



Scottish Information
Commissioner

**Decision 022/2008 – Mr Peter MacMahon of The Scotsman
and the Scottish Ministers**

Communications on the removal of asylum seekers from Scotland

Applicant: Mr Peter MacMahon of The Scotsman

Authority: Scottish Ministers

Case No: 200600389

Decision Date: 11 February 2008

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 022/2008 – Mr Peter MacMahon of The Scotsman and the Scottish Ministers

Request for all correspondence, emails and notes of meetings between UK Ministers and the Scottish First Minister and Justice Minister (and their officials and advisors) relating to the removal of asylum seekers from Scotland

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 25 (Information otherwise accessible); 28 (Relations within the United Kingdom); 29(1)(a) (Formulation of Scottish administration policy etc); 30(b)(i) and 30(b)(ii) (Prejudice to effective conduct of public affairs).

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendices 1 and 2 (Appendix 2 is referred to later in this decision) form part of this decision.

Facts

Mr MacMahon submitted an information request to the Scottish Ministers (the Ministers) for all the correspondence, emails and notes of meetings over a specified period between the UK Government and the Scottish Administration relating to the removal of asylum seekers from Scotland.

The Ministers considered that some information was not held by them and that other information was exempt under various sections of FOISA.

Following an investigation, the Commissioner found that the Ministers had complied with Part 1 of FOISA in dealing with certain aspects of the information request made by Mr MacMahon, but also that it had failed to do so in withholding certain information. He required the information wrongly withheld to be released to Mr MacMahon



Background

1. Mr MacMahon submitted an information request to the Ministers on 9 December 2005 for:
 - All correspondence, emails and notes of meetings, between UK ministers and the Scottish First Minister and Justice Minister over the last six months (i.e. the six months prior to making this information request) relating to the removal of asylum seekers from Scotland.
 - All correspondence, emails and notes of meetings, between UK special advisers and officials and Scottish Executive (now Scottish Government) officials and special advisers over the last six months on the removal of asylum seekers from Scotland.
2. On 12 January 2006, the Ministers responded to Mr MacMahon's request for information. In this response the Ministers confirmed that some of the information was not held by them in terms of section 3(2)(a)(ii) of FOISA (I will consider this provision in more detail later in the decision). Other information was held by the Ministers but was exempt in terms of section 28 and section 38(1)(b) of FOISA.
3. On 23 January 2006, Mr MacMahon submitted a request for a review of the Ministers' decision not to release information to him.
4. A review was subsequently carried out and the Ministers upheld their original decision to apply the exemption in section 28 of FOISA to the information that it had withheld.
5. On 22 February 2006, Mr MacMahon applied to me for a decision as to whether the Ministers had breached Part 1 of FOISA in withholding the information from him. The case was subsequently allocated to an investigating officer. Mr MacMahon's application was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Ministers to review their response to his request.



The Investigation

6. A letter was sent by the investigating officer to the Ministers on 22 March 2006. In this letter the investigating officer asked the Ministers to comment on Mr MacMahon's application in terms of section 49(3)(a) of FOISA. The Ministers were asked to provide, amongst other items;
 - a copy of the information that had been withheld from Mr MacMahon.
 - an analysis of the exemptions that they were relying on in withholding the information from Mr MacMahon.
 - an analysis of their consideration of the public interest test in relation to these exemptions, where applicable.
7. A full response was received from the Ministers on the 19 April 2006. The Ministers cited further exemptions under sections 25, 29(1)(a) and 30(b)(i) and (ii). Clarification on these and other points was provided in subsequent correspondence.

Submissions from the Scottish Ministers

8. In their submissions to my Office, the Ministers advised that the provision of services to asylum seekers is a devolved matter, while immigration legislation (including policy with regard to the removal of asylum seekers) is a matter which is reserved to Westminster. However, the Scottish Administration meets regularly with the Home Office to discuss this issue and the impact that it has on Scottish services and communities.
9. The Ministers also advised that discussions began between the Ministers and the Home Office in 2005 to discuss a range of measures to improve the asylum system. The Ministers submit that although an announcement was made by a Home Office Minister in March 2006 (a copy of the press release for this announcement can be found at www.press.homeoffice.gov.uk/press-releases/dialogue-with-scotland), in which he set out measures which were being taken forward, full agreement had not been reached on how these measures should operate and be implemented.
10. Submissions from the Ministers in relation to each of the exemptions and provisions in FOISA relied on by them are considered in more detail below.



Submissions from the applicant

11. In communication with my Office, Mr MacMahon has indicated that it is his view that the information that he is seeking from the Ministers is information which relates to an important matter of public policy and debate in Scotland. Mr MacMahon also states that it is his view that this information should be in the public domain.

