



Scottish Information
Commissioner

**Decision 196/2006 Mr Robert Stephen and the
Scottish Executive**

*Internal advice that led to the decision to deal with the Banff marina
development under the terms of the Planning Acts as opposed to
harbour legislation*

**Applicant: Mr Robert Stephen
Authority: Scottish Executive
Case No: 200600629
Decision Date: 30 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 196/2006 Mr Stephen and the Scottish Executive

Request for copies of all internal advice that led to the decision to deal with the proposed development at Banff Harbour under the terms of the Planning Acts as opposed to harbour legislation

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 21(1) (Review by Scottish public authority); 30(b)(i) and 30(b)(ii) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality) and 38(1)(b) (Personal information).

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

Other Sources

Three Rivers District Council and others v. Governor and Company of the Bank of England (2004) UKHL 48

Scottish Information Commissioner Decision 077/2006

Facts

Mr Stephen requested copies of all minutes, notes, e-mails and correspondence to and from certain parts of the Scottish Executive (the Executive) on the Banff Marina development including facts and analysis which were the basis for decisions relating to Banff Harbour.



The Executive provided Mr Stephen with a number of documents, but withheld others on the grounds that the information within them was exempt from disclosure under section 30(b)(i) and 30(b)(ii) (prejudice to the effective conduct of public affairs) of the Freedom of Information (Scotland) Act 2002 (FOISA). This position was upheld on review and in addition the Executive applied section 36(1) (Confidentiality) of FOISA to certain of the information withheld. Mr Stephen was not satisfied and applied to the Commissioner for a decision.

Following investigation, the Commissioner found that the Executive had generally complied with Part 1 of FOISA in dealing with Mr Stephen's request. The Commissioner found, however, that the Executive had misapplied exemptions in section 30(b)(i) and 30(b)(ii) to certain of the documents withheld. The Commissioner also found that the Executive had not complied with section 21(1) of FOISA in its response to Mr Stephen's request for review.

Background

1. Development of land, in terms defined by the Town and Country Planning (Scotland) Act 1997, requires planning permission. In coastal areas, the extent of planning control in the seaward direction ends at the Mean Low Water Mark of Ordinary Spring Tides (MLWS). In effect, this means that any area beyond the MLWS would not fall within planning control and therefore, development in that area would not require planning permission.
2. Aberdeenshire Council promoted the formation of a marina at Banff Harbour under planning legislation and referred the proposal to the Scottish Ministers as required under planning legislation. There was deliberation as to whether the development should be treated under planning legislation or harbours legislation, which was dependant on the positioning of the MLWS. The Executive concluded that the development should be promoted under planning legislation.
3. On the 25 November 2005 Mr Stephen requested from the Executive all the minutes, notes, emails and correspondence to and from and within the Scottish Executive Planning Division and Development Department relating to the Banff Harbour including material on how the decision relating to the development was reached.
4. Mr Stephen further clarified his request by letter on 26 November 2006 stating that he was seeking "facts and analysis of facts which are the basis for decisions" relating to Banff Harbour.



5. The Executive replied on 28 December 2005 and supplied Mr Stephen with information which fell within his request but withheld other documents on the grounds that the information contained within them were exempt under section 30(b)(i) and 30(b)(ii) of FOISA.
6. Mr Stephen was dissatisfied with the response supplied by the Executive and requested a review of the Executive's decision on 31 December 2005. Mr Stephen did not consider the exemptions applied to be appropriate and furthermore did not accept the Executive's application of the public interest test.
7. Following his request for review Mr Stephen again narrowed his request to all internal advice that led to the decision to deal with the proposed development at Banff Harbour under the terms of the Planning Acts as opposed to harbours legislation.
8. The Executive responded to Mr Stephen's request for review on 23 February 2006. The Executive confirmed that the application of section 30(b)(i) and 30(b)(ii) had been correct. In addition, the Executive applied section 36(1) (information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings). The Executive considered that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.
9. In its response to Mr Stephen's request for review, the Executive apologised for failing to respond within the 20 working day period allowed.
10. Mr Stephen contacted this Office on 21 March 2006, stating that he was dissatisfied with the outcome of the Executive's review. Mr Stephen, in his letter to this Office, stated his belief that he was entitled to know the "facts and analysis of the reasons" underpinning the Executive's decision to deal with this development under the terms of the Planning Acts.
11. Mr Stephen's appeal was validated by establishing that he had made a valid request to a Scottish public authority, and had appealed to me only after asking the authority to review its response.
12. The case was then allocated to an investigating officer.



