



Scottish Information
Commissioner

Decision 008/2005 – Mr Shields and the Scottish Parliament

Refusal of the request for information about constituents' enquiries to MSPs

Applicant: Mr Duncan Shields

**Authority: The Scottish Parliament / Scottish Parliament
Corporate Body**

Case No: 200500463

Decision Date: 13 July 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Information about constituents' requests to their MSPs – whether information is held by the Scottish Parliament – section 3(2) – whether MSPs and information they hold fall under the scope of FOISA – whether an authority has a duty to gather information it does not hold in response to a request under FOISA

Facts

Mr Shields wrote to the Presiding Officer of the Scottish Parliament requesting an annual breakdown of figures relating to requests for help, assistance or intervention from individual constituents to their MSPs, the nature of these requests and the outcome. This request was refused by the Parliament on the grounds that the Scottish Parliament Corporate Body does not hold this information. Mr Shields sought a review of this decision on the grounds that the Parliament could collate this information. After the outcome of this review confirmed the Parliament's original decision, Mr Shields applied to the Commissioner for a decision on this case.

Outcome

The Commissioner found that the Scottish Parliament had correctly stated that it does not hold the information requested by the applicant. Although individual MSPs will hold information relevant to the request, they are not bound by the terms of the Freedom of Information (Scotland) Act 2002 (FOISA). There is no obligation for the Scottish Parliament to collect this information from its Members in order to respond to the applicant's request.

(This decision has been addressed to the Clerk/Chief Executive of the Scottish Parliament and SPCB. Both bodies are listed as Scottish public authorities in Schedule 1 of FOISA, and the relationship between them is discussed in some detail later on in this document. For the purposes of this application, the Clerk/ Chief Executive would be responsible for responding, whether from the Parliament or SPCB.)



Appeal

Should either the Parliament or Mr Shields wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. Mr Shields wrote to the Presiding Officer of the Scottish Parliament (the Parliament) by e-mail on 16 January 2005. He requested an annual breakdown of figures relating to requests for help, assistance or intervention from individual constituents to their Members of the Scottish Parliament (MSPs), the nature of the requests and the outcome. This request referred to one MSP in particular but did not seek any less or more information in relation to this one Member than any other.
2. The Parliament responded to this request on 17 January 2005. The response stated that the Scottish Parliament Corporate Body (SPCB) does not hold the information requested and therefore could not provide it to Mr Shields. This response advised Mr Shields that information relating to constituency casework is held in MSPs' constituency offices, and provided a list of contact details for these.
3. Mr Shields wrote again to the Presiding Officer by e-mail on 26 January 2005 seeking a review of the Parliament's decision. The reason for his dissatisfaction was that although the SPCB does not currently hold the information, there seemed to be no reason why it should not collate the information in order to show how MSPs respond to their constituents.
4. On 8 February the Parliament wrote to Mr Shields detailing the outcome of its review. This confirmed the Parliament's original decision, on the grounds that the information sought was not held. It noted further that MSPs are not covered by the Freedom of Information (Scotland) Act 2002 (FOISA).
5. Mr Shields then applied to me on 9 February 2005 for a decision on whether the Parliament had dealt with his request for information in accordance with Part 1 of FOISA.
6. The case was allocated to an Investigating Officer within my Office.



The Investigation

7. Mr Shields' application was validated by establishing that he had made a request to a Scottish public authority, and had appealed to the Commissioner only after requesting that the authority review its decision.

Initial comments from the Parliament

8. A letter was sent to the Parliament on 16 February 2005, informing it that the application had been received and that an investigation into the matter had begun. The Parliament was invited to comment on the case and asked to provide certain information and documents. In particular:
- a) Clarification was sought on the Parliament's assertions, first that the SPCB does not hold the information requested (in its letter of 17 January 2005), and then that "we do not hold the information" (in its letter of 8 February 2005). Schedule 1 of FOISA lists both "The Scottish Parliament" and "The Scottish Parliament Corporate Body" as Scottish public authorities bound by the terms of the Act. Therefore, the Parliament was asked to confirm whether these statements should be interpreted as meaning that neither of these authorities holds the information requested by the applicant.
 - b) Clarification was sought on the use of the term "held" in the Parliament's letters to Mr Shields. This word has a specific meaning in section 3(2) of FOISA that is not simply determined by the presence of information within the premises or information systems of a public authority. When information is present within a public authority's premises and systems only because it is held on behalf of another person or organisation, this information is not held by the public authority for the purposes of FOISA.

