

Decision Notice



Decision 088/2009 Mr Robert O'Hare and the Office of the Scottish Charity Regulator

Names of persons interviewed

Reference No: 200900605
Decision Date: 27 July 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr O'Hare requested from the Office of the Scottish Charity Regulator (OSCR) the names of individuals who had been interviewed during an investigation carried out by OSCR. OSCR responded by withholding the information in terms of section 35(1)(g) of FOISA. Following a review, Mr O'Hare remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that OSCR had been entitled to withhold the information from Mr O'Hare under section 35(1)(g) of FOISA, on the basis that disclosure of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by OSCR of certain of its functions in relation to charity regulation. He did not require OSCR to take any action.

Relevant statutory provisions and other sources

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, section 1(1) - (3) and (5) (Office of the Scottish Charity Regulator)

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. Mr O'Hare was in communication with OSCR regarding the awarding of a contract by a named charity, making claims of fraud and money laundering. On 11 October 2008, Mr O'Hare wrote to OSCR requesting the names of the persons involved in the awarding of the contract who had been interviewed by a particular OSCR investigator.



2. OSCR responded on 10 November 2008, informing Mr O'Hare that the information requested was exempt in terms of section 35(1)(g) of FOISA, read in conjunction with certain paragraphs of section 35(2), in that its disclosure would, or would be likely to, prejudice substantially the exercise by OSCR of its functions for the purposes of protecting a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration (section 35(2)(f)) and protecting the property of a charity from loss or mismanagement (section 35(2)(g)).
3. On 12 November 2008, Mr O'Hare wrote to OSCR requesting a review of its decision.
4. OSCR notified Mr O'Hare of the outcome of its review on 4 December 2008, upholding its decision to withhold the information in terms of section 35(1)(g) of FOISA as outlined above.
5. On 24 March 2009 Mr O'Hare wrote to the Commissioner, stating that he was dissatisfied with the outcome of OSCR's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr O'Hare had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 31 March 2009, OSCR was notified in writing that an application had been received from Mr O'Hare and was asked to provide the Commissioner with the information which had been withheld from Mr O'Hare. OSCR responded with the information requested and the case was then allocated to an investigating officer.
8. 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. In particular, OSCR was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. OSCR responded, providing detailed reasons as to why it was withholding the information in terms of section 35(1)(g) of FOISA, having considered the public interest test in terms of section 2(1)(b) of FOISA. Its arguments will be considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr O'Hare and OSCR, and is satisfied that no matter of relevance has been overlooked.
11. During the investigation to which Mr O'Hare's application relates, OSCR interviewed various persons and (while identifying certain governance issues) found no evidence of misconduct or mismanagement in the matters reported to it and therefore concluded that no further action was required. Mr O'Hare was informed of the outcome of the investigation, but was not provided with details of the persons interviewed.

Section 35(1)(g) – law enforcement

12. 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), i.e. 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)).
13. The exemptions contained within 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 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 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.
14. When considering the use of the exemption in section 35(1)(g), the Commissioner must therefore consider three separate matters. First of all, he must consider whether OSCR has a function in relation to one or more of the purposes mentioned in section 35(2). If he is satisfied that it does, he must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially OSCR's ability to exercise the function(s). Even where he is satisfied that it would, 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 release of the information.



15. The Commissioner is satisfied that the purposes described in section 35(2)(f) and (g) are functions of OSCR by virtue of section 1(5)(d) of the Charities and Trustees Investment (Scotland) Act 2005 (the text of which is reproduced in the Appendix below), which 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.
16. The Commissioner also accepts that the investigation carried out by OSCR, resulting in persons being interviewed, was carried out in the exercise of its functions to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration and as such fell within the scope of section 35(2)(f) of FOISA.
17. Whilst "property" is not defined by FOISA for the purposes of section 35(2)(g), the Commissioner has taken this to include the finances of the charity and therefore is satisfied that the investigation carried out by OSCR could equally be said to have been carried out to protect the property of a charity from loss or mismanagement within the meaning of section 35(2)(g).
18. The Commissioner must now consider whether release 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 qualifies for exemption under 35(1)(g) of FOISA.
19. OSCR has submitted that, as a public authority, its statutory functions include 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 this information would, OSCR submitted, prejudice substantially its intelligence gathering abilities and inhibit the free and frank disclosure of information to it by charity trustees and others.
20. OSCR further argued that, when receiving evidence from or in respect of charities, there was an expectation that information identifying individuals would not be disclosed to a third party: disclosure would, it contended, deter charities and others from providing information to OSCR in the future. This would, it believed, greatly inhibit OSCR's ability to investigate allegations of misconduct or mismanagement, and act to protect charities from such misconduct or mismanagement, with a consequent reduction in public confidence in Scottish charities.
21. In addition to the above, OSCR advised that a second investigation into similar allegations was ongoing and submitted that release of the requested information would prejudice that investigation.
22. In relation to the identification of witnesses, the Commissioner considers investigations carried out by OSCR to be similar to investigations of crime carried out by the police, in that criminal prosecution could result should evidence of wrong doing be identified.



