

Decision Notice

Decision 179/2017: Alasdair Tibbitt and the Office of the Scottish Charity Regulator

Complaints about charities

Reference No: 201701054

Decision Date: 23 October 2017



Scottish Information
Commissioner

Summary

OSCR was asked for details of complaints received about charities. OSCR disclosed some information, but withheld the name and number of each charity, arguing that disclosure would substantially prejudice its ability to carry out its functions.

The Commissioner agreed the information was exempt 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); 23(1)(a) (Entitlement to information about charities); 28(1) - (4) (Inquiries about charities etc.); 29 (Power of OSCR to obtain information for inquiries); 33 (Reports on inquiries); 66 (Charity trustees: general duties)

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 26 April 2017, Mr Tibbitt made the following request for information to the Office of the Scottish Charity Regulator (OSCR):

Please ... supply me with the following information for the period 1st April 2016 to 31 March 2017:

- (i) *The total number of complaints received by OSCR during this period, broken down by regulated charity. Please include the name of the charity, the number of the charity, and the outcome of each complaint in the response.*
 - (ii) *The total number of enforcement actions taken [by] OSCR in respect of regulated charities during this period. Please include the name of the charity and the type of enforcement action undertaken by OSCR for each case.*
 - (iii) *Please could you provide top-level comparative data on the number of complaints and the number of enforcement actions for all previous financial years. This does not need to be broken down by individual charity – although if it is possible to provide this data without incurring a cost, I would appreciate this level of data too.*
2. OSCR responded on 16 May 2017. It provided Mr Tibbitt with some information, but it withheld information under section 35(1)(g) of FOISA. OSCR considered that disclosure of this information would, or would be likely to, prejudice substantially the exercise of its functions for the purposes of protecting a charity against misconduct or mismanagement (section 35(2)(f) of FOISA) and protecting the property of a charity from loss or mismanagement (section 35(2)(g)).
3. Later that day, Mr Tibbitt wrote to OSCR requesting a review of its decision. He argued that there was a considerable public interest in understanding more about the complaints about

charities, particularly where complaints were upheld and some form of action from OSCR resulted. Mr Tibbitt sought to limit his request to information on charities where complaints had been upheld and action had concluded, asking OSCR to reconsider its decision on the balance of the public interest in disclosing or withholding the information.

4. OSCR notified Mr Tibbitt of the outcome of its review on 14 June 2017. It upheld its previous decision to withhold some information under section 35(1)(g) of FOISA and it provided additional public interest arguments.
5. On the same day, Mr Tibbitt applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt was dissatisfied with the outcome of OSCR's review because he believed it should have released information about complaints against charities where the complaints were upheld and where enforcement action had concluded.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt 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.
7. On 21 June 2017, OSCR was notified in writing that Mr Tibbitt had made a valid application. OSCR was asked to send the Commissioner the information withheld from Mr Tibbitt. OSCR provided the information and the case was allocated to an investigating officer.
8. 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 including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 Tibbitt and OSCR. He is satisfied that no matter of relevance has been overlooked.

Information disclosed during the investigation

10. During the investigation, Mr Tibbett confirmed that he was seeking details of each upheld complaint between 1 April 2016 and 31 March 2017 as well as the name and registration number of each charity that was subject to a complaint.
11. When questioned, OSCR indicated that it had offered to provide Mr Tibbett with summary information for each complaint but he had stated that he wanted all of the withheld information; therefore, it had not disclosed this information to him.
12. The Commissioner asked OSCR to disclose the summary information to Mr Tibbett, as it clearly fell within the scope of his request, and it did so on 12 July 2017.

Withheld information

13. OSCR withheld the names and registration numbers of charities which had complaints against them upheld between 1 April 2016 and 31 March 2017. The information was withheld under section 35(1)(g) of FOISA.

Section 35(1)(g) – Law enforcement

14. 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.
15. OSCR is a Scottish public authority as defined by FOISA (see Schedule 1 to FOISA).
16. 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)).
17. 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 what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
18. 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.
19. 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. In addition, section 28 of CTISA provides that OSCR may make inquiries with regard to charities and associated bodies and individuals and, in connection with such an inquiry, direct a charity, body or individual not to undertake specified activities (the relevant provisions from CTISA are reproduced in the Appendix).
20. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of OSCR's functions for the purposes listed at section 35(2)(f) and (g) and therefore whether the information is exempt from disclosure under section 35(1)(g) of FOISA.

