



Scottish Information
Commissioner

**Decision 039/2007 Michael Matheson MSP and the
Scottish Executive**

*Decision to locate the permanent headquarters of the National
Theatre of Scotland*

Applicant: Michael Matheson MSP

Authority: Scottish Executive

Case No: 200501968

Decision Date: 06 March 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 039/2007 Michael Matheson MSP and the Scottish Executive

Papers and information relating to the decision to locate the permanent headquarters of the National Theatre of Scotland – request refused and refusal upheld in part on review – application to the Commissioner for a decision – authority’s decision upheld in part

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 25(1) (Information otherwise accessible); 29(1)(a) & (b), (2) – (5) (Formulation of Scottish Administration policy etc.) and 30(a) & (b) (Prejudice to effective conduct of public affairs).

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

Facts

Mr Matheson requested from the Scottish Executive (the Executive) the papers and information relating to the decision to locate the permanent headquarters of the National Theatre of Scotland. This was refused by the Executive, citing various exemptions under FOISA. Mr Matheson sought a review of this decision. The Executive, while agreeing to release part of one document, maintained that remaining information was exempt under sections 25, 29(1)(a) and 29(1)(b) of FOISA. Mr Matheson applied to the Commissioner for a decision. Following an investigation, the Commissioner concluded that the Executive had partially complied with FOISA in dealing with Mr Matheson’s information request.



Background

1. On 22 March 2005, Mr Matheson wrote to the Executive, asking it to make available “all the papers and information relating to the decision to locate the permanent headquarters of the National Theatre of Scotland”.
2. On 20 April 2005, the Executive responded to Mr Matheson, advising that the information he had requested was considered to be exempt from release under sections 25 (Information otherwise accessible) and 29(1)(a) and (b) (Formulation of Scottish Administration policy etc.) of FOISA. Mr Matheson was advised of his rights to seek a review of the Executive’s decision and (if he remained dissatisfied) to apply to the Commissioner for a decision.
3. Mr Matheson requested a review from the Executive on 4 May 2005, as he was dissatisfied with the lack of information made public by the Executive to explain how the decision to locate the Theatre’s headquarters in a particular place (Easterhouse in Glasgow) had been arrived at. The Executive responded to this request on 2 June 2005. The review had concluded that an extract of one letter should be released to Mr Matheson, the remainder of that letter being outwith the scope of his request for information. The Executive remained of the opinion, however, that it had been justified in applying the exemptions in section 29 of FOISA to the rest of the information withheld from Mr Matheson. Mr Matheson was advised that he had the right to apply to the Commissioner for a decision if he was unhappy with the outcome of the review.
4. Mr Matheson applied to the Commissioner for a decision in relation to the Executive’s refusal to release the information withheld on 9 June 2005. The case was allocated to an investigating officer and the application validated by establishing that Mr Matheson had made a valid request for information to a Scottish public authority and had appealed to the Commissioner only after asking the authority to review its response to his application.



Investigation

5. At the outset of the investigation, as required by section 49(3)(a) of FOISA, I notified the Executive of Mr Matheson's application and invited its comments, including its reasons for applying the exemptions claimed to the information withheld. In addition, I requested a copy of that information. In responding, the Executive provided copies of the 32 documents withheld from release and provided arguments to the effect that sections 25, 30(a), 30(b)(i) and 30(b)(ii) applied to certain of the information in them (in addition to arguments supporting its application of sections 29(1)(a) and 29(1)(b)).
6. In the course of the investigation I have considered fully the information withheld from release, along with all relevant submissions from the parties. Certain information was released to Mr Matheson in the course of the investigation. Examination of the remainder has led me to conclude that only documents 1, 4, 5, 6, 27, 27.1, 28 and 28.1 are relevant to Mr Matheson's request (documents 29 and 29.1 duplicate documents 28 and 28.1 respectively and therefore will not be considered separately). Other documents held by the Executive deal with the consequences of the decisions, but only these documents address the making of the decisions to locate in Glasgow and more particularly within a particular development at Easterhouse and the underlying reasons for these decisions. Consequently, I do not consider the information in the remaining documents (i.e. those not released to Mr Matheson and still withheld by the Executive) to fall within the scope of Mr Matheson's request.
7. I should make it clear that I consider only the following sections of document 1 to be relevant to Mr Matheson's request:
 - (i) The second paragraph, up to and including the word "theatre)" in the third line; and
 - (ii) The third sentence of the third paragraph, up to and including the word "talent)" in the second line.

I consider only the first four bullet points in document 27.1 and the first three bullet points in document 28.1 to fall within the scope of the request. I also note that a "question and answer" attachment to document 27.1 has been released to Mr Matheson and therefore does not require further consideration by me. I consider documents 4, 5, 6, 27 and 28 to fall within the scope of the request in their entirety.