The Commissioner's Analysis and Findings

12. In their response to my Office, the Ministers provided copies of the documents that they had withheld from Mr MacMahon, together with a schedule detailing which had been withheld and listing the exemptions the Ministers relied on to withhold the information.
13. In all, the Ministers submitted 39 documents to my Office. In the main the Ministers relied on a combination of exemptions in section 28, 29 and 30 for withholding the documents, and, in addition, relied on the exemptions in section 25 and 38(1)(b) for certain documents.
14. In relation to document 28, I have considered submissions made by the Ministers as to those parts of the document which should be regarded as falling within the scope of Mr MacMahon's request and in the circumstances agree that only one email (22 November 2005 14:48) is in fact covered by the request. I will therefore not consider the remainder of that document further in this decision.

Section 3(2)(a)(ii)

15. In their response to Mr MacMahon, and in their submission to my Office, the Ministers indicated that certain of the information in their possession which would address Mr MacMahon's request did not come within the scope of the general rights of access under FOISA. The Ministers relied on the terms of section 3(2)(a)(ii) in relation to this information.
16. In further communication with the investigating officer the Ministers advised that they no longer wished to rely on section 3(2)(a)(ii) in respect of any information. The Ministers indicated that they were relying on the exemptions in sections 28, 29(1)(a) and 30(b) in relation to all of these documents. As a result of this, I will not consider the application of section 3(2)(a)(ii) any further in this decision.



Section 25(1)

17. The exemption contained in section 25 of FOISA is an absolute exemption, which means that where a Scottish public authority relies on this exemption it is not required to consider the application of the public interest test.
18. In their submissions to my Office, the Scottish Ministers sought to rely on the exemption under section 25(1) in respect of the press articles in document 9 and a press release forming part of document 36.
19. The Ministers advised in their submissions that the information contained in document 9 included Press Association articles which would be otherwise accessible to the applicant. The Ministers also stated that document 36 contains a copy of a press release and that this is otherwise accessible to the applicant, and as a result they were relying on section 25(1) of FOISA in withholding the information in the press articles in document 9 and the press release in document 36 from Mr MacMahon.
20. Following further communication between the investigating officer and the Ministers, they indicated that they were unable to identify the press release in document 36 from a search of the internet (and specifically the Home Office website), and as a result were of the view that this was a draft press release. The Ministers indicated that they were seeking to withhold the information in this draft under the terms of the exemption in section 30(b)(ii). I will consider this further later on in this decision notice.
21. In their further submissions to my Office, the Ministers indicated that they could find no record of where the two press articles in document 9 appeared and as such they were content to release them to Mr MacMahon. I therefore require the Ministers to do this. The Ministers have not applied any other exemptions to these articles, so I will not consider them further in this decision.
22. I am therefore not satisfied that the Ministers applied the terms of the exemption in section 25(1) of FOISA correctly, as the information in documents 9 (Press Association articles only) and 36 (draft press release only) could not have been reasonably obtained by Mr McMahon other than by requesting it under section 1(1) of FOISA.



Section 28

23. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. Section 28(2) defines “administration in the United Kingdom” as including the Government of the United Kingdom and the Scottish Administration. The exemption in section 28(1) is a qualified exemption in that it is subject to the public interest test contained in section 2(1)(b) of FOISA.
24. In their submissions to my office, the Ministers relied on this exemption for all of the documents that they had withheld from Mr MacMahon, apart from a document entitled “EPU 07/05 – FAMILY REMOVALS POLICY”, which is contained in document 11 and is already in the public domain. The Ministers indicated that they would provide a copy of this to Mr MacMahon, which I understand they have now done. I will therefore not consider this document further in my decision.
25. In justifying their reliance on the exemption under section 28, the Ministers submitted that, although matters relating to asylum and immigration were reserved and therefore not their responsibility, they did have responsibility for providing services to asylum seekers. In addition, the removal of asylum seekers from Scotland was subject to the law of Scotland and required the assistance of Scottish police forces. Therefore, there were many occasions where reserved and devolved policy areas interacted and required to be considered by both administrations. The Ministers submitted that they relied on good communications with Whitehall (and in particular, for these purposes, the Home Office), which included being copied into correspondence, in order to keep up to date on relevant issues and inform their responses to them. They argued that it was implicit that documents exchanged with Whitehall should remain confidential, to allow clear and uninhibited communication which could explore all the options freely. Their disclosure, it was argued, would undoubtedly prejudice relations with Whitehall substantially, and any consequent limitation on such communications would mean that Ministers were no longer adequately informed on immigration and asylum matters and therefore would not be in a position to respond accurately and appropriately to issues as they arose.



