



Scottish Information
Commissioner

050/2007 Mr Andrew Graham-Stewart and the Scottish Environment Protection Agency
<i>Request for copies of all emails sent by a named SEPA employee in relation to Dingwall and District Angling Club and the applicant</i>

Applicant: Mr Andrew Graham-Stewart
Authority: Scottish Environment Protection Agency
Case No: 200600788
Decision Date: 12 March 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 050/2007 Andrew Graham-Stewart and the Scottish Environment Protection Agency

Request for copies of all emails sent by a named SEPA employee which referred to either the Dingwall and District Angling Club or to himself – section 17 (Notice that information is not held) applied and upheld by the Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1)(b) (Notice that information is not held).

The relevant text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Andrew Graham-Stewart wrote to the Scottish Environment Protection Agency (SEPA) to ask it for copies of all emails sent by a named employee, which referred either to him or to the Dingwall and District Angling Club.

SEPA informed Mr Graham-Stewart that it did not hold the information in terms of section 3(2)(a)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Section 3(2)(a)(i) states that for the purposes of FOISA information is held by an authority if it is held by the authority otherwise than on behalf of another person. SEPA explained that even if it had in its possession the emails requested by Mr Graham-Stewart, for the purposes of FOISA it did not hold the requested information.

Mr Graham-Stewart was not satisfied with SEPA's response and asked it to review its decision.

Upon review, SEPA upheld its original decision and gave Mr Graham-Stewart notice, in terms of section 17(1) of FOISA, that the information he requested was not held by SEPA.



Mr Graham-Stewart was dissatisfied with the response he received from SEPA and submitted an application for a decision by the Scottish Information Commissioner in order to obtain the documents which had been withheld from him.

Following an investigation, the Commissioner found that SEPA dealt with Mr Graham-Stewart's request for information in line with Part 1 of FOISA.

Background

1. On 26 October 2005 Mr Graham-Stewart wrote to SEPA to ask it for copies of all email correspondence, sent since 1 October 2004, between a named employee of SEPA and any third party that referred either to him or to the Dingwall and District Angling Club.
2. On 21 November 2005, SEPA wrote to Mr Graham-Stewart and informed him that the SEPA email system did not hold any emails exchanged between him and the named employee, and that the emails it did hold in relation to the Dingwall and District Angling Club were exempt in terms of section 3(2)(a)(i) of FOISA, in that the correspondence was sent by the employee in a private capacity, and that SEPA only held the information on behalf of another person.
3. On 22 November 2005, Mr Graham-Stewart wrote to SEPA to ask it to review its decision that it did not hold the documents he requested in terms of section 3(2)(a)(i) of FOISA. In his request for review Mr Graham-Stewart argued that he knew of the existence of several emails sent by the employee via the SEPA email system, in which he was mentioned by name. Mr Graham-Stewart also clarified that he was not seeking copies of any emails between himself and the named employee, but was seeking copies of emails sent by the named employee in relation to him.
4. On 21 December 2005, SEPA wrote to Mr Graham-Stewart and upheld its original decision that the requested information was not held. It informed Mr Graham-Stewart that although some emails relating to the Dingwall and District Angling Club existed on the SEPA email system they were, in terms of section 3(2)(a)(i) of FOISA, not held by SEPA. Consequently SEPA gave Mr Graham-Stewart notice under section 17(1) of FOISA that the requested information was not held.
5. On 24 April 2006, Mr Graham-Stewart wrote to my Office, stating that he was dissatisfied with the outcome of SEPA's review and was applying to me for a decision in relation to SEPA's decision that it did not hold the email communications he sought.



6. Mr Graham-Stewart's application was validated by establishing that he had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request. The case was allocated to an investigating officer.

The investigation

7. On 9 May 2006, the investigating officer wrote to Mr Graham-Stewart and advised him that if it was found that the requested email correspondence was a) held by SEPA and b) constituted his own personal data then it would be exempt from release under FOISA in terms of section 38(1)(a) of that Act. Section 38(1)(a) of FOISA contains an absolute exemption for information which is the personal data of the applicant. The investigating officer informed Mr Graham-Stewart that if he wanted to pursue access to any information of which he was the subject, he would have to do so under the Data Protection Act 1998 (DPA). Mr Graham-Stewart was then advised by the investigating officer that the scope of this investigation would be limited to:
 - SEPA's handling of his information request;
 - Whether relevant information was held by SEPA;
 - Whether relevant information held constituted personal information about Mr Graham-Stewart;
 - Whether any held correspondence which did not constitute personal information about Mr Graham-Stewart should be released.
8. On 17 May 2006, Mr Graham-Stewart wrote to the Investigating officer and confirmed that he wanted the investigation to proceed within the parameters outlined above (paragraph 7).
9. On 25 May 2006, the Investigating officer formally contacted SEPA in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole and in particular on its assertion that it did not hold the information requested.



Submissions from SEPA

10. A response was received from SEPA on 14 June 2006. SEPA contended that it had conducted thorough searches of its email system, both in response to Mr Graham-Stewart's original request and on review (these searches were described), but that it had found no email records which referred to Mr Graham-Stewart, although it had identified emails, sent by the employee, which referred to the Dingwall and District Angling Club. SEPA asserted that these emails were held on behalf of another person (the employee), and therefore in terms of section 3(2)(a)(i) it did not hold the requested material.

11. SEPA contended that the employee had sent and received these emails in a personal capacity and that all SEPA employees had permission to use the SEPA email system for limited personal use. SEPA referred to a previous decision by the Scottish Information Commissioner [008/2005] in which the Commissioner stated that:

“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.”