23. 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 (as section 34(1) of FOISA) was “essential for an effective justice system”. Information provided by witnesses and victims was, he submitted, 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.
24. Whilst the above paragraph 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 outlined under section 35(2)(f) and (g) of FOISA, provided of course that substantial prejudice can be established in any given case.
25. The Commissioner has previously considered the exemption in section 35(1)(g), and in *Decisions 063/2007 Mr David Keown and West Dunbartonshire Council* and *111/2007 Mr Robert Mathewson and Angus Council* (both relating to the regulatory functions of local authorities), he accepted that if information relating to statements (in each case made voluntarily in the expectation that they would not be made public) were to be disclosed, the likelihood was that the Councils would be unable to rely on the provision of evidence of the same type (in each case on matters of some sensitivity) in the future, to the substantial prejudice of their exercise of the relevant functions.
26. The Commissioner is satisfied that public authorities such as OSCR must have the confidence of individuals and organisations when conducting investigations, which, by the nature of their functions, relates to matters of public trust and could result in criminal proceedings or action at the Court of Session with significant potential sanctions. Should organisations or individuals come to believe that information they provide for such investigations will routinely be made public, without the protection afforded by relevant criminal or civil proceedings, then it is likely that such confidence would be undermined.
27. Whilst this case involves a request simply for the names of the individuals who were interviewed rather than any evidence gathered from them, the Commissioner is satisfied in the circumstances that disclosure of the withheld names in response to Mr O'Hare's request would make it much less likely that future potential witnesses 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. In reaching this conclusion, the Commissioner has taken account of the proximity of the OSCR investigation to the timing of OSCR's handling of Mr O'Hare's request for information and request for review, and the ongoing currency of the matters addressed in the investigation.



28. Having considered all the circumstances, therefore, the Commissioner is satisfied that disclosure of the withheld information would, or would be 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 the information is exempt in terms of section 35(1)(g) of FOISA.

The public interest test

29. 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 is satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the exercise of the functions by OSCR as required by section 35(1)(g) of FOISA, he must still order the information to be disclosed unless he is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
30. The Commissioner will therefore go on to consider the public interest test as it applies to the information he has found to be exempt in terms of section 35(1)(g) of FOISA.
31. In its submissions, OSCR stated that it had considered the public interest as follows, concluding that the public interest in maintaining the exemption outweighed that in disclosure:

Considerations supporting disclosure:

- a. transparency;
- b. applicant knowing the source(s) of the evidence, and
- c. applicant having the opportunity to question source(s).

Considerations against disclosure:

- the request related to an open inquiry instigated by the applicant;
- releasing this information might damage the willingness of charities and others to provide OSCR with information in confidence, which in turn might seriously undermine the robustness of the inquiry process;
- based on the information available at the time of OSCR's investigation, it was found that while there was some lack of clarity in the commissioning process there was no evidence of wrong doing, and
- OSCR did not consider the withheld information to be of wider public interest, as opposed to the personal interest to one individual.

32. In his application to the Commissioner, Mr O'Hare outlined his perception of the background to OSCR's investigation and his request for information, stating that in the circumstances he believed it to be in the public interest that the names of the individuals be released.
33. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities, particularly where the exercise of their functions has been questioned. He must also recognise, however, that there requires to be a genuine public interest in disclosure in this particular case, which must extend beyond simply the personal interests of the applicant.



34. In essence, the information requested here comprises the names of individuals who were interviewed by OSCR as part of an investigation it carried out under statutory powers. The investigation was carried out into allegations concerning a specific and localised issue and, as the Commissioner has accepted above, 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. In the circumstances, he considers 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.
35. Whilst the Commissioner recognises that disclosure of information such as that withheld might at times be in the public interest, the reason for doing so would have to be particularly strong. Apart from the more general reasons (described above) why it might be in the public interest for authorities to disclose information of this nature to the public, and while noting Mr O'Hare's personal interest in the matter, the Commissioner cannot identify particular arguments of substance to the effect that in this particular case it would serve the interests of the public for the withheld names to be released.
36. In all the circumstances, therefore, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. He 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 (OSCR) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr O'Hare, in that the information requested was properly withheld in terms of section 35(1)(g) of FOISA when read in conjunction with section 35(2)(f) and (g) of FOISA.

The Commissioner does not require OSCR to take any action.



Appeal

Should either Mr O'Hare 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
27 July 2009



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.

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

- (1) There is to be an office to be known as the Office of the Scottish Charity Regulator.
- (2) There is established a body corporate, to be known as the Scottish Charity Regulator, which is to be the holder of that office.
- (3) That office-holder is referred to in this Act as "OSCR".
- ...
- (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
 - ...