



Scottish Information  
Commissioner

<b>Decision 038/2007 – Mr David Emslie and Communities Scotland</b>
<i>Information on rent increases by Grampian Housing Association</i>

**Applicant: Mr David Emslie**  
**Authority: Communities Scotland**  
**Case No: 200600806**  
**Decision Date: 5 March 2007**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 038/2007 – Mr David Emslie and Communities Scotland**

**Request for information on alleged “illegal rent increases” in respect of Grampian Housing Association – information not held – section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA).**

### **Relevant Statutory Provisions and other Sources**

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); section 8(1) (Requesting information); section 14(2) (Vexatious or repeated requests); section 15 (Duty to provide advice and assistance); section 17 (Notice that information is not held).

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

Edward Anthony Barber and the Information Commissioner (ICO) (11 November 2005) [Ref: EA/2005/0004].

### **Facts**

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Mr Emslie requested from Communities Scotland all information held by it relating to alleged illegal rent increases by Grampian Housing Association since 1982. Communities Scotland replied by stating that it held no information which came within the terms of Mr Emslie's request.

The Commissioner found that Communities Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Emslie. In narrowly defining the terms of his information request, the Commissioner found that Communities Scotland failed to comply with section 15 of FOISA.

However, the Commissioner found that Communities Scotland already supplied all the information it would be required to supply to Mr Emslie in response to his information request and did not require Communities Scotland to release information to Mr Emslie in response to his information request.



## Background

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1. On 14 January 2006, Mr Emslie faxed a letter to Ms Cathy Jamieson, Justice Minister, in which he asked for various information about Grampian Housing Association (GHA), including:
  - (a) information held “on the illegal rent increases” by Grampian Housing Association since 1982 and the effects on Housing Benefits Overpayments;
  - (b) information held on actions taken by the Executive “to protect public funds” in respect of those rents increases;
  - (c) correspondence with the Lord Advocate on this matter;
  - (d) correspondence with the Procurator Fiscal Service in Aberdeen on this matter;
  - (e) departmental correspondence within the Executive on this matter;
  - (f) correspondence with Communities Scotland on this matter.
2. Communities Scotland replied on 8 February 2006 indicating that it was unaware of any “illegal rent increases” and accordingly advising Mr Emslie that the information requested by him was not held by them.
3. On 10 March 2006 Mr Emslie wrote to Communities Scotland asking it to review its decision. Mr Emslie detailed correspondence he had had with persons and Departments in the Scottish Executive (and, earlier, the Scottish Office) on the subject of rents. He explained that he had many letters of acknowledgement in relation to his correspondence on alleged “illegal rent increases” and provided details of his past correspondence on this subject.
4. Communities Scotland subsequently carried out a review and, on 6 April 2006, notified Mr Emslie of the outcome of the review. It confirmed that it held considerable correspondence about Mr Emslie’s complaints against GHA, which had either been generated by Mr Emslie as a result of his enquiries or had already been released to him as a result of an earlier information request made by him (except where the material was considered to be exempt). The review therefore concluded that there was no further releasable information beyond that already in Mr Emslie’s possession.



5. Mr Emslie was dissatisfied with the outcome of the review and, on 10 April 2006, applied to me for a decision as to whether Communities Scotland had dealt with his information request in accordance with Part 1 of FOISA. He stated that he had been in correspondence with Communities Scotland on the subject of rent increases by GHA for many years and that he could not understand how Communities Scotland could state that they had no awareness of the information he was requesting (on the rent increases) and that they must hold information relevant to his request.
6. The case was allocated to an investigating officer. Mr Emslie's application was validated by establishing that he had made a valid information request to a Scottish public authority and had applied to me only after asking the public authority to review its response to his request.

## **The Investigation**

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7. On 10 May 2006, the investigating officer notified Communities Scotland of the application made by Mr Emslie and, in terms of section 49(3)(a) of FOISA, asked for its comments on the application. The Freedom of Information Unit of the Scottish Executive responded on behalf of Communities Scotland on 30 May 2006, and again on 30 August 2006 and 7 September 2006. Communities Scotland is an agency of the Scottish Executive. References below to "the Executive" are references to the Freedom of Information Unit of the Scottish Executive.

## **Submissions from the Executive**

8. The Executive stated that Communities Scotland does not hold information relevant to Mr Emslie's request. It stated that Communities Scotland had dealt with previous requests by Mr Emslie under FOISA and the Data Protection Act 1998 (DPA) and had provided all releasable information on the issues raised.
9. The Executive emphasised that Mr Emslie had specifically asked for documents relating to "illegal" rent increases and that, because Communities Scotland were unaware of any court decision confirming that GHA had acted illegally, Communities Scotland held no documents that related to "illegal" rent increases.



10. The Executive explained that GHA has generally followed the best practice process in setting rent and service charges for tenants with regulated tenancies. This required GHA to register the rent and service charges with a Rent Officer at the Rent Registration Service. Tenants then have an opportunity to appeal to the Rent Officer on the set rent. The Rent Officer may then decide whether the Rent Assessment Committee, which consists of three independent assessors, should hear the appeal. Communities Scotland is aware of one instance – since corrected – in 2003 when GHA misinterpreted the Housing (Scotland) Act 2001 and wrongly applied an increase to the regulated rents.
11. The Executive also quoted from the Records Management Policy of the Regulation and Inspection Division (of Communities Scotland) which included the provision that all records, including general files and correspondence, should be destroyed after 5 years. However, Communities Scotland had retained older documents in respect of GHA which had previously been supplied to Mr Emslie.