26. The Ministers emphasised their commitment to working closely with the UK Government (and vice versa), in accordance with the principles established by the Memorandum of Understanding between the UK Government and the devolved administrations and (more particularly) the Concordat between the (then) Scottish Executive and the Home Office, which relied on mutual trust. They also expressed concern over the short period of time that had passed since the relevant documents had been created, and also the fact that this remained a matter of current debate and sensitivity. For all of the reasons they had advanced, they considered that release of the information would cause real harm to relations between the Scottish and UK administrations, to communications between them and to the effective work of Scottish government.
27. During the investigation, the investigating officer asked the Ministers whether they had considered redaction of information withheld under section 28, so that the remaining information could be released to the applicant. The Ministers were of the view that redaction of the sensitive information would in most cases have resulted in the information that was released being meaningless. The Ministers also advised that they were concerned (given previous expressions of disquiet) that even a partial release of the information would upset relations with the Home Office, which would as a consequence become less forthcoming in future exchanges. The Ministers provided the investigating officer with copies of emails from the Home Office in order to substantiate their assertions.
28. In determining whether the Ministers were correct to rely on the exemption in section 28(1) of FOISA, I must be satisfied that release of the withheld information to Mr MacMahon would prejudice substantially relations between any administration in the United Kingdom and any other such administration. In this case, it has been argued that the relevant administrations are the Government of the United Kingdom and the Scottish Administration (which includes the Ministers and their staff). Although there is no definition under FOISA as to what is deemed to be substantial prejudice, as I have outlined in previous decisions it is my view that the test for establishing substantial prejudice is high. In order to rely on this exemption the risk of damage being caused by disclosure of the information would have to be real or very likely, not hypothetical. The harm caused or likely to be caused would have to be significant, not marginal, and it would have to occur in the near (certainly the foreseeable) future and not in some distant time.



29. I note the existence of the Memorandum of Understanding (MOU) and supplementary concordats between the UK Government and devolved administrations, and that the MOU puts in place an agreed framework as to how administrations should work with each other and the co-operation that is expected, including provision as to the exchange of information. However, I am also clear that the terms of the MOU and concordats do not create legal obligations. While protective marking and other indications of the providing administration's expectations as to disclosure will always be relevant, decisions on the disclosure of any information held by an administration need to be made in accordance with the terms of FOISA.
30. In deciding whether the Ministers were correct to rely on the exemption in section 28 of FOISA for all of the documents withheld, I have considered the content of the information which has been withheld together with the submissions from the Ministers. It is clear to me that by having regard to the specific details of each document, different conclusions can be arrived at in respect of each as to whether the exemption at section 28 applies. Having considered the information contained within the withheld documents I accept the submissions from the Ministers that at least some of this information relates to communications which at the time the Ministers dealt with Mr McMahon's request were still ongoing between the Ministers and the Home Office relating to matters concerning asylum seekers. I also accept that although matters concerning immigration and asylum are reserved to Westminster it is still of importance that discussion can take place between the Home Office and the Ministers concerning this, particularly where it impacts on responsibilities which are devolved to the Ministers. I am satisfied that there is a clear intention in a number of the documents which have been withheld that the Ministers and the Home Office should work together in relation to policy on the removal of asylum seekers, a matter of considerable sensitivity. I am also satisfied that it is clear in certain of the documents that information is only being passed between administrations on the understanding that it is held in confidence by the administration which receives it.
31. I also recognise that the documents which have been withheld were of relatively recent origin at the time when the Ministers dealt with Mr McMahon's request and that the issues addressed were then ongoing. It is clear from the information that has been made available in the public domain already that certain decisions had at the time been made in respect of these issues, but also that further discussions remained to be had, and I accept that these discussions should be carried out in a manner which allows all options to be discussed freely between the administrations. In all the circumstances, I accept that disclosure of much of the information would reasonably be expected to inhibit such discussion to a significant extent. For the reasons given above, therefore, I accept that release of certain of the information withheld would, or would be likely to, prejudice substantially relations between the UK Government and the Scottish administration.



32. However, I do not come to this conclusion with respect to all of the documents for which this exemption is claimed.
33. Primarily, I have come to this conclusion on those documents which originate in the Home Office and have been supplied in confidence to the Scottish Ministers to keep them informed on current thinking or activity within relevant Government departments and agencies in respect of asylum matters. I come to the same view on that information which contains detailed exchanges or summaries of discussion between the Home Office and the Scottish Executive on how matters will be taken forward and a protocol agreed. A public announcement on such an agreement was made in March 2006, but at the time of Mr MacMahon's request (December 2005) these discussions were ongoing and disclosure would have been premature and would undoubtedly have impacted adversely upon the willingness of both administrations to exchange views frankly. In the light of the representations made to me and considering the content of those documents, it can be concluded that disclosure of that information could reasonably have been expected to have the effect of causing the Home Office to be less willing to share such information and views, to the substantial prejudice of relations within the UK.
34. The fact that the information originates from the Home Office is not, however, sufficient to justify the application of the exemption. For instance one document (Document 36) is a copy of a press release which was issued by the Home Office whilst the Home Office Minister was in Scotland. I do not see how the disclosure of that information in response to the request could substantially prejudice relations within the United Kingdom.
35. Similarly, the information contained in document 29 relates to a line the relevant Home Office Minister agreed should be taken by the Ministers' press officers in response to queries regarding certain issues. As it was clearly the intention of the Home Office Minister that this information should be placed in the public domain in response to questions put to the Ministers' press officers, I am not satisfied that release of this information would prejudice substantially relations between the Home Office and the Scottish Administration
36. There are other documents where I do not find that withholding the information, on the basis of the section 28 exemption, is justified. These include documents which often originate from within the (then) Scottish Executive. Often these are informing the Home Office of activity within Scotland or representations made to the Scottish Executive. These are often for information only and I cannot see why the relationship within the UK would be harmed by the release of this information. In other cases the communications are seeking assistance or support from the Home Office on a specific matter and I have not found that harm to relationships would occur if this was released (although such information may attract another exemption such as section 29, which will be addressed later).



