

Decision Notice

Decision 048/2015: Mr Tom Gordon and the Scottish Ministers

Transcript of interview

Reference No: 201500115

Decision Date: 8 April 2015



Scottish Information
Commissioner

Summary

On 2 May 2014, Mr Gordon asked the Scottish Ministers (the Ministers) for recordings and transcripts of an interview with the then First Minister. The Ministers withheld the information, claiming that disclosure would substantially prejudice the effective conduct of public affairs and the commercial interests of GQ Magazine.

The Commissioner investigated and found that the Ministers had wrongly withheld the information covered by Mr Gordon's request. She required the Ministers to give Mr Gordon the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 May 2014, Mr Gordon made a request for information to the Ministers. He asked for:
... all recordings and transcripts held of the interview given by the First Minister to Alastair Campbell on 14 March 2014, some of which was later published in the June 2014 edition of GQ Magazine.
2. The Ministers failed to respond and, on 6 June 2014, Mr Gordon wrote to the Ministers, requiring a review on the basis that they had failed to respond.
3. Following an application to the Commissioner, the Ministers notified Mr Gordon of the outcome of their review on 11 August 2014. They informed him that the information was considered exempt from disclosure under sections 30(c) and 33(1)(b) of FOISA.
4. On 15 January 2015, Mr Gordon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Gordon stated he was dissatisfied with the outcome of the Ministers' review because he did not believe they had justified the exemptions claimed.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Gordon made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
6. On 5 February 2015, the Ministers were notified in writing that Mr Gordon had made a valid application. They were asked to send the Commissioner the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.

7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, with specific reference to the requirements of the exemptions in sections 30(c) and 33(1)(b) of FOISA.
8. The Ministers responded, confirming that they considered both of these exemptions to apply. They provided reasons for their position. Mr Gordon also provided further comments, in relation to the public interest.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 30(c) – Prejudice to effective conduct of public affairs

10. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
12. Mr Gordon submitted that the Ministers had conspicuously failed to demonstrate that any specific harm would follow the release of the information requested. He believed they had resorted to general, hypothetical and conjectural arguments.
13. The Ministers argued that the disclosure was likely to significantly harm the effective conduct of public affairs, by both significantly damaging the Scottish Government's relationship with GQ Magazine and also, more widely, damaging relationships with other journalists and media organisations.
14. The Ministers explained that they had obtained comment from GQ Magazine, which confirmed that it did not want the transcript disclosed. GQ considered the information to be confidential journalistic material, disclosure of which would set a dangerous precedent.
15. The Ministers submitted that even though that might not be the case, accepting that each request should be considered on its merits, other media organisations would be likely to take a similar view and consider there was less merit in taking the time to secure and work on exclusive interviews with Scottish Government Ministers, if those interviews might then be released to other journalists.

16. The Ministers further contended that it was important for them to maintain good relations with a range of media organisations, including those such as GQ Magazine, to ensure they could use the full spectrum of media to explain to the public they were doing in key policy areas. It was important, they believed, to use the wide reach of the variety of media organisations to do this. They submitted that if journalists were no longer willing to put the effort into undertaking exclusive interviews, it would be harder for the Scottish Government to explain its work to a sufficiently broad number of people in Scotland.
17. In addition, the Ministers argued that the context in which comments were made could not be properly interpreted from the transcript alone, so it was likely to be misinterpreted and misunderstood. They submitted that releasing the raw text, without any editing, could lead to journalists or others drawing the wrong conclusions from parts of it and, as a result, writing articles which could be misleading. This would be likely to significantly harm the effective conduct of public affairs, they argued, by giving the public an incorrect impression of what the former First Minister said – and therefore of what the Scottish Government’s policies were.
18. Whilst accepting that Mr Campbell conducted the interview in question (and may have his own recording and transcript of the interview) the transcript being withheld is of a recording of the interview which was made by the Scottish Government. It was not obtained from GQ and the Ministers have provided no further submissions on the nature of the confidentiality alluded to by GQ: the Commissioner is aware of no inherent confidentiality in journalistic material, beyond that which attaches to material obtained from confidential sources (which clearly is not relevant here).
19. In its letter to the Ministers, GQ Magazine acknowledges that (unlike the magazine) the Ministers are subject to FOISA. The letter also acknowledges that lengthy extracts of the interview were published in its June 2014 issue, and that some of the material has been used by Mr Campbell in other fora, including blogs and speeches. It is clear from the letter that neither the magazine nor Mr Campbell support disclosure, but the letter does not identify any particular harm either of them might believe likely as a result of disclosure.
20. The Commissioner has considered the Ministers’ submissions fully. On the basis of the arguments she has been given, she can see no basis for concluding that disclosure of this particular information would have the effects claimed on the relationship between the Ministers and the media entities concerned, or the media in general.
21. To the extent that the Ministers believe any of the information contained in the transcript is in danger of being misinterpreted, then explanation as to the context could be given to alleviate that. As outlined in previous decisions, the risk of information being taken out of context or misinterpreted is not itself a ground for withholding information. Having considered the content of the withheld information, the Commissioner cannot see why (on the basis of the submissions she has received) its disclosure should be so harmful. It is far from obvious that its unedited, relatively disjointed form contributes to any risk of harm.
22. While disclosure might lead to speculation (although it is not immediately apparent from the content that it should), the Commissioner can see no basis for concluding that it would run the risk of the kind of breakdown in media relations identified by the Ministers in this instance. In particular, there would appear to be no rational foundation for apprehending that disclosure would, or would be likely to, diminish the media’s appetite for interviews with leading politicians. The letter the Ministers received from GQ does not, in fact, raise this as even a possibility. It may be important to the Ministers to maintain effective relations with the media, but the regular reporting of key policy developments within Government (in Scotland

and elsewhere) suggests that such stories are of equal, if not greater, importance to the media itself. If GQ or Mr Campbell had apprehended a genuine risk that they would be less likely to pursue such stories in the event of this information being disclosed, the Commissioner is satisfied that GQ would have articulated that risk clearly when writing to the Ministers about the request.

