

Decision Notice 163/2020

Anti-Catholicism Complaints

Applicant: The Applicant

Public authority: Crown Office and Procurator Fiscal Service

Case Ref: 202000724



Scottish Information
Commissioner

Summary

COPFS was asked for numbers of complaints and remedial action taken on complaints of Anti-Catholicism against COPFS between 2014 and 2016.

COPFS told the Applicant this was not a category of complaint it recorded, and to respond to the request would exceed the £600 cost limit. Following an investigation, the Commissioner agreed that it would exceed £600 to comply with the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 12(1) (Excessive cost of compliance); 48(c) (When application excluded)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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

Background

1. On 10 March 2020, the Applicant made a request for information to the Crown Office and Procurator Fiscal Service (COPFS). The information requested was:
A full count, disclosure and summary of remedial action per all complaints of Anti-Catholicism raised against COPFS between 10/3/2014 – 10/3/2016.
2. COPFS responded on 13 March 2020. COPFS stated that information of this type is not recorded as a specific category of complaint. It therefore notified the Applicant, in terms of section 17 of FOISA, that the information was not held.
3. On 15 March 2020, the Applicant wrote to COPFS requesting a review of its decision on the basis that they did not accept the information was not held. They commented that it would be reasonable to believe that, if any complaints were raised, then they would have been recorded in some way, even if they cannot be identified by the label “anti-Catholicism.” They suggested that all of the complaints against COPFS (in the specified time period) in relation to “sectarianism” or “anti-religious prejudice” should be checked to ascertain whether any of the complaints referred to anti-Catholicism in any way.
4. COPFS notified the Applicant of the outcome of its review on 9 April 2020. COPFS confirmed that it did not hold this information as a category of complaint and to check all complaints would exceed the upper cost limit and, therefore, section 12(1) of FOISA applied. COPFS also detailed other exemptions that would be likely to apply to any information identified by such a search.
5. On 4 July 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant did not accept that COPFS did not hold the information requested and questioned its application of section 12(1) of FOISA.

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. Section 48(c) of FOISA (see Appendix 1) makes it clear that no application may be made to the Commissioner under section 47(1) as respects a request for review made to the Lord Advocate, to the extent that the information is held by him as head of the systems of criminal prosecution and investigation of deaths in Scotland.
8. In this case, the Commissioner is satisfied that this exclusion does not apply. He has been mindful of the content of the (then) Scottish Executive's policy memorandum which accompanied the Freedom of Information (Scotland) Bill. This sets out the reason for the exception in section 48(c) and explains that:

Ministers considered that because of section 48 of the Scotland Act 1998 (SA), it would not have been competent for the Bill to provide for the Commissioner to require disclosure of information held by the Lord Advocate as head of the systems of criminal prosecution and of investigation of deaths in Scotland. Section 48(5) of the SA provides that any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken independently of any other person.
9. Justification for the provision for the independence of this role was discussed during the passage of the Scotland Bill in 1998. The memorandum indicated that Ministers would not have considered it appropriate to permit the Commissioner to investigate and rule upon the Lord Advocate's decision under FOI. Given the damage that disclosure of information provided to prosecuting authorities might cause, Ministers reached the following conclusions:

It was considered that any provision which allowed the Commissioner to require the disclosure of such information would create uncertainty and be detrimental to the effective operation of the criminal justice system. It was considered vital that the Lord Advocate and procurators fiscal retain their autonomy in deciding what information should be disclosed and it was thought that it would be inappropriate for the Commissioner to be given powers to overrule the Lord Advocate or Procurators Fiscal and require disclosure.
10. However, having considered the details of this request, the Commissioner is satisfied that it seeks details of service complaints about COPFS as an organisation and does not directly relate to decisions taken by the Lord Advocate in his role as head of the systems or criminal prosecution and investigation of deaths in Scotland
11. On 20 July 2020, COPFS was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. COPFS was invited to comment on this application and to answer specific questions. These related to the searches conducted, details of the complaints system and how information is recorded, along with cost estimates and any advice or guidance held by COPFS that could help reduce cost.

Commissioner's analysis and findings

13. 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 COPFS. He is satisfied that no matter of relevance has been overlooked.

Information held by COPFS

14. COPFS stated that complaints are recorded on 'RESPOND', its internal correspondence management database. This database is an operational database to assist in managing complaints and responses. It explained that this is not a statistical database and has no search facility which would enable it to identify relevant keywords to identify complaints that may fall within the scope of the request.
15. COPFS explained how it categorises complaints in order to identify thematic issues and areas for improvement. These themes are provided in Annual Reports and include failure to communicate, handling of case, decision not to prosecute, return of productions and delays in decision making. COPFS submitted that there is no category for "Anti-Catholicism", sectarianism or religious prejudice.

Section 12(1) – Excessive cost of compliance

16. Section 12(1) provides that a Scottish public authority is not obliged to comply with an information request where it estimates that the cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations (currently £600). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum. He must consider the reliance on section 12 in the first instance.
17. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, the authority reasonably estimates it is likely to incur in:
- (i) locating
 - (ii) retrieving; and
 - (iii) providing
- the information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
18. The public authority may not charge for the cost of determining whether:
- (i) it actually holds the information requested, or
 - (ii) it should provide the information.
19. COPFS submitted that, due to the volume of complaints for each of the years requested and with no automatic search facility in the system, to identify the possibility that any complaint had any feature of "Anti-Catholicism" it would require a manual analysis of any information in relation to each complaint or the related criminal case or deaths investigation. COPFS therefore considered that section 12(1) would apply.

20. The relevant provisions of the Fees Regulations are set out in Appendix 1. COPFS provided the Commissioner with a breakdown of the likely costs in this case. For the period requested, COPFS provided the total complaints recorded. These were:
 - (i) 2014/2015: 740
 - (ii) 2015/2016: 717.
21. COPFS estimated it would take a member of staff 45 minutes per case, at a cost of £15 per hour. Using the number of complaints for 2015/2016 as a sample, it estimated that it would cost more than £8,000 to determine whether it held information.
22. The Commissioner considers that the estimate of 45 minutes per case to be excessive. However, even if the time taken was reduced to the bare minimum of five minutes per complaint, a manual review of each complaint file would still take the costs to £885, over the £600 threshold.
23. Either way, the Commissioner is satisfied that a manual review of all complaints over this time period would be required and that COPFS were correct to refuse to provide the information requested as complying with the request would exceed the cost limit.
24. The Commissioner is satisfied that the cost of complying with the Applicant's request would exceed £600. He therefore finds that, in line with section 12(1) of FOISA, COPFS was not obliged to comply with the Applicant's request.

Section 15 – Duty to advise and assist

25. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
26. The Scottish Minister's Code of Practice on the discharge of functions by Scottish public authorities under FOISA (the Section 60 code¹) provides (at Part 2, paragraph 1.9):

Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600... the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly.
27. In its responses to the Applicant, COPFS provided an explanation as to how complaints are categorised and why a manual review of each file would be required. In its submissions to the Commissioner, COPFS explained that there was no relevant guidance which could be given to the Applicant to reduce the cost due to the nature of the request, the limitations of the complaints system and the manual processes that would be required to extract any relevant information.
28. The Commissioner accepts that COPFS gave the Applicant reasonable advice and assistance in line with its duty under section 15 of FOISA.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

Decision

The Commissioner finds that the Crown Office and Procurator Fiscal Service 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 COPFS 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

10 December 2020

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.
...

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.
...

48 When application excluded

No application may be made to the Commissioner for a decision under section 47(1) as respects a request for review made to –

- ...
- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

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