37. Where I am satisfied that the information withheld is exempt information under section 28(1), I am required to consider the application to that information of the public interest test in section 2(1)(b) of FOISA and to determine whether the public interest in disclosing the information is outweighed by that in maintaining the exemption.
38. In considering the application of the public interest test, the Ministers have advanced the following arguments to justify their assertion that the public interest in disclosing the information is outweighed by that in maintaining the exemption.
- Release of the information would cause real harm to the relations between the Scottish and UK Administrations, to communications between them, and to the effective work of the Scottish Government.
 - The Ministers recognise the importance of transparency in the government's operations, but the handling of complex and sensitive issues such as those which form the subject of Mr McMahon's request require a clear private space in which both UK and Scottish Ministers and their officials can operate.
 - Jeopardising the communication channel between the Home Office and the Ministers would have a negative impact on the development of policy intended to improve public services to children of asylum seekers and the local communities they live in.
 - The devolution settlement relies on mutual co-operation and trust between the administrations, and where disclosure of information may cause damage to this relationship – as the Ministers believe that it will do in this case – they would argue that there is a strong reason for the balance of the public interest to lie in withholding the information concerned.
39. In considering the application of the public interest test, I have taken into account the arguments which were advanced by the Ministers. I note that the Ministers appear not to have considered or provided any arguments relating to the public interest in disclosing any of this particular information, concerning themselves only with the public interest in withholding the information. It is not at all clear to me that they have balanced public interest considerations as envisaged by section 2(1)(b).



40. It is clear that the issue of asylum seekers in Scotland, and particularly the removal of asylum seekers, is a matter of public concern and debate, and a highly contentious issue which impacts on communities in Scotland. This has obviously been recognised by the Ministers and the Home Office given the information that has been released in the press, particularly details of a speech made by Home Office Minister Tony McNulty on 27 March 2006 during a visit to Scotland, in which he outlined some of the matters which had been discussed. A copy of the press release from this can be found at www.press.homeoffice.gov.uk/press-releases/dialogue-with-scotland. It is also clear from the submissions made by Mr MacMahon that it is his view that the information which has been withheld should be put into the public domain to inform public debate on this issue.
41. In this case, the information which has been withheld relates to issues which were at the time the Ministers dealt with Mr McMahon's request the subject of ongoing deliberation within government and between administrations. I accept that these issues are complex and sensitive, particularly where reserved and devolved aspects meet, and that it was important that both the UK Government and the Scottish Administration could debate them fully and frankly, both individually and together. I also accept that it was necessary that there was mutual trust and co-operation between administrations to allow good communication on such an issue which impinged on both reserved and devolved matters.



42. Of course, on such a highly charged and contentious matter there is a public interest in having an insight into what options were being considered; whether there were areas of disagreement and whether those discussions encompassed matters being raised by civic society organisations outside of the political process. However there is also a strong public interest in both administrations feeling that they can air their views frankly and to explore options which may be adopted, amended or discarded. The balance to be struck will often depend upon when the information was requested and whether the public has been given any or sufficient insight into what was being discussed and the outcomes. In this case Mr MacMahon requested the information whilst detailed discussion was underway on matters which had led to expressions of concern. Some of the matters being discussed had only been exchanged between officials and had not yet been put to the relevant Ministers. The fact that these discussions were being had was not secret - Ministers in both administrations had made reference to them and the outcome was publicly announced on 27 March 2006. It seems to me, therefore, that on balance the public interest lay in allowing those discussions to progress and that to cause the information to be released whilst the negotiations were under way would not be in the public interest. On balance, therefore, I am satisfied in all the circumstances that the public interest in disclosing the information withheld (with the exception of the information referred to in paragraph 34-36 above and as detailed in Appendix 2) is outweighed by that in maintaining the exemption, and therefore that the information withheld (subject to those exceptions referred to above) was properly exempted and withheld under section 28(1) of FOISA.

Section 29(1)(a)

43. Section 29(1)(a) states that information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy.
44. The exemption under section 29(1)(a) is sometimes referred to as a “class based” exemption, a term which was adopted during the consultation process for the proposed Scottish Freedom of Information legislation to describe the scope of the exemption. This would suggest that there is a presumption that this section of FOISA exempts any information from disclosure that falls into this class. However, the Ministers’ internal guidance on exemptions in FOISA states: “it is not the nature of the document itself that is determinative but the substance of the information contained within it”.
45. For information to fall within the scope of the exemption under section 29(1)(a), the information only needs to “relate” to the formulation or development of government policy.



