

Decision Notice



Decision 185/2010 Mr Ben Borland of the Scottish Sunday Express and the Scottish Ministers

Correspondence between the Scottish Government and STV plc

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Summary

Mr Ben Borland, Deputy Editor of the Scottish Sunday Express, requested from the Scottish Ministers (the Ministers) correspondence on a range of matters between the Ministers and STV plc (STV). The Ministers responded by providing the information subject to the redaction of some information considered to be exempt from disclosure under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Borland remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Borland's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption in section 33(1)(b) of FOISA. However, the Commissioner also found that the Ministers had breached the timescales for responding under sections 10(1) and 21(1) of FOISA. The Commissioner did not require the Ministers to take any action in respect of these breaches.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority) and 33(1)(b) (Commercial interests and the economy).

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

Background

1. On 5 January 2010, Mr Ben Borland wrote to the Ministers requesting the content of correspondence containing exchanges of views between STV plc (STV) and the Scottish Government since 2008 on the following subjects:
 - STV's decision in March 2009 to increase the amount of home-made Scottish content and programming that it was to broadcast, and to drop a number of UK shows and dramas
 - the dispute between STV and ITV relating to being part of the UK network



- any reference to Scottish Government advertising contracts with STV
 - the future direction of STV and its long-term aims as a Scottish broadcaster
2. The Ministers responded on 22 February 2010. They provided copies of all the relevant documents to Mr Borland, subject to the redaction of certain content which was claimed to be exempt in terms of sections 33(1)(b) and 38 of FOISA.
 3. On 2 March 2010, Mr Borland emailed the Ministers requesting a review of their decision to withhold the redacted information. In particular, Mr Borland maintained that the public interest favoured the disclosure of this information, and argued that the scrutiny of how public funds are spent should outweigh any commercial considerations regarding STV.
 4. The Ministers notified Mr Borland of the outcome of their review on 21 April 2010. They released some further information, but maintained the decision to withhold the remaining redacted information.
 5. On 23 April 2010, Mr Borland wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Borland's application asked the Commissioner to consider only the information redacted from one letter. Mr Borland expressed dissatisfaction with the time taken by the ministers to respond to his information request and subsequent request for review.
 6. The application was validated by establishing that Mr Borland had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 29 April 2010, the Ministers were notified in writing that an application had been received from Mr Borland and were asked to provide the Commissioner with the information withheld from him. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information withheld.
9. The Ministers replied on 22 June 2010 with their comments on the case. They confirmed that, having consulted with STV, they now considered that the passage of time meant that some of the information previously withheld within the document under consideration could now be disclosed. The Ministers disclosed a further copy of this letter with some of the redacted content reinstated to Mr Borland during the course of the investigation.



10. Mr Borland confirmed receipt of this additional information, and indicated that he still wanted the Commissioner to reach a decision on his case. He has also provided submissions explaining why in his view the public interest favoured disclosure of the withheld information.
11. The submissions received from both Mr Borland and the Ministers are summarised below, where relevant.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Borland and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. As noted above, Mr Borland has only asked the Commissioner to consider the information withheld within one letter. Since some of the redacted information was disclosed during the investigation, the Commissioner has focussed in this decision on the remaining redacted parts of that letter, which the Ministers still considered exempt at the end of the investigation.

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

14. The Ministers relied upon the exemption in section 33(1)(b) to withhold the information in question.
15. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (the definition of "person" includes a public authority). This is also a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.
16. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify whose commercial interests would be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Generally, if substantial prejudice is being claimed to the interests of a third party, the views of that third party will be relevant (although the final decision on disclosure must be one for the public authority itself).
17. In this case, the Ministers have applied the exemption in section 33(1)(b) on the basis that disclosure of the withheld information would or would be likely to prejudice substantially STV's commercial interests.



18. The Commissioner first considered whether STV has relevant commercial interests, and he is satisfied that it does. He noted that commercial interests will generally relate to any commercial trading activity which an organisation undertakes, such as the sale or provision of products, information or services, commonly for the purpose of generating revenue. This can be across a wide range of activities and industries, and such activity will normally take place within a competitive environment. The Commissioner is satisfied that these requirements are clearly met in relation to STV in the present case.
19. The Ministers have commented on the content that continues to be withheld within the letter under consideration, and the wider context within which it was created. In particular the Ministers highlighted the ongoing legal dispute between STV and ITV, and uncertainty regarding the future of channel three licensing arrangements.
20. The Commissioner has considered the Minister's submissions carefully. He has not summarised them in detail in this decision, as to do so could reveal the nature of the withheld information. The Ministers maintained that, given the context in which it was generated and which still maintained, disclosure of this information would be harmful to STV's commercial interests.
21. The Ministers also provided a copy of communications between them and STV regarding the information under consideration, when responding to Mr Borland's information request, and again during the Commissioner's investigation of this case. This revealed that the Ministers had sought the views of STV about the disclosure of the information under consideration, and taken its concerns into account when preparing their response.
22. STV's responses supported disclosure of the information released to Mr Borland in the interests of transparency and accountability, but clearly highlighted information that it considered exempt and explained why. The matter was kept under review by Ministers during the Commissioner's investigation and when consulted again during the investigation, STV informed the Ministers that the sensitivity of certain information previously withheld had diminished. Consequently this information was disclosed by the Ministers without awaiting this decision.
23. Having considered all of the submissions from the Ministers, the Commissioner has found that disclosure of the information withheld from Mr Borland, would or would be likely to substantially prejudice the commercial interests of STV (and this was also the case at the time of the Ministers' review of their handling of his request). He is therefore satisfied that the exemption in section 33(1)(b) was correctly applied in this case.