Subsequently, SEPA argued that, for the purposes of FOISA, the personal emails of the employee were not held by SEPA, regardless of whether they physically existed in the SEPA email system. As a result SEPA contended that these emails are exempt from disclosure in terms of section 3(2)(a)(i) of FOISA.

12. SEPA went on to explain that Mr Graham-Stewart's request for review had also initiated a parallel internal Service Complaint within SEPA. During this Complaints procedure, on 6 January 2006, Mr Graham-Stewart provided SEPA with copies of two emails sent to the Trout and Salmon magazine by the employee, both of which referred to Mr Graham-Stewart. These emails had not been recovered during SEPA's initial searches of the SEPA email system and its backup tapes.

13. SEPA explained that it did not operate an email archiving system and its email backup process was, therefore, unable to locate any emails which might have existed in the employee's inbox more than three weeks prior to Mr Graham-Stewart's request. Emails which are deleted by a SEPA employee are retained in the backup tapes for a maximum of three weeks, after which time they are permanently deleted and cannot be restored. Additionally, SEPA asserted that any emails which are received and deleted the same day by a SEPA employee are not backed up at all, and neither are any emails which are sent by an employee but are not copied to their 'sent items' folder.



14. SEPA contended that as the two emails submitted to it by Mr Graham-Stewart on 6 January 2006 could not be found on the SEPA email system it did not hold the information in terms of section 17(1) of FOISA.

Submissions from Mr Graham-Stewart

15. Mr Graham-Stewart contended that as the employee sent the emails using the SEPA email system, and as the employee's emails did not contain a disclaimer stating that they were personal emails and not SEPA communications, that the provision in section 3(2)(a)(i) of FOISA did not apply, and that he considered the emails in question to be held by SEPA.
16. Mr Graham-Stewart also argued that as he had proof that the employee in question had sent emails concerning him to third parties, SEPA could not claim that it did not hold any emails relating to him.
17. Mr Graham-Stewart asserted that as the emails were clearly held by SEPA they should be released to him forthwith as per his original information request.

The Commissioner's Analysis and Findings

18. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Graham-Stewart and SEPA and I am satisfied that no matter of relevance has been overlooked.
19. In its submission to my Office, SEPA provided me with detailed information about its internal handling of Mr Graham-Stewart's request as well as information about its email backup systems.
20. On receipt of Mr Graham-Stewart's request, SEPA obtained copies of all existing emails regarding Dingwall and District Angling Club that the employee still held in his mailbox at that time. SEPA also took a copy or 'snapshot' of the employee's mailbox and checked it for emails which specifically referred to Mr Graham-Stewart, but none were found.
21. Mr Graham-Stewart later provided SEPA with evidence that the employee had, in fact, sent emails concerning him to a third party. However, the fact that the employee had used the SEPA email system to send the emails does not mean that, at the time of Mr Graham-Stewart's request, the emails could be retrieved from the SEPA email system.



22. After considering the submissions that SEPA provided, I am satisfied that at the time of Mr Graham-Stewart's request, the SEPA email system did not have a record of any emails sent by the employee to a third party in relation to Mr Graham-Stewart. Consequently, I find that SEPA was correct to give Mr Graham-Stewart notice, in terms of section 17(1) of FOISA, that it did not hold any of these emails.
23. I am also satisfied that the SEPA email system did have a record of emails sent by the employee in relation to the Dingwall and District Angling Club and I will now go on to consider whether these emails should be considered to be held by SEPA in terms of FOISA.

Section 3(2)(a)(i)

24. Section 3(2)(a)(i) states that for the purposes of FOISA information is held by an authority if it is held by the authority otherwise than on behalf of another person. This means that even if SEPA had in its possession the emails requested by Mr Graham-Stewart, it is possible that the information would not have been "held" by SEPA for the purposes of FOISA.
25. Guidance provided by the UK Information Commissioner, entitled: "*Freedom of Information Act Awareness Guidance No. 12*" states that:

"In most circumstances private emails sent or received by staff in the workplace would not be held by the authority as it has no interest in them. It will be a question of fact and degree whether a public authority does hold them, dependent on the level of access and control it has over the e mail system and on the computer use policies. It is likely to be the exception rather than the rule that the public authority does hold them."
26. SEPA's "*IT Acceptable Use Procedures*" state that its staff are permitted to use the SEPA email system for limited personal use. Having considered each of the emails in question, it is clear to me that these emails were sent by the employee in a private capacity, as they relate to the personal interests of the employee and are not related to the employee's role at SEPA.
27. Any information of this kind SEPA had in its possession would (on the basis of the definition in section 3(2)(a)(i)) not have been held by it for the purposes of FOISA (i.e. it would have been held on behalf of the employee as a private individual).
28. As a result, I am satisfied that SEPA was correct to give Mr Graham-Stewart notice, in terms of section 17(1) of FOISA, that it did not hold any of the information he requested.



Decision

I find that the information requested by Mr Graham-Stewart is not (and was not at the time of Mr Graham-Stewart's request) held by SEPA, for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA), and therefore that SEPA was not under a duty to provide Mr Graham-Stewart with the information he had requested. SEPA acted in accordance with Part 1 of FOISA in giving Mr Graham-Stewart notice that the information was not held in terms of section 17(1).

Appeal

Should either Mr Graham-Stewart or SEPA wish to appeal against this 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.

Kevin Dunion
Scottish Information Commissioner
12 March 2007



Appendix

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

3 Scottish public authorities

- (2) For the purposes of this Act ... information is held by an authority if it is held –
- (a) by the authority otherwise than –
- (i) on behalf of another person.

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) ... 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.