46. I take the view that “formulation” means the output from the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. “Development” is sometimes used interchangeably with “formulation”, but “development” may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy.
47. Where a public authority seeks to rely on the exemption in section 29(1)(a) it must also take into account the terms of section 29(2) and 29(3). Under section 29(2) any statistical information which has been used to provide an informed background to the taking of a decision as to policy is not to be regarded as relating to the formulation or development of the policy in question once that decision has been taken. This means that any statistical information should be released to the applicant on request, if the policy decision the information was used for has been taken.
48. Section 29(3) relates to factual information which has been used, or is intended to be used, to provide an informed background to making a policy decision. This section requires the public authority to consider the public interest in releasing this factual information to the applicant. To do so, it is necessary for the public authority to differentiate between statistics, facts analysis and opinion to determine what factual information it holds in relation to the matter concerned. The public authority would then need to consider the public interest in disclosing this factual information.
49. In their submissions to my Office, the Ministers have relied on the exemption under section 29(1)(a) in respect of all of the documents withheld from Mr MacMahon.
50. In justifying their reliance on this exemption, the Ministers have submitted that although they recognise that matters relating to asylum are reserved to Westminster, it is clear that they can have a policy on the issues concerned. The Ministers assert that this is evidenced by the fact of the ongoing discussions between Scottish Ministers and UK Ministers on this issue. The Ministers also state that this reserved issue has a clear impact on areas of devolved responsibility, including the provision of services to asylum seekers. Where reserved and devolved policy areas lie in close proximity to each other or meet, the Ministers state that it is necessary that these matters must be analysed by both administrations. The Ministers state that in respect of section 29(1)(a) they are also relying on the submissions they have made in respect of their reliance on the exemption in section 28.



51. Further submissions were sought by the investigating officer as to whether the Ministers had considered whether any factual information that was used or was likely to be used in coming to a decision on this policy matter could be disclosed to the applicant, as per section 29(3) of FOISA. In their response the Ministers advised that the factual information they had received from the Home Office contributed to decisions being made regarding removal of asylum seekers. The Ministers stated that they were withholding this factual information under section 28 to ensure that any future exchanges with the Home Office over asylum cases and Home Office policy could be free to contain factual information.
52. Considering the information that has been withheld from Mr MacMahon, I am satisfied that there is evidence within the information that the UK Government, in particular the Home Office were content to enter into discussion with Scottish Ministers on the matter of removal of asylum seekers, even although this is a reserved matter.
53. I have only gone on to consider under section 29(1)(a) those documents which I have not found to be exempt under section 28. In my view (as set out in Appendix 2 to this decision) many of these documents are concerned with the formulation or development of policy. The Scottish Executive was embarking upon seeking agreement on a protocol with the Home Office. To my mind this was a matter of policy formulation and development seeking to give expression (so far as was agreed) to the Scottish Executive's position on the removal of failed asylum seekers and in particular how the education and social work responsibilities of the Scottish Executive would in future be discharged.
54. However, I am not convinced that this exemption can be applied simply because a document contains reference to the issue of asylum seekers. As in the case of section 28 exemption, I do not find that the exchange of information about action being taken by civil society organizations or confirmation about what was said at First Minister's Question Time on the matter constitutes the formulation of development of policy.



55. I have concluded that the exemption does not apply to the information in documents 9 and 10, which relate to press articles; document 12 relating to information received from a voluntary organisation; document 20 relating to a particular Scottish Parliamentary Question; documents 27 and 29 as regards general lines to take in respect of press enquiries, and document 36 which relates to information which was released to the press. In none of these cases do I believe that the information can be said to relate to the formulation or development of the Scottish Administration policy. At best what is communicated are current policy positions, much of which was already in the public domain at the time of the request, sometimes as a result of the direct release of the information concerned. In other instances, the information reflects on public or political activity on the matter of the removal of failed asylum seekers (which may in whole or part be exempt under section 30 as will be discussed later in this decision).
56. Where I accept that the information withheld does relate to the formulation or development of government policy (as set out in Appendix 2), I now have to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.
57. In considering whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption, the Ministers have advanced the following arguments in favour of withholding the information.
- That there is a strong public interest in high quality policy-making and implementation. For the Government to succeed in upholding this public interest, Ministers and officials need to be able to consider all available options, however unpalatable, and to be able to debate these rigorously, to expose all their merits and demerits.
 - That the candour of Ministers and Officials when carrying out these discussions will be affected if the content of these discussions were to be disclosed in the near future.
 - That if this information were to be released in the near future this may undermine or constrain the government's view on settled policy or policy which is at the time under discussion and development.



