

Decision Notice

Decision 187/2017: Mr X and OSCR

Complaint against Melness and Tongue Community Development Trust

Reference No: 201700884

Decision Date: 13 November 2017



Scottish Information
Commissioner

Summary

OSCR was asked for information regarding a complaint against Melness and Tongue Community Development Trust.

OSCR disclosed some information, but withheld other information.

At the start of the investigation, OSCR changed its position, disclosing most of the withheld information. By not disclosing this information earlier, the Commissioner decided OSCR failed to respond to this request for information fully in accordance with Part 1 of FOISA. However, he was satisfied that OSCR had correctly applied the exemption under section 35(1)(g) of FOISA (Law enforcement) to the information that was still withheld.

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)

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. Mr X submitted four requests to the Office of the Scottish Charity Regulator (OSCR) regarding his concerns about the Melness and Tongue Community Development Trust (the Trust) and related matters.

Request 1

2. On 1 February 2017, Mr X asked what checks OSCR had done on the Trust, CVS North and Highland Third Sector Interface within the last five years, including any stored notes and reviews of their accounting practices. He also requested a copy of OSCR's Policy on how it monitored charitable groups and asked OSCR what checks should have been done.
3. OSCR responded on 1 March 2017, disclosing information to Mr X. It also notified him that it did not hold accounting reviews or notes relating to Highland Third Sector Interface. OSCR also informed Mr X it was not re-supplying him with the information it believed he had access to already, applying section 25 of FOISA (Information otherwise accessible) to this information. It also identified information which it withheld under sections 30(b) (Prejudice to effective conduct of public affairs) and 35 (Law enforcement) of FOISA.

Request 2

4. On 2 February 2017, Mr X asked for copies of four images attached to an email (which he described). He also asked for any information held about the purpose of a "write-off" of a loan for the Trust, and about issues relating to compliance with accounting requirements (which he described).

5. OSCR responded on 15 March 2017, explaining that the images were simply logos or other embellishments attached to the emails. It disclosed information on costs and revenues, but stated that it had been unable to locate other information.

Requests 3 and 4

6. On 10 March 2017, Mr X submitted two further, related, requests regarding year-end accounts for the Trust.
7. Request 3 asked for various details on a provision for £219,398 which he assumed to be another “write off”, including any discussions OSCR had about the matter and explanations of “tangible assets” listed.
8. Request 4 related to an annual report which Mr X thought was missing. He enquired about a sum understood to have been recovered from a larger loan. He also requested reports and information relating to the previous year’s accounts.
9. OSCR responded to requests 3 and 4 on 30 March 2017. It disclosed information and explained why it did not hold other information. It withheld information under sections 25, 35 and 38 (Personal information) of FOISA.

Review of all requests

10. On 30 July 2017, Mr X wrote two separate emails to OSCR requesting a review of its decisions (all four requests). Referring to OSCR’s application of section 35 of FOISA, he submitted that it was not clear why the information was being withheld and asked for confirmation of which part of this exemption OSCR was relying on. He was not satisfied that the exemption was being relied on correctly, as he confirmed in subsequent correspondence with OSCR.
11. OSCR notified Mr X of the outcome of its review on 21 April 2017. It confirmed, with reasons, that it considered section 35(1)(g) to apply, read with section 35(2)(f) and (g).
12. On 15 May 2017 Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of OSCR’s review because he did not believe OSCR was entitled to withhold information under section 35(1)(g) of FOISA.

Investigation

13. The application was accepted as valid. The Commissioner confirmed that Mr X made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
14. On 30 June 2017, OSCR was notified in writing that Mr X had made a valid application. OSCR was asked to send the Commissioner the information withheld from Mr X. OSCR provided the information and the case was allocated to an investigating officer.
15. 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 its reasons for withholding the information in the four documents.

16. During the investigation, OSCR reconsidered the withheld information and disclosed the majority of it to Mr X. Mr X confirmed receipt of the information. He also confirmed that he still wished to pursue disclosure of the remaining withheld information.
17. Mr X was informed that the withheld information contained personal data and was asked if he was seeking all of the personal data. He confirmed that he only wished to obtain personal data for those at the level of “Director/Trustee of Melness and Tongue Community Development Trust or any Associated Entity i.e. Melness and Tongue Community Energy Company Ltd.” The Commissioner will not, therefore, consider any other personal data in this decision.

Commissioner’s analysis and findings

18. 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 X and OSCR. He is satisfied that no matter of relevance has been overlooked.

Information disclosed during investigation

19. As indicated above, OSCR disclosed the majority of the withheld information during the investigation, having concluded that it could not withhold it under section 35(1)(g). In failing to disclose this information earlier, the Commissioner finds that OSCR failed to comply with section 1(1) of FOISA.
20. The Commissioner will now go on to consider the remaining withheld information. He will consider the application of section 35(1)(g) first, looking at personal data under section 38(1)(b) only if he does not uphold that other exemption.

