

Decision Notice

Decision 213/2018: Mr R and the Office of the Scottish Charity Regulator

Social Bite Fund

Reference No: 201800322

Decision Date: 20 December 2018



Scottish Information
Commissioner

Summary

OSCR was asked about the Social Bite Fund, a registered charity.

OSCR disclosed some information, and withheld some other information which it considered exempt from disclosure under various exemptions in FOISA. OSCR also refused to either confirm or deny that it held some information.

The Commissioner investigated. While he found that OSCR had correctly withheld some information, he found that some other information had been wrongly withheld. The Commissioner also determined that OSCR was not entitled to refuse to confirm or deny whether other information was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) and (2)(c) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 35(1)(g), (2)(f) and (2)(g) (Law enforcement); 36(2) (Confidentiality)

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 14 December 2017, Mr R made a request for information to the Office of the Scottish Charity Regulator (OSCR). He asked for copies of all correspondence between OSCR and the Social Bite Fund SC045232, and copies of all correspondence between OSCR and the Scottish Government regarding the Social Bite Fund.
2. Mr R stated he was particularly interested in any information held that related to enquiries, whether formal regulatory enquiries, or more informal discussions, made by OSCR, over the conduct, organisation and presentation of the Social Bite Fund.
3. Noting that the charity was apparently registered in November 2014, Mr R clarified he was interested in all correspondence relating to the initial registration of the charity and onwards from that date.
4. OSCR responded on 17 January 2018, informing Mr R that, for the purpose of responding, it had interpreted his request as follows:
 - part 1 – a request for all information between the applicant and OSCR in respect of the application for charitable status.
 - part 2 – a request for all correspondence between OSCR and the Scottish Government in respect of the Social Bite Fund.
 - part 3 – a request for any and all information in respect of any informal discussions or inquiries by OSCR into conduct, organisational or financial matters relating to the Social Bite Fund.

5. For part 1, OSCR provided Mr R with a list of documents falling within scope, indicating what information was being disclosed, and the exemption(s) it had applied to information that was being withheld. OSCR explained why it considered some information to be exempt from disclosure under (variously) the following exemptions in FOISA:

- section 25(1) (Information otherwise accessible)
- section 30(b)(i), (b)(ii) and (c) (Prejudice to effective conduct of public affairs),
- section 33(1)(b) (Commercial interests and the economy)
- section 36(2) (Confidentiality)
- section 38 (Personal information)

For those exemptions which are subject to the public interest test, OSCR explained why it believed the public interest in maintaining the exemption outweighed that in disclosure.

6. For part 2, OSCR informed Mr R, in terms of section 18 of FOISA, that it was refusing to reveal whether it held any information falling within scope, or whether it existed, as to do so would be contrary to the public interest. If the information existed, OSCR explained, it would be considered exempt from disclosure under the exemptions in section 30(b)(i), (b)(ii) and (c) and section 35(1)(g) (Law enforcement) of FOISA and the public interest would favour non-disclosure.

7. For part 3, OSCR provided a list of documents falling within scope, detailing what information was being disclosed and the exemption(s) being applied to information that was being withheld. OSCR explained why it considered some information to be exempt from disclosure under (variously) the following exemptions in FOISA:

- section 25(1)
- section 35(1)(g)
- section 38

For section 35(1)(g) (Law enforcement), which is subject to the public interest test, OSCR explained why it believed the public interest in maintaining the exemption outweighed that in disclosure.

8. On 17 January 2018, Mr R wrote to OSCR, requesting a review of its decision on the basis that, with the exception of any redactions for personal data, he did not believe such extensive exemptions should have been applied to the information requested. Mr R contended there was a strong public interest in understanding the relationship between the regulator and the Scottish Government, as well as between the regulator and this particular charity.

9. OSCR notified Mr R of the outcome of its review on 14 February 2018, upholding its original decision with modifications.

- For part 1, OSCR disclosed some further information. For some of the remaining withheld information, it modified the exemptions being relied on. For the remainder, it maintained its reliance on the exemptions originally applied. OSCR informed Mr R that it upheld its original arguments for the use of the exemptions applied and its consideration of the public interest.