As FOISA provides a right to access information that is held (in this specific sense) by a Scottish public authority, information it holds on behalf of another person or organisation would not need to be provided in response to a request under FOISA. Therefore, the Parliament was asked to confirm whether its assertion that it does not hold the information sought by Mr Shields should be understood in the simple sense (i.e. there is no such information within the Parliament's systems and buildings) or in the technical sense of section 3(2) (i.e. there may be some relevant information within the Parliament's systems but it is only held on behalf of another person or organisation).
 - c) Details were sought of any types of information collected by the Scottish Parliament from MSPs and their offices in relation to their constituency work.



9. The Parliament replied on 3 March 2005. This response stated that:
- a) Neither the Scottish Parliament nor the Scottish Parliament Corporate Body holds information relating to the applicant's request.
 - b) The Parliament was not using the term "held" in the technical sense of section 3(2) of FOISA when it informed the applicant that it did not hold the information requested.
 - c) No information is collected by the Parliament from MSPs and their offices in relation to their constituency work.

Further consideration of the status of information within MSPs' Parliamentary offices

10. The Parliament's response to the request for clarification set out in 8 b. above, stated that as constituency matters did not relate to Parliamentary process, the Parliament did not hold (in the simple sense) any such information.
11. However, I consider it likely that while the majority of correspondence and information relating to MSPs' constituency work will be held in their constituency offices, at least some constituents will choose to direct their correspondence via the Holyrood building and communication systems to an MSP's Parliamentary office or e-mail address. If this is the case, then at least some information relevant to Mr Shields' request is likely to be held, in the simple sense of the word, by the Parliament.
12. On 17 March 2005, the Parliament was sent an e-mail asking a number of follow-up questions in order to understand whether it should be deemed to own or control information within an MSP's office and IT systems. The aim of these questions was to determine whether such information would be considered to be held by the Parliament in its own right, or held on behalf of an MSP:
- a) Can Parliamentary authorities ever require access to MSPs' mail (or their staff or offices' mail), or have any control over its use or disposal following delivery to his or her office?
 - b) Are MSPs' e-mail and IT systems (and those of their offices) controlled by the Parliamentary authorities? Can Parliamentary system administrators access their accounts, modify them or view them without an MSP's consent?
 - c) Do MSPs' IT systems form part of the same network as that used by Parliamentary staff? Are they supported by the same staff, with the same access privileges as those supporting Parliamentary staff?
 - d) What (if any) systems are in place to ensure the privacy of MSPs' communications and to avoid interference from Parliamentary authorities in their work.



13. The Parliament's response to this request was provided on 5 April 2005. It described the relationship between the SPCB and MSPs as similar to that between a tenant and a facilities management company in a multi tenanted building. It noted:
- a) The SPCB provides an IT infrastructure to MSPs and their staff, and this forms part of the same network used by SPCB staff.
 - b) A very small number of specialist staff could, once granted permission, access MSP's systems, although this would be solely for technical and support purposes.
 - c) SPCB staff can only access Members' mail, either physical or electronic, if consent and approval to do this is provided by a Member.
 - d) MSPs' use of the IT infrastructure provided to them by the SPCB is not governed by the policies that govern use of IT systems by SPCB staff.
 - e) MSPs have control over the information contained within their IT systems. They decide how long to retain information for, and a member of SPCB staff could only access, alter or destroy any information within an MSP's system if given specific permission to do so to.

Does the Parliament collect information from MSPs on constituency work?

14. Further information was also sought in order to independently confirm the Parliament's response to 8c above (which asked whether it collects any information about MSPs' constituency work). Letters were sent to four constituency MSPs (one representing each of the Conservative Party, the Labour Party, the Liberal Democrat Party and the Scottish National Party) on 21 April 2005. These letters asked for confirmation of (i) whether the MSP had ever been required to provide the Scottish Parliament with information relating to their constituents' requests, and (ii) whether they had ever provided such information to the Parliament.
15. The responses of all the MSPs contacted stated that they had never been required to provide such information to the Parliament, nor had they ever done so.

Are MSPs covered by FOISA?

16. At this point, the investigating officer wrote to Mr Shields to explain the work conducted to date and to seek his comments on the case. The e-mail explained that evidence provided by the Parliament suggested that it did not hold any information relevant to his request. It pointed out that FOISA only requires an authority to provide information that it holds. The letter also repeated the Parliament's assertion, which had so far not been challenged by Mr Shields, that MSPs themselves are not covered by FOISA.