The Investigation

13. A letter was sent to the Executive on 9 May 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to comment on matters raised by the applicant and on the application as a whole, in accordance with section 49(3) of FOISA. The Executive was also asked to provide the following information:
 - A copy of all information falling within the scope of Mr Stephen's request which had been withheld from release;
 - A detailed submission in relation to each item of withheld information;
 - A commentary providing background information in relation to the case;
 - Commentary on the Executive's failure to respond to Mr Stephen's request for review within 20 working days. Details of any steps taken to prevent a reoccurrence of this failure;
 - Any other information the Executive considered relevant to the case.
14. The Executive replied on 31 May 2006 enclosing its statements on the case and supporting documentation.
15. In its response to this Office the Executive commented that during a telephone conversation on 2 February 2006 Mr Stephen narrowed his request to all internal advice that led to the decision to deal with the proposed development at Banff Harbour under the terms of the Planning Acts as opposed to harbours legislation.
16. As a result, the Executive's review focussed on the consideration of this specific information, as opposed to more general information that might be held in relation to Banff Harbour.
17. Mr Stephen confirmed with this Office on 6 June 2006, the summary of events submitted by the Executive.
18. The investigation therefore focused on the consideration of the specific information detailed in paragraph 15 above.



The Commissioner's Analysis and Findings

19. In its response to this Office the Executive supplied 11 documents which had been withheld from release. The Executive stated that, after further consideration, it regarded a number of these documents as falling outwith the scope of Mr Stephen's request.

Information considered outwith the scope of Mr Stephen's request

20. In its response to this Office the Executive stated that it considered documents 1 and 3 to fall outwith the scope of Mr Stephen's request. The Executive states that in retrospect, the information contained within document 1 does not relate to the decision to deal with the proposed development under the terms of the planning legislation and therefore should have been considered outwith the scope of Mr Stephen's request.
21. However, document 1 has previously been supplied to Mr Stephen. I therefore did not consider this document to form part of this investigation.
22. The Executive also considers document 3 to fall outwith the scope of the Mr Stephen's request as it does not contain any of the facts or analysis which would have formed the basis for the decision.
23. Document 3 is a record of a telephone conversation between the Executive and two officers of Aberdeenshire Council. The Executive submits that the content these discussions are not concerned with the decision to deal with the proposed development at Banff Harbour under the terms of the planning legislation and therefore outwith the scope of Mr Stephen's request.
24. Although the substance of this document contains comments which may have influenced the decision relating to Banff Marina, there is no evidence to suggest that it was used for this purpose. This document is merely a factual record of a telephone conversation with an external organisation.
25. Given Mr Stephen's clarification of his request at the review stage for "all internal advice" that led to this decision; I do not regard the content of document 3 to fall within the scope of Mr Stephen's request.



Documents withheld under section 36(1)

26. Section 36(1) of FOISA allows a public authority to withhold information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. It covers advice from a solicitor to a client and information passed by a client to their solicitor for the purposes of obtaining legal advice, and this includes staff in a public authority taking legal advice from solicitors employed within the same authority. In such a case the public authority, as client, has the right to waive confidentiality of communications and must waive it where it is in the public interest to do so.
27. The Executive believes that a number of the documents withheld from Mr Stephen are exempt from disclosure under section 36(1) of FOISA. These are discussed in the following paragraphs.

Documents withheld under section 36(1): 2, 5, 9, 10 and 11

Document 2 –email exchange

28. This email exchange consists of a request for legal advice from officials within the Executive (with background information and comments from other Executive officials) and the legal advice requested from one of the Executive's solicitors.
29. Looking at document 2 as a whole, I am satisfied that this document meets the necessary requirements of section 36(1).

Document 5 – email exchange

30. This email is the imparting of internal legal advice. I am satisfied that this document meets the necessary requirements of section 36(1).

Document 9 – minute of legal advice

31. This document is a minute of internal legal advice. I am satisfied that this document fulfils the necessary requirements of section 36(1).

Document 10 – email exchange and copy of draft letter

32. This email exchange requests and imparts legal advice on the drafting of a letter to Aberdeenshire Council. I am satisfied that this exchange falls within the scope of section 36(1). The draft, including track changes, is attached to this email exchange. As this document forms the basis of the discussions in the email exchange and secondly does not reflect the final version sent, I am satisfied that this document falls within the scope of section 36(1).



Document 11 – email

33. This email is a clear request for internal legal advice and the imparting of information between client and solicitor. I am therefore satisfied that this email falls within the scope of section 36(1).

