

14 July 2009

Franc McLaughlin Esq.
request-13376-2be5e842@whatdotheyknow.com
(by email only)

Dear Mr McLaughlin,

FREEDOM OF INFORMATION ACT 2000

I am writing further to your email of 15 June, received on 16 June, in which you requested the following information:

The following proposal appeared in the PMs statement last week on rebuilding the constitution –

'As the [Dacre] report recommended, we have considered the need to strengthen protection for particularly sensitive material and there will be protection of Royal Family ..papers.'

This was in response to the recommendatin in the Dacre Review which read –

'We therefore recommend that, in parallel with the adoption of a 15 year rule, the government, in consultation with interested parties, may wish to consider whether there is a case for enhanced protection of such categories of information.'

Please disclose the relevant consultations.

Your request for information has been handled under the Freedom of Information Act 2000 ('the Act').

I can confirm that the Cabinet Office does hold information falling within the scope of your request.

This information is exempt under the following exemptions in the Act:

- Section 35(1)(a) (formulation and development of policy)
- Section 37(1)(a) (communications with Her Majesty etc.)
- Section 40(2) (personal data)
- Section 41(1) (information provided in confidence)
- Section 42(1) (legal professional privilege)



Further details on these exemptions are set out below.

Section 35(1)(a) (formulation and development of policy)

Section 35(1)(a) exempts information if it relates to the formulation or development of government policy. This exemption is subject to the public interest test and I have therefore considered whether the public interest falls in favour of releasing the information, or whether it falls in favour of maintaining the exemption and withholding the exemption.

We recognise that the decisions taken by Ministers may have a significant impact on the lives of citizens and there is a public interest in this process being transparent. We also recognise that greater transparency makes government more accountable to the electorate and increases trust. There is a public interest in providing the public with the information it needs to satisfy itself that the process by which government develops policy is of a high quality. In addition, we recognise that as knowledge of the way government works increases, the public contribution to the policy making process could become more effective and broadly-based.

On the other hand, there is a very strong public interest in withholding this information. There is a need to protect the policy space so that officials can consider all policy options without fear of their discussions being disclosed prematurely. Premature disclosure of government thinking may close off options which should be taken further and to decrease the rigour and analysis of options. The possibility of wide disclosure may mean that the range of options considered is limited, and that some options are not put forward at all in case deliberations are held up to undue criticism in their early stages. Linked to these points is the fact that disclosure of policy advice could undermine relations between Ministers and officials, and so harm the process of government, the principle of the accountability of Ministers for policy and civil service neutrality. It is important that officials retain the ability to debate issues relating to policy formulation freely and in confidence, before putting advice to Ministers. This is an iterative process and may include amendments and proposals which are not subsequently taken forward.

Having considered all the circumstances of the case, I believe the balance of public interest falls in favour of withholding the information exempt under section 35(1)(a) of the Act.

Section 37(1)(a) (communications with Her Majesty etc.)

Section 37(1)(a) exempts information if it relates to communications with Her Majesty, with other Members of the Royal Family or with the Royal Household. This exemption is subject to the public interest test and I have therefore considered whether the public interest falls in favour of releasing the information, or whether it falls in favour of maintaining the exemption and withholding the exemption.

It should be noted however that there is an important distinction between 'what the public are interested in' and what is 'in the public interest'. I accept



that some members of the public may be curious in seeing the information held, given interest in information to do with the Royal Family, but this is not however the same as there being a 'public interest' in the disclosure of the information. I have kept this in mind when considering the balance of public interest.

We recognise there is a public interest in the role of the Royal Family generally and specifically with regard to their interaction with Government. We also acknowledge that there is a specific public interest with regard to any information held in this context, given the operation of the Act and the Prime Minister's announcement on 10 June that Government will look to provide greater protection for sensitive 'Royal' papers.