58. As was considered in paragraph 42 above, what is particularly pertinent here is the timing of the request. Policy making was actively underway at the time of the request and the nature of such a process, as was apparent in this case, is often that views are canvassed and exchanged between officials (and in this case between officials in each administration and then between administrations). In the course of these exchanges, views can be expressed strongly and options considered and discarded. In this case there was a clear policy output which was being worked towards, which was announced in March 2006. At the time of the request, however, the content of that agreement was still under discussion and thus there was as a strong public interest in allowing that space to conclude those discussions.
59. Of course, on such a matter there is a countervailing argument that the release of the information whilst discussions were still underway would allow the public to have an understanding of the decision making process and what matters were being considered and to have a role in the decision making process by advocating options which they thought needed to be considered.
60. In my view then it should not be automatically assumed that information should be withheld where a matter is as yet unresolved. However, I am mindful that in this case the fact that the discussion was taking place had been publicly declared, the subject matter and purpose was known and the outcomes were expected in due course and would be put into the public domain. There is no doubt that public expressions of view on the issue were being addressed in the course of these discussions. In this instance I believe that the balance of the public interest lay in accepting that there was a benefit to allowing that policy discussion to proceed without contemporaneous release of the content of that discussion. On that basis, I find that the balance of the public interest lay in withholding rather than disclosing the information at the time of the request.

Section 30(b)(i) & (ii)

61. I am only going to consider 12 documents under the exemptions in section 30(b), as the remainder of the information withheld has been found to be exempt under sections 28 or 29.
62. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of the exemption, it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
63. In order for the Ministers to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, they would have to show that the disclosure of the information under the Act would, or would be likely to, inhibit substantially – (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation, respectively.



64. As I have said in previous decisions, it is my view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) 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. The Ministers' own guidance to its staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
65. In their submissions to my Office, the Ministers have advised that there is a need to ensure free and open communication between the Ministers and the Home Office to enable both parties to develop their respective policies in relation to asylum seekers living in Scotland. The Ministers contend that there is a clear need to allow officials to provide a free and frank exchange of advice and views for the purposes of deliberation, and that if these documents were to be released then officials might be more circumspect in commenting on issues in future. The Ministers have advised that in their view inappropriate disclosure of information has the potential to not only limit the full and frank discussion of policy, but might also distort public perceptions of advice that has been provided by officials. The Ministers contend that early disclosure of information might affect the impartiality of the advice provided.
66. In the course of this investigation, the Scottish Ministers submitted additional, general submissions on the arguments they were relying on in justifying their conclusions that the exemptions in section 30(b) of FOISA applies to the information which has been withheld in various cases, including this one, which are subject to my consideration.
67. I have addressed these additional, general submissions already in paragraphs 23 to 31 of my decision number 089/2007, *Mr James Cannell and Historic Scotland*. As these new arguments which have been submitted by the Ministers are not specific to the information under consideration, I do not intend to discuss them further here, other than to say that I have considered them fully, together with the original submissions that the Ministers provided, in reaching my decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here.
68. Turning now to the documents to be considered under the exemptions in section 30(b), these are specifically documents 2, 4, 8, 9 (covering email only), 10, 12, 20, 27, 29, 36 and 37. I will consider the press release in document 36 under section 30(b)(ii) only.
69. In my view, documents 2, 8, 9, 10 and 29 contain innocuous covering e-mails relating to information which is outwith the scope of this exemption. None of the content of these documents attracts the section 30(b) exemptions.



70. I also consider that none of the information in documents 27 and 37 would attract the exemptions in section 30(b) of FOISA. I do not consider that if this information were to be released it would have the effect of inhibiting substantially the free and frank provision of advice or exchange of views in future.
71. From documents 4 and 12, where officials are exchanging views, only certain sentences attract the exemption and these can be redacted allowing the remainder of the documents to be released.
72. Document 20 expresses the opinion of an official and seeks views on a specific and sensitive matter, and I am satisfied that release of this information at the time of the request would have had a substantially inhibiting effect.
73. Having considered document 9 (covering email only, as the Ministers have already indicated that they are content to release the information in the Press Association articles), I am satisfied that the information in the covering email would not come within the scope of section 30(b)(i) or 30(b)(ii). I am satisfied that this is the case as I do not accept that if this information were to be released it would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation. I am of this view as the covering email in document 9 refers to the attached Press Association articles, which were clearly intended to be placed in the public domain, and the main substance of the text in this email is an extract from one of these articles. Furthermore it clearly states that a full account of this information is to be placed on the Scottish Parliament website from 30 September 2005. Although I have no evidence to prove that this information did go onto the website, it was clearly the intention of the author of the email that this should happen, and that therefore this information would be publicly available, and as a result I am unable to accept that release of this information would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
74. From considering the information contained in document 29, I accept that this does represent the free and frank provision of advice. However, I cannot accept that release of the information in this document would inhibit substantially the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, as laid down in section 30(b)(i) and 30(b)(ii) of FOISA. I am of this view as the information contained within this document relates to a statement that was agreed by the Home Office to be used by the Home Office and Ministers' press offices in responding to media requests. Therefore, it was obviously within the contemplation of both the Home Office and the Ministers that this information might go into the public domain. I cannot then accept the Ministers' contention that release of this information would have an inhibiting effect.



