



Scottish Information
Commissioner

**Decision 149/2007 Dr Gordon Macdonald and Her
Majesty's Chief Inspector of Fire and Rescue
Authorities**

Correspondence relating to Stonewall or the Pride Scotia event

Applicant: Dr Gordon Macdonald

**Authority: Her Majesty's Chief Inspector of Fire and Rescue
Authorities**

Case No: 200700198

Decision Date: 22 August 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 149/2007 Dr Gordon Macdonald and Her Majesty's Chief Inspector of Fire and Rescue Authorities

Correspondence between named officials relating to Stonewall or the Pride Scotia festival in Glasgow, 2006. Information provided or not held.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17(1) (Notice that information is not held); 20(1) (Requirement for review of refusal etc.); 21(4) (Review by Scottish public authority).

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

Facts

Dr Macdonald asked HM Fire Service Inspectorate for Scotland (HMFSI) to supply copies of all correspondence between certain named officials which related to the campaigning group Stonewall and/or the Pride Scotia event that took place in Glasgow in 2006. One email relating to his request was provided.

Dr Macdonald was not satisfied with this response and asked for it to be reviewed. He pointed out that he had obtained two additional emails from another source.

HMFSI carried out a review and found that two additional emails, originally excluded from consideration, should also have been provided. It confirmed that one of the emails obtained by Dr Macdonald had been held at one time, but the email had been deleted before his request was received. It confirmed that no other correspondence relating to Dr Macdonald's request was held.

Dr Macdonald was dissatisfied with this response and applied to the Scottish Information Commissioner for a decision.

Following an investigation, the Commissioner found that Her Majesty's Chief Inspector of Fire and Rescue Authorities (the relevant public authority in terms of FOISA) had dealt with Dr Macdonald's request for information in accordance with Part 1 of FOISA.



Background

1. On 8 January 2007, Dr Gordon Macdonald wrote to HMFSI to request copies of all correspondence between certain named officials (one of whom was Her Majesty's Chief Inspector of Fire and Rescue Authorities) which related to the campaigning group Stonewall and/or the Pride Scotia event that took place in Glasgow in 2006.
2. On 18 January 2007, HMFSI wrote to Dr Macdonald in response to his request for information, and provided a copy of an email dated 9 May 2006.
3. On 24 January 2007, Dr Macdonald wrote to HMFSI asking for a review of its decision. He informed HMFSI that he had obtained two additional emails from another source (dated 13 February 2006 and 18 September 2006) and asked for an explanation on this point.
4. On 5 February 2007, HMFSI wrote to notify Dr Macdonald of the outcome of its review.
5. HMFSI explained that the email dated 18 September 2006 was not initially supplied as it had been routinely destroyed and there was no record of it. However, HMFSI had since obtained a copy of the email from another party.
6. HMFSI explained that the email dated 13 February 2006 was a communication between one of the named officials and another person not named in Dr Macdonald's request, albeit a copy was sent to another of the named officials: this was the reason why the email had not been provided.
7. Similarly, HMFSI provided a copy of a fourth email, dated 24 March 2006, which had not previously been supplied because it had been addressed to another recipient and simply copied to one of the named officials. HMFSI provided copies of the three emails identified above and confirmed that a check of its records showed that there was no other relevant correspondence held which had been copied to the named officials.
8. On 8 February 2007 Dr Macdonald wrote to my Office, stating that he was dissatisfied with the outcome of HMFSI's review and applying to me for a decision in terms of section 47(1) of FOISA.



9. Dr Macdonald raised three main concerns. He complained that the review had been dealt with by the same officer who prepared the initial response to his request. He asked me to examine the initial decision that emails copied to one of the named officers should not be released in response to his request. Finally, Dr Macdonald expressed concerns that there may have been an attempt to conceal information and asked several questions about the destruction of the email dated 18 September 2006.
10. The application was validated by establishing that Dr Macdonald 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 that request.

The Investigation

11. It should be explained that Dr Macdonald used the term “Scottish Executive” throughout his application rather than making a distinction between the Executive and HMFSI. Schedule 1 of FOISA lists Her Majesty’s Chief Inspector of Fire and Rescue Authorities (the Chief Inspector) as a separate public authority. As the initial response and review were carried out by the Chief Inspector, I have deemed it appropriate to name Her Majesty’s Chief Inspector of Fire and Rescue Authorities as the public authority in this case. For the purposes of my investigation into Dr Macdonald’s application, the Scottish Executive (the Executive) has provided a submission on behalf of the Chief Inspector.
12. On 22 February 2007 the Executive was notified in writing that an application had been received from Dr Macdonald and was asked to provide my office with information required to investigate his complaint.
13. The Executive provided its response on 19 March 2007.
14. During the investigation the Executive provided further information about back-up facilities for emails sent and received by the Executive and the feasibility of using data available from such a system to establish the date of destruction of the email dated 18 September 2006.



15. For the purposes of this Decision Notice, the emails will be numbered according to the submission received from the Executive:

No. 1: email dated 9 May 2006
No. 2: email dated 18 September 2006
No. 3: email dated 24 March 2006
No. 4: email dated 13 February 2006

The Commissioner's Analysis and Findings

16. 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 Dr Macdonald and the Executive and I am satisfied that no matter of relevance has been overlooked.
17. I will consider each of the concerns raised by Dr Macdonald, as listed above in paragraph 9.

