

Scottish Parliament Region: Mid Scotland and Fife

Case 200500641: Scottish Environment Protection Agency

Summary of Investigation

Category

Scottish Executive and Devolved Administration: Environmental; Policy; Complaint Handling

Overview

The complainant (Mr C) raised a number of complaints that were in connection with unanswered questions he put to the Scottish Environmental Protection Agency (SEPA) about private discharge proposals in or near sewered areas.

Specific complaints and conclusions

The complaints which have been investigated are that SEPA:

- (a) failed to answer five questions outlined in Mr C's letter of 25 April 2005 and all subsequent questions he raised thereafter (*upheld*);
- (b) failed to adequately answer the related queries from Mr C's lawyer (*not upheld*);
- (c) failed to abide by the terms and conditions of the Service Charter that was in operation at the time Mr C made his complaint (*upheld*);
- (d) failed to ensure that their staff should not use draft policies that have not been signed off by the Board (*not upheld*); and
- (e) as an organisation fails to be consistent and fair (*not upheld*).

Redress and recommendations

The Ombudsman recommends that SEPA:

- (i) apologise to Mr C for failing to answer his five questions and respond directly to him answering the questions in the same way that SEPA replied to me;
- (ii) apologise to Mr C for their failure to meet the terms and conditions of their Service Charter;
- (iii) review how they identify and address formal complaints that arise from ongoing correspondence.

SEPA have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. On 24 October 2005 the Ombudsman received a complaint from a businessman (referred to in this report as Mr C) against the Scottish Environmental Protection Agency (SEPA). Mr C runs a small environmental consultancy business (a limited company referred to in this report as the Company) along with a colleague. There was on-going correspondence between Mr C and SEPA when Mr C came to the Ombudsman. It can be seen from correspondence and also comments received from SEPA that relations between Mr C, the Company and SEPA were strained.

2. Mr C complained that SEPA failed to answer five questions he put to them in his letter dated 25 April 2005, in connection with proposals about the private discharge of treated sewage effluent in or near sewered areas. Mr C stated that it was crucial that SEPA answered his questions as they were directly connected to a client of his, (referred to in this report as Mr D), who wished to build eight houses at X.

3. Mr C had complained to the Chief Executive of SEPA on 2 September and 13 October 2005 and received a reply dated 20 October 2005 from their Area Manager (referred to in this report as Officer 1). Mr C felt that SEPA's failures to both address his complaints and address them in good time had a detrimental effect on the Company and his consultancy relationship with Mr D.

4. The complaints from Mr C which I have investigated are that SEPA:

- (a) failed to answer five questions outlined in Mr C's letter of 25 April 2005 and all subsequent questions he raised thereafter;
- (b) failed to adequately answer the related queries from Mr C's lawyer;
- (c) failed to abide by the terms and conditions of the Service Charter that was in operation at the time Mr C made his complaint;
- (d) failed to ensure their staff should not use draft policies that have not been signed off by the Board; and
- (e) as an organisation fails to be consistent and fair.

Investigation

5. The investigation of this complaint involved obtaining and reading all relevant documentation, including correspondence between Mr C and SEPA and correspondence between Mr C's lawyer and SEPA. I have also reviewed relevant SEPA policies for example, their policy on private waste water drainage and read SEPA's Service Charter and Complaints Procedures. A written enquiry was made to SEPA on 17 November 2005 and their reply was received on 28 February 2006.

6. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and SEPA were given an opportunity to comment on a draft of this report.

(a) SEPA failed to answer five questions outlined in Mr C's letter of 25 April 2005 and all subsequent questions he raised thereafter

7. In two of Mr C's questions he asked SEPA to define 'sewered areas' and to agree with him that as X had a population of less than 2000, he should be exempt from providing a sewage collection system and needed only to ensure that urban waste water is treated before being discharged to the water environment. In the remaining three questions Mr C asked SEPA to agree with him that there was no legal requirement, Act or Regulation that would prevent the installation of a private sewage treatment plant in X.

