

Decision Notice



Decision 121/2012 Mr James Colquhoun and the Office of the Scottish
Charity Regulator

Correspondence with a specific charity

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Colquhoun asked the Office of the Scottish Charity Regulator (OSCR) for correspondence between OSCR and a specified charity. OSCR withheld this information and confirmed its decision to do so on review.

Following an investigation, the Commissioner found that OSCR had been entitled to withhold the majority of the information requested by Mr Colquhoun on the basis that disclosure would substantially prejudice the exercise of its functions in relation to the protection of the charity and its property against mismanagement (section 35(1)(g) of FOISA). The remainder of the information was properly withheld as it was information which was otherwise accessible to Mr Colquhoun under section 25(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 25(1) and (2)(b)(i) (Information otherwise accessible); 35(1)(g), (2)(f) and (g) (Law enforcement)

Charities and Trustee Investment (Scotland) Act 2005 (CTISA) sections 1(5)(d) (Office of the Scottish Charity Regulator); 23(1)(a) (Entitlement to information about charities); 28(1) - (4) (Inquiries about charities etc.)

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 7 December 2011, Mr Colquhoun (who had been in correspondence with OSCR regarding a specific charity) wrote to OSCR requesting the following information:
“all copies that were sent to that branch and all copies of reply from that branch regarding our initial enquiry.”



2. OSCR responded on 9 January 2012, confirming that it held certain information falling within the scope of Mr Colquhoun's request. On the basis that one of the items held (the charity's constitution) was reasonably obtainable by Mr Colquhoun other than by requesting it under section 1(1) of FOISA, OSCR withheld this information under section 25 of FOISA. The remaining information was withheld under section 35(1)(g): OSCR considered disclosure would, or would be likely to, prejudice substantially the exercise of its functions for the purposes of protecting a charity against misconduct or mismanagement (section 35(2)(f)) and protecting the property of a charity from loss or mismanagement (section 35(2)(g)).
3. Following further correspondence, Mr Colquhoun wrote to OSCR on 23 February 2012, requesting a review of its decision to withhold the information. OSCR notified Mr Colquhoun of the outcome of its review on 7 March 2012, upholding its original decision without modification.
4. On 3 May 2012, Mr Colquhoun wrote to the Commissioner, stating that he was dissatisfied with the outcome of OSCR's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Colquhoun 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

6. On 22 May 2012, OSCR was notified in writing that an application had been received from Mr Colquhoun and was asked to provide the Commissioner with any information withheld from him. OSCR responded with the information requested and the case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted OSCR, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. With particular reference to the requirements of the exemptions it had cited earlier, OSCR was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. OSCR confirmed its reliance on those provisions, with reasons. However, Mr Colquhoun was provided with a copy of the charity's constitution during the investigation.
8. The relevant submissions received from both OSCR and Mr Colquhoun will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

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

Section 25(1) – Information otherwise accessible

10. OSCR submitted that it wished to rely upon section 25(1) of FOISA, read with section 25(2)(b)(i), to withhold certain information (the charity's constitution).
11. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
12. Section 25(2)(b)(i) of FOISA states that information is taken to be reasonably obtainable if the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than making it available for inspection), whether free of charge or on payment.
13. In its response to Mr Colquhoun's request, OSCR informed him that it considered the constitution to be reasonably obtainable by him, on the basis that section 23(1)(a) of CTISA entitled him to obtain a copy of the constitution from the charity itself on request. This was reiterated in its submissions to the Commissioner
14. Having considered section 23(1)(a) of CTISA (reproduced in the Appendix), the Commissioner is satisfied that this does create an obligation meeting the requirements of section 25(2)(b)(i) of FOISA. Consequently, she must accept that OSCR was entitled to withhold the charity's constitution under section 25(1) of FOISA.
15. The Commissioner notes that, in any event, OSCR provided Mr Colquhoun with a copy of the constitution during the investigation.