Application of the public interest test

34. Section 36(1) is a qualified exemption in that it is subject to the public interest test. I must now go on to consider whether the public interest would be better served by the information being withheld or the information being released.
35. The Executive submits that it would be harmful to the public interest if solicitors and clients could not discuss relevant issues and give and receive legal advice in confidence. The Executive regards the danger in disclosure of such advice as twofold: firstly by unreasonably exposing legal positions to challenge, and secondly by potentially diminishing the range and quality of that advice which would in turn damage the quality of the Executive's decision making.
36. As I have noted in previous decision notices (for example, 023/2005), the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
37. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
38. Regarding documents 2, 5, 9, 10 and 11, I have not found any public interest which outweighs the principle of maintaining confidentiality in this instance.

Documents withheld under section 30(b)(i) and 30(b)(ii)

Documents 4, 6, 7 and 8

39. The residual documents which remain within the remit of this case following the assessments above are 4, 6, 7 and 8. The Executive has applied both section 30(b)(i) and 30(b)(ii) to all of these documents.



40. Sections 30(b)(i) and 30(b)(ii) allow information to be withheld if its disclosure would, or would be likely to, inhibit substantially (respectively) the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. The exemptions in section 30(b) therefore allow for information to be withheld if its disclosure would inhibit the imparting or commissioning of advice, or the offering or requesting of opinions or considerations.
41. In both cases the exemption can only be upheld if the public interest in disclosure is outweighed by the public interest in upholding the exemption.
42. As highlighted in my previous decision 077/2006, as “inhibit” is not defined in FOISA, I take the view that in this context it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. “Deliberation” tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority’s course of action. It will include expressions of opinion and recommendations, but will not include purely factual material or background information. The information must reveal the “thinking process” or reflection that has gone into the decision.
43. As stated in previous decisions (for example, 015/2005) the standard to be met in applying the tests in section 30(b)(i) and 30(b)(ii) is high. To qualify for the exemptions in 30(b)(i) and 30(b)(ii) the information withheld does not just have to constitute either “advice” or “opinion”, but the public authority must show that the release of the information would inhibit substantially the provision of advice or the exchange of views.
44. When considering the application of section 30(b) each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. This would involve considering, *inter alia*:
 - the subject matter of the advice or exchange of views
 - the content of the advice or exchange of views
 - the manner in which the advice or exchange of views is expressed, and
 - Whether the timing of release would have any bearing (releasing advice or views whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision had been taken).



Document 4 – File note

45. Document 4 is a file note which outlines the situation under debate. At the time of writing, a formal position regarding this issue had not been reached. This two-page informal note largely contains comments of a factual nature with subsequent annotations.
46. The Executive comments that it does not consider the content of this document in itself particularly sensitive but that the release of this document so soon after the discussions to which it relates would inhibit in future the provision of free and frank advice or exchange of opinions.
47. Looking at the content of this document, the manner in which the views are expressed, the fact that a settled position has now been reached and given that the Executive do not regard the information itself as particularly sensitive, I am not convinced that the disclosure of this document would (or would be likely to) inhibit substantially the future provision of free and frank advice or the future free and frank exchange of views between Ministers or officials as argued by the Executive.
48. After consideration of document 4 I do not consider it to fall within the scope of section 30(b)(i) or section 30(b)(ii).

Document 6 – email

49. Document 6 is an internal response to a request for advice by the Executive which was subsequently passed onto its legal advisors for information. Having considered the content of this email and the manner in which the response is expressed, I am satisfied that this email falls within the scope of section 30(b)(ii).

Document 7 – email exchange

50. Document 7 is an e-mail exchange emanating from a query from a member of the public. The exchange consists of a request for advice with background information, consideration of the handling of correspondence from a member of the public and a suggested course of action from the issues raised in that correspondence.
51. In its submissions to my Office the Executive stated that it did not consider any of the comments made in this communication particularly sensitive. However, it did consider that officials would be likely to be concerned if exchanges discussing communications about an enquiry from a member of the public were released so soon after they were made.



52. Although I consider this document to contain the provision of advice and an exchange of views I do not consider that anything within these exchanges would have an “inhibiting” effect on any such exchanges in the future. There is nothing so sensitive within this exchange as to justify them being withheld on the basis that the information would (or would be likely to) inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation.
53. After consideration of document 7 I conclude that the Executive misapplied section 30 (b)(i) and 30(b)(ii) of FOISA in relation to the information contained in it.

Document 8 – email with advice document attached

54. Document 8 consists of an email from an official to a number of people within the Planning Division commenting on internal advice. This advice considers issues other than which statutory regime is appropriate.
55. Having considered the content of this document I am not satisfied that it falls within the scope of Mr Stephen’s request.