- For part 2, OSCR maintained its reliance on section 18 in conjunction with section 30(c) and section 35(1)(g) of FOISA, including its consideration of the public interest. It withdrew reliance on section 18 in conjunction with section 30(b)(i) and (ii).
 - For part 3, OSCR upheld the exemptions originally applied and its consideration of the public interest. OSCR informed Mr R that it had identified some further information falling within the scope of part 3, which it considered to be exempt from disclosure under section 30(c), section 33(1)(b) and section 36(2) of FOISA. Where relevant, OSCR explained why it believed the public interest favoured maintaining the exemption.
10. On 16 February 2018, Mr R wrote to the Commissioner's office, applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr R stated he was dissatisfied with the outcome of OSCR's review because he believed it had erroneously applied an extensive list of exemptions to the information requested. Mr R believed there was a strong public interest in understanding more about communications between the regulator and the Scottish Government with regard to this charity, which should militate against non-disclosure.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that Mr R made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
12. On 12 March 2018, OSCR was notified in writing that Mr R had made a valid application. OSCR was asked to send the Commissioner the information withheld from Mr R in relation to parts 1 and 3 of his request (with the exception of any information to which section 25 of FOISA had been applied). OSCR provided the information and the case was allocated to an investigating officer.
13. On examination of the withheld information, it was evident to the investigating officer that it did not accord with the list of information detailed in OSCR's response to Mr R. OSCR was asked to carry out further work and resubmit the withheld information, clearly showing the exemption(s) being applied to the corresponding information. This involved a number of exchanges with OSCR, all of which contributed to delays in the commencement of the investigation.
14. Mr R confirmed to the investigating officer that he was raising no dissatisfaction with OSCR's decision to withhold information under the exemptions in section 25 and section 38(1) of FOISA.
15. OSCR resubmitted the withheld information. It informed the investigating officer that, having carried out further analysis, it had identified that some additional information could now be disclosed to Mr R.
16. Examination of the resubmitted withheld information identified that further clarification was required from OSCR to allow the investigation to be taken forward. This again involved a number of exchanges with OSCR, delaying the investigation further.
17. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. OSCR was invited to comment on this

application and answer specific questions (with particular reference to the exemptions/provisions applied at review stage).

18. As OSCR was withholding some information for parts 1 and 3 of the request under exemptions that are subject to the public interest test, Mr R was asked for his comments on why he believed disclosure of the information was in the public interest. For part 2, he was also invited to comment on the public interest in knowing whether the information was or was not held by OSCR.
19. Both parties provided submissions to the Commissioner. During the investigation, OSCR changed its position, on a number of occasions, in relation to the exemptions being applied to particular information withheld for part 1 of Mr R's request.
20. On 29 June 2018, OSCR disclosed some further information to Mr R that it had originally withheld.
21. This investigation will not focus on any information withheld under the exemptions in section 25 or section 38 of FOISA, given that Mr R has confirmed he is raising no dissatisfaction with OSCR's application of these exemptions.

Commissioner's analysis and findings

22. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr R and OSCR. He is satisfied that no matter of relevance has been overlooked.

Information held – parts 1 and 3 of request

23. In order to ascertain whether all relevant information had been identified, OSCR was asked to explain the steps it took to establish what relevant information it held and which fell within the scope of parts 1 and 3 of Mr R's request. OSCR explained that all its records are held within its electronic records digital management (eRDM) system "Objective", a full search of which was undertaken using the charity name and number. All files listed in the search results were opened and considered by OSCR, to identify whether any information contained in them fell within the scope of the request.
24. Having considered the relevant submissions, the Commissioner accepts that OSCR took adequate, proportionate steps in the circumstances to identify and locate any information relevant to parts 1 and 3 of the request.

OSCR's change of position during investigation

25. As explained above, during the investigation OSCR provided submissions to the effect that some information for parts 1 and 3, originally withheld, could now be disclosed. This information had been withheld at review stage under (variously) the exemptions in section 30(b)(ii) and (c), section 33(1)(b) and section 36(2) of FOISA. OSCR disclosed this information to Mr R on 29 June 2018.
26. OSCR submitted that, in disclosing this further information, some parts comprising personal information had been redacted under section 38(1)(b) of FOISA. OSCR confirmed it was no longer relying on any other exemption to withhold the information now disclosed. OSCR provided no submissions, however, explaining why this information was correctly withheld at the time it dealt with Mr R's request or requirement for review, so the Commissioner can only

conclude that OSCR was not entitled to withhold that information at that time (and therefore breached section 1(1) of FOISA in doing so).

27. The Commissioner will now consider whether or not OSCR was entitled to rely on any exemptions claimed by OSCR to withhold the remaining withheld information for parts 1 and 3 of the request.