Section 35(1)(g) – law enforcement

16. OSCR submitted that the remainder of the information was exempt from disclosure in terms of section 35(1)(g) of FOISA.
17. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. OSCR argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions for two of the purposes specified in section 35(2):



- to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration (section 35(2)(f)), and
 - to protect the property of a charity from loss or mismanagement (section 35(2)(g)).
18. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
19. The Commissioner must therefore consider three separate matters to determine whether this exemption applies. First of all, does OSCR have a function in relation to one or more of the purposes mentioned in section 35(2)? If satisfied that it does, she must then consider whether disclosure of the information would, or would be likely to, prejudice substantially OSCR's ability to exercise the function(s). If she accepts that such prejudice would, or would be likely to, occur, she must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless she finds that it does, she must order OSCR to disclose the information.
20. The Commissioner is satisfied that the purposes described in section 35(2)(f) and (g) are functions of OSCR. Section 1(5)(d) of CTISA states that one of OSCR's general functions is to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct. In addition, section 28 of CTISA provides that OSCR may make inquiries with regard to charities and associated bodies and individuals and, in connection with such an inquiry, direct a charity, body or individual not to carry out specified activities (the relevant text of CTISA is reproduced in the Appendix). The Commissioner accepts that these functions embrace the protection of both the charity and its property for the purposes set out in sections 35(2)(f) and (g).
21. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of OSCR's functions for the purposes listed at section 35(2)(f) and (g) and therefore whether the information would be exempt under 35(1)(g) of FOISA.
22. OSCR submitted that its statutory functions included acting on information obtained from any source about allegations of misconduct in any body which was a charity, and acting to protect the property of a charity against such misconduct. Disclosure of the withheld information would, OSCR believed, prejudice its intelligence gathering abilities substantially and inhibit the free and frank disclosure of information to it.



23. When receiving evidence from or in respect of charities, OSCR believed there was an expectation that information identifying individuals would not be disclosed to a third party. Disclosure of this information, it contended, would deter members of the public and charities from providing information to OSCR in the future. This would, it believed, greatly inhibit its ability to investigate alleged misconduct and/or mismanagement, and to protect charities from such misconduct or mismanagement. The consequence of this could, it argued, be a reduction in public confidence in Scottish charities, and also in OSCR as a regulator.
24. In relation to the provision of evidence, the Commissioner considers investigations carried out by OSCR to be similar to investigations of crime carried out by the police, in that criminal prosecution or other regulatory proceedings could result should evidence of wrong doing be identified. She also notes that section 28(2) of CTISA makes specific provision for inquiries under section 28(1) being carried out by OSCR “of its own accord or on the representation of any person”: clearly, therefore, the provision of information by third parties is of importance to the functions under consideration here.
25. When the Freedom of Information (Scotland) Bill was being considered by the Scottish Parliament, the Lord Advocate (in an opening statement to the Justice 1 Committee meeting on 5 December 2001) stated that the existence of a class-based exemption in relation to criminal investigations (in section 34(1) of FOISA) was “essential for an effective justice system”. Information provided by witnesses and victims was, he submitted, necessary for the purposes of criminal investigation and possible proceedings, and subsequent disclosure for another purpose would undermine confidence in the criminal justice system. In this context, he argued that witnesses and people under investigation should not be inhibited from co-operating in criminal investigations by the possibility that information provided might be disclosed and their identity revealed to the public outwith the protection of the court.
26. While this comment relates to criminal investigations, the Commissioner considers that the rationale behind the protection offered is equally relevant to the types of investigations carried out by OSCR for the purposes under consideration here, provided of course that substantial prejudice can be established in any given case.
27. There are decisions of the previous Commissioner which consider the exemption in section 35(1)(g). In *Decision 095/2012 Dunnet Head Educational Trust and the Office of the Scottish Charity Regulator*,¹ he accepted that letters of objection relative to the reorganisation of a charitable trust had been correctly withheld in terms of that exemption. Also, in *Decision 088/2009 Mr Robert O'Hare and the Office of the Scottish Charity Regulator*,² he accepted that the names of the individuals who provided statements to OSCR had been correctly withheld, as the witnesses would not in the circumstances have expected their names to be divulged outwith the protection of any legal process which might have resulted.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201100422.asp>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200900605.asp>