8. In his reply letter to Mr C dated 8 June 2005, SEPA's Environmental Protection Officer (referred to in this report as Officer 2), acknowledged the questions posed, however, outlined that he felt these questions 'are not appropriate for me to answer'. He then forwarded Mr C's letter of 25 April 2005 to SEPA's Water Policy Unit for their input.

9. From 25 April 2005 onwards, various written and telephone exchanges occurred between Mr C and SEPA and, although a meeting between the parties was also suggested during August 2005, this never took place. Thereafter as Mr C's five questions remained unanswered, he complained to SEPA's Chief Executive on 2 September and 13 October 2005.

10. In their reply to me, SEPA explained that they received these questions when they were actively drafting a detailed formal policy for consultation that included the issues Mr C raised. SEPA believed that Officer 1 answered some of Mr C's questions in his reply to him dated 20 October 2005. SEPA also

believed that other issues raised by Mr C were taken into consideration during the development of the policy and consultation period. SEPA stated that they do not consider it appropriate to have 'detailed discussions with an individual company seeking to influence SEPA's development of policy to their commercial advantage'. They considered this could be seen as collusion outside their public consultation process that took place from December 2005 up to February 2006.

11. In Annex 1 of SEPA's reply to me, they answered the five questions outlined in Mr C's letter of 25 April 2005.

(a) Conclusion

12. It is a valid point that no external pressures should be placed on SEPA by individual companies to influence policy making to their commercial advantage. However, I am not convinced this is the conclusion that can be drawn from the questions Mr C asked of SEPA. Also, Officer 2 stated in his letter to Mr C dated 8 June 2005, that his questions continued to be considered by SEPA, but they remained unanswered. I find no evidence that from this date up to October 2005, a clear, unambiguous explanation was given to Mr C by SEPA about why his questions remained unanswered or when he could expect an answer. I accept that SEPA's view that they did take Mr C's questions into account. Nevertheless, they did not explicitly refer to them in their replies to Mr C. Therefore, on balance, I do uphold this aspect of the complaint.

(a) Recommendation

13. The Ombudsman recommends that SEPA apologise to Mr C for failing to answer his five questions and respond directly to him answering the questions in the same way that SEPA replied to me.

(b) SEPA failed to adequately answer the related queries from Mr C's lawyer

14. When Mr C's lawyer contacted SEPA, questioning SEPA policy and asking for a full legal argument as to why SEPA can refuse to consent applications for discharges to controlled waters, in what they perceive to be a sewered area, Mr C's identity was not disclosed and he was referred to as a client. Mr C's identity only became fully clear when the Company wrote to SEPA's Chief Executive on 2 September 2005.

15. In SEPA's written response to Mr C's lawyer dated 31 May 2005, SEPA said that the questions posed by the lawyer were connected to their policy development and stated it was appropriate to consider these challenges during their consultation period, to avoid the risk of a later formal legal challenge. SEPA believed that they answered Mr C's lawyer's contacts 'adequately'.

16. Mr C did not agree that SEPA's response to his lawyer of 31 May 2005 was adequate, furthermore Mr C believes this response was ludicrous. Continuing correspondence between Mr C's lawyer and SEPA from June to October 2005 did not resolve matters any further.

(b) Conclusion

17. SEPA responded to Mr C's lawyer's related queries on behalf of 'clients'. I am of the view this response was given in time and was adequate. Mr C may not accept the reasons given by SEPA within their reply, but they did respond to the enquiries. I also consider that in responding to enquiries or questions, SEPA can make it clear what they can/can not comment on and why. In this case SEPA did make its position clear, therefore, I do not uphold this aspect of the complaint. Although this complaint is linked to complaint (a), I have made a clear distinction between upholding complaint head (a) with not upholding complaint head (b) based on the presented evidence.