75. Considering the information contained in document 36, this information represents an exchange of information between the Ministers and the Home Office, regarding an attached press release. There is nothing contentious within the emails and nothing of particular substance. Therefore, I am not satisfied that if this information were to be released it would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
76. The Ministers argue that as they have been unable to find reference to the attached press release on the Home Office website it must be a draft, and therefore argue that it should be withheld under section 30(b)(ii) on the grounds that officials must be given thinking space when drafting such material. However, there is no evidence of any drafting process in which the officials within the Scottish Executive or the Home Office were engaged, and I am not persuaded that it is a draft at all. The information had been supplied to an official within the Scottish Executive who had requested a copy of a press release which had recently been issued by the Home Office. In responding to this request, there is nothing to indicate that the release was a draft or had not been issued. Therefore I am unable to uphold the application of section 30(b)(ii).
77. Where I am satisfied that certain of the information would be exempt under section 30(b)(i) and 30(b)(ii) of FOISA, I am required to consider the application of the public interest test in section 2(1)(b) of FOISA.
78. The Ministers advanced the following arguments to justify their stance that the public interest in disclosing the information was outweighed by that in maintaining the exemption:
- That there is a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case.
 - That the knowledge of possible disclosure might inhibit provision of advice in the future and impair the candour and freedom within which papers are prepared, deliberated and revised in future.
 - That the public interest in protecting frank communications also concerns any underlying effects likely to suppress effective future communications.
79. In considering the application of the public interest test, much the same considerations apply as I have set out earlier in this decision in relation to other exemptions. I conclude here that in the limited number of cases where s30 (b)(i) and (ii) applies, the nature of the information would not significantly benefit public understanding of the issue or how a decision was arrived at, and the public interest is not served in causing harm to the process of the exchange of advice and views. Accordingly, I conclude that the public interest in disclosing the information is outweighed by that in maintaining the exemption.



Section 38(1)(b)

80. The Ministers applied the exemption in section 38(1)(b) of FOISA to certain information. As I have found this information to be exempt and correctly withheld under other exemptions, I am not required to (and will not) go on to consider the application of section 38(1)(b).

Decision

I have found that the Ministers failed to comply with the requirements of Part 1 of FOISA in that they did not rely on the exemption under section 25(1) correctly in relation to parts of 2 items which the applicant had requested.

I have found that the Ministers complied with the requirements of Part 1 of FOISA in that they correctly applied the exemption in section 28(1) to a number of items requested by the applicant. In considering the application of the public interest test in relation to these documents I found that the public interest in disclosing the information contained in them was outweighed by that in maintaining the exemption.

I have found that the Ministers complied with the requirements of Part 1 of FOISA in that they correctly applied the exemption in section 29(1)(a) to a number of items that had been requested by the applicant. In considering the application of the public interest test in relation to these documents I found that the public interest in disclosing the information contained in these documents was outweighed by that in maintaining the exemption.

I have found that the Ministers complied with the requirements of Part 1 of FOISA in that they correctly applied the exemption in section 30(b)(i) and 30(b)(ii) to parts of two items, and all of one item, which had been requested by the applicant. In considering the application of the public interest test in relation to these documents I found that the public interest in disclosing the information contained in these documents was outweighed by that in maintaining the exemption.

I have found that the Ministers failed to comply with the requirements of Part 1 of FOISA by withholding certain information. I have found a number of instances where none of the exemptions in section 25(1), section 28(1), section 29(1)(a) or section 30(b)(i) & (ii) of FOISA applied to the information under consideration, and therefore the Ministers failed to comply with section 1(1) of FOISA in withholding this information. In order to comply with the requirements of section 1(1) of FOISA, I require this non-exempt information to be disclosed to the applicant.



My conclusions and any steps required in relation to each item under consideration in this decision are summarised in the table (Appendix 2) appended to this document. This Appendix forms part of the decision notice.

In order to comply with Part 1 of FOISA, I require the Ministers to take the steps specified above and in Appendix 2 within 45 days after the date of intimation of this decision notice.

Appeal

Should either Mr MacMahon or the Ministers 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 February 2008



Appendix 1

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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
 - (a) may be reasonably obtainable even if payment is required for access to it;
 - (b) is to be taken to be reasonably obtainable if-
 - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
 - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.



28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
 - (a) the formulation or development of government policy;
 - ...
- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-
 - (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
 - (b) paragraph (b) of that subsection, as relating to Ministerial communications.
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section-

"government policy" means-

 - (a) the policy of the Scottish Administration; and



- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or

...