Section 35(1)(g) Law enforcement

21. 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):
 - to protect a charity against misconduct of 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)).
22. 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.
23. The exemptions in section 35(1) are also subject to the public interest test in section 2(1)(b) of FOISA.
24. 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 of more of the purposes mentioned in section 35(2)?

- (ii) 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 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)?

- 25. In OSCR's view, disclosure of the issues raised in the withheld information would prejudice substantially its ability to carry out its statutory functions, as set out in the Charities and Trustee Investment (Scotland) Act 2005 (CTISA).
- 26. Specifically, OSCR referred to section 1 of CTISA, which describes OSCR's general functions as including "to encourage, facilitate and monitor compliance by charities with the provisions of this Act" (section 1(5)(c)) and "to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct" (section 1(5)(d)). Section 1(6) of CITSA also provides that OSCR "may do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions."
- 27. OSCR also referred the Commissioner to the provisions in section 66 of CTISA, which impose key duties on charity trustees. These include acting in the interests of the charity (section 66(1)) and ensuring that the charity complies with "any direction, requirement, notice or duty" imposed by CTISA (section 66(2)). Breaches of these duties are to be treated as being misconduct in the administration of the charity.
- 28. Reading all these provisions together, OSCR submitted that it had the power to take remedial or protective action with trustees and registered charities, which extended to ensuring that a charity's assets and property were protected.
- 29. In the light of the above, the Commissioner is satisfied that the purposes described in 35(2)(f) and (g) are functions of OSCR.

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

- 30. OSCR highlighted the risk of disclosure seriously hampering its ability to investigate properly. It had to maintain the free flow of information to allow it to carry out its statutory functions. This would, it believed, be harmed by disclosure.
- 31. OSCR also provided a considerable amount of other comment on the effects of disclosure on the charitable sector, but the Commissioner considers those summarised in the previous paragraph to be most pertinent to the application of section 35(1)(g) in this case. Having considered the withheld information, along with these submissions, the Commissioner is satisfied that disclosure of this information would make it less likely that those with concerns about the operation of a charity would be prepared to engage freely with OSCR in articulating these concerns. It is not the kind of information a complainant would expect to be made public. The loss of that freedom in sharing information with OSCR would be substantially prejudicial to its ability to perform the functions described above.

32. 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

33. 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 there will, or will be likely to, be substantial prejudice for the purposes of section 35(1)(g) of FOISA, he must still order OSCR to disclose the information 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.
34. In his application, Mr X submitted that it was in the public interest for the withheld information to be disclosed. He further explained that disclosure would help the public understand that OSCR has monitored the Trust correctly and fairly and that it continued to do so. He did not believe it was possible to know how effectively the investigation had been handled without disclosure.
35. OSCR acknowledged that there was a public interest in transparency in relation to its decision-making processes, and in confirming whether it was carrying out its regulatory functions properly. It would, however, be damaging to the charity, its trustees and their reputation, without the protection afforded by its own inquiry process or the courts. A belief that information would be made public without such protection would undermine public confidence in OSCR and the public's willingness to provide information in future. It noted that complaints could be minor, unsubstantiated or vexatious, or relate to matters over which OSCR had no locus, all of which could be damaging to the charities concerned – and the willingness of individuals to volunteer their services with them – if disclosed without the necessary protections.
36. The Commissioner recognises that there is a general public interest in improving transparency and, by extension, accountability in all Scottish public authorities. There is a public interest in being satisfied that a body with regulatory functions is carrying out those functions properly: to a large extent, that has been met by the information disclosed already and the Commissioner is not satisfied that disclosure of the remaining withheld information would contribute significantly to that public interest. Neither is the Commissioner satisfied that disclosure of that information would serve any other public interest, in the circumstances of this particular case.
37. On the other hand, the Commissioner is satisfied that there are genuine reasons for not disclosing the remaining withheld information, in the public interest. For OSCR's investigative and inquiry processes to remain effective, it is important that it has the opportunity to receive and consider information in confidence, and to determine what action is appropriate within the relevant statutory framework and subject to appropriate safeguards designed to ensure fair treatment of all concerned. Disclosure outwith that context would not generally be in the public interest.
38. In all the circumstances, therefore, the Commissioner finds that the public interest in disclosure of the remaining withheld information is outweighed in this case by the public interest in maintaining the exemption in section 35(1)(g) of FOISA.
39. Having reached this conclusion on the remaining withheld information, the Commissioner is not required to consider any personal data withheld under section 38(1)(b) of FOISA.

Decision

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

The Commissioner finds that OSCR correctly applied the exemption in section 35(1)(g) of FOISA to some information and, in so doing, it complied with Part 1.

However, the Commissioner also finds that OSCR failed to comply with Part 1 (and in particular section 1(1)) of FOISA, by not disclosing the majority of the information earlier, in response to Mr X' requirement for review.

Appeal

Should either Mr X 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

13 November 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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info