17. In response to this e-mail, Mr Shields restated his opinion that the Parliament should collect this information in order to monitor the activities of MSPs. He also raised a new objection; that he did not accept the Parliament's assertion that MSPs are not covered by the terms of FOISA. Mr Shields argued that as MSPs are funded by the Parliament, they should not be considered to be separate of it.
18. Until this point, this investigation had accepted the Parliament's statement that MSPs are not bound by the terms of FOISA. Although the applicant had not raised any concerns regarding the status of MSPs in his initial application, I decided that it would be appropriate to extend the scope of the investigation to consider this matter.
19. The question of whether MSPs are covered by FOISA does not depend on their funding. The main public authorities that are covered by the terms of FOISA are listed in schedule 1 of the FOISA. (Under section 6 of FOISA, any company that is wholly owned by one or more of the public authorities listed in Schedule 1 will also be covered by the Act. However, this provision is not relevant to the consideration of the status of MSPs.) The question of whether an authority or individual is covered by FOISA will therefore depend on whether it is listed in Schedule 1, or if it forms a part of an organisation that is listed.
20. MSPs are not specifically listed in Schedule 1. However, if they are part of the Scottish Parliament or the SPCB, rather than distinct from these, then they would fall under the scope of FOISA and information that they hold would need to be collected and provided in response to a request to the Parliament.

What is meant by Parliament in FOISA?

21. The Official Report of the debates and committee sessions during the Freedom of Information (Scotland) Bill's passage through the Parliament's legislative process were consulted to establish whether there had been any discussion of the intended scope of the terms "The Scottish Parliament" and "The Scottish Parliament Corporate Body" in Schedule 1. No references to these terms, and whether they were intended to include or exclude MSPs, were found.
22. The primary source of information about the status of the Parliament and MSPs is the Scotland Act 1998 (the Scotland Act), which established the devolution framework for Scotland. Section 1 (1) states that "There shall be a Scottish Parliament". Section 1(2) and 1(3) of the Scotland Act go on to state that Members of the Scottish Parliament shall be returned for each constituency and region in Scotland. Subsequent sections set out how Members will be elected and set out the Parliament's powers to create legislation.



23. The Scotland Act does not explicitly define the term “Scottish Parliament” and does not indicate whether MSPs are to be considered as parts of the Parliament, or distinct units that come together within it.
24. Section 21 of the Scotland Act creates the SPCB as a body corporate whose membership includes the Presiding Officer of the Parliament and four other Members of the Parliament. The job of the SPCB is to ensure that the Parliament has the staff, property and services required for its purposes (section 21(3)).
25. The Scottish Parliament was approached once again to seek its views on the status of MSPs in relation to the Scottish Parliament and the SPCB. In a letter of 4 May 2005, the Parliament was asked for comments on three main issues along with an explanation of the reasons for its belief that MSPs do not fall under the scope of “the Scottish Parliament” and so are not covered by FOISA:
 - a) what is meant by the term “The Scottish Parliament” when it is listed as number 2 of part 1 of Schedule 1 to FOISA?
 - b) What is meant by the term “The Scottish Parliament Corporate Body” when it is listed as number 3 of part 1 of Schedule 1 to FOISA?
 - c) What is the status of MSPs in relation to each of these terms and do they fall under the scope of either “The Scottish Parliament” or “The Scottish Parliament Corporate Body” for the purposes of any or all of their functions?
26. The Parliament’s response stated that:
 - The Scottish Parliament is an unincorporated association consisting of its Members. The Parliament believes this was listed separately in schedule 1 of FOISA in order to ensure that the legislative and other functions of the Parliament (those distinct from the administrative functions of the SPCB) were covered by the freedom of information law.
 - Although the Parliament (through the SPCB) pays a salary to MSPs, they are office holders rather than employees of the SPCB. They do not operate under any contract of employment and there is no provision for dismissal of an MSP from office.
 - MSPs collectively form the Parliament but individually they are distinct from it. Since they are office holders in their own right, FOISA would have needed to include them separately in Schedule 1 to bring them under its remit. As it did not, MSPs do not fall within the terms of FOISA.



