

# Decision Notice 090/2021

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## **Allegations of child sexual offences raised against Catholic priests**

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**Applicant: The Applicant**

**Public authority: Scottish Courts and Tribunals Service**

**Case Ref: 202100005**



Scottish Information  
Commissioner

## Summary

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The SCTS was asked about allegations of child sexual offences raised against Catholic priests. The SCTS told the Applicant it did not hold any information falling within the scope of certain parts of their request and, for the remainder, the cost of responding meant it was not required to comply.

Following an investigation, the Commissioner was satisfied that the SCTS did not hold any of the information requested.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 12(1) (Excessive cost of compliance); 17(1) (Notice that information is not held); 73 (Interpretation) (definition of “information”)

The full text of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 September 2020, the Applicant made a request for information to the Scottish Courts and Tribunals Service (the SCTS). The information requested was:
  - A) *A full count plus disclosure of any and all civil cases in which the accused was a Catholic priest convicted of a sexual offence against a child between 0 - 15 years of age but whom subsequently had their conviction quashed, overturned or otherwise declared false by the Scottish Court of Session or any other criminal court upon appeal between the dates of 10/3/2015 - 14/9/2020 thus was awarded damages by the Court of Session in the form of remedy under Scots or British civil law.*
  - B) *A full count plus disclosure of any cases of false allegation of child sexual abuse made by any child 0 - 15 at the Scottish Court Service or any Scottish Court or any adult at the Scottish Court Service or any Scottish Court on their behalf, against any Catholic priest in Scotland between 10/3/2015 - 14/9/2020.*
  - C) *A full count plus disclosure of any and all criminal cases brought to the Scottish Court of Session or any other Scottish Court in which the accused was a Catholic priest convicted of a sexual offence against a child between 0 - 15 years of age but whom subsequently had their conviction quashed, overturned or otherwise declared false by the Scottish Court of Session or any other criminal court upon appeal between the dates of 10/3/2015 - 14/9/2020.*
2. The Applicant made it clear that they did not want the names of the children or priests.
3. The SCTS responded on 1 October 2020. It notified the Applicant, in terms of section 17 of FOISA, that it did not hold the information requested. The SCTS explained that it used a live operational case management system for processing court business and the information held on the system was structured for operational needs, rather than for statistical reporting or research purposes. Even it were able to identify cases involving Catholic priests, the SCTS explained that, if held, such information would have been created for the purpose of court proceedings and would also be the personal data of individuals, so the exemptions in section 37 (Court records, etc.) and section 38(1)(b) (Personal information) of FOISA would apply.

4. On 10 November 2020, the Applicant wrote to the SCTS requesting a review of its decision.
5. The SCTS notified the Applicant of the outcome of its review on 20 November 2020.
6. For parts A and C, the SCTS clarified that the case management systems used for processing court business contained only high level data, but had no “marker” for cases relating to Catholic priests and so information on court cases could not be extracted. The SCTS was satisfied that the response provided in that regard was correct and the information requested was not held on its case management systems.
7. The SCTS explained that, for court cases relating to any actions against Catholic organisations or priests, any manual interrogation of cases would incur excessive costs under section 12 of FOISA. To ascertain whether any of the appeals against convictions sustained during 2015-2020 (of which there were over 150) related to Catholic priests, the SCTS would require to identify the original court, locate the papers from storage and manually read each case. Subsequent searches would be required to identify any civil actions raised from any convictions overturned. The SCTS considered the work involved in doing so would take more than 40 hours and would therefore exceed the cost limit for compliance.
8. For part B, the SCTS clarified that, while the response provided related to the case management system relating to court proceedings at *any Scottish Court*, no explanation had been given addressing the aspect of *at the Scottish Court Service*. It explained that the purpose of the SCTS was to provide administrative support to Scottish courts and tribunals, to the judiciary of courts and to the Office of the Public Guardian and Accountant of Court, and it did not deal with complaints against Catholic priests. The SCTS was satisfied that the notice given, in terms of section 17 of FOISA, was correct.
9. Referring to its explanation of other exemptions which may apply (sections 37 and 38(1)(b)), the SCTS clarified that, while these were likely to apply to any information held, they did not fall to be considered.
10. On 31 December 2020, 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 SCTS’s review, as they believed the SCTS may hold information pertaining to false allegations against Catholic priests, despite having no markers to locate such information. The Applicant further wished to ascertain whether the SCTS held information on complaints, as specified in part B, and be provided with any such information. For parts A and C, the Applicant asked to be provided with any information held, commenting that the SCTS had provided no cost estimate of either a manual or electronic search to support its position that responding would be cost excessive. The Applicant also commented on the exemptions in sections 37 and 38(1)(b) of FOISA.

