



Scottish Information
Commissioner

Decision 051/2006 – Mr Peter MacMahon, The Scotsman newspaper, and the Scottish Executive

Request for documentation which details the attitude of the Royal Family and Royal Household to the Holyrood Project

Applicant: Peter MacMahon, The Scotsman newspaper

Authority: The Scottish Executive

Case No: 200502221

Decision Date: 22 March 2006

**Kevin Dunion
Scottish Information Commissioner**

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Decision 051/2006 – Mr Peter MacMahon, The Scotsman Newspaper, and the Scottish Executive

Request for documentation detailing the attitude of the Royal Family and Royal Household to the Holyrood project – section 41(1) communications with Her Majesty etc – sections 30(b)(i) and 30(b)(ii) effective conduct of public affairs

Facts

Mr Peter MacMahon, a journalist with *The Scotsman* newspaper, requested information from the Scottish Executive which detailed the attitude of the Royal Family and the Royal Household to the Holyrood project. The Scottish Executive refused this request, citing section 41(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). Section 41(a) exempts information if it relates to communications with the Royal Family or Royal Household. In their submission to the Commissioner, the Executive also stated that sections 30(b)(i) and 30(b)(ii) of FOISA, which relate to the effective conduct of public affairs, also applied to some of the requested information.

Outcome

The Commissioner found that the Scottish Executive (the Executive) acted in accordance with the FOISA in applying the exemption contained under section 41(a) to the information requested by Mr MacMahon in its entirety, and that the public interest favours non-disclosure in relation to this exemption.

In addition, the Commissioner found that the Executive acted in accordance with FOISA in applying the exemptions contained under sections 30(b)(i) and 30(b)(ii) to some of the withheld information. Again, the Commissioner found that the public interest favours non-disclosure.

However, the Commissioner also found that the Executive failed to act in accordance with FOISA in applying the exemptions contained under sections 30(b)(i) and 30(b)(ii) to other withheld documents. The Commissioner noted, however, that those documents would continue to be exempt from release under section 41(a) of FOISA.



Appeal

Should either the Scottish Executive or Mr MacMahon 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.

Background

1. Peter MacMahon, a journalist with *The Scotsman* newspaper, submitted an information request to the Scottish Executive (the Executive) on 25 March 2005. In this request, Mr MacMahon sought the following:

“A complete set of all the correspondence, memos, official minutes and other documentation relating to the Holyrood building, which details the attitude of the Royal Household to the project. I would include in this letters between not only the Prince of Wales, but other members of the Royal Family and their household, and the Scottish Office, the Scottish Executive and the Scottish parliamentary authorities which you hold in your files.”
2. The Executive responded to Mr MacMahon’s information request on 19 April 2005. In this response, the Executive stated that the requested information was exempt under section 41 of the Freedom of Information (Scotland) Act 2002 (FOISA). Section 41(a) of FOISA states that information is exempt if it relates to communications with Her Majesty, with other members of the Royal Family, or with the Royal Household.
3. Section 41 is, however, subject to the public interest test. The Executive stated in its response that, while it recognised that there was a substantial public interest in material relating to the Holyrood project, the overall balance of the public interest lay in favour of protecting the ‘fundamental constitutional principle’ that communications between Ministers and the Monarch are confidential in nature.
4. On 25 May, Mr MacMahon wrote to the Executive requesting that it review its decision. In this correspondence, Mr MacMahon expressed his view that the public interest in this case lay in favour of disclosure. Mr MacMahon stated that, in his opinion, the fact that the public funded both the Monarchy and the Scottish Parliament should mean that the public had a right to see how these two institutions interacted over a very important period of Scottish public life.



5. The Executive responded on 28 June. Following a review of the case, the Executive confirmed that it believed the initial assessment to be correct in all the circumstances.
6. Mr MacMahon submitted an application for decision to me on 4 July 2005.