28. The Commissioner accepts that public authorities such as OSCR must have the confidence of individuals and organisations when conducting inquiries which, by the nature of their functions, relate to matters of public trust and could result in criminal proceedings or action in the Court of Session with significant potential sanctions. Should organisations or individuals come to believe that information they provide for such inquiries will routinely be made public, without the protection afforded by relevant criminal or civil proceedings, then the Commissioner accepts that it is likely that such confidence would be undermined.
29. The Commissioner is satisfied, in the circumstances, that disclosure of the information requested would make it much less likely that future potential witnesses and other sources, including charities, would be willing to provide information about such matters, to the substantial prejudice of OSCR's ability to protect a charity against misconduct or mismanagement or to protect the property of a charity from loss or mismanagement.
30. Having considered all relevant submissions and the information withheld in this case, the Commissioner is satisfied that disclosure of the requested information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by OSCR of its functions for the purposes listed in section 35(2)(f) and (g) of FOISA, and consequently that OSCR was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

31. The exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, even where the Commissioner accepts substantial prejudice for the purposes of section 35(1)(g) of FOISA, she must still order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
32. OSCR stated that it had considered the following factors in assessing the public interest, concluding that the public interest in maintaining the exemption outweighed that in disclosure:

Considerations supporting disclosure:

- Public interest in the transparency of OSCR's regulatory process
- Mr Colquhoun and the public would know what activities and actions OSCR undertook during the inquiry
- Mr Colquhoun and the public would know the information provided, and governance recommendations agreed, by the charity.

Considerations against disclosure:

- Disclosure would be damaging to the charity, its trustees and its reputation, without the protection afforded by OSCR's inquiry process or the courts



- OSCR must have the confidence of individuals and organisations when carrying out its statutory functions: this would be undermined should organisations or individuals believe that information would routinely be made public, without the protection afforded by relevant criminal or civil proceedings
 - The charity had not been found guilty of any offence or other wrongdoing at the time the request was dealt with
 - Disclosure might deter the public, including charities, from providing OSCR with information in confidence, which in turn might seriously undermine the robustness of OSCR's inquiry process.
33. Mr Colquhoun made various submissions to the Commissioner in relation to the withholding of the information, emphasising his belief that members of the public had a right to know the financial arrangements of the charity in question.
34. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities. However, apart from such general considerations (and while noting Mr Colquhoun's particular interests in the matter), the Commissioner cannot identify any arguments of substance to the effect that disclosure in this particular case would serve the interests of the wider public.
35. On the other hand, the Commissioner believes there to be a strong public interest in maintaining the section 35(1)(g) exemption, with a view to maintaining the effectiveness of OSCR's investigative processes. In the circumstances, she considers there would require to be a compelling public interest in disclosure to outweigh that in maintaining the exemption.
36. In all the circumstances, therefore, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. She therefore finds that OSCR was correct to withhold the information under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(f) and (g).

DECISION

The Commissioner finds that the Office of the Scottish Charity Regulator complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Colquhoun.



Appeal

Should either Mr Colquhoun or the Office of the Scottish Charity Regulator 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.

Margaret Keyse
Head of Enforcement
19 July 2012



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 –

...

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

...

25 Information otherwise accessible

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

- (2) For the purposes of subsection (1), information-

...

- (b) is to be taken to be reasonably obtainable if-

- (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

...



members of the public on request, whether free of charge or on payment.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- ...
- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- ...
- (2) The purposes are-
- ...
- (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- (g) to protect the property of a charity from loss or mismanagement;
- ...

Charities and Trustee Investment (Scotland) Act 2005

1 Office of the Scottish Charity Regulator

...

- (5) OSCR's general functions are—
- ...
- (d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and
- ...

23 Entitlement to information about charities

- (1) A person who requests a charity to provide a copy of its—
- (a) constitution,
- ...



is, if the request is reasonable, entitled to be given that copy constitution or copy statement of account (if any) by the charity in such form as the person may reasonably request.

- (2) A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe.

...

28 Inquiries about charities etc.

- (1) OSCR may at any time make inquiries, either generally or for particular purposes, with regard to—
- (a) a charity,
 - (b) a body controlled by a charity (or by two or more charities, when taken together),
 - (c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),
 - (d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of—
 - (i) a charity, or
 - (ii) a body falling within paragraph (b) or (c),
 - (e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,
 - (f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).
- (2) OSCR may make inquiries under subsection (1) of its own accord or on the representation of any person.
- (3) OSCR may direct any charity, body or person with regard to which it is making inquiries under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.
- (4) A direction under subsection (3) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body to which the inquiries relate.

...