asking about a person's gender identity and not sex? What are your definitions of these terms?"

Scotland's Census 2021 does not define the term "sex". The census has never explicitly defined what it is asking by "sex". It has been made clear in the plans for Scotland's Census 2021 that the current proposal is for the question in 2021 to be asked on a self-identified basis, which allows people to answer in relation to their own understanding of the term.

The *Scotland's Census 2021 Definitions* document, which accompanies my response, provides definitions for use in the Scotland's Census 2021 Programme. An exemption under section 38(1)(b) (personal information) of FOISA applies to some of the information in this document. The information which has been redacted is the names of officials. The reason why this exemption applies have been explained in the annex to this letter.

Scotland's Census 2021 Sex and Gender Identity Topic Report sets out the evidence gathered in developing sex and trans status questions for Scotland's Census 2021. See:

https://www.scotlandscensus.gov.uk/documents/census2021/Sex_and_Gender_Identity_Topic_Report.pdf).

However, it should be stressed that questions are still under development. As mentioned in our original response, all questions to be asked in the 2021 Census will be considered by Parliament as part of the legislative process and therefore it is possible that the final questions may be different to those currently under consideration.

4. "As Sex is a protected characteristic within the Equality Act 2010 why are the National Records of Scotland no longer collecting this information? What assessments have been carried out to reveal the impact this will have?"

The content of the census is governed by the Census Act 1920. The text of the act is available at: <https://www.legislation.gov.uk/ukpga/Geo5/10-11/41/contents>

Scotland's Census 2021 will collect self-identified sex as defined in the *Scotland's Census 2021 Definitions* document. Considerations of the implications of asking a non-binary sex question and allowing individuals to self-identify in their responses to Scotland's Census 2021 are ongoing and the results of the testing carried out so far are set out in the *Scotland's Census 2021 Sex and Gender Identity Topic Report* mentioned above. These considerations concern the implications for public acceptance and understanding of, and response rates to, the questions, and they will feed into the full Equality Impact Assessment for Scotland's Census 2021 which will be published in 2019.

5. "How will the National Records of Scotland ensure they comply with the Public Sector Duty as set out in the Equality Act 2010 if they no longer record the basic information on biological Sex?"

An Equality Impact Assessment (EQIA) for the Census (Scotland) (Amendment) Bill has been carried out under the Equalities Act 2010 and is available at https://www.scotlandscensus.gov.uk/documents/census2021/Equality_Impact_Assessment.pdf

This assessment specifically relates to the Bill which would amend the Census Act to allow for the asking of questions on sexual orientation and certain aspects of gender identity (trans status/history) on a voluntary basis and therefore was not a complete assessment of all questions. A full EQIA covering all aspects of Scotland's Census 2021 will be published during 2019.

It is recognised that information about the makeup of Scotland's population in terms of sex is important and useful for a wide variety of public bodies and planning purposes and to assist with their own compliance with the Public Sector Duty under the Equalities Act 2010. Therefore, as set out in our original response, to meet this need, current proposals are that the Scotland's Census 2021 will continue to ask a sex question and outputs will be on a binary basis, as in 2011.

Further information:

As well as the topic report and Equality Impact Assessment for the Bill mentioned above, there is a large amount of further information available about the planning of Scotland's Census 2021 at <https://www.scotlandscensus.gov.uk/2021>, some of which you might find useful. This includes '[Plans for Scotland's Census 2021](https://www.scotlandscensus.gov.uk/documents/census2021/Plans_for_Scotlands_Census_2021.pdf)', published on 27 September 2018, which lays out proposals for how the census will be conducted and the questions it will ask (see https://www.scotlandscensus.gov.uk/documents/census2021/Plans_for_Scotlands_Census_2021.pdf)

The Culture, Tourism, Europe and External Affairs Committee's Stage 1 Report on the Bill was published yesterday and we will be considering the implications (see: <https://digitalpublications.parliament.scot/Committees/Report/CTEEA/2019/2/7/Stage-1-Report-on-the-Census--Amendment---Scotland--Bill#Recommendations-and-Conclusions>). We are committed to an on-going programme of engagement and are currently working closely with stakeholders, including women's groups, LGBT organisations and others, as the specific questions for Census 2021 are developed. If you would like to find out about ways to feed into the consultation work NRS is undertaking, please email Amy Wilson at scotlandscensus@nrscotland.gov.uk.

Yours sincerely

Laura Mitchell
Director of Records and Information Services

REASONS FOR NOT PROVIDING INFORMATION

An exemption applies

An exemption under section 38(1)(b) (personal information) of FOISA applies to some of the information in the *Scotland's Census 2021 Definitions* document because it is personal data of third parties and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.