The Investigation

7. Mr MacMahon's application was validated having confirmed that he had made a valid information request to a Scottish public authority and appealed to me only after asking that authority to review its response to the request. The case was assigned to an Investigating Officer.
8. The Investigating Officer contacted the Executive on 11 July 2005. Information sought included:
 - Copies of the documentation requested by Mr MacMahon;
 - A detailed commentary in relation to the withheld information, including further information on the reasoning behind the assessment that the public interest in withholding the information outweighed that in disclosure;
 - Details of the review process carried out by the Executive.
9. The Executive responded to this correspondence on 11 August 2005. In its response, the Executive set out the process involved in identifying and locating the information requested by Mr MacMahon, while also supplying copies of sixteen documents which it stated fell within the scope of Mr MacMahon's information request. These sixteen documents comprised five pieces of direct correspondence between the Executive and members of the Royal Family or Royal Household, and eleven internal Executive documents which related to the above correspondence.
10. The Executive stated that all sixteen documents fell within the scope of the exemption under section 41(a). In addition, in its submission to my Office, the Executive also indicated that it wished to apply a second exemption to some of withheld information. Specifically, the Executive stated that the eleven documents which comprised internal Executive communications were also exempt under section 30(b)(i) and section 30(b)(ii) of FOISA.



11. Section 30(b)(i) and section 30(b)(ii) of FOISA exempt information if its disclosure would or would be likely to inhibit substantially either the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.

The Commissioner's Analysis and Findings

The information provided

12. As stated above, the Executive supplied 16 documents to this Office which it indicated fell within the scope of Mr MacMahon's request. Having considered the specific content of each document, however, it is my view that one of the documents supplied, identified as document 2b, fell outwith the scope of Mr MacMahon's request, and therefore should not be considered in my assessment of this case.
13. Document 2b comprises a briefing note prepared in advance of a meeting. Having reviewed this briefing note, however, it is clear that it does not constitute information detailing '*the attitude of the Royal Household to the [Holyrood] project*', as sought by Mr MacMahon in his initial request. Indeed, document 2b was prepared as a briefing for Executive staff prior to the meeting in question, and as such details the attitude of the Executive to the Holyrood project, as opposed to that of the Royal Household. In addition, it should also be noted that the information contained within document 2b is substantially similar to the public statements made by the Executive in relation to the Holyrood project on or around the time that the briefing note was created.
14. Given that it is my view that document 2b falls outwith the scope of Mr MacMahon's initial request, it will not, therefore, fall to me to consider the issue of whether or not the exemptions claimed by the Executive can be applied to this document. The remainder of this Decision Notice will, therefore, focus only on the Executive's application of exemptions in relation to the 15 documents falling within the scope of the request.

Consideration of the exemptions

15. The Executive stated in its submission to my Office that all of the requested information was exempt from release under section 41(a) of FOISA, while a proportion was also exempt under section 30(b)(i) and section 30(b)(ii). I will consider the application of each of these exemptions in turn below.



Section 41(a) – Communications with Her Majesty, etc.

16. Section 41(a) of FOISA exempts information if it relates to communications with:
 - Her Majesty;
 - Other members of the Royal Family; or
 - The Royal Household.

17. Information will fall within the scope of section 41(a) if it *relates to* communications with any of the above. The scope of this exemption therefore extends beyond the specific content of particular communications, and will take in any minutes, memos, emails, notes, reports or drafts which relate in some way to those communications.

18. Having considered the information contained within the 15 documents falling within the scope of Mr MacMahon's request, it is clear to me that all the information either constitutes actual communications with a member of the Royal Family or Royal Household, or it relates directly and specifically to those communications. As such, I am satisfied that all the information held falls within the scope of the exemption contained under section 41(a) of FOISA.

Consideration of the public interest

19. The exemption under section 41(a) is, however, subject to the public interest test. Where an exemption is subject to this test, FOISA requires the authority to consider the public interest in relation to the release of the information before ultimately assessing whether it should be withheld. Information can only be withheld under FOISA where the public interest in withholding it is greater than that in disclosure.

20. In his application to me, Mr MacMahon stated that, in his view, the balance of the public interest lay strongly in favour of release. Mr MacMahon asserted that the building of the Scottish Parliament in Edinburgh had been the most important development in Edinburgh in recent times, and made clear his view that there was a strong public interest in the release of information relating to its construction. Mr MacMahon also stated that there was a considerable public interest in the debate over devolution, and that issues relating to the parliament, including those relating to its location, had been a major factor of that debate. In addition, Mr MacMahon has also stated, in his request for review to the Executive, that the public, which funds both the Monarchy and the Scottish Parliament, have a right to see how these two institutions interacted over an important period of Scottish public life.