Public interest test

24. Having found that the exemption in section 33(1)(b) was correctly applied to the information under consideration, the Commissioner is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in disclosing it is outweighed by the public interest in maintaining the exemption.



25. Mr Borland (who did not have the benefit of access to the information under consideration when making his submissions) highlighted that the relationship between the Ministers and STV is a matter of significant public interest. He argued that the sensitivity of the information withheld had diminished. He asked why “secret deals between Ministers and chief executives” should be protected in this way, and commented that the role of the exemption in section 33 is not to cover up wrongdoing.
26. The Ministers accepted in their submissions on the public interest that STV was a significant Scottish company whose commercial interests and successes were relevant more widely to the Scottish economy and to Scottish culture. The Ministers also accepted that the relationship between broadcasters and the Scottish Government, in the context of the functioning of a modern democracy, was a matter of legitimate public interest.
27. The Ministers also highlighted that STV had strenuously argued that the disclosure of the withheld information would severely damage the company’s commercial interests and viability in the broadcasting market. The Ministers, considering STV’s importance to Scotland as a whole, expressed their view that on balance the public interest in withholding the information outweighed that in disclosing it.
28. The Commissioner has considered all of these submissions and agrees that there is a general public interest in disclosure of information that would reveal the nature and extent of Ministers’ relationship with a significant Scottish company. The disclosures to Mr Borland have recognised this public interest, which has been acknowledged by the Ministers and (in its correspondence with the Ministers) STV.
29. With respect to the remaining withheld information, however, the Commissioner has recognised that its disclosure at the relevant time would, or would have been likely harm STV’s commercial interests. His decision with respect to the exemption in section 33(1)(b) has accepted that the sensitivity of this information remained at that time, given the circumstances surrounding STV. The Commissioner therefore considers that at the relevant time there remained a significant public interest in non-disclosure in order to prevent harm to a major private sector organisation.
30. If this information would reveal evidence of wrongdoing with the relationship between the Ministers and STV, then this would have been a factor weighing heavily in favour of disclosure, but the Commissioner is satisfied that it does not. The Commissioner cannot give weight to Mr Borland’s comments suggesting that disclosure is required in order to reveal wrongdoing.
31. On balance, the Commissioner has found that, in all the circumstances of the case, the public interest in disclosing the information was at the relevant time outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. The Commissioner therefore finds that the Ministers complied with Part 1 of FOISA by withholding the information under consideration when responding to Mr Borland’s information request.

Failure to comply with timescales in FOISA



32. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
33. The Ministers responded to Mr Borland's email request of 5 January 2010 by letter sent by email dated 22 February 2010. The Commissioner therefore finds that the Ministers failed to respond to Mr Borland's request for information within the 20 working days allowed under section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.
34. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review subject to exceptions contained within Part 2 of FOISA. Mr Borland submitted a requirement for review by email on 2 March 2010.
35. The Ministers acknowledged this by email on 29 March 2010. They apologised to Mr Borland for an administrative error in the late recording of the date of receipt of his request for review, which meant, they explained, that the Ministers would be unable to respond to him by the end of the permitted period under FOISA. The Ministers responded to Mr Borland's request for review by letter sent by email on 21 April 2010.
36. The Commissioner finds that the Ministers failed to respond to Mr Borland's request for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale, the Ministers failed to comply with Part 1 of FOISA.
37. While noting with concern the failures identified in this case, the Commissioner does not require any action to be taken in response to these particular breaches in response to Mr Borland's application. However, the breaches will be noted and may be taken into account in determining whether any future action should be taken in respect of the Ministers under the Commissioner's Enforcement Strategy.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Borland.

The Commissioner finds that by withholding the information under consideration in this decision under section 33(1)(b) of FOISA, the Ministers complied with Part 1 of FOISA.

However, the Commissioner finds that the Ministers failed to comply with section 10(1) and 21(1) of FOISA, by failing to provide their responses to the request and requirement for review within 20 working days. He does not require the Ministers to take any action in respect of these failures.



Appeal

Should either Mr Borland 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
09 November 2010



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.

...

- (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 –

- (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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
(b) in a case where section 1(3) applies, the receipt by it of the further information.

...

21 Review by Scottish public authority



- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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).