Section 30(b)(ii) - Prejudice to effective conduct of public affairs

(Documents 12, 34a, 42, 43 and 46 [part only])

28. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
29. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
30. Each request must be considered on a case by case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
31. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.
32. OSCR submitted that its officers must have a private space in which to discuss issues in order to perform its functions properly. It believed that disclosure of these discussions would substantially inhibit the free and frank exchange of views in future, particularly where discussions were ongoing and decisions had yet to be taken, and/or which related to sensitive or controversial issues. OSCR considered this to be particularly relevant to matters such as the application of the charity test, where the concepts of public and private benefit required to be considered on a case-by-case basis.
33. OSCR submitted that disclosure of information shared internally for the purposes of its regulatory function would have a negative impact on its decision-making processes and the conduct of future enquiries, thus inhibiting substantially the free and frank exchange of views for the purposes of deliberation. It believed that disclosure would lead to officers being less willing to hold, and certainly to record, such open and frank discussions in future.
34. The Commissioner has considered all of the submissions made by OSCR, along with the withheld information under consideration. He has considered the content and nature of the exchanges, which comprise OSCR's internal views on particular issues concerning the charity's application for charitable status, and the context in which they were provided.
35. In all the circumstances of the case, the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by OSCR. As such, he is satisfied that the information under consideration here is exempt from disclosure in terms of section 30(b)(ii) of FOISA.

Public interest test – section 30(b)(ii)

36. Section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
37. OSCR identified a number of factors it had taken into account when considering whether the public interest favoured disclosure. These included whether disclosure would:
- enhance the scrutiny and transparency of OSCR’s decision-making, thereby improving accountability
 - contribute to ensuring that OSCR was adequately discharging its regulatory functions, thereby increasing public confidence
 - contribute to open policy making, leading to increased trust and engagement between OSCR and the public
 - provide evidence of the thoroughness of OSCR’s charitable application process.
38. OSCR believed these factors should be balanced against whether disclosure would:
- limit the scope and inhibit internal frankness and candour, which could diminish the quality of OSCR’s decision-making
 - impact the requirement to have a safe space to debate decisions and formulate policy internally
 - lead to a reduction in fully recording high-level decision-making, so as to avoid creating information which might require disclosure.
39. Having considered all these factors, OSCR concluded that the public interest in disclosing the information was outweighed in this case by that in maintaining the exemption.
40. Mr R submitted that the Social Bite Fund was a large, high-profile charity with extensive political connections and public support. As such, he believed there was a strong public interest in understanding what, if any, concerns OSCR has (or had) concerning the charity’s governance.
41. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises OSCR’s internal views on particular issues concerning the charity. He recognises there is a genuine public interest in allowing understanding of the processes undertaken by OSCR in fulfilling its functions, and whether it is meeting its regulatory obligations.
42. However, the Commissioner also recognises that there is a strong public interest in OSCR being able to hold internal discussions and debate in a private space, when considering applications for charitable status, or any other concerns it might have regarding a charity’s conduct. He acknowledges that the ability to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion to allow open and frank exchanges to support informed decision-making. The Commissioner accepts there is no public interest in disclosing information that would limit such future discussion or debate, adversely impacting the quality of OSCR’s decision-making.

43. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure of this particular information. Accordingly, he finds that OSCR was entitled to withhold this information.
44. OSCR also applied the exemption in section 33(1)(b) to some of the information under consideration here. As the Commissioner has found that the information has been correctly withheld under section 30(b)(ii), he is not required to consider any other exemption simultaneously applied to this same information.

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

(Documents 9, 13a, 14, 24, 28, 30, 38, 39, 46 [part only], 49, 49a and 55)

45. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
46. 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 applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
47. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to 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; therefore, the authority 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.
48. OSCR stated that the information under consideration comprised communications between OSCR and the charity, seeking clarification on various points concerning the charity application.
49. Disclosure of this information, OSCR submitted, would be likely to prejudice substantially the effective conduct of public affairs, in that it would likely have a detrimental effect on future discussions with stakeholders.
50. OSCR explained that, in carrying out its functions (which included the regulation of the charitable sector), it was required to handle sensitive, controversial or incomplete information about such bodies, consideration of which was an essential element of its decision-making functions. OSCR stated that it relied on the exchange of information with its stakeholders, who, it believed, would be deterred from speaking openly if they believed their information would routinely be disclosed.
51. OSCR stated that its ability to communicate effectively with external stakeholders was crucial to its ability to carry out its regulatory functions. Disclosing such communications, without the consent of stakeholders, was likely to undermine their trust in OSCR and thus restrict communications in future. This, in turn, would adversely impact OSCR's ability to gather all the evidence necessary to allow it to make fully informed decisions.
52. The Commissioner acknowledges that such information is valuable to OSCR's regulatory function. Having examined the withheld information under consideration here, he considers

it likely that the level of detail contained therein would be unlikely to have been provided, or recorded, were there to be any expectation of disclosure.