- The SPCB is in many respects the legal persona of the Parliament, and any property or liabilities of the Parliament are treated (under section 21(5) of the Scotland Act) as the property and liabilities of the SPCB. Under section 40 of the Scotland Act, any legal proceedings instituted by or against the Scottish Parliament actually will be instituted by or against the SPCB. The distinction between SPCB and Parliament can be viewed as a distinction between the legislative/debating activity of the Parliament through its committees and in the chamber, and the business operation of the Parliament conducted through the SPCB.
- In relation to MSPs who are elected to the SPCB, these act as a body and decisions are reached by the body. It is the body corporate that holds legal status rather than the MSPs themselves.

The Commissioner's analysis and findings

27. The main issue to be addressed is whether the information requested by Mr Shields is held by the Scottish Parliament or the SPCB. The investigation conducted to address this question had two main stages. The first stage asked whether the Parliament, in the restricted sense of the Parliamentary administration, held this information. The second stage asked whether the first stage had accepted too restricted a definition of the Parliament for the purposes of FOISA, and whether information held by MSPs themselves ought to be considered to be held by the Parliament. I will address each of these questions in turn.

Does the Parliament (excluding MSPs) hold the information for the purposes of FOISA?

28. I am satisfied by the Parliament's evidence, corroborated independently by four MSPs, that information is not collected centrally by the Parliament about the constituency activities of MSPs. If the Parliament were to provide Mr Shields' with such information, therefore, it would first have to be gathered from individual MSPs.
29. If we accept, for now, the Parliament's view that MSPs are not bound by the terms of FOISA then information held outside Parliamentary offices and IT systems, for example within an MSP's constituency office, will not be available to a requestor under FOISA. This information is not held by the Parliament in any sense of the term.



30. Information that is held by MSPs within their Parliamentary offices and Parliamentary IT systems is held in the simple sense of the word, by the Parliament, however. I do not accept the Parliament's contention in its letter of 3 March 2005 that, because any constituency related information does not relate to a Parliamentary process, it is not held by the Parliament in a non-technical sense of the word. FOISA applies to any recorded information that is held by a public authority for any reason, whether or not it relates to the core business of that public authority. The only circumstances where a request for information that is present within a public authority's buildings and systems would not need to be considered under FOISA is (by virtue of section 3(2)) where this information is held only on behalf of another person or organisation.
31. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner's consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it.
32. The information provided to me by the Parliament in its letter of 5 April 2005 satisfies me that this is the case with any information and correspondence held by MSPs within their own Parliamentary offices and IT systems. This information is not subject to the Scottish Parliament records management policies and MSPs' use of information systems is not governed by the policies that apply to SPCB staff.
33. Therefore, I conclude that under section 3(2), any information relating to MSPs' constituency activities that is held within their Parliamentary offices and IT systems is not held by the Parliament (or the SPCB) for the purposes of FOISA.
34. Mr Shields argues that even if the Parliament does not currently hold the information he requests, it should gather it. FOISA provides a right of access to any information that is held by a Scottish public authority, subject to certain exemptions. It does not create the right to require an authority to create or gather information that it does not already hold. Therefore, the Parliament has not acted improperly in refusing to do so.

Does the FOISA reference to Parliament mean individual MSPs?

35. Of course, if MSPs were covered by FOISA by virtue of them technically forming a part of the Parliament, then any information they hold in their constituencies or the Parliament would be considered to be held by the Parliament. The Parliament would be obliged to collate information from each MSP about their work because any information held by the MSPs would also be considered to be held by the Parliament.



36. Sources of evidence on the status of MSPs in relation to the Parliament are scarce on this matter. The Scotland Act created the Scottish Parliament and ensured that Members should be elected to it. We might infer from the Scotland Act's separate references to the Parliament and its Members that these two entities are distinct. At the same time, we might legitimately ask what is the Parliament if MSPs themselves are not the Parliament? The SPCB is its legal persona, the owner of its property, the employer of its staff and the provider of the means to conduct its business. What else is left that FOISA applies to when the Parliament is listed separately from the SPCB in Schedule 1? Indeed, the Parliament's own explanation of its status was that it is an association of its Members.
37. In the absence of conclusive sources of evidence on this issue, I have considered the consequences of both the inclusion and exclusion of MSPs within the scope of the Parliament for the purposes of FOISA in order to reach a view on which of these was the most likely intent of the Parliament when it passed FOISA.
38. If, by referring to the Parliament, FOISA is intended to include MSPs, then this would encompass their total role as Parliamentarians. There is nothing in FOISA to suggest that this would be restricted in any way. This would be very unusual in international terms. Most freedom of information laws around the world do not apply to parliaments at all; for example, the US, Canadian, Australian and New Zealand laws all exclude the nations' parliaments from their provisions. The Irish Freedom of Information Act does apply to the Houses of the Oireachtas (Parliament) but access to Members' papers is restricted by explicit provisions both within the Irish Act itself and the Irish constitution.
39. If FOISA applied to Parliamentarians, this would not be restricted to information they held within the Parliament building itself – it would include any information held by virtue of this role in constituency offices and even at home. It would mean individuals had a right to require MSPs to provide information they held such as details of constituents' problems and enquiries, letters to third parties, or briefings from commercial, or voluntary organisations in their constituency
40. It seems to me that this is so wide ranging and so out of the ordinary in terms of other jurisdictions with freedom of information laws that it is highly unlikely that MSPs, and Parliament as a whole, would have allowed the passage of the legislation to pass without any comment, challenge or amendment to the likely consequences, if they believed that it encompassed MSPs as individual Parliamentarians.