Summary

56. In summary, therefore, I find the contents of document 6 to be exempt information by virtue of section 30(b)(ii).

Application of the public interest test

57. Sections 30(b)(i) and (ii) is subject to the public interest test contained in section 2(1)(b) of FOISA and therefore I must go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemption.
58. In its submissions to me the Executive provided reasons why this information should not be released on public interest grounds. The Executive submitted that there was a strong public interest in maintaining the integrity of the process of giving free and frank advice. The knowledge of possible disclosure might inhibit provision of advice in the future and impair the candour and freedom within which papers were prepared, deliberated on and revised in future. The Executive acknowledged that this was not a blanket position but argued that in this case, where the consideration concerned occurred in the immediate past, there would be likely to be prejudice to the candour of future discussions. It pointed out that the ultimate decision was a matter of public knowledge and that release of the information withheld would add little or nothing to any public debate.



59. In addition, the Executive maintains that there is a strong public interest in high quality policy making and implementation. It argues that for Government to succeed in upholding that public interest, Ministers and officials need to be able to consider all available options (however unpalatable), to debate those rigorously and understand their possible implications. Their candour in doing so will be affected by the perceived likelihood of early disclosure, which may undermine or constrain the Government's view on settled or developing policy. The Executive aver that inappropriate disclosure also has the potential not only to limit the full and frank discussion of policy between Ministers, but may also distort public perceptions of advice provided by officials. The prospect of early disclosure therefore has the potential to affect the impartiality of the advice provided.
60. After considering the content of the information withheld under section 30(b)(i) and 30(b)(ii) and the public interest arguments discussed above, I am satisfied in relation to document 6 that the public interest in disclosing the information is outweighed by the public interest in maintaining the two exemptions.
61. In reaching this decision I have considered the desirability of making information available to the public and the general need for transparency and accountability in decision making. I have also taken into account that officials should be able to discuss matters of substance freely and openly.
62. I find that there is no overriding public benefit in the disclosure of the information contained in document 6 when it is weighed against the harm that would or would be likely to result.
63. In summary, I find that the Executive acted correctly in applying section 30(b)(i) and 30(b)(ii) in withholding document 6. However, I find that the Executive was incorrect in its application of the exemptions contained in section 30(b) in respect of documents 4 and 7. In addition, I find that document 8 is outwith the scope of Mr Stephen's request.

Application of section 38 (1)(b) - documents 4 and 7

64. In its response to this Office the Executive highlighted that, if it were required to release documents 4 and 7, these documents should be subject to redaction in order to conform to the first data protection principle of fair processing.



65. Under section 38(1)(b) of FOISA, personal data can only lawfully be disclosed if doing so would not contravene any of the data protection principles laid down in the Data Protection Act 1998 (DPA). The first data protection principle relates to fair and lawful processing of personal data, and the Information Commissioner, who is responsible for enforcing the DPA, has provided guidance on the consideration of the data protection principles within the context of freedom of information legislation.
66. This guidance recommends that public authorities consider such questions as:
- would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - would the data subject expect that his or her information might be disclosed to others?
 - has the person been led to believe that his or her information would be kept secret?
67. In this instance, having considered the information in question and having received comment from the data subject highlighted by the Executive, I consider that it would be inappropriate to redact the information relating to this individual contained in documents 4 and 7.
68. However, I do consider it appropriate to redact the personal data contained in document 7 which is linked directly to the member of the public who submitted the query addressed in the document.

Technical breaches of FOISA

69. During the investigation, I have also considered whether the Executive complied with the timescales in FOISA when responding to Mr Stephen's request.
70. In terms of section 21(1) of FOISA a public authority must respond to the request within 20 working days of receipt of a request for review. I note that in responding to Mr Stephen's request for review, the Executive took longer than 20 working days to respond and therefore was in breach of section 21(1).
71. The Executive state that the delay was due to an administrative error which led to a delay in the case being allocated to the reviewer. The Executive has made assurances that any requests for review will be allocated more quickly in future.



Decision

I find that, for the most part, the Scottish Executive (the Executive) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Stephen's information request.

I find that the Executive's response to the request for review failed to comply with section 21(1) of FOISA in not responding within the 20 working day period allowed. I do not require the Executive to take any action in respect of this breach.

I find that the Executive misapplied section 30 (b)(i) and section 30(b)(ii) of FOISA to documents 4 and 7 and therefore failed to deal with Mr Stephen's request wholly in accordance with section 1(1) of FOISA. I require the Executive to release these documents to Mr Stephen, subject to the redaction of personal data from document 7 as detailed in paragraph 68 above.

As I cannot require the Executive to comply with this decision notice within the appeal period of 42 days, I require the Council to take these steps within 45 days of this notice.

Appeal

Should either Mr Stephen or the Executive wish to appeal against the Commissioner's decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
30 October 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

21 Review by Scottish public authority

- (1) ... a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

38 Personal information

- (1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;
(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

- (2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and



(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.