53. The content (and context) of the information is also a relevant factor. In this case, the Commissioner recognises that there is a perceived expectation that the information would not be publicly disclosed.
54. In the circumstances described, the Commissioner is satisfied that disclosure of the withheld information would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs (i.e. OSCR's regulatory activity).

Public interest test – section 30(c)

55. Section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
56. In considering whether the public interest favoured disclosure, OSCR referred to the same factors identified for section 30(b)(ii) above.
57. OSCR believed these factors should be balanced against the following:
 - Disclosure would not enhance public scrutiny of OSCR as the charity in question is not a public body, nor was it publicly funded.
 - Disclosure would lead to charities being less willing to provide OSCR with information. This would lead to a culture of secrecy and suspicion, adversely impacting OSCR's ability to properly and effectively carry out its regulatory functions.
 - Disclosure would lead to a reduction in confidence in OSCR from charities and members of the public, which would adversely impact OSCR's ability to regulate charities effectively.
 - Disclosure would limit frankness and candour between OSCR and charities or third parties.
58. OSCR concluded that the public interest in disclosing the information was outweighed in this case by that in maintaining the exemption.
59. As for section 30(b)(ii) above, Mr R submitted that the public interest lay in understanding what, if any, concerns OSCR had concerning the charity's governance, given that the Social Bite Fund was a large, high-profile charity with extensive political connections and public support.
60. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises external communications between OSCR and the charity/its solicitors. As with section 30(b)(ii) above, he recognises there is a genuine public interest in allowing understanding of the process undertaken by OSCR in fulfilling its functions, and whether it is meeting its regulatory obligations.
61. On the other hand, the Commissioner accepts that OSCR must be able to gather in all the necessary information required to allow it make informed decisions on applications for charitable status, and to be able to review and monitor charities effectively. He considers there is no public interest in disclosing information that would adversely impact OSCR's ability to do so, which would undermine these aspects of its regulatory function.

62. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure, in respect of this particular information. Accordingly, he finds that OSCR was entitled to withhold the information.
63. OSCR also applied the exemptions in section 33(1)(b) and section 36(2) to some of the information under consideration here. As the Commissioner has found that the information has been correctly withheld under section 30(c), he is not required to consider any other exemption simultaneously applied to this information.

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

(Documents 1 [part only], 40a and 46 [part only])

64. Section 33(1)(b) of FOISA provides that information is exempt information if 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). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
65. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (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.
66. 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.
67. OSCR stated that the information related to the commercial and trading activities and running of the charity and its trading subsidiary, registered as a private limited company.
68. Mr R submitted that there was no commercial relationship between OSCR and the charity. As the charity was regulated by, and not a supplier or customer of OSCR, he considered the application of section 33(1)(b) to be inappropriate.
69. However, the relationship between OSCR and the charity is not the determining factor here and the Commissioner is satisfied that the charity has commercial interests for the purposes of section 33(1)(b).
70. OSCR submitted that the information comprised details of plans for the charity and its trading subsidiary, including profitability, concession opportunities, expansion, identifying funders and future staffing numbers and positions, cashflow documents and projections.
71. OSCR believed disclosure of the information under consideration would alert other similar businesses to the charity's and its trading subsidiary's expansion plans, the services to be offered and the geographical areas of operation. This would give competitive advantage to other similar organisations/businesses, and would commercially disadvantage the trading subsidiary, the running of the charity and the services offered to beneficiaries.