#### **Submissions from the applicant**

12. In his application, it was clear that Mr Emslie was dissatisfied with the claim by Communities Scotland that it was not aware of the alleged illegal rent increases when he had been advising it of this for the past 13 years. He said that he could not understand how Communities Scotland could state that it had no knowledge of the “illegal rent increases”.
13. Mr Emslie supplied to my Office copies of documents relating to what he alleged were “illegal” rent increases. Mr Emslie also referred me to a letter written by a senior rent officer which used the expression “illegal increase” in respect of rents.
14. Also included in Mr Emslie’s documentation was an excerpt from a decision of the Rent Assessment Panel for Scotland (of 27 January 2006) relating to a tenancy of which GHA was the landlord and within which were the sentences:  
  
“He [the person representing GHA] accepted that in the past, in error, rents of registered properties had been unlawfully increased. That issue had now been resolved” [at paragraph 5].

## **The Commissioner’s Analysis and Findings**



15. Section 1(1) of FOISA contains the general entitlement to information, that is, a person who requests information from a public authority which holds it is entitled to be given it by the authority. Section 8(1) of FOISA defines what is meant by “requesting information” and makes it clear, in section 8(1c), that the request must describe the information requested. However, FOISA does not state what is required in order that the request can be said to describe the information requested.
16. In Mr Emslie’s application, he states that he seeks “a review of the decision that they [Communities Scotland] were not aware of the illegal rent increases I have been advising them of for thirteen years”. On this point, I would note that Communities Scotland was stating that it had no knowledge of illegal rent increases in the sense of a situation to which a legal decision had been pronounced that certain rent increases were illegal. It was not stating that it had no knowledge of Mr Emslie’s views on GHA, or that it held no information in respect of Mr Emslie’s views on GHA or alleged illegal rent increases. This was stated in the review and again in further submissions from the Executive on 30 May 2006 and 30 August 2006.
17. Indeed, Communities Scotland has clearly stated that although it does not hold any information about illegal rent increases by GHA or any other housing association, it does hold considerable information relating to Mr Emslie’s dealings with GHA. In respect of this latter information, Communities Scotland did not regard any information it held as within the scope of Mr Emslie’s request.
18. Mr Emslie provided me with documentation which used the words “unlawful” and “illegal”. However, Communities Scotland and the Executive argued that the word “illegal” relates to a situation where a court has pronounced that an action was contrary to the law.
19. I note that the Concise Oxford English Dictionary (OED) describes “illegal” as “contrary to or forbidden by law” and “unlawful” as “not conforming to or permitted by the law or rules”. The OED distinguishes the two as follows:  
  
“Something that is illegal is against the law, whereas an unlawful act merely contravenes the rules that apply in a particular context”.
20. As I said in decision 149/2006, Mr Rob Edwards and the Scottish Executive (at paragraph 32):  
  
“I would expect that any public authority interpreting a request for information in a way that diverged from the established meaning of the words contained in the request would do so only on the basis on some evidence that the requestor intended such an interpretation.”



21. It is unreasonable always to expect an applicant to have detailed knowledge of what information is held by a Scottish public authority, or how to describe such information with precision. However, in this instance the information is not at issue, but rather how the information is described.
22. In respect of Mr Emslie's request, I take the view that Communities Scotland has interpreted the terms of the request in an inappropriately restrictive manner.
23. Section 15 of FOISA places a duty on Scottish public authorities to provide reasonable advice and assistance to a person who has made an information request to it.
24. In general, I would expect, in terms of section 15 of FOISA, that when an applicant describes information using certain terms but describes it using different terms from that which the public authority would use, and where the authority thinks that the applicant is referring to information which that public authority holds – but which it would describe using a more precise or technical word, or a different expression – that it would be reasonable to expect the authority to clarify what information is described by the applicant and consider whether the information can be disclosed or released.
25. In this respect I agree with the comments of the Information Tribunal in the appeal of Edward Anthony Barber and the Information Commissioner (ICO) (11 November 2005) [Ref: EA/2005/0004]:

“If Public Authorities are permitted under the FOIA [the Freedom of Information Act 2000] to pick and choose which requests they respond to on the basis of whether or not they approve of the language used by requesters, this would make a mockery of the legislation. If the language causes difficulty in identifying the information then they can resort to s.1 (3) as outlined above.”
26. I therefore find that, in defining Mr Emslie's information request in so narrow a manner, Communities Scotland was wrong to advise Mr Emslie that it did not hold any information in respect of his request. Where I have found that a public authority has failed to comply with any aspect of Part 1 of FOISA, I must consider what, if any, steps the public authority should take in order to comply with Part 1.
27. Matters are made more difficult here in that Communities Scotland has already supplied all the information it would be required to supply to Mr Emslie in response to his information request to Mr Emslie. There is therefore little practical use in ordering Communities Scotland to provide Mr Emslie with another copy of this information and I do not intend to do so.



28. Finally, I would comment that I am surprised that Communities Scotland did not, so far as I am aware, refuse to deal with the request from Mr Emslie in terms of section 14(2) of FOISA (which does not oblige public authorities to comply with repeated requests).

## **Decision**

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I find that Communities Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Emslie. In narrowly defining the terms of his information request, I consider that Communities Scotland failed to comply with section 15 of FOISA.

However, for the reason set out above, I do not require Communities Scotland to release information to Mr Emslie in response to his information request.

## **Appeal**

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Should either Communities Scotland or Mr Emslie 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**  
**05 March 2007**





## Appendix

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### 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.

##### **8 Requesting information**

- (1) Any reference in this Act to “requesting information” is a reference to making a request which –  
(...) (c) describes the information requested.

##### **14 Vexatious or repeated requests**

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

##### **15 Duty to provide advice and assistance**

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



## **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.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.