21. As noted above, one of OSCR's statutory functions is to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such conduct, and that it may do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.
22. OSCR referred the Commissioner to section 66 of CTISA which sets out the general duties of charity trustees and which states (section 66(4)) that any breach of these duties is to be treated as being misconduct in the administration of the charity.
23. Section 66(1)(b) of CTISA requires trustees to "*act with ... care and diligence*" to protect the charity and its assets from misconduct or loss. In ensuring that charity trustees comply with their duties, OSCR submitted that it has a statutory duty to ensure that a charity's assets and property are protected.
24. OSCR argued that, in order for it to execute its functions, it is important that charities are willing to co-operate and to voluntarily supply and share information in assisting with its inquiries. OSCR relies on members of the public and employees of charities to inform it of any potential issues of financial abuse and/or mismanagement, and encourages the free flow of voluntary information from such individuals. OSCR submitted that, while it has the power, under section 29 of CTISA, to compel "any person" to provide it with information (see Appendix 1), this power is rarely used.
25. OSCR argued that routine disclosure of the names of charities which have been subject to complaint would be likely to substantially prejudice its ability to carry out its statutory functions, as it may no longer be able to rely on the voluntary supply and open sharing of information from charities. If OSCR could only obtain information using its powers under section 29 of CTISA, the information it could obtain would be limited to that which it was able to identify. This could restrict OSCR's understanding of issues and prevent it from obtaining a full picture. Relying on its powers under section 29 to obtain information would also involve much more administration and would be considerably more time consuming.
26. OSCR submitted that if it could only obtain information from charities using its powers under section 29, it would receive far less information and be able to deal with far fewer cases, thus prejudicing its ability to function effectively. In addition, OSCR noted that some of its most effective work with charities takes place when there is an open free flowing discussion. It argued that such communication could not take place if OSCR was only able to obtain information by using its powers. This reduction in information and an increase in administration was very likely to substantially prejudice OSCR's ability to carry out its functions to protect charities and their assets from loss.
27. OSCR noted that of all of the charities captured by this information request, none of the charity trustees have had a finding of misconduct against them, and in each case the recommendation was to ensure the trustees comply with their duties in future. OSCR also noted that its inquiry policy advises complainants and witnesses that information will not be disclosed as a matter of course. It argued that if there was an expectation that reporting minor governance issues (resulting solely in advice or guidance being issued to a charity) would result in disclosure of the detail under FOISA, the public, charity trustees and charity employees and members would be far less likely to report concerns to OSCR at an early stage.
28. In summary, OSCR claimed that disclosure in this case would result in a loss of trust between potential complainants and itself, as future complainants would be wary of voluntarily raising issues with OSCR for fear that information is published. OSCR argued that

this reluctance to report concerns would be likely to substantially prejudice and inhibit its ability to exercise its functions described in sections 35(2)(f) and (g) of FOISA.

The Commissioner's view

29. In relation to the provision of evidence to OSCR, the Commissioner considers investigations carried out by OSCR to be similar to investigations of crime carried out by the police, in that criminal prosecution or other regulatory proceedings could result should evidence of wrong doing be identified. He notes that section 28(2) of CTISA makes specific provision for inquiries under section 28(1) being carried out by OSCR "*of its own accord or on the representation of any person*": clearly, the provision of information by third parties is of importance to the functions under consideration here.
30. The Commissioner accepts that public authorities such as OSCR must have the confidence of individuals and organisations when conducting inquiries which, by the nature of their functions, relate to matters of public trust and could result in criminal proceedings or action in the Court of Session with significant potential sanctions.
31. The Commissioner notes that while OSCR has a responsibility under section 33 of CTISA to publish reports on inquiries made under section 28 of CTISA, none of the charities in this case were found to be responsible for such serious mismanagement that a report under section 33 of CTISA was required.
32. The Commissioner acknowledges that in most cases OSCR does not use its powers to legally compel charities to provide it with information, but obtains information by request or on a voluntary basis. When it uses its power to compel charities to provide information under section 29 of CTISA, OSCR must specify the information to be provided and can only use this power where OSCR considers the provision is necessary for its enquiries. In addition, charities must be given at least 14 days to provide the information. The Commissioner acknowledges that if OSCR had to rely on the powers provided in section 29 of CTISA in all its inquiries, it would be likely to extend the length of each inquiry and could limit the number of complaints that OSCR is able to investigate.
33. In this case, the information that would be disclosed would be the names and registration numbers of charities which have had minor complaints upheld against them. It is important to note that OSCR has already disclosed a detailed summary of each complaint. In the circumstances, the Commissioner is satisfied that disclosure of the charity name or number, particularly in conjunction with the information which has been disclosed, would make it less likely in future that charities and their employees or office-holders would be willing to provide information voluntarily, 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.
34. Having considered all relevant submissions and the information withheld in this case, the Commissioner is satisfied that disclosure of the requested information would, 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. Consequently, he finds that OSCR was correct in considering 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 acknowledged that there were various arguments in favour of disclosure of the withheld information. Disclosure would increase openness and transparency in its decision-making thereby improving its accountability and participation; it would confirm that OSCR was properly carrying out its regulatory functions; it would ensure fairness in relation to applications or complaints and would reveal malpractice ensuring the thoroughness of OSCR's inquiries.
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 charities, their trustees and their reputation 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 if organisations or individuals believe that information will routinely be made public, without the protection offered by relevant criminal or civil proceedings, confidence in OSCR will be undermined.
38. OSCR submitted that a considerable proportion of concerns raised are either unfounded, inappropriate or vexatious, while most others require little more than discussion with the charity. It argued that where there is no finding of serious mismanagement, misconduct or unlawful activity, there is little or no public interest in disclosure, and disclosure would be more harmful than withholding the information. OSCR maintained that where it has concluded that there is a public interest in the outcome of its inquiries it will publish reports (under section 33 of CTISA) to explain its findings.
39. Mr Tibbitt argued that disclosure was in the public interest. He acknowledged that it might not be fair to disclose information on complaints that were proven to be vexatious or malicious, but he argued that OSCR should disclose information about complaints against charities where the complaint was upheld and where enforcement action had concluded.
40. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities. In addition, there is a genuine public interest in knowing whether or not OSCR is discharging its duties properly and is investigating and taking appropriate action against charities which have been the subject of complaint.
41. However, the Commissioner notes that section 33 of CTISA only *requires* OSCR to publish a report of any inquiry that has resulted in it taking significant action against a charity, such as suspending an individual or withdrawing its charitable status. The Commissioner is satisfied that none of the complaints under consideration in this request required OSCR to issue a report under section 33 of CITSA, and that none of the charities or trustees have been found guilty of any offence or other wrongdoing in the inquiries carried out.
42. Furthermore, the Commissioner notes that Mr Tibbett has been provided with a detailed summary of each complaint and, while he does not know the name of the charity associated with each complaint, the Commissioner is satisfied that the public interest in transparency and accountability has been met.
43. The Commissioner believes there to be a strong public interest in maintaining the section 35(1)(g) exemption, with a view to maintaining the effectiveness of OSCR's investigative