21. The Executive, however, concluded that the balance of the public interest lay strongly in favour of non-disclosure. In their submissions to me, the Executive stated that there was a fundamental public interest in maintaining the political neutrality of the Monarchy in public affairs. The Executive stressed that such political neutrality was fundamental to the United Kingdom's system of constitutional monarchy, and underpinning such neutrality was the constitutional principle that communications of the type under consideration here were confidential in nature. The Executive therefore stated that there was an extremely strong public interest in protecting this fundamental constitutional principle.
22. The Executive also asserted that certain key items of correspondence under consideration were sent on a personal basis, and indicated that, as such, the correspondence was sent by the relevant member of the Royal Family as a private individual, as opposed to in their public role. The Executive suggested that, where communication had taken place with members of the Royal Family acting in a private capacity, there would be a greater public interest in non-disclosure in relation to the exemption under section 41(a) of FOISA (and indeed that there was a specific public interest in maintaining the opportunity to allow members of the Royal Family to express their views in this way). The Executive stated that, in such a private capacity, there was a reduced argument that there should be public scrutiny of the workings of the Royal Family, and that there was, conversely, a strong public interest in maintaining and ensuring their privacy and dignity.
23. Finally, the Executive also stated that, while only a proportion of the information (five documents) constituted direct correspondence with members of the Royal Family or Royal Household, the nature of the remainder of the documents meant that they detailed the attitudes of these parties to the Holyrood project. As a result, the Executive stated that the release of this information would have the same effect as releasing the direct correspondence, and the public interest test therefore again favoured non-disclosure.
24. When applying the public interest test to this exemption, I accept that it may be particularly difficult to disentangle the public and private personas of some members of the Royal Family. For instance, my guidance on this exemption notes that the Sovereign has the right and the duty to counsel, encourage and warn Her government. She is thus entitled to have opinions on government policy and to express them to Her ministers. She is, however, constitutionally bound to accept and act on the advice of Her ministers. Any communications which have preceded the giving of that advice would be covered by the exemption and it may be considered that the public interest in maintaining the political neutrality of The Queen in public affairs (its reality and appearance) which is fundamental to the UK system of constitutional monarchy is not outweighed by the public interest in disclosure.



25. Having considered the specific circumstances of this case and, in particular, having carefully reviewed the content of the information requested by Mr MacMahon, I am not persuaded by the Executive's argument that the release of the information would prejudice the political neutrality of members of the monarchy. However, this is because they appear to me to be private and personal communications, and I am of the view that there is a general public interest argument in favour of ensuring that the Royal Family's communications, and particularly those sent on a personal basis or made under an expectation of privacy, have a level of protection from general disclosure.
26. In order for disclosure to be appropriate, therefore, the public interest in maintaining the exemption must be outweighed by the public interest in disclosure. However, in considering this balance, a distinction must be drawn between information in which the public is interested, and information which is in the public interest.
27. Paragraph 74 of the '*Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002*' (the Section 60 Code) provides some examples of the factors which may be considered by an authority when considering whether information is, in fact, in the public interest. These factors include:
 - Whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
 - Whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
 - Whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
 - Whether disclosure would contribute to a debate on a matter of public interest.
28. Having considered the specific information falling within the scope of Mr MacMahon's request, it is my view that, while the information may well be of some interest to the public, it falls significantly short of the standard required to ensure that disclosure would be in the public interest.
29. I do not, therefore, find that the public interest in non-disclosure is outweighed by that in disclosure in relation to this case. As a result, I find that the Executive acted correctly in refusing to release the requested information under section 41(a) of FOISA.



Section 30(b)(i) and section 30(b)(ii)

30. As detailed above, it is my view that the Executive appropriately applied the exemption contained under section 41(a) to the requested information in its entirety. However, given that the Executive also applied section 30(b)(i) and section 30(b)(ii) in relation to 10 of the 15 documents which fell within the scope of the request, it is also appropriate to consider the application of these exemptions within the scope of this Decision.
31. Section 30(b)(i) exempts information if it would, or would be likely to, inhibit substantially the free and frank provision of advice, while section 30(b)(ii) exempts information if it would, or would be likely to, inhibit substantially the free and frank exchange of views for the purpose of deliberation.
32. The ten documents to which this exemption was applied comprise a range of different document types. These are:

Document	Description
2a	Covering note forwarding a copy of briefing note 2b to Executive staff
4	Covering email forwarding draft of correspondence contained under 5c
5a	Draft of outgoing correspondence
5b	Draft of outgoing correspondence
5c	Draft of outgoing correspondence
6	Covering note forwarding draft of outgoing correspondence
7	Email commenting on outgoing correspondence
8	Memo describing content of meeting
9	Covering note seeking comment on draft of outgoing correspondence
11	Memo describing content of telephone conversation

