

Decision Notice 109/2021

Vatican Flag

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 202100202



Scottish Information
Commissioner

Summary

The Ministers were asked for information about the sectarian criminalisation of the flag of the Sovereign State of Vatican City. The Ministers told the Applicant they did not hold any information falling within the scope of the request.

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 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 Ministers (the Ministers). The information requested was:

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 Government (Scottish Executive) or any information held detailing the Scottish Government's (Scottish Executive's) support of such sectarian criminalisation by Police Scotland via the approval of guidance contained within a police operational order document.

2. The Ministers responded on 16 November 2020. The Ministers issued a formal notice in terms of section 17(1) of FOISA, informing the Applicant they did not hold the information requested.
3. On 24 November 2020, the Applicant wrote to the Ministers, requesting a review of their decision and seeking confirmation that no information was held. In doing so, the Applicant referred to a response they had received from Police Scotland on 31 December 2018, (IM-FOI-2018-18-2885), which s[t]ated:

" The Guidance (within an operational order) document was originally written and adopted by the football coordination for Scotland within its first National Toolkit for Policing Football in Scotland which was created in 2011-2012 and which was approved for adoption across Scotland by ACPOS Operational Policing Business Area; Since this first version there has been some changes, the toolkit was converted into a Standard Operating Procedure when Police Scotland was established in April 2013 with Executive approval therefore, there is not a single person in the development of this document."

4. The Applicant commented that this response from Police Scotland seemed to suggest that the Guidance referred to had either been given "Executive Approval", therefore the Scottish Government approval, or that Police Scotland were given the approval to exist as a unified force in 2013 by the Scottish Government or the Scottish Executive.

5. The Ministers notified the Applicant of the outcome of their review on 18 December 2020. They stated that due searches had been undertaken to ascertain whether they held information falling within the scope of the request. They upheld the original response in terms of section 17(1) of FOISA.
6. 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 Ministers' review, asking that the Ministers demonstrate that due and appropriate searches were conducted.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant had 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.
8. On 16 March 2021, the Ministers were notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
9. 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 Ministers were invited to comment on the application and to answer specific questions, focusing on the steps they had taken to identify and locate any information falling within the scope of the request.
10. The Ministers responded on 18 May 2021. They maintained that they did not hold any information falling within the scope of the request.

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 Ministers. He is satisfied that no matter of relevance has been overlooked.
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 Commissioner notes the submissions provided by the Applicant, which ask that the Ministers demonstrate that due and appropriate searches were conducted.
15. The Commissioner also notes the Applicant's interpretation of the response that had been provided by Police Scotland on 31 December 2018, and the Applicant's view that the term "Executive approval" tended to show that the Ministers should hold information falling within the scope of the request.

16. The investigating officer contacted Police Scotland, who confirmed the reference to “Executive approval” within the guidance referred to was a reference to the Force Executive of the Police Service, not the Scottish Government (or the Scottish Executive, as it was named originally).
17. In their submissions to the Commissioner, the Ministers confirmed that they held no information falling within the scope of the Applicant’s request.
18. The Ministers detailed the enquiries they undertook to ascertain whether they held any information falling within the scope of the Applicant’s request. These included consultation with the various departments considered relevant and relevant staff within those departments. The keywords used in searches were provided. The Ministers also supplied supporting evidence regarding the enquiries and their outcomes. The conclusion of the enquiries was that no information was held falling within the scope of the request made by the Applicant.
19. 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 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).
20. Having considered all relevant submissions, and the terms of the request under consideration, the Commissioner accepts that the Ministers interpreted the Applicant’s requests reasonably and took adequate, proportionate steps in the circumstances to establish what information they held. Given the explanations and other submissions provided, he is satisfied that the Ministers do not (and did not, on receiving the request) hold the information requested by the Applicant and were correct to give the Applicant notice, in terms of section 17(1) of FOISA, that they held no such information.

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.

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

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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