72. OSCR submitted that, to its knowledge, the information was not in the public domain, nor was it provided to OSCR with the intention of placing it in the public domain.
73. In OSCR's view, bodies applying for charitable status would be less willing to furnish the same level of detail about their financial and commercial planning and history, if they believed the information would routinely be published. OSCR argued that a culture of secrecy and routine withholding of information would manifest itself, leading to the removal of many of the checks and balances currently available, particularly in relation to OSCR's consideration of public and private benefit. This, OSCR believed, would substantially prejudice its ability to effectively identify and register suitable organisations as charities, and monitor them beyond the granting of charitable status.
74. OSCR informed the Commissioner that it had not consulted with the charity regarding its views on disclosure of the information under consideration. It explained why it did not consider such consultation to be viable in the circumstances (information the Commissioner would consider to have been provided in confidence).
75. The Commissioner notes that the information includes detailed commercial information relating to the finances of the charity and its trading subsidiary. In his view, this information gives a valuable insight into these finances, which could be used by competitors to their commercial advantage.
76. In the circumstances, the Commissioner is satisfied that disclosure of the withheld information would, or would be likely to prejudice substantially, the commercial interests of the charity and its subsidiary, by placing them at an unfair commercial disadvantage.

Public interest test – section 33(1)(b)

77. Section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
78. OSCR identified the following factors which it had taken into account when considering whether the public interest favoured disclosure:
 - As the charity is a limited company, financial information relating to its accounts, filing history and appointed officers is in the public domain and open to public scrutiny through Companies House.
 - Disclosure would enhance the scrutiny and transparency of OSCR's decision-making, thereby improving accountability.
 - Disclosure would contribute to ensuring that OSCR was adequately discharging its regulatory functions, thereby increasing public confidence.
79. OSCR believed these factors should be balanced against the following:
 - Disclosure would not enhance public scrutiny of OSCR as the charity in question is not a public body, nor is publicly funded.
 - The information under consideration is not required to be in the public domain for any charity.

- Disclosure would lead to a future reduction in the level of detailed information volunteered to OSCR by charities.
 - Disclosure would not enhance public debate on charities, charity regulation or OSCR's regulatory functions, given that the information relates solely to the charity in question.
 - Disclosure would place the charity at a commercial competitive disadvantage.
80. OSCR concluded that the public interest in disclosing the information was outweighed in this case by that in maintaining the exemption.
81. The Commissioner has considered the submissions from both parties, together with the withheld information, which comprises financial information relating to the charity and its trading subsidiary. He recognises there is general public interest in disclosing information held by Scottish public authorities. He acknowledges that disclosure in this case would aid the public's understanding of OSCR's decision-making.
82. However, the Commissioner is also of the view that the disclosure of the information in question would give competitors a valuable insight into the charity's finances and those of its trading subsidiary, thus giving them commercial advantage. He considers there is no public interest in placing a particular organisation at a commercial disadvantage, simply as a result of commercial information having been submitted to the appropriate statutory regulator in support of an application for charitable status. In addition, the Commissioner considers the public interest in disclosure is met, to some extent, by the financial information available via Companies House.
83. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of this particular information. Accordingly, he finds that OSCR was entitled to withhold this information.
84. OSCR also applied the exemption in section 36(2) to some of the information under consideration here. As the Commissioner has found that the information has been correctly withheld under section 33(1)(b), he is not required to consider any other exemption simultaneously applied to this information.

Section 35(1)(g) - Law enforcement

(Documents 50, 51, 54)

85. Section 35(1)(g) of FOISA applies to information the disclosure of which would, or would be likely to, prejudice substantially the exercise by any public authority or Scottish public authority of its functions for any of the purposes mentioned in section 35(2). 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):
- (i) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration (section 35(2)(f)), and
 - (ii) to protect the property of a charity from loss or mismanagement (section 35(2)(g)).
86. There is no definition of "substantial prejudice" in FOISA, but the Commissioner is of the view that authorities have to be able to establish harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
87. The exemptions in section 35(1) are also subject to the public interest test in section 2(1)(b) of FOISA.

88. There are three separate matters the Commissioner must consider to determine whether this exemption applies.
- (i) Does OSCR have a function in relation to one or more of the purposes mentioned in section 35(2)?
 - (ii) If satisfied that it does, would its disclosure prejudice substantially, or be likely to prejudice substantially, OSCR's ability to exercise the functions(s)?
 - (iii) If he accepts that such prejudice would, or would be likely to occur, the Commissioner 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 he finds that it does, he must order OSCR to disclose the information.

Does OSCR have a function in relation to one of more of the purposes mentioned in section 35(2)?