Review procedure followed by HMFSI

18. Dr Macdonald complained that the review of the handling of his information request had been dealt with by the same officer who prepared the initial response to his request. He pointed out that the Executive's normal practice is that a request for review should be dealt with by different staff from those who provided the initial reply.
19. The Executive explained that Dr Macdonald's request was initially dealt with by the Chief Inspector. In order to review the response, the Chief Inspector convened a small staff group. This included one staff member not involved in the original decision, although he had been aware of the original request and had supplied some general information on Freedom of Information to other staff members. The review group concluded that an email received as a "cc" copy was arguably 'correspondence' and that emails 3 and 4 should have been supplied in response to the request. The review group also confirmed that no further relevant information was held by HMFSI.



20. As acknowledged by the Executive, the Section 60 Code of Practice¹ provides guidance about handling reviews. Paragraph 66 states:
- “...the review should generally be handled by staff who were not involved in the original decision. While this may not always be possible it is important that the review procedure enables the matter to be considered afresh.”
21. Paragraph 65 of the Section 60 Code lays down the main requirement:
- “The review procedure should be fair and impartial and it should enable different decisions to be taken if appropriate.”
22. In this case I accept that HMFSI is a very small organisation, which makes it more difficult for reviews to be carried out by different staff. It may have been preferable for the Chief Inspector to have excluded himself from the review group as evidence of its impartiality, particularly as his own correspondence formed part of Dr Macdonald’s request. However, as the Executive has pointed out, it is clear that the review procedure followed was successful in identifying and retrieving documents which had not been released with the initial response. I have no reason to doubt that the review carried out was both impartial and fair.

Initial decision to withhold emails which were “cc” copies

23. The Executive has confirmed that in responding to Dr Macdonald’s request, the electronic files of the two named officers and another officer were checked for relevant correspondence. This search located only the emails numbered 1, 3 and 4. It was also established that no other information was held in hard copy, and there was nothing stored on the electronic records data management system.
24. The Chief Inspector, who dealt with the initial request, concluded that emails 3 and 4 did not fall within the scope of the request as the named officer was merely copied into the correspondence as a “cc” recipient.
25. There is provision within FOISA for applicants to request a review of a public authority’s initial response, and for the public authority to substitute a different decision (section 20(1) and section 21(4)(b) – see Appendix for full details). I note that HMFSI revised its initial decision after the review, and am satisfied that this course of action was in compliance with the provisions and spirit of FOISA.

¹ Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002



The destruction of email 2

26. As noted above, email 2 was not retrieved by the searches carried out by HMFSI in response to Dr Macdonald's request. Its existence was discovered when Dr Macdonald obtained a copy of it from another source. The failure to retrieve and provide a copy of email 2 was considered during the review procedure, and it was established then that the email had been deleted before the search had been carried out.
27. Dr Macdonald has raised several questions in relation to the deletion of this email. He has asked if it is possible to establish when and why the email was deleted, who decided that it should be deleted, and who carried out the deletion. Dr Macdonald is concerned that the email may have been deleted in anticipation of his information request, following inquiries he made in November and December 2006.
28. In this decision notice I must consider whether HMFSI acted in compliance with the provisions of FOISA in responding to Dr Macdonald's request. Although I understand Dr Macdonald's concerns, in terms of my decision the key question is whether email 2 was still held by HMFSI at the time of Dr Macdonald's request, in which case the authority should either have provided him with a copy or explained why the information was exempt from disclosure under FOISA.
29. I have therefore attempted to establish whether it is possible to identify when the email was deleted.
30. The Executive has explained that the email was sent to remind some fire brigade representatives to complete the Workplace Equality Index 2007 questionnaire. As such, it did not form part of HMFSI's official record and so could be deleted once the recipient had no further need for it. Staff are responsible for their own records management in respect of this type of email. The officer concerned could not recall precisely when the email was deleted but was certain that this had taken place before receipt of Dr Macdonald's request.
31. The Executive were asked what procedures were in place to back-up emails, and whether it might be possible to check data stored on back-up files in order to establish when the e-mail of 18 September was deleted.



32. The Executive explained that file and mail servers are backed-up after each working day. The procedures provide for a 20-day tape cycle, allowing items up to four weeks old to be retrieved if required. However, each tape is re-used after 20 days, and no backed-up data now exists from the period between 18 September 2006 (the date of the email) and 8 January 2007 (the date of Dr Macdonald's request).
33. As no records are available, my judgement is based on the circumstances of the case. I take the view that it is reasonable to accept that the email was deleted as part of the normal business activities of the Inspectorate, without any record of this event being required. The content of the email indicates that it was sent to remind officials to carry out a particular activity within a few days, and I can find nothing untoward in the fact that the email was deleted within a short period.
34. HMFSI has acknowledged that its initial search retrieved emails 1, 3 and 4, although it originally considered two of those emails to fall outside the scope of Dr Macdonald's request. I can find no reason why the authority would not similarly have retrieved email 2 and acknowledged that fact, if the email was still in existence at the time of Dr Macdonald's request. I therefore accept that for the purposes of FOISA, email 2 was not information which HMFSI should have considered in relation to Dr Macdonald's request.

Decision

I find that Her Majesty's Chief Inspector of Fire and Rescue Authorities acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Dr Macdonald.



Appeal

Should either Dr Macdonald or Her Majesty's Chief Inspector of Fire and Rescue Authorities 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 decision notice.

Kevin Dunion
Scottish Information Commissioner
22 August 2007



Appendix

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.

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.

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.



21 Review by Scottish public authority

(...)

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.