The Commissioner's Analysis and Findings

8. The issues for determination in this case would appear to be as follows:
- (i) Whether any of the exemptions claimed by the Executive (sections 25, 29(1)(a), 29(1)(b), 30(a), 30(b)(i) and 30(b)(ii) have been applied in various combinations) apply to the information withheld; and
 - (ii) If certain of the information withheld is exempt information under these exemptions (except for the exemption in section 25), whether in all the circumstances the public interest in maintaining the relevant exemption outweighs the public interest in disclosing that information.
9. I will now consider each of these issues in turn. As indicated above, the full text of each of the relevant provisions of FOISA is set out in the Appendix to this decision. I will not repeat them at length here.

Section 25

10. The Executive has applied section 25 of FOISA to documents 4, 6, 27 and 28, being respectively Scottish Executive news releases (4, dated 11 September 2003, and 6, dated 25 September 2003) and Scottish Parliament questions and answers (PQs S2O-04402 and S2W-12442) relating to the location of the National Theatre. I accept that these documents are readily accessible to the public on the respective websites of the Executive and the Scottish Parliament and therefore are exempt from disclosure under section 25. However, I note that in relying on this exemption, the Executive failed to describe the information in sufficient detail for it to be located by Mr Matheson, but simply advised Mr Matheson that some information was exempt under section 25 and referring to it simply as "parliamentary questions" or "news releases" with the relevant web addresses. In responding to Mr Matheson in this manner, I do not consider the Executive to have discharged its duty to provide Mr Matheson with advice and assistance under section 15 of FOISA.

Section 29(1)(a) (Formulation or development of government policy)

11. The Executive has argued that this exemption applies to both of documents 1 and 5, on the basis that the creation of a National Theatre of Scotland is one of its key cultural initiatives. It is argued that the information relates to that element of Executive policy and therefore is covered by the exemption.



12. Of course, I have to be satisfied that the information relates to the formulation or development of the policy in question rather than simply to the policy. In this case, however, I am happy that the exemption applies to the relevant information in both documents. It appears to have been accepted that it fell to Scottish Ministers to determine where the Theatre's administrative offices should be located and in the circumstances I accept that this was part of the wider strategic process of developing the policy of having a National Theatre.
13. Section 29(1)(a) is of course subject to the public interest test contained in section 2(1)(b) of FOISA. I will go on to consider the public interest after analysing the Executive's arguments in relation to the remaining exemptions claimed.

Section 29(1)(b) (Ministerial communications)

14. Information is exempt under section 29(1)(b) of FOISA if it relates to Ministerial communications. The Executive has claimed this exemption in relation to information in document 1 only. The information in question records that a discussion had taken place between Ministers and the outcome of that discussion. I accept that the information relates to Ministerial communications and therefore falls within the scope of the section 29(1)(b) exemption.
15. Section 29(1)(b) is of course subject to the public interest test contained in section 2(1)(b) of FOISA. I will go on to consider the public interest after analysing the Executive's arguments in relation to the remaining exemptions claimed.

Section 30(a) (Collective responsibility of the Scottish Ministers)

16. The Executive has argued that certain information in document 1 is exempt under section 30(a) of FOISA, which applies to information the disclosure of which would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. This convention, which is well established in the constitutional law of the United Kingdom and is given expression in the Scottish Ministerial Code, means that the Scottish Ministers are considered to have arrived at their decisions collectively and are required to abide by and defend them once they are made. The convention, as traditionally interpreted, allows free and frank debate among Ministers in private while requiring a united front (and therefore non-disclosure of individual views expressed during the decision-making process) once the relevant decision is made. On the other hand, Ministerial decisions are normally announced and explained as the decision of the Minister concerned.



17. The Executive argues that the information clearly shows which Ministers were involved in a particular decision and that release of such information would make it substantially more difficult for Ministers to act collaboratively and cohesively. It argues that this would be the case regardless of whether the information in question recorded agreement or discord between the Ministers concerned, as the release of such information wherever there was agreement would give rise to the assumption that there had been disagreement or dissent between Ministers wherever information of that kind was not released.
18. As I have made clear in previous decisions (see, for example, Decision 077/2006 Paul Hutcheon and the Scottish Executive), to rely on section 30(a) the Executive must do more than simply assert that the documents contain views expressed by the Minister and therefore should be protected. For the maintenance of the convention to be prejudiced substantially, the views expressed would need to be significant. I have expressed the opinion that the maintenance of the convention might be prejudiced substantially where the view expressed by the Minister was at variance with the final policy or was outwith the scope of the Minister's responsibility, or where the information revealed disagreement between Ministers. On the other hand, I would find it difficult to see how disclosure of merely procedural information, or information relating to a matter of substance but at a mundane or routine level, could cause substantial prejudice of the kind required by section 30(a).
19. In every case, clearly, a full assessment of the nature and content of the information withheld will be necessary to determine whether the exemption in section 30(a) applies, along with due consideration of all other relevant circumstances. While a lack of discord between Ministers may indicate that the exemption is less likely to apply, therefore, it should never be assumed that the exemption should only be associated with situations where Ministers disagree.
20. Having considered the information in document 1, I cannot accept that its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. All the relevant part of document 1 does is to record that a certain matter was discussed by certain Ministers (who might reasonably be expected to have been involved in any discussion of this kind) and that a certain outcome, which was made public a few days later (a full 18 months before Mr Matheson submitted his request for information), was agreed. I do not question that the matter under discussion was one of substance, but there is nothing beyond the obvious in the record that did not reach the public domain a very short time after the exchange took place.
21. Having decided that the exemption in section 30(a) of FOISA does not apply to the information in document 1, I am not required to consider the public interest test in relation to the use of that exemption.