## Investigation

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11. 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.
12. On 18 February 2021, the SCTS was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.

13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 22 April 2021, the SCTS was invited to comment on the application and to answer specific questions. These focussed on the steps the SCTS had taken to identify and locate any information falling within the scope of the request, and its justification for relying (in part) on section 12 of FOISA for parts A and C.
14. The SCTS responded on 13 May 2021, revising its position and withdrawing reliance on section 12 for those parts of parts A and C which related to manual court records. The SCTS confirmed it now wished to rely on section 17 for all parts of the request in their entirety.
15. On 17 May 2021, the SCTS was asked for further submissions, which it provided on 24 May 2021. The SCTS maintained that it did not hold any information falling within the scope of the request.

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

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16. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the SCTS. He is satisfied that no matter of relevance has been overlooked.

### **Interpretation of request**

17. In its submissions to the Commissioner, the SCTS explained that it had drawn a distinction between Scottish courts and the SCTS (described as "the Scottish Court Service" in the request) as follows:
  - Scottish courts – a judiciary-led entity dealing with criminal and civil matters. References to "at any Scottish court" in its submissions referred to matters before the judiciary.
  - SCTS – an independent body corporate established by the Judiciary and Courts (Scotland) Act 2008 with an administrative function, with staff based in locations such as its headquarters buildings, various tribunals buildings and court buildings/premises across Scotland. References to "at the Scottish Court Service" in its submissions referred to matters dealt with administratively by the SCTS at any of its buildings or premises.
18. The SCTS submitted that, for information to be captured by parts A, B (relating to Scottish courts) and C of the request, there must be information which records, as a minimum, that the conviction related to a sexual offence against a child between 0-15 years, where the accused was a Catholic priest, and where said conviction was subsequently quashed, overturned or otherwise declared false by the Scottish Court of Session or any other criminal court upon appeal within the dates stated in the request.
19. For part B (relating to SCTS), the SCTS submitted that this part was interpreted in the first instance as relating to Catholic priests. Any searches would require to be based on that initial criterion to identify whether information relating to allegations against Catholic priests was held. As the SCTS was unable to identify records relating to Catholic priests, there was no further requirement to consider the other elements of the request.
20. The Commissioner agrees with this interpretation.

## The SCTS's revised position

21. The SCTS revised its position on section 12 during the investigation in relation to parts A and C in respect of the manual interrogation of court records. It now submitted that it did not hold information in relation to:
- (i) parts A and C (in their entirety) and part B (relating to Scottish courts) - on the basis that it would require skill and complex judgement to compile the information requested from either the case management system or court records.
  - (ii) part B (relating to SCTS) - on the basis that the searches carried out, which were reasonable with regard to the functions of the SCTS, produced no results.

## Whether the SCTS held the information requested

22. 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.
23. 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 that effect.

### *Parts A, B (relating to Scottish courts) and C*

24. In its submissions to the Commissioner, the SCTS acknowledged that, while public authorities are not required to create information in order to respond to a request, the Commissioner expects them to compile information from readily-available resources which are held. It noted the exception to this, described in the Commissioner's guidance<sup>1</sup> on section 17 of FOISA (paragraph 46), which indicated that, if collation of the information would require skill and judgement, the information was not held for the purposes of FOISA.
25. The SCTS submitted that the request contained a number of criteria - occupation, sexual offence, award of damages - each having elements which made the identification and extraction of any information held a difficult task.
26. The SCTS explained that court records were held in both paper and electronic format. Case management systems, which had been developed and structured for operational purposes, were used to record court business. Separate systems recorded criminal and civil records, and these had no cross-referencing facility. The SCTS gave an overview of the different levels of detail recorded in these systems, and confirmed that neither system recorded occupation (as this was not required for operational purposes), nor did they have a marker that would allow a search to determine whether an accused, or a party in a civil case, was a Catholic priest or a member of any religious order. As these separate systems recorded different categories of information and had no cross referencing-facility, any attempt to link individuals in civil and criminal cases could not be taken to be accurate.