89. OSCR derives its powers from the Charities and Trustee Investment (Scotland) Act 2005 (CTISA). Specifically, OSCR referred to section 1(5)(d) of CTISA, which states that one of its 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".
90. OSCR also referred the Commissioner to the provisions in Chapter 4 (Supervision of charities etc.) of CTISA, which provide that OSCR may make inquiries with regard to charities and other charitable bodies and, where there is apparent misconduct, take certain steps in order to protect the property of a charity or secure a proper application of such property for its purposes (section 28(1) of CTISA).
91. Section 28(2) of CTISA makes specific provision for inquiries being carried out by OSCR "of its own accord or on the representation of any person". This, OSCR believed, covered the provision of information provided to it by third parties.
92. In light of the above, the Commissioner is satisfied that the purposes described in section 35(2)(f) and (g) fall within the statutory functions of OSCR.

Whether disclosure would or would be likely to, prejudice substantially OSCR's ability to exercise the functions(s)?

93. OSCR reiterated that its statutory functions included acting on information obtained from any source about allegations of misconduct in any charitable body, and acting to protect the charity against such misconduct. It believed disclosure would prejudice substantially its ability to gather intelligence, and inhibit the free flow of information provided by whistleblowers, charities or members of the public, which was vital to the performance of its functions.
94. OSCR stated that it must have the confidence of third parties when conducting investigations. When receiving evidence from, or in respect of, charities, there was an expectation that the information provided would not be further disclosed. OSCR argued that should those wishing to provide information believe that it would routinely be made public, without the protection afforded by relevant criminal or civil proceedings, such confidence would be undermined, which would likely deter individuals from providing information in future. This, OSCR believed, would inhibit its ability to investigate, and protect, charities from alleged misconduct or mismanagement, and would lead to a reduction in public confidence both in Scottish charities, and in OSCR as their regulator.

95. Having considered all relevant submissions and the withheld information, with particular regard to the context in which it is held, the Commissioner is satisfied that disclosure of this information would, or would be likely to, prejudice substantially OSCR's exercise of its functions for the purposes listed in section 35(2)(f) and (g) of FOISA. The Commissioner is unable to expand further on his reasoning, as to do so would require direct reference to the withheld information, but he is satisfied that the risks identified by OSCR are pertinent in this particular case. The Commissioner is therefore satisfied that section 35(1)(g) was correctly engaged in respect of the withheld information under consideration here.
96. As the Commissioner has found that the exemption in section 35(1)(g) was correctly applied to the withheld information, he is required to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test – section 35(1)(g)

97. OSCR identified a number of factors it had taken into account when considering whether the public interest favoured disclosure. These included whether disclosure would:
- enhance the scrutiny and transparency of OSCR's decision-making, thereby improving accountability
 - contribute to ensuring that OSCR was adequately discharging its regulatory functions
 - provide evidence of the thoroughness of OSCR's investigation process.
98. OSCR believed these factors should be balanced against the following:
- in the circumstances, disclosure could unfairly damage the charity's reputation
 - there should not be the same assumption of transparency as there would be if the charity were a public authority, subject to FOISA
 - disclosure might lead to third parties being less willing to provide information to OSCR in confidence, which could undermine the robustness of OSCR's inquiry process
 - OSCR does not consider the information to be of wider public interest.
99. OSCR concluded that the public interest in disclosing the information was outweighed in this case by that in maintaining the exemption.
100. Mr R submitted that OSCR was a relatively secretive regulator, which did not routinely publish details of its investigations into charitable organisations. Given the Social Bite Fund's high profile, Mr R believed there was a strong public interest in understanding what concerns OSCR had about its governance.
101. The Commissioner has considered the submissions from both parties, together with the withheld information. He recognises that there is a public interest in allowing understanding and scrutiny of OSCR's actions relating to its investigatory processes.
102. The Commissioner also recognises, however, that OSCR must be able to conduct its investigations on a confidential basis, with parties being able to provide information to OSCR safe in the knowledge that their information will not routinely be made public, outwith any formal investigation process.

103. The Commissioner considers disclosure of the information under consideration would adversely impact OSCR's ability to successfully conduct future investigations of this nature, which would not be in the public interest.
104. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 35(1)(g) outweighs that in disclosure in respect of this particular information. Accordingly, he finds that OSCR was entitled to withhold this information.
105. Having reached this conclusion, the Commissioner finds that OSCR correctly withheld information in Documents 50, 51 and 54 under section 35(1)(g) of FOISA.