(b) Recommendation

18. The Ombudsman has no recommendations to make.

(c) SEPA failed to abide by the terms and conditions of the Service Charter that was in operation at the time Mr C made his complaint

19. SEPA did not record Mr C's letter of 2 September 2005 to the Chief Executive as a complaint against their service and believed that it was part of the ongoing exchange about their policy development. However, Mr C's letter dated 13 October 2005 clearly stated he was registering a formal complaint. SEPA accepted that it did not follow the section 'Putting Things Right' in its Service Charter.

(c) Conclusion

20. I can understand why SEPA failed to identify Mr C's letter dated 2 September 2005 as a complaint, due to the on-going exchanges regarding the five unanswered questions. However, it is quite clear from the letter of 13 October 2005 that Mr C was making a complaint and that SEPA failed to

abide by the terms and conditions of their Service Charter. Therefore, I uphold this aspect of the complaint.

(c) Recommendations

21. The Ombudsman recommends that SEPA apologise to Mr C for their failure to meet the terms and conditions of their Service Charter. She also recommends that SEPA review how they identify and address formal complaints that arise from ongoing correspondence.

(d) SEPA failed to ensure that their staff should not use draft policies that have not been signed off by the Board

22. SEPA explained that it is an interim practice for staff to use draft policies that have not been signed off by the main Board. This approach has been approved by their Corporate Management Team. I note it is clear that the practice of using draft policies has been the subject of debate for some considerable time.

23. SEPA has provided a detailed account of the link between the increased pressure for private sewerage facilities and their policies and periods of consultations that cover this subject. As it has been their practice to oppose the development of private sewerage facilities within sewered settlements, they advised me that they have progressively formalised proceedings in dealing with this issue.

(d) Conclusion

24. As an organisation, SEPA has the right to take decisions with regard to its policies and practices. It may be best practice to try to avoid using draft policies, however, while policies are being developed, this is an acceptable practice. Therefore, I do not uphold this aspect of the complaint.

(d) Recommendation

25. The Ombudsman has no recommendations to make, however observes that in the pursuit of best practice, the tightening up of the time period a draft policy operates, is an area that could be strengthened.

(e) SEPA as an organisation fails to be consistent and fair

26. I have linked the questions Mr C put to SEPA about private discharge proposals in or near sewered areas with his allegations of failures by SEPA to be consistent and fair. Mr C has given me information about a number of cases

which he believes show inconsistency by SEPA in its decision making on these issues.

27. SEPA issued two guidance notes for staff advising them of the approaches they should take regarding this issue dated 22 November 2004 and 22 August 2005. I noted (para 22) that the development of policy by SEPA is on-going.

(e) Conclusion

28. The guidance notes for staff outline the approaches to be taken when encountering private discharge proposals in sewered areas. The guidance note dated 22 August 2005 also highlights that the draft policy is not a formal document and should only be used as an interim measure. I have reviewed these documents and I consider they reveal that SEPA was trying to be consistent during a time when their policy was being developed.

29. I have also considered the cases Mr C has presented as evidence of inconsistency. However, these decisions were taken at a time when SEPA's draft policy was evolving. They were also taken with reference to the particularities of each case. In my view the decisions reached are a reflection of these factors rather than evidence of inconsistency.

30. While I acknowledge that there are areas of disagreement between the parties and there are some faults, this is not evidence of SEPA failing to be consistent and fair. In all the circumstances, I do not uphold this aspect of the complaint.

(e) Recommendations

31. The Ombudsman has no recommendations to make

32. I am pleased that SEPA has acknowledged the failures in their complaint handling and that they failed to meet the terms and conditions of their Service Charter. SEPA have accepted the recommendations and will act on them accordingly.

18 July 2007

Explanation of abbreviations used

Mr C	The complainant
SEPA	Scottish Environmental Protection Agency
The Company	The complainant's business
Mr D	The complainant's client
X	Development Site
Officer 1	SEPA Area Manager
Officer 2	SEPA Environmental Protection Officer