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<sup>1</sup> <https://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/Informationnotheld/InformationnotheldFOISA.aspx>

27. The SCTS had considered whether it could identify if it held any of the information requested, through firstly identifying relevant sustained criminal appeals involving a sexual offences charge, and then checking paper files to ascertain whether information on occupation was recorded. This, however, proved difficult due to the identification of the offence itself. For the 157 appeals sustained during the period set out in the request, the SCTS explained it was unable to identify those where at least one sexual offence charge code was present due to:
- the need to analyse and interpret the charge code, and make a judgement on whether it fell within the category of a sexual offence. This, the SCTS argued, went beyond the administrative function and abilities of its staff. The SCTS explained that charge codes are created by the Crown Office and Procurator Fiscal Service and do not always contain the word “sexual” or reveal that an offence is sexual. In light of this, the SCTS submitted, knowledge or consultation of legislation contained in a charge code and consideration of any basic common law charge would be required to be able to determine whether the offence was sexual.
  - difficulties, where multiple charges are appealed, in determining which charge was successfully appealed, without further manual interrogation. The SCTS explained new charge codes can replace those successfully appealed, meaning a lesser non-sexual offence could replace the charge appealed. Linking this back to the case and identifying the original charge appealed would require complex coding to be outsourced to the third party contractor that maintains and develops the SCTS’s case management system.
  - the need, where there is a combined appeal against conviction and sentence, to manually interrogate the case management system to identify which part of the appeal was successful.
28. The SCTS submitted that the level of work required to determine whether it held the information requested was a difficult task, part of which would require complex coding. It argued that this complex task could not be carried out by, and went beyond what would be expected of, its administrative staff. While some elements of the search could be undertaken by a limited number of SCTS staff with specialised statistical skills, the interpretation of “sexual offences” would require a level of legal knowledge and understanding to allow a judgement to be made on whether the information was relevant to the request. Even if it were possible to identify all relevant sustained appeals, the SCTS argued that the relevant appeal papers would then need to be retrieved and reviewed to identify and piece together any relevant information to be able to reach a judgement on whether, as a whole, it fell within the scope of the request. This, the SCTS submitted, went beyond the skills of its staff.
29. The SCTS listed the types of documents within appeal papers, many of which comprised legal documents, which would need to be manually read. It submitted that any components identified therein would need to be extensively cross-referenced and analysed to determine whether, when compiled, they met the terms of the request. Similarly, in relation to any damages awarded by the Court of Session, as this would not show up in any statistical search, the content of actions across the various procedures at the Court of Session, falling within the timescale set out in the request, would need to be considered and assessed by staff, and a judgement reached on whether any information fell within the scope of the request. Again, the SCTS argued, this went beyond the skills of its staff.

30. In conclusion, the SCTS believed that, to be able to determine whether it held any elements of the information requested which, when put together, formed information which met, as a whole, the terms of the request, was a complex task involving the aspects described above. For these reasons, the SCTS concluded it did not hold the information requested.

#### *Part B (relating to SCTS)*

31. In its submissions to the Commissioner, the SCTS explained that its purpose was to provide administrative support to Scottish courts and tribunals, to the judiciary of courts, including the High Court of Justiciary, Court of Session, sheriff courts and justice of the peace courts, and also to the Office of the Public Guardian and Accountant of Court. As it had no role in complaints against any other organisations or persons, the SCTS submitted there was no reasonable expectation that it held any information falling within the scope of this part of the request, within its corporate systems. In support of this, the SCTS explained that its complaints procedure defined a complaint as “*any expression of dissatisfaction about our action or lack of action or about the standard of service provided by us or on our behalf*”.
32. The SCTS explained that, in the interest of completeness, it had carried out a search of its corporate complaints database (which held information on complaints from 2017 onwards, in line with its retention and disposal policy) using the search term “Catholic priest”. This search identified no results. This led the SCTS to conclude that it held no information falling within the scope of this part of the request.