Section 30(b) (Free and frank provision of advice/exchange of views)

22. The Executive has argued that both parts of section 30(b) apply to documents 1 and 5, and that section 30(b)(i) applies to documents 27.1 and 28.1. Section 30(b)(i) provides that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice, while section 30(b)(ii) exempts information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
23. The Executive argues that these exemptions are concerned not so much with the content and sensitivity of particular documents as with the potential wider impact of their release. It is firmly of the belief that the release of the documents it regards as covered by these exemptions would have the substantially inhibiting effects required because officials would feel constrained from offering their views in a candid manner on future occasions if they were concerned that their comments would be made public “in such circumstances”. This is a very broad argument and, in relation to documents 27.1 and 28.1 in particular (both background notes for Ministers relating to the parliamentary questions to which they are attached), the Executive appears to be arguing that the section 30(b)(i) should apply to documents of this type of as a class. It should be clear by now that this approach to the exemptions in section 30(b) is inappropriate.
24. As I have explained in a number of previous decisions, for example Decision 017/2006 Mrs X and Angus Council, the main consideration in determining whether this group of exemptions is triggered is not so much whether the information constitutes advice or (as the case may be) an exchange of views – although obviously that will be relevant in many cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the relevant exemption to apply.
25. As will be clear from previous decisions, I require authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question has to take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word “substantial” is important here: the degree to which the person is likely to be inhibited in expressing themselves must of some real and demonstrable significance.



26. As with section 30(a) (see paragraph 19 above), I must consider the actual information withheld, not the category of information to which it belongs. In other words, I must consider whether the disclosure of that information would, or would be likely to, in all the surrounding circumstances, have the inhibiting effects described in paragraphs (i) and (ii) (or either of them). It cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future.
27. The relevant sections of document 1 might be regarded as a record of an exchange of views for the purposes of deliberation and also as advice from one civil servant to another. They contain no particular freedom or frankness of expression, however, and I can identify nothing in their content or in any of the Executive's submissions to persuade me that their disclosure could be expected to have a remotely inhibiting effect on similar future exchanges, or on the accurate recording and transmission of similar records in the future. As I have indicated in paragraph 20 above, most of the relevant information was in the public domain within a very short time in any event. I do not accept that the exemptions apply.
28. Similarly, I have difficulty identifying what in document 5 might reasonable be expected to have the required inhibiting effect on either the provision of advice or the exchange of views for the purposes of deliberation. It appears to impart largely factual advice on a particular option for locating the Theatre's headquarters, with no obvious freedom or frankness. To the extent that it contained information of any sensitivity, concerns about that must to a large extent be deemed to have been dismissed by the public announcement of the preferred option within a matter of hours. I note that this document includes advice and views from parties outwith the Executive, but I cannot accept that as being of particular significance given the content of the information. Once again, I am not persuaded that the disclosure of this document 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.
29. Documents 27.1 and 28.1 contain advice to Ministers for the purposes of responding to related parliamentary questions. Their content is very similar. I cannot identify anything in the content of the relevant sections of these notes which could be expected to inhibit the provision of future advice, given that the majority of the background information reflects the parliamentary answers given. One of the background points (contained in both sets of notes) contains slightly more information than was communicated in the relevant answers, but I think that is a matter of nuance. In any event, it seems to me that it would have been difficult to for the Minister to avoid providing the further information in question had she been asked a direct question on the point (and I presume that was the point of the information being there).



30. As I have determined that the relevant information in documents 1 and 5 does not fall within the scope of either of the exemptions contained in section 30(b)(i) or section 30(b)(ii) of FOISA, and that the information in documents 27.1 and 28.1 does not fall within the scope of the exemption in section 30(b)(i) of FOISA, I am not required to go on to consider the application of the public interest test in relation to these exemptions.

