

Decision Notice

Decision 023/2018: Mr Graham Keith and the Office of the Scottish Charity Regulator

Complaint correspondence

Reference No: 201701856

Decision Date: 27 February 2018



Summary

OSCR was asked for all correspondence relating to a complaint made about the Strathspey Railway Charitable Trust.

OSCR withheld some information on the basis that disclosure would substantially prejudice its ability to carry out its functions in supervising charities.

The Commissioner agreed that the information was properly withheld from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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); 28(1) and (2) (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 16 August 2017, Mr Keith made a request for information to OSCR. The information requested was for:
“... all correspondence (including electronic) that relates to the Strathspey Railway Charitable Trust (SRCT) in relation to the recent complaint relating to the Trust, from July 2016 to date.”
2. OSCR responded on 25 August 2017. It provided Mr Keith with some of the information requested, explaining that it had redacted personal data.
3. OSCR also informed Mr Keith that, having considered the public interest, it considered other information to be exempt under section 35(2)(f) and (g) of FOISA, as disclosure would, or would be likely to, prejudice substantially the exercise its functions for the purposes of (f) protecting a charity against misconduct or mismanagement and (g) protecting the property of a charity from loss or mismanagement. It also advised that it considered the information to be exempt in terms of section 36(2) of FOISA, as it had been provided in confidence.
4. In addition, OSCR stated that any previous correspondence between Mr Keith and OSCR was subject to section 25(1) of FOISA, on the basis that the information was otherwise accessible to him. It informed Mr Keith, however, that it would provide this information to him separately, and not under FOISA.
5. On 13 September 2017, following further exchanges, Mr Keith wrote to OSCR acknowledging the application of section 25(1) and 38(1)(b) of FOISA. He explained his understanding that OSCR was relying upon section 35(1)(g) of FOISA, applied in conjunction with section 35(2)(f) and (g). He asked OSCR to review its decision, on the basis that he was not satisfied with OSCR’s conclusions, in this particular case, on either substantial prejudice or the public interest. He also noted that section 36(2) of FOISA applied only

where there was actionable breach of confidence (which he was not satisfied would follow from disclosure in this case).

6. OSCR notified Mr Keith of the outcome of its review on 10 October 2017. It upheld its application of sections 35 and 36(2) of FOISA, providing a list of documents it was withholding.
7. On 23 October 2017, Mr Keith wrote to the Commissioner. Mr Keith applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Keith stated he was dissatisfied with the outcome of OSCR's review as he believed OSCR had misapplied the exemptions.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Keith 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.
9. On 13 November 2017, OSCR was notified in writing that Mr Keith had made a valid application. OSCR was asked to send the Commissioner the information withheld from Mr Keith. OSCR provided the information and the case was allocated to an investigating officer.
10. 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 focusing on the exemptions applied to the withheld information.
11. OSCR responded and confirmed its reliance on section 35(1)(g) of FOISA, in conjunction with section 35(2)(f) and (g), and also section 36(2), to withhold the information. It provided reasons in support of its position.
12. Mr Keith also provided submissions as to why he considered the exemptions claimed did not apply, and also as to why he considered disclosure to be in the public interest.
13. The relevant submissions received from both OSCR and Mr Keith will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Keith and OSCR. He is satisfied that no matter of relevance has been overlooked.
15. In its submissions to the Commissioner OSCR acknowledged that it should have explained in its response to Mr Keith, that it was applying section 35(1)(g) of FOISA, in conjunction with section 35(2)(f) and (g).
16. The Commissioner will first of all consider whether OSCR correctly withheld the information as exempt from disclosure under the exemption in section 35(1)(g) of FOISA. Only where he finds that OSCR was not entitled to do this will he go on to consider the application of section 36(2) of FOISA.

Section 35(1)(g) – Law enforcement

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.
18. OSCR is a Scottish public authority as defined by FOISA (see Schedule 1 to FOISA).
19. 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)).
20. Section 35(1)(g) is a qualified exemption, in that it is subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemption 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 “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.
21. 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) of FOISA? If satisfied that it does, he 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 he accepts that such prejudice would, or would be likely to, occur, he 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.

OSCR's functions

22. The Commissioner is satisfied that OSCR exercises functions which relate to the purposes described in section 35(2)(f) and (g) of FOISA. 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.
23. In addition, section 28(1)(a) of CTISA provides that OSCR may at any time make inquiries, either generally or for particular purposes, with regard to a charity. OSCR submitted that 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. OSCR submitted that this covers the provision of information given to OSCR by third parties, which is under consideration here. (The relevant provisions from CTISA are reproduced in Appendix 1.)

24. In his submissions to the Commissioner, Mr Keith acknowledged that OSCR had a duty under 35(1)(g), read in conjunction with 35(2)(f) and (g), although he did not accept that the other requirements of the exemption were met.

Would disclosure cause, or be likely to cause, substantial prejudice?

25. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of the functions identified by OSCR.
26. OSCR submitted that the disclosure of the information would prejudice substantially its intelligence gathering abilities, and inhibit the free and frank disclosure of information to OSCR by members of the public and charities. It explained that the free flow of information, whether from trustees, whistleblowers, members of charities or the public raising concerns, was vital to the performance of its functions for the purposes of 35(2)(f) and (g).
27. OSCR submitted there was an expectation that information identifying individuals would not be disclosed to a third party, whether or not that party was the charity in question.
28. OSCR explained that in order to perform its functions, it must have the confidence of individuals, charities and organisations when conducting investigations. Should those who provided it with information come to believe that the information would routinely be made public, without the protection afforded by relevant criminal or civil proceedings, OSCR considered it likely that such confidence would be undermined.
29. OSCR concluded that disclosure of the information under consideration here would deter persons from providing it with information in the future. It believed this would greatly inhibit its ability to investigate alleged misconduct or mismanagement, and its ability to protect charities from such misconduct or mismanagement. By extension, it believed disclosure could lead to a reduction in public confidence in Scottish charities and undermine the public's confidence in OSCR as a regulator.
30. In his request for review and in his submissions to the Commissioner, Mr Keith stated that he disagreed with the application of section 35(1)(g) of FOISA, on the basis that OSCR had not evidenced that disclosure would cause the substantial prejudice required, in the circumstances of this particular case, and that FOISA does not allow section 35(1)(g) to be applied in blanket fashion. He submitted that an authority had to show a genuine link between the disclosure of the information and the harm caused: it could not simply be a remote or hypothetical possibility, as he believed OSCR was arguing in this case.
31. Mr Keith disputed that OSCR had a legal obligation to maintain confidence with complainers and submitted that any assurance of non-disclosure on OSCR's website extended only to the identity of the complainer and not the substance of their complaint. He could identify no expectation of confidentiality in relation to the content of the complaint, and no basis in evidence for disclosure of that content causing the required harm in this case.
32. The Commissioner notes that OSCR publishes its Inquiry Policy Document¹, which at page 3 states:

The charity will not be told who has raised the concern without that person's permission. However, there may be legal circumstances where we have to do so. For example, if we are required to do so by a Court. Additionally, the identity of the person raising the concern may be obvious to the charity because of the type of issues raised.

¹ <https://www.oscr.org.uk/media/1768/2014-12-22-oscr-inquiry-policy-document.pdf>

33. The Commissioner does not accept that it can be taken from the content of OSCR's Inquiry Policy Document that a complainant can assume the information provided to OSCR will be publicly disclosed.
34. The Commissioner has considered the withheld information and the context in which it is held. It is not possible for the Commissioner to publish all his reasoning, as to do so would involve direct reference to the withheld information, but having considered the content of the information and all relevant submissions he is satisfied that disclosure of the withheld information would have prejudiced substantially, or would have been likely to prejudice substantially, OSCR's exercise of its functions for the purposes listed in section 35(2)(f) and (g) of FOISA. He considers the risks identified by OSCR to be pertinent in this particular case, and does not accept that these would be ameliorated to any significant extent by removing the identities of any individual complainer(s). Consequently, the Commissioner is satisfied that that OSCR was correct in finding the information to be exempt from disclosure in terms of section 35(1)(g) of FOISA.

Public interest test

35. 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, he must still order the information to be disclosed unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
36. OSCR recognised that disclosure of the requested information would enhance the scrutiny and transparency of its decision-making process and contribute to ensuring it was discharging its regulatory functions adequately. It also accepted that disclosure would provide evidence of the thoroughness of any investigation conducted and allow the charity to know the full nature and source(s) of complaints raised.
37. However, OSCR argued that there was a greater public interest in maintaining the exemption. In particular, OSCR argued that disclosure of the information would be damaging to the charity, its trustees and their reputations, without the protection afforded by OSCR's inquiry process or the Courts. OSCR argued that it must have the confidence of individuals and organisations when executing its statutory functions and that this would be undermined if organisations or individuals believed that information would routinely be made public, without the protection offered by relevant criminal or civil proceedings.
38. OSCR provided further comments, which cannot be divulged without disclosing specific aspects of the matters referred to or considered by it.
39. Mr Keith submitted that disclosure of the information would ensure that, as a public body, OSCR complied with FOISA. Specifically, it would contribute to ensuring that OSCR was adequately discharging its functions. He believed it to be in the public interest to disclose, since scrutiny would be enhanced and accountability would be improved.
40. Mr Keith submitted that the withholding of the information would be contrary to natural justice and that, to provide confidentiality, in perpetuity, to a complainer where no case had, subsequently, been proven, would not be fair and would not allow the accused the right to a fair hearing. The failure to disclose, he stated, did not contribute to ensuring that OSCR's resources were being used efficiently and effectively in the discharge of its functions, giving the impression that complainers could bring as many false accusations as they wished without any recourse for those accused.

41. The Commissioner has considered all of the relevant submissions made by OSCR and Mr Keith as to the application of the public interest. The Commissioner acknowledges that disclosure of the information would enhance scrutiny of OSCR's actions in carrying out its regulatory functions. On the other hand, it is not immediately apparent why there should be an inherent public interest in airing complaints the regulator has not found it appropriate to take forward, without the protections afforded by due process. The Commissioner has to balance the broad public interest in transparency against the strong public interest in maintaining the section 35(1)(g) exemption, with a view to maintaining the effectiveness of OSCR's investigative processes.
42. In all the circumstances of this case, the Commissioner is satisfied that the public interest in maintaining the exemption (and, by extension, the effectiveness of OSCR's statutory processes) outweighs that in disclosure. He therefore finds that OSCR was correct to withhold information under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(f) and (g).
43. Given that the Commissioner is satisfied that the information withheld by OSCR was properly withheld in terms of section 35(1)(g) of FOISA, he is not required to (and will not) go on to consider whether the exemption in section 36(2) of FOISA could also apply.

Decision

The Commissioner finds that, in respect of the matters specified in the application, 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 Keith

Appeal

Should either Mr Keith or OSCR 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.

Margaret Keyse
Head of Enforcement

24 February 2018

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.

...

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;

...

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

...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info