#### *The Commissioner’s views*

33. “Information” is defined in section 73 of FOISA as “information recorded in any form”. Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in recorded form (for example, a person’s intentions or opinions).
34. 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 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 must also consider, 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 held, at the time it received the request).
35. The Commissioner has taken account of the arguments in both the Applicant’s requirement for review and their application, in which they provide reasons as to why they consider the SCTS may hold the information requested.

#### *Parts A, B (relating to Scottish courts) and C*

36. In coming to a decision on this matter, the Commissioner has considered the Information Tribunal case *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085 13 July 2007)*<sup>2</sup>, which involved a request relating to the number of cases dismissed in the High Court. (The Information Tribunal deals with appeals against decisions of the (UK) Information Commissioner made under the Freedom of Information Act 2000.)

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<sup>2</sup> <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

37. In that case, a public authority had not collated the information at the time of the request. Although the Tribunal eventually concluded that the Ministry of Justice did hold the information, it commented that the degree of skill and judgement that must be applied may well have a bearing on whether the information is held or not. The Commissioner agrees with the approach taken by the Information Tribunal: a public authority will hold information if it holds the building blocks to generate the information and no complex judgement is required to produce it.
38. This means that, in considering this application, the Commissioner will take into account whether the information requested by the Applicant can be collated without the need for any complex judgement on the part of the SCTS. If complex judgement is required, then the Commissioner will conclude that the information is not held by the SCTS for the purposes of FOISA. In contrast, if he is satisfied that no complex judgement is required, he will require the SCTS to identify and disclose the information to the Applicant (subject to any relevant provisions or exemptions in Parts 1 and 2 of FOISA).
39. Having considered the submissions put forward by the SCTS, the Commissioner must conclude that it could not provide the Applicant with the information requested in these parts of the request, without undertaking tasks that require considerable skill and complex judgement. He is satisfied that the information is not readily retrievable.
40. The Commissioner has some sympathy with the Applicant's view that the SCTS may hold information on false allegations made against Catholic priests. However, as noted above, while the Commissioner acknowledges that the SCTS may hold the basic "building blocks" of the information, he recognises that the SCTS would have to undertake complex tasks and analysis which would essentially result in the creation of new information, not already held in the composite format described in the request, in order to be able to provide the information requested by the Applicant.
41. For these reasons, the Commissioner finds that the SCTS did not (and does not) hold the information requested.
42. The Commissioner notes, however, that the SCTS informed the Applicant, in its review response, that it was relying on section 12 for information held in manual court records falling within the scope of parts A and C of the request. As the Commissioner has found that the SCTS does not hold any information falling within these parts of the request, he must conclude that the SCTS was wrong to notify the Applicant that it was not required to comply with these parts of the request on the grounds of excessive costs.

#### Part B (relating to SCTS)

43. For this part of the request, the Applicant is seeking information that is recorded by virtue of the falseness of an allegation of a specific nature made against an individual of a specific religious faith. The Commissioner accepts that the request can only be interpreted as a request for recorded information regarding sexual abuse allegations that were not only recorded as being false in nature, but were recorded as being made against Catholic priests.
44. Having considered all relevant submissions, the Commissioner is satisfied that there would be no reasonable expectation of the SCTS holding information on the falseness of any such allegations made against such individuals. In this regard, he has considered the outcomes of the searches undertaken by the SCTS in response to this part of the request.



45. The Commissioner accepts that the SCTS took adequate, proportionate steps in the circumstances to establish whether it held any information covered by this part of the request. He is satisfied that the searches carried out by the SCTS were reasonable and proportionate in the circumstances, and were capable of identifying any relevant information held for this part of the request.
46. In conclusion, the Commissioner is satisfied that the SCTS does not (and did not at the time of receiving the request) hold the information requested by the Applicant for this part of the request.

## **Decision**

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The Commissioner finds that the Scottish Courts and Tribunals Service (the SCTS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

The Commissioner finds that the SCTS was wrong to advise the Applicant that it was not required to comply with parts of the request under section 12 of FOISA.

However, given that the Commissioner is satisfied that the SCTS does not hold any information falling within the scope of parts A, B and C of the request, the Commissioner does not require the SCTS to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

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Should either the Applicant or the SCTS 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**

**2 June 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

#### 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.

...

#### 73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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