Section 18 – “neither confirm nor deny” (part 2 of request)

106. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by the authority;
 - (ii) if the information were held by the authority (and it need not be), the authority could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
107. Where an authority has chosen to rely on section 18, the Commissioner must establish:
 - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions cited in section 18(1). The authority must satisfy the Commissioner that:
 - (a) an exemption would apply and, if it did,
 - (b) that the balance of the public interest would favour withholding the information, and then
 - (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
108. The Commissioner must ensure that his decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any depth on the authority's reliance on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held.
109. It is not sufficient simply to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information, if it existed and was held, would be exempt information under one or more of the listed exemptions. Where the exemption(s) is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.

110. In this case, in its review response to part 2 of Mr R's request, OSCR stated that if it did hold any information falling within the scope of this part of the request, it could be withheld under the exemptions in section 30(c) and section 35(1)(g) of FOISA.
111. The Commissioner will first of all consider whether OSCR would be entitled to rely upon the exemption contained in section 30(c) of FOISA.

Section 18 applied with section 30(c) – Prejudice to effective conduct of public affairs

112. The requirements of section 30(c) are set out above – see paragraphs 45-47.
113. OSCR submitted that it must have a private space within which it could obtain advice from, or discuss issues with, external stakeholders in order to be able to make informed, quality decisions, and to carry out its functions effectively. It argued that disclosure of the content of such discussions, without the stakeholder's consent, would likely undermine trust in OSCR, and make others less willing to communicate with, or be more circumspect in their communications with, the regulator. OSCR further argued that premature disclosure would likely undermine such discussions, its policy and decision-making processes and its relationships with external stakeholders. All of these factors, OSCR believed, would substantially inhibit the free and frank exchange of views in future, particularly where discussions were ongoing and decisions had yet to be taken, or where these related to sensitive or controversial issues.
114. The Commissioner accepts OSCR's arguments that disclosure of such communications, if the information existed and were held, could be obstructive to future dialogue with the Scottish Government (and, potentially, other external stakeholders) concerning matters of sensitivity, importance and significance. Accordingly, he is satisfied that, should any such information exist and be held by OSCR, it would be exempt from disclosure under section 30(c) of FOISA on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

Public interest test – section 2(1)(b) as applied to section 30(c)

115. As indicated above, section 30(c) is subject to the public interest test contained in section 2(1)(b) of FOISA.
116. In considering whether the public interest favoured disclosure, OSCR submitted that it wished to rely on the public interest arguments provided for section 30(c) above.
117. In Mr R's view, given that OSCR was "supposed to be" an independent regulator, there was a public interest in understanding the nature and content of any communications that existed between OSCR and the Scottish Government about particular charities, and what they may indicate about the independence of the regulator.
118. The Commissioner has considered the submissions from both parties. He recognises there is a genuine public interest in allowing understanding of the processes undertaken and the decisions made by OSCR in fulfilling its functions, including understanding of matters that may be discussed with the Scottish Government.
119. However, the Commissioner accepts that OSCR must be able to communicate with external bodies on specific matters in a confidential setting, allowing the free flow exchange of information, and thus enabling OSCR to make informed decisions. He considers there would be no public interest in disclosing information, if it existed and was held, that would adversely impact OSCR's ability to do so, which would undermine these aspects of its regulatory function.

120. On balance, therefore, if any information falling within the scope of part 2 of the request existed and were held by OSCR, the Commissioner is satisfied that the public interest in maintaining the exemption in section 30(c) would outweigh that in disclosure. Having satisfied himself that part 2 could have been refused under section 30(c), he is not also required to consider whether, if the information existed and were held, it could also have been refused under section 35(1)(g) of FOISA.
121. As the Commissioner has accepted that OSCR could have given a refusal notice under section 16(1) of FOISA, on the basis that any relevant information would be exempt by virtue of section 30(c) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether OSCR was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

Public interest test – section 18(1)