The Public Interest

31. The exemptions under sections 29 are, of course, subject to the public interest test and therefore I must be satisfied that the public interest in maintaining the exemptions outweighs that in disclosing the relevant information or I must order the information to be released. Given the class nature of section 29, it will be in considering the public interest that it is appropriate to examine the content of the information, including its relative sensitivity, and the potential effects of disclosure.
32. In this case, I accept that the public interest arguments in relation to both exemptions are interlinked and therefore will consider them together.
33. Section 2(1)(b) of FOISA, which contains the public interest test, is worded in such a way as to presume that disclosure, rather than withholding the information, will be in the public interest. The onus is on the public authority to persuade me in a given set of circumstances that the public interest would not be served by releasing the information.
34. There is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. I would also acknowledge a more specific public interest in disclosure in this particular case, to allow scrutiny of a decision to locate a public agency in a particular part of Scotland and the reasons why that particular location was selected (and perhaps the reasons why other potential locations were not). Such decisions may have tangible consequences for the areas selected (and the areas which are not) and in any event would appear to be a legitimate subject of public debate in a transparent democratic society.



35. I have considered the public interest arguments made by the Executive. I accept that there is a strong public interest in enabling frank and candid debate between and among Ministers, their officials and, in appropriate circumstances, third parties, where such debate is required for the purpose of making high quality and effective policy. Equally, there is a strong public interest in Ministers being able to receive full, considered and impartial advice before making their decisions, and in there being adequate scope for the analysis of risk as part of the policy-making process. The fear of inappropriate disclosure may well inhibit the putting forward of strongly held views and unpalatable advice, or at least its recording and I accept (as I have previously, for example in Decision 077/2006) that the benefits of open government need to be balanced against this risk in the interests of sound policy development.
36. On the other hand, I have also made it clear (see again Decision 077/2006) that it is inappropriate to “ring-fence” all internal deliberations on public interest grounds to maximise the scope for strong views and unwelcome advice being offered. I will not be able to accept arguments that information requires protection simply because it is of a sensitive general type or subject matter. Consideration must be given to the content of the information in deciding whether the public interest demands its protection. It will be clear from my previous consideration of the information in documents 1 and 5 that I consider its sensitivity and potential for inhibiting full and considered contributions to the policy process to be low.
37. I note that some information about the decision to locate the Theatre’s offices in Glasgow (and more specifically in Easterhouse) has been made available to the public already, in particular the information released to Mr Matheson following his review and in the course of this investigation. I accept, as I have in previous decisions, that the publication of related information may demonstrate due process and a desire to be transparent on the authority’s part and may be taken into account when considering the public interest. Indeed, I accept that the information withheld does not necessarily add a great deal to the relevant information which has been placed in the public domain already. None of these factors can, however, by themselves justify the withholding of further information requested by the applicant.
38. Having considered the arguments presented to me and the content of the relevant information in documents 1 and 5, I cannot accept that there is a stronger public interest in maintaining the exemptions in sections 29(1)(a) (document 1 only) and 29(1)(b) in relation to that information and therefore cannot uphold the Executive’s decision to withhold the information under these exemptions.



Decision

I find that the Scottish Executive (the Executive) failed to deal with Mr Matheson's request for information in that it misapplied the following exemptions in FOISA to the relevant parts (as detailed in paragraph 7 above) of the following documents:

- (i) To document 1, sections 29(1)(a), 29(1)(b), 30(a), 30(b)(i) and 30(b)(ii);
- (ii) To document 5, sections 29(1)(a), 30(b)(i) and 30(b)(ii); and
- (iii) To documents 27.1 and 28.1, section 30(b)(i).

In misapplying these exemptions, the Executive failed to deal with the request in accordance with section 1(1) of FOISA and thereby breached Part 1 of FOISA.

I require the Executive to provide Mr Matheson with the relevant information in documents 1, 5, 27.1 and 28.1 (as detailed in paragraph 7 above) within 45 days from the date of receipt of this decision notice.

I also find that the Executive applied section 25 of FOISA correctly to the information in documents 4, 6, 27 and 28. It failed, however, to comply with section 15 of FOISA in exempting that information without describing it in sufficient detail for the applicant to be able to locate it and in failing to do so did not comply with Part 1 of FOISA. I now require the Executive to identify these documents to Mr Matheson, with details of where they are located on the relevant websites, within 45 days from the date of receipt of this decision notice.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
06 March 2007



Appendix

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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

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;
 - (b) Ministerial communications...



- (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;

“the Law Officers” means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

“Ministerial communications” means any communication between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

“Ministerial private office” means any part of the Scottish Administration which provides personal administrative support to a Minister.
- (5) In the definitions of “Ministerial communications” and “Ministerial private office” in subsection (4), “Minister” means a member of the Scottish Executive or a junior Scottish Minister.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (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; ...