23. In the absence of any evidence supporting risks of the kind described by the Ministers, the Commissioner cannot accept that disclosure of the transcript would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.

Section 33(1)(b) – Commercial interests and the economy

24. The Ministers submitted that any information held was also exempt in terms of section 33(1)(b) of FOISA, which provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
25. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
- i. whose commercial interests would (or would be likely to) be harmed by disclosure;
 - ii. the nature of those commercial interests; and
 - iii. how those interests would (or would be likely to) be prejudiced substantially by disclosure.
26. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
27. In his application to the Commissioner, Mr Gordon referred to the above tests and submitted that the Ministers had failed to meet them. He argued that they had failed to address the specific material in question and speculated about the effects of disclosure.
28. In their submissions to the Commissioner, the Ministers stated that it would be the commercial interests of GQ Magazine, along with those of Alastair Campbell (in his role as freelance journalist), which would be likely to be harmed as a result of disclosure.
29. They explained that GQ Magazine's commercial interests in this case were in obtaining an "exclusive" in-depth and frank interview with the then First Minister, and in having information on his views which could be used to generate marketable articles, aimed at encouraging people to read the magazine. They explained that Mr Campbell also had commercial interests, in that he might use other elements of the interview in other fora, such as on blogs or via speeches. The information, the Ministers submitted, could be used to encourage people to read those blogs or attend those speaking engagements.
30. The Ministers stated that, while some time had passed since the interview took place and the article was first published, the interview was still fairly recent at the time the review response was issued (August 2014), when it was still likely Mr Campbell might have wished to use

some of the material which had not already been used in the GQ Magazine article or in other fora.

31. In the circumstances, the Commissioner accepts that both GQ Magazine and Mr Campbell would have relevant commercial interests in the information requested.
32. Having reached this conclusion, the Commissioner must go on to consider whether the commercial interests she has identified would be, or would be likely to be, prejudiced substantially by the disclosure of the information withheld. Substantial prejudice is described in paragraph 26 above: such prejudice must be at least likely before the exemption can apply, and therefore the Commissioner will expect to be satisfied that there is a significant probability of its occurrence.
33. The Ministers considered it likely that Mr Campbell's and GQ Magazine's commercial interests would be significantly harmed by disclosure. Firstly, the Ministers submitted that the information retained value, particularly for the elements which were not used in the GQ article, as this could provide further articles for Mr Campbell. They submitted that, if disclosed, this would be accessible to other journalists and thus would have little or no ongoing value to Mr Campbell.
34. Secondly, the Ministers submitted that GQ Magazine's commercial interests were also likely to be significantly harmed, as GQ regarded the information as confidential journalistic material and felt "it would be commercially damaging to them to reveal the details of their editing process by comparing the original transcript with the finalised article".
35. The Commissioner has considered all of the information withheld, along with the submissions received. In this case she acknowledges that, at the time the Ministers dealt with Mr Gordon's request, the interest in the information would have been more significant and current than it is now. She has also considered the submissions by GQ Magazine, where it is stated that neither GQ Magazine nor Mr Campbell consent to disclosure. Whilst noting GQ Magazine's objections to the disclosure, these do not specify harm (to its commercial interests or otherwise) apprehended as a result of disclosing the transcript. The Ministers appear to have concluded that GQ considered such harm to be likely, but the basis for that conclusion is not clear.
36. On the question of harm, the Commissioner must be persuaded by the submissions she has received from the Ministers. In her view, these do not explain how the disclosure of the requested information would have had, or would have been likely to have (at the time the Ministers responded to Mr Gordon's request), a substantially prejudicial impact on the commercial interests of either GQ Magazine or Mr Campbell. The submissions by the Ministers are speculative in nature, with no evidence to explain how the prejudice required would be manifested should the information be disclosed (certainly, there is none in the comments received from GQ).
37. The Commissioner has also considered the content of the withheld information. As the Ministers have indicated, this is a direct transcript of a relatively informal, discursive interview. Inevitably, it is not entirely coherent. The Commissioner has not identified anything in it which would be likely to surprise an informed reader. In the absence of more focused submissions, it is not evident why this information should be of such commercial value to other journalists and media entities.
38. Based on the submissions received from the Ministers, therefore, the Commissioner is not satisfied that the disclosure of the information would have the substantially prejudicial impact

required for section 33(1)(b) of FOISA to be engaged. Consequently, she is not satisfied in this case that the information requested was properly withheld under that exemption.

39. In conclusion, therefore, the Commissioner has not been persuaded by the Ministers that the exemptions in either section 30(c) or section 33(1)(b) of FOISA were applicable to the withheld information. Given that the Commissioner does not accept that either of these exemptions applied, she is not required to consider the public interest test in section 2(1)(b) of FOISA.

Decision

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gordon. The Ministers were not entitled to withhold the information under the exemptions in sections 30(c) or 33(1)(b) of FOISA.

The Commissioner therefore requires the Ministers to provide Mr Gordon with the transcript of the interview requested, by 26 May 2015.

Appeal

Should either Mr Gordon or the Ministers wish to appeal against this decision, they have the right to 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

8 April 2015

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption..

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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