On the other hand, there is a very strong public interest in withholding this information. We consider that there is a strong public interest in withholding information to because of the historical and constitutional importance of the Convention referred to below. In weighing the respective public interests we consider that some clear, compelling and specific justification for disclosure must be shown in order to outweigh the in-built public interest in withholding this information. In favour of maintaining the exemption it must be noted that there is a well established constitutional Convention that correspondence between the Sovereign and Government is confidential in nature. The Convention is an adjunct to the right of the Sovereign to be consulted by her Government, and to advise, encourage and warn the Government as appropriate. The rights of the Sovereign could not be exercised effectively in the absence of confidentiality, as the political neutrality of the Sovereign could not be preserved. These communications are regarded as subject to expectations of confidence, and it is of considerable public interest that they be treated as such.

Having considered all the circumstances of the case, I believe the balance of public interest falls in favour of withholding the information exempt under section 37(1)(a) of the Act.

Section 40(2) (personal data)

Section 40(2) exempts personal information from disclosure if that information relates to someone other than the applicant, and if disclosure of that information would, amongst other things, contravene one of the data protection principles in schedule 1 of the Data Protection Act 1998. In this case, I believe disclosure would contravene the first data protection principle, which provides that personal data must be processed fairly and lawfully. Section 40(2) is an absolute exemption and the Cabinet Office is not obliged to consider whether the public interest favours disclosing the information.

Section 41(1) (information provided in confidence)

Section 41(1) exempts information, where disclosure of the information by the public authority holding it would constitute an actionable breach of confidence. I am satisfied that disclosure of the information would constitute an actionable breach of confidence and that the Cabinet Office could not rely on the defence that an overriding public interest justified breaching its duty of



confidence. Section 41(1) is an absolute exemption for the purposes of the Act but the Cabinet Office has taken into account the public interest test inherent within the law of confidence in reaching its decision. It is the Cabinet Office's view that the public interest favours maintaining this exemption. The courts have maintained that there is a strong general public interest in protecting confidences and this could only be superseded by an overriding public interest in disclosure of the information withheld, for example if the information revealed iniquity or fraud or disclosure was necessary to protect the public from harm. These are among the conventional public interests that the Courts have accepted as outweighing the public interest in maintaining a confidence. Though other public interests may also outweigh the public interest in maintaining confidences, I do not consider that the general public interest in having information made available is a compelling public interest capable of overriding this.

Section 42(1) (legal professional privilege)

Section 42 exempts information in respect of which a claim to Legal Professional Privilege could be made in legal proceedings. This exemption is subject to the public interest test and I have therefore considered whether the public interest falls in favour of releasing the information, or whether it falls in favour of maintaining the exemption and withholding the exemption.

The public interest arguments in favour of disclosure include the general public interest in access to information about the government, how it reaches decisions and how it discharges its public functions. There is a public interest in legally privileged material being disclosed so that the legal advice officials and Ministers receive can be scrutinised publicly.

On the other hand, there is also a strong public interest in a person or body seeking access to legal advice being able to communicate freely with their legal advisors in confidence and in being able to receive advice from them in confidence. The importance of this public interest has been reaffirmed by the House of Lords in *Three Rivers DC v. Bank of England (No 6)* [2004] UKHL 48. The underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between clients and their legal advisers, which is judicially recognised as being strongly in the public interest. The High Court has also recognised the in-built public interest in not disclosing information subject to legal professional privilege in the case of *Department for Business Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164 (QB).

Having considered all the circumstances of the case, I believe the balance of public interest falls in favour of withholding the information exempt under section 42(1) of the Act.

If you have any queries about this letter, please contact me. Please remember to quote the reference number below in any future communications.

If you are unhappy with the service you have received in relation to your request or wish to request an internal review, you should write to:



Sue Gray
Director
Cabinet Office
70 Whitehall
London
SW1A 2AS

e-mail: foiteam@cabinet-office.x.gsi.gov.uk

You should note that the Cabinet Office will not normally accept an application for internal review if it is received more than two months after the date that the reply was issued.

If you are not content with the outcome of your internal review, you may apply directly to the Information Commissioner for a decision. Generally, the Commissioner cannot make a decision unless you have exhausted the complaints procedure provided by Cabinet Office. The Information Commissioner can be contacted at:

The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely,

Michael Pigott

MICHAEL PIGOTT