41. There are other indicators that suggest that it was never contemplated that individual MSPs would have a responsibility under FOISA. While public authorities trained their staff in preparation for implementation in January 2005, there was no preparatory training for MSPs on how to respond to requests under FOISA. Also, when the SPCB submitted a publication scheme to my office for approval on behalf of the Scottish Parliament, the contents did not include any documents held by individual MSPs rather than central Parliamentary authorities.
42. Finally, if any Parliamentarian failed to comply with a request for information under FOISA, enforcement action would presumably have to be taken (under the terms of section 40 of the Scotland Act) against the SPCB in respect of the failings of an individual member. This seems to me far fetched and impractical when I have established that for all practical purposes the SPCB staff has no facility to access or inspect MSPs' record systems and to thus rectify any failing if individual MSPs were encompassed by FOISA.
43. A narrower interpretation, along the lines proposed by the Parliament, is that the Scottish Parliament was included separately within schedule 1 with the intention of ensuring that the legislative functions of the Parliament are brought under the scope of FOISA alongside the administrative corporate functions of the SPCB. By including both, it was assured that information on the running of Parliament as an institution can be requested (e.g. costs, staffing, assets and resource deployment) as well as information about Parliament as a legislature (e.g. committee papers, official proceedings and background documents). Although these two types of information come from separately cited authorities, they are all provided by the same source, that is the staff employed by SPCB, and failure to respond is enforceable on the Chief Clerk of the SPCB.
44. In the absence of the clear evidence that FOISA should be read and was intended to be read as including MSPs within its provisions, I am of the view that individual MSPs do not fall under the scope of the term the Parliament when it is listed in schedule 1. Therefore, I conclude that MSPs are not bound by the terms of FOISA.
45. In reaching this conclusion, my attention has been drawn to a potential problem area within the application of FOISA. Should an applicant request information about parliamentary debates, committee proceedings or other parliamentary matters from an MSP, they have no right to receive a response under the terms of FOISA. If they ask for the same information from a clerk or the Parliamentary information service, they will activate their rights of access. To resolve any future problems in this respect, I suggest that a code of practice be considered by the Parliament. This could provide that such information requests made to MSPs be passed on to the appropriate members of SPCB staff, or indicate a response which would help the applicant to appropriately direct their request so to be covered by FOISA.



46. I am also aware that there may in future be the need to consider in more detail the status of the Presiding Officer and other MSPs elected to the SPCB. In this case I have considered only the status of MSPs in relation to their core Parliamentary roles of debating, scrutinising and serving constituents. There remains a possibility that along with the corporate responsibility of membership of the SPCB, these Members will be covered by FOISA in relation to information they hold for the purposes of that role. This question has not been addressed here.

Conclusion

47. I am satisfied that neither the Parliament nor its corporate body hold for the purposes of FOISA any information relating to requests for help, assistance or intervention from individual constituents to their MSPs, the nature of these requests and the outcome. No such information is collected from individual MSPs by the Parliament or the SPCB. MSPs themselves are not bound by the terms of FOISA and where information relating to constituency matters is housed within the Parliament building and IT systems, it is held by the Parliament only on behalf of MSPs. FOISA does not require the Parliament or the SPCB to collect information that is not already held in response to Mr Shields' request for information.

Decision

I find that the authority has dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002, as detailed in paragraphs 26-46 above.

Kevin Dunion
Scottish Information Commissioner
13 July 2005