33. As I have stated previously in cases where the exemptions under section 30(b)(i) and section 30(b)(ii) have been applied, it is my view that the standards to be met in applying the tests contained within these exemptions is high. In applying these exemptions the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views.
34. In its submission to this Office, the Executive has argued that that all of the aforementioned documents fall within the ambit of providing advice or views, and that their release would have a substantially inhibiting effect. Indeed, the Executive asserts that, were this information to be released, it would result in a true reluctance on the part of Executive staff to proffer advice or views for deliberation in an open and frank manner in future. This, it argues, is essential to its responsible and effective operation.



35. In making this submission the Executive has presented a “broad brush” approach in relation to the application of the exemptions under section 30(b)(i) and section 30(b)(ii), indicating its belief that all internal documentation held in relation to the request will fall within the scope of both exemptions. In doing so, however, the Executive has failed to make clear why each of the exemptions should apply to each specific piece of information.
36. Having considered the information to which the exemptions under section 30(b)(i) and section 30(b)(ii) have been applied, it is clear to me that this “broad brush” approach was not appropriate in the circumstances of this case. Indeed, it should be noted by the Executive that the circumstances under which such an approach will be appropriate are likely to be rare.
37. While it is clear that there are strong arguments for the application of the exemptions under section 30(b)(i) and section 30(b)(ii) in relation to some of the withheld documents, it is also apparent that there is no reason for exempting the information under these particular exemptions in relation to others.
38. I do not, for example consider that the documents 2a, 4 and 6 will fall within the scope of either of these exemptions. Each of these three documents represents covering correspondence which was sent alongside other, more substantive documentation. While, in the cases of documents 4 and 6, there are clear arguments for the accompanying documentation to be exempt under sections 30(b)(i) and/or section 30(b)(ii), I am not persuaded that there is any argument for the application of these exemptions to any of the covering correspondence.
39. In each case, the covering correspondence refers to the issue which has resulted in the creation of the attached document, and draws the recipient’s attention to that document. While the discussion of the issue underpinning the document ensures that this covering correspondence will be exempt under section 41(a), I can see no reason for the Executive’s assertion that the release of this information would either substantially inhibit the future free and frank provision of advice, or the future free and frank exchange of views for the purpose of deliberation.
40. Document 8 comprises a minute of a meeting. On consideration of this document, I can again see no reason to conclude that the release of this material would inhibit substantially either the provision of advice, or the exchange of views for the purposes of deliberation. I therefore again conclude that, while the information is exempt under section 41(a), the Executive has incorrectly applied the exemptions contained under section 30(b)(i) and section 30(b)(ii) to this information.
41. As a result, I conclude that neither section 30(b)(i) nor section 30(b)(ii) apply to documents 2a, 4, 6 and 8.



42. With regard to the remaining documents, it is my view that there are significantly stronger arguments for the application of one or more of the exemptions under section 30(b)(i) and section 30(b)(ii) in relation to those documents.
43. Documents 5a, 5b and 5c, all represent drafts of outgoing correspondence at various stages in the drafting process, while document 7 comprises an email commenting on the content of one of these drafts, and proposing a suggested amendment. Each draft has been prepared for circulation amongst Executive staff, and the various drafts reveal that, as a result of this process, a number of amendments have been made to the content and tone of the correspondence prior to its completion.
44. The initial draft of this letter can be considered to represent the presentation of a suggested course of action to senior Executive personnel or, indeed, the provision of advice to those personnel on how to proceed in terms of the formulation of the correspondence. This suggested course of action has then been amended and revised, following consultation and comment with various Executive staff members. A written example of such a comment has been supplied in the form of document 7.
45. It is my view that the release of the drafts described under documents 5a, 5b and 5c, and the comment described under document 7, would indeed inhibit substantially both the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation. Having considered carefully the documentation in question, I am of the opinion that their content can be considered to represent both the provision of advice on how to proceed, while also representing a subsequent exchange of views on the most appropriate tone and content to be included in the correspondence. Were this information to be released, I am therefore persuaded by the Executive's belief that release would have the effect of substantially inhibiting the candour and freedom within which such drafts are prepared, deliberated, and revised, in future.
46. Document 9 represents a covering note which was sent alongside a draft of outgoing correspondence. It should be noted that this outgoing correspondence was not directly related to the outgoing correspondence in documents 5a, 5b, or 5c, discussed in paragraph 43 above.
47. In addition to forwarding the draft of outgoing correspondence, document 9 also explicitly refers to key aspects of the content of this draft, and sets out the reasoning which informed the tone and content of the draft correspondence. In addition, this note also seeks comment and advice on whether specific aspects of the draft correspondence were appropriate in the circumstances.