Appendix 2 – Schedule of documents

| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|---|--|
| 1 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes No n/c n/c | Withhold document |
| 2 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No No No | Release document |
| 3 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No Yes (one sentence only) n/c n/c | Release document with limited redaction Redact sentence in last paragraph on page 2 of document. Sentence starts “Scottish Executive officials...” and finishes “...eviction procedures” |
| 4 | s.28 s.29(1)(a) | No Yes (Partially) | Release subject to redaction Redact sentence in second last paragraph on the first page. Sentence starts “...Scottish Executive Officials” and finishes “...eviction |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|-------------------------------------|-------------------|---|
| 5 | s.30(b)(i) | Yes (partially) | procedures” Redact last paragraph on first page from “..Secondly I was” to “further questions in parliament” |
| | s.30(b)(ii) | Yes (partially) | |
| | s.28 | No | Withhold document |
| | s.29(1)(a) | Yes | |
| 6 | s.30(b)(i) | n/c | Withhold document |
| | s.30(b)(ii) | n/c | |
| | s.28 | No | |
| | s.29(1)(a) | Yes | |
| 7 | s.30(b)(i) | n/c | Withhold document |
| | s.30(b)(ii) | n/c | |
| | s.28 | Yes | |
| | s.29(1)(a) | n/c | |
| 8 | s.30(b)(i) | n/c | Release document |
| | s.30(b)(ii) | n/c | |
| | s.28 | No | |
| | s.29(1)(a) | No | |
| 9 | s.25(1) | No | Release document |
| | s.30(b)(i) | No | |
| | s.30(b)(ii) | No | |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|--|--|
| | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No No No | |
| 10 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No No No | Release document |
| 11 | s.28 s.29(1)(a) | Yes (except for document EPU 07/05 – FAMILY REMOVALS POLICY as the Ministers have released this) Yes (except for information contained in Annex F as this does not relate to the formulation or development of government policy and not document EPU 07/05 – FAMILY REMOVALS POLICY as the Ministers has indicated it will | Withhold document (apart from document entitled “EPU 07/05 – FAMILY REMOVALS POLICY” which the Ministers have released to Mr MacMahon) |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|------------------------------------|---|
| | s.30(b)(i) s.30(b)(ii) s.38(1)(b) | release this) n/c n/c n/c | |
| 12 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No Yes – in part n/c | Release document with sentences 2 and 3 of e-mail 5 Oct at 13.37 redacted |
| 13 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | Yes n/c n/c n/c n/c | Withhold document |
| 14 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes n/c n/c n/c | Withhold document |
| 15 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | Yes n/c n/c n/c n/c | Withhold document |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|--------------------------------|------------------------------------|
| 16 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | Yes No n/c n/c n/c | Withhold document |
| 17 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | Yes No n/c n/c n/c | Withhold document |
| 18 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | No Yes n/c n/c n/c | Withhold document |
| 19 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) s.38(1)(b) | No Yes n/c n/c n/c | Withhold document |
| 20 | s.28 s.29(1)(a) | No No | Withhold document |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|-------------------------------------|-------------------|------------------------------------|
| | s.30(b)(i) | Yes | |
| | s.30(b)(ii) | Yes | |
| 21 | s.28 | No | Withhold document |
| | s.29(1)(a) | Yes | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |
| 22 | s.28 | No | Withhold document |
| | s.29(1)(a) | Yes | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |
| 23 | s.28 | Yes | Withhold document |
| | s.29(1)(a) | Yes | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |
| 24 | s.28 | Yes | Withhold document |
| | s.29(1)(a) | No | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |
| 25 | s.28 | Yes | Withhold document |
| | s.29(1)(a) | No | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|---|--|
| 26 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No Yes (attached paper only) n/c n/c | Withhold attachment. Release covering email. |
| 27 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No No No | Release document |
| 28 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes (email dated 22 November 2005 at 14:48hrs only) No n/c n/c | Withhold document (email dated 22 November 2005 at 14:48hrs only, as the other emails in this document do not fall within the scope of the request from the applicant) |
| 29 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | No No No No | Release document |
| 30 | s.28 s.29(1)(a) s.30(b)(i) | Yes No n/c | Withhold document |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|---|--------------------------|------------------------------------|
| | s.30(b)(ii) | n/c | |
| 31 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes No n/c n/c | Withhold document |
| 32 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes No n/c n/c | Withhold document |
| 33 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes No n/c n/c | Withhold document |
| 34 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes n/c n/c n/c | Withhold document |
| 35 | s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii) | Yes n/c n/c n/c | Withhold document |
| 36 | s.25(1) | No | Release document |



| Document Number | Exemption(s) cited by the Ministers | Exemptions upheld | Steps to be taken by the Ministers |
|-----------------|-------------------------------------|-------------------|--|
| | s.28 | No | |
| | s.29(1)(a) | No | |
| | s.30(b)(i) | No | |
| | s.30(b)(ii) | No | |
| 37 | s.28 | No | Release document- withhold e-mail of 5 December (G McHigh) |
| | s.29(1)(a) | Yes – in part | |
| | s.30(b)(i) | No | |
| | s.30(b)(ii) | No | |
| 38 | s.28 | Yes | Withhold document |
| | s.29(1)(a) | n/c | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(ii) | n/c | |
| 39 | s.28 | Yes | Withhold document |
| | s.29(1)(a) | n/c | |
| | s.30(b)(i) | n/c | |
| | s.30(b)(i) | n/c | |

n/c – not considered