processes, which outweighs the public interest in full transparency and openness around the investigation of complaints about charities.

44. In all the circumstances, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs that in disclosure. He therefore finds that OSCR was correct to withhold information about the charity names and registration numbers under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(f) and (g).

Decision

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

Appeal

Should either Mr Tibbitt 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

23 October 2017

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

...

23 Entitlement to information about charities

(1) A person who requests a charity to provide a copy of its -

(a) constitution,

...

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

...

28 Inquiries about charities etc.

(1) OSCR may at any time make inquiries, either generally or for particular purposes, with regard to-

(a) a charity,

(b) a body controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),

(d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of -

(i) a charity, or

(ii) a body falling within paragraph (b) or (c),

(e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,

- (f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).
- (2) OSCR may make inquiries under subsection (1) of its own accord or on the representation of any person.
- (3) OSCR may direct any charity, body or person with regard to which it is making inquiries under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.
- (4) A direction under subsection (3) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body to which the inquiries relate.

...

29 Power of OSCR to obtain information for inquiries

- (1) OSCR may by notice require any person to provide to it –
 - (a) any document, or a copy of or extract from any document,
 - (b) documents of any type, or copies of or extracts from such documents,
 - (c) any information or explanation,
 which OSCR considers necessary for the purposes of inquiries under section 28.
- (2) The notice must specify –
 - (a) the documents, types of documents, copies, extracts, information or explanation which the person is to provide to OSCR,
 - (b) the date (which must be at least 14 days after the date on which the notice is given) by which the person must do so, and
 - (c) the effect of subsection (6).
- (3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.
- (4) OSCR must not disclose any document, information or explanation provided in response to a requirement under subsection (1) except for the purposes of the inquiries in connection with which the requirement was made.
- (5) OSCR may pay to any person a sum in respect of expenses reasonably incurred by the person in complying with a requirement under subsection (1).
- (6) A person who, without reasonable excuse, refuses or fails to comply with a requirement under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.

33 Reports on inquiries

- (1) OSCR must prepare a report of the subject matter of inquiries made under section 28 if—
 - (a) as a result of the inquiries it—
 - (i) gives a direction, or removes a charity from the Register, under section 30,
 - (ii) suspends a person under subsection (4) of section 31, or
 - (iii) gives a direction under any of subsections (5) to (9) of that section, or
 - (b) in any other case, it is requested to do so by the person in respect of whom the inquiries were made and it has not previously prepared a report of the subject matter of those inquiries under this subsection or subsection (2).
- (2) OSCR may prepare a report of the subject matter of any other inquiries under section 28.
- (3) A report prepared under this section may relate to two or more inquiries.
- (4) Apart from identifying the person in respect of whom inquiries were made, a report under this section must not—
 - (a) mention the name of any person, or
 - (b) contain any particulars which, in OSCR's opinion—
 - (i) are likely to identify any person, and
 - (ii) can be omitted without impairing the effectiveness of the report, unless OSCR considers it is necessary to do so.
- (5) OSCR must—
 - (a) send a copy of a report prepared under subsection (1) to the person in respect of whom the inquiries were made, and
 - (b) publish a report prepared under this section or such other statement of the result of inquiries made under section 28 as OSCR thinks fit in such manner as OSCR thinks fit.

66 Charity trustees: general duties

- (1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
 - (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
 - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and

- (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—
 - (i) put the interests of the charity before those of the other person, or
 - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.
- (2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.
- (3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.
- (4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.
- (5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
 - (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
 - (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info