

Decision Notice 108/2021

Vatican Flag

Applicant: The Applicant

Public authority: Scottish Parliament

Case Ref: 202100201



Scottish Information
Commissioner

Summary

The Parliament was asked for information about the sectarian criminalisation of the flag of the Sovereign State of Vatican City. The Parliament initially told the Applicant it did not hold any information falling within the scope of the request.

During the investigation, the Parliament notified the Commissioner that it did hold information falling within the scope of the request and that this had been provided to the Applicant.

The Commissioner was satisfied that, by the end of the investigation, all relevant information had been disclosed, but found the Parliament breached FOISA initially, by informing the Applicant that it did not hold the information requested.

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

Background

1. On 20 October 2020, the Applicant made a request for information to the Scottish Parliament (the Parliament). The information requested was for:
A full disclosure of all and any information held detailing the sectarian criminalisation of the flag of the Sovereign State of Vatican City during the visitation of Arleen Foster MLA to Scotland in 2018 by the Scottish Parliament or any Information held detailing the Scottish Parliament's support of such sectarian criminalisation by Police Scotland via the approval of guidance contained within a police operational order document.
2. The Parliament responded on 28 October 2020. The Parliament told the Applicant that no such meeting had taken place at the Scottish Parliament, advising them they may wish to address the request to the Scottish Government. It issued a notice in terms of section 17(1) of FOISA, advising that no information was held.
3. On 24 November 2020, the Applicant wrote to the Parliament requesting a review of its decision on the basis that they had not sought information about a meeting, but had sought information in the terms stated in the request.
4. The Parliament notified the Applicant of the outcome of its review on 14 December 2020. It advised the Applicant that the Parliament was not involved in any activities relating to Arlene Foster's visit to Scotland in 2018, and therefore held no information about it. It upheld the response in terms of section 17(1) of FOISA.
5. On 11 February 2021, 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 Parliament's review.

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 16 March 2021, the Parliament was notified in writing that the Applicant had made a valid application. 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. On 5 May 2021, the Parliament was invited to comment on the application and to answer specific questions, focusing on the steps it had taken to identify and locate any information falling within the scope of the request.
9. The Parliament responded on 18 May 2021. It advised the Commissioner that it had reconsidered the request and, having conducted further searches, it had located information falling within the scope of the request. It issued a further response to the Applicant that day, providing the information held.
10. The Applicant confirmed receipt of the information provided by the Parliament on 19 May 2021. The Applicant confirmed a decision notice was still required.

Commissioner's analysis and findings

11. 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 Parliament. He is satisfied that no matter of relevance has been overlooked.

Information held by the Parliament

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 that effect.
14. 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 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 as to what information the authority should hold, ultimately 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).
15. In its submissions to the Commissioner, the Parliament confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of the Applicant's request, included staff consulted and electronic searches carried out. It also

explained the discovery of the information provided to the Applicant during the investigation. It advised that the further searches carried out during the investigation revealed no further information, in addition to that disclosed to the Applicant.

16. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Parliament interpreted the Applicant's request reasonably and took adequate, proportionate steps in the circumstances to establish what information it held. He is satisfied that the Parliament identified and located all the relevant information it held by the close of the investigation and that the information located during the investigation has now been provided to the Applicant.
17. Given that, during the investigation, the Parliament confirmed that it held information falling within the scope of the Applicant's request, the Commissioner finds that the Parliament was incorrect to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of the request. By doing so, the Parliament failed to comply with section 1(1) of FOISA.

Decision

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

The Commissioner finds that, by incorrectly advising the Applicant that it did not hold information falling within the scope of the request, the Parliament failed to comply with section 1(1) of FOISA.

Given that the information held has since been provided to the Applicant, the Commissioner does not require the Parliament to take any action in response to the Applicant's application.

Appeal

Should either the Applicant or the Parliament 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

7 July 2021

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.

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