48. Once again, having considered the specific content of this document, I am satisfied that the exemptions contained under section 30(b)(i) and section 30(b)(ii) have been applied correctly. It is my view that, were this information to be released, there would be a future reluctance on the part of Executive staff to present advice and views, of the type expressed in this correspondence, in such a frank and open manner.
49. In relation to the document 11, I consider that a similar set of circumstances apply to those described in relation to document 9 above. Document 11 represents a detailed note of a telephone conversation. Again, having considered the content of this document, I am satisfied that the release of this information would be likely to inhibit substantially the presentation of such information in future, for reasons similar to those described in paragraph 48 above.
50. As such, I conclude that both section 30(b)(i) and section 30(b)(ii) apply to documents 5a, 5b, 5c, 7, 9 and 11.

Consideration of the public interest

51. Section 30(b)(i) and section 30(b)(ii) are, however, also subject to the public interest test. Even if the information falls within the scope of the exemption, therefore, I must consider whether the public interest in non-disclosure is outweighed by that in release.
52. In practical terms, the consideration of the public interest in relation to section 30(b)(i) and section 30(b)(ii) will be substantially similar to those considerations made in relation to section 41(a). In considering the public interest arguments, the specific content of the information must be examined within the context of the public interest, and in this respect, the issues considered in relation section 41(a) (and described in paragraphs 19-28 above) are inextricably linked to those which should be considered in relation to section 30(b)(i) and section 30(b)(ii).
53. In addition, there will be additional public interest considerations to be balanced in weighing the public interest in ensuring that the Executive is open and accountable in the carrying out of its functions, against the public interest in ensuring that the Executive can undertake discussions and deliberations on sensitive issues as freely and frankly as possible, without fear that the exploration of potential solutions would be subdued or inhibited.
54. On consideration of the public interest in relation to section 30(b)(i) and section 30(b)(ii), I again conclude that the public interest in non-disclosure is not outweighed by that in disclosure. Underpinning this conclusion, are the public interest arguments discussed in paragraphs 24-28 above.



55. As a result, I find that the Executive acted in accordance with FOISA by refusing to release documents 5a, 5b, 5c, 7, 9 and 11, on the grounds that the information was exempt under section 30(b)(i) and section 30(b)(ii) of FOISA. I also find, however, that the Executive failed to act in accordance with FOISA in exempting documents 2a, 4, 6 and 8 under section 30(b)(i) and section 30(b)(ii) of FOISA.

The work undertaken to identify relevant information

56. During the course of the investigation, my Investigating Officer conducted a detailed assessment of the search undertaken by the Executive for relevant information, in order to confirm that all reasonable steps had been taken to identify and retrieve information falling within the scope of the request. This was considered to be particularly relevant in this case given the broad scope of the original request, the fact that much of the documentation would be likely to date back to the mid-1990's, and that any correspondence would be likely to involve individuals who are now deceased.
57. As a result of this assessment, and having considered in detail the work undertaken by the Executive, I am satisfied that the search for relevant records was reasonable and appropriate in the circumstances, and that the information supplied to this office represents all the identifiable documentation held by the Executive that is relevant to Mr MacMahon's request.



Decision

I find that the Scottish Executive (the Executive) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemption contained under section 41(a) of FOISA to the information requested by Mr MacMahon in its entirety. I find that the public interest favours non disclosure in relation to this exemption.

I also find that the Executive acted in accordance with Part 1 of FOISA in applying the exemptions contained under section 30(b)(i) and section 30(b)(ii) in relation to documents 5a, 5b, 5c, 7, 9 and 11 of the withheld information. Again, I find that the public interest favours non-disclosure in relation to this exemption.

However, I also find that the Executive failed to act in accordance with Part 1 of FOISA in applying the exemptions contained under section 30(b)(i) and section 30(b)(ii) to documents 2a, 4, 6 and 8. Regardless of this, however, this information falls under the exemption contained in section 41(a) of FOISA.

Kevin Dunion
Scottish Information Commissioner
23 March 2006