122. Mr R considered the public interest lay in understanding the nature and content of any communications that existed between OSCR and the Scottish Government about particular charities, and what they may indicate about the independence of the regulator. He highlighted a particular public interest in communications outwith the normal regulatory framework.
123. OSCR submitted that to confirm whether or not correspondence between OSCR and the Scottish Government existed would seriously inhibit its ability to register and regulate charities effectively, and would have a detrimental effect on its ability to have open conversation with third parties.
124. OSCR acknowledged that confirming the existence of the information, if it existed and were held, would verify whether OSCR had been in communication with the Scottish Government regarding the charity in question. While this would not confirm the content of any such communications, OSCR believed it might lead to incorrect assumptions being made about that content – and, by extension, about the charity and its work – wrongly creating suspicion and distrust among the public, potential donors and its supporters.
125. In undertaking its statutory duties, OSCR explained it relied on open, frank discussions and willing input from third party participants, conducted generally in confidence with no expectation of further disclosure of the information exchanged. OSCR submitted that confirmation of the existence or otherwise of that information might prevent third parties – including individuals, organisations, charities, public bodies and government – from willingly communicating with OSCR in future, should they believe their identity or their views would routinely be made public. OSCR considered this would adversely impact on the quality and range of information provided, from which it would draw its decisions, impacting negatively on its operational efficiency and ability to carry out its functions effectively.
126. Recognising the public interest in openness and transparency in relation to its work, and in allowing access to information under FOISA, OSCR believed this was outweighed by the public interest in protecting charitable assets or property, should the information exist. OSCR concluded there was no discernible public interest in confirming or otherwise whether OSCR had corresponded with the Scottish Government regarding the charity in question.
127. The Commissioner has carefully considered the arguments presented by both OSCR and Mr R.
128. In the Commissioner's view, the role of FOISA is important not only in enabling transparency in relation to information held by public authorities, but also in enabling transparency in

relation to processes and procedures. In this case, the Commissioner has concluded that, if the information existed and was held by OSCR, it would have been entitled to issue a refusal notice under section 16(1). However, the Commissioner fails to see why it would be contrary to the public interest to reveal whether correspondence exists between two bodies relating to a third party, where there is no indication of what particular topic or theme – except at a general level – such correspondence might concern. As OSCR has itself recognised, while confirmation of the information's existence would verify whether or not OSCR had been in communication with the Scottish Government regarding the charity in question, it would give no indication whatsoever of the subject matter of any such correspondence, if indeed any existed and were held.

129. The Commissioner does not accept, either, that confirming or denying the information's existence (or whether it was held) would necessarily lead to negative inferences being drawn about the charity. Neither does he accept that it would necessarily lead to external bodies being less inclined to co-operate with OSCR, or otherwise prejudice OSCR's functions, in the manner described by OSCR. In the Commissioner's view, OSCR's arguments for applying section 18 appear to focus more on the content of any relevant information, as opposed to confirmation (or otherwise) of its existence and whether it is held.
130. On balance, the Commissioner is not satisfied, in this case, that it would be contrary to the public interest for OSCR to reveal whether the information requested in part 2 of Mr R's request exists or is held by it. In particular, and as noted above, the Commissioner considers that it is in the public interest to know whether or not OSCR had entered into communications with the Scottish Government in relation to this charity, to enable scrutiny and a better understanding of OSCR's regulatory and investigatory processes.
131. Consequently, the Commissioner concludes that OSCR was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested by Mr R in part 2 of his request.
132. The Commissioner requires OSCR to provide Mr R with a revised review outcome for part 2 of his request, otherwise than in terms of section 18(1) of FOISA. He requires OSCR to reveal to Mr R whether the information he requested existed and was held by it when it received his request, and provide him with a fresh review outcome in terms of section 21(4)(b) of FOISA.

Decision

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

Parts 1 and 3 of request:

The Commissioner finds that OSCR correctly withheld some information under section 30(b)(ii) and (c), section 33(1)(b) and section 35(1)(g) of FOISA, and so complied with Part 1.

However, the Commissioner also finds that OSCR wrongly withheld other information under section 30(b)(ii) and (c), section 33(1)(b) and section 36(2) of FOISA, and thereby failed to comply fully with section 1(1) of FOISA. Given that, during the investigation, OSCR disclosed to Mr R all of the information found to have been wrongly withheld, the Commissioner does not require OSCR to take any action in respect of this failure, in response to parts 1 and 3 of Mr R's application.

Part 2 of request:

The Commissioner finds that OSCR was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held information for part 2 of Mr R's request, or whether that information existed, and so failed to comply with Part 1.

The Commissioner therefore requires OSCR to reveal to Mr R whether the information he requested exists and was held by it when it received his request, and to provide Mr R with a fresh review outcome in terms of section 21(4)(b) of FOISA. The Commissioner requires OSCR to comply with this requirement by **4 February 2019**.

Appeal

Should either Mr R or the Office of the Scottish Charity Regulator 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 Office of the Scottish Charity Regulator (OSCR) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that OSCR has failed to comply. The Court has the right to inquire into the matter and may deal with OSCR as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

20 December 2018

Appendix 1: 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.

- (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 –

...

- (c) section 36(2);

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

- (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).

...

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);

...

by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.

- (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;

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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