

# Decision Notice



Decision 008/2012 Mr N and the Office of the Scottish Charity Regulator

Investigation of a complaint concerning a charity

Reference No: 201100674

Decision Date: 9 January 2012

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr N requested from the Office of the Scottish Charity Regulator (OSCR) all correspondence relating to its investigation of his complaint concerning a charity. OSCR responded by withholding the requested information under sections 30(b)(ii), 30(c) and 35(1)(g) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, as a result of which some information was disclosed, Mr N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that OSCR had dealt with Mr N's request for information in accordance with Part 1 of FOISA, by withholding the remaining information under the exemptions specific above. He did not require OSCR to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to the effective conduct of public affairs) and 35(1)(g), (2)(f) and (g) (Law enforcement)

Charities and Trustee Investment (Scotland) Act 2005 (CTISA) section 1(5)(d) (Office of the Scottish Charity Regulator) and 28(1)(a) 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

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1. On 21 January 2011, Mr N emailed OSCR requesting all emails, letters and other correspondence concerning its investigation of a complaint he made regarding a named charity, from the time of his first complaint (on May 4 2010) to the date of the request.
2. OSCR responded on 11 February 2011. It indicated that it had considered Mr N's request to be seeking correspondence within OSCR, and between OSCR and the charity or other third parties. It advised Mr N that it had excluded his own correspondence, but this could be requested under the Data Protection Act 1998 (DPA) if he wished.
3. Having set out its understanding of the request, OSCR identified five emails or email chains that fell within its scope, and notified Mr N that these were being withheld under sections 30(b), 30(c) and 35(1)(g) (in conjunction with 35(2)(f) and (g)) of FOISA.



4. On 3 March 2011, Mr N wrote to OSCR requesting a review of its decision. In particular, Mr N asked OSCR to consider whether it had identified all the information that fell within scope of his request. He also argued that the exemptions cited had been applied in a blanket fashion, and that OSCR had failed to identify a real and significant risk of prejudice to its functions. Mr N also maintained that the public interest favoured disclosure of the withheld information.
5. OSCR notified Mr N of the outcome of its review on 25 March 2011. It had identified additional information that fell within the scope of Mr N's request, comprising three internal emails and a caselog. OSCR reconsidered the application of exemptions and the public interest test, and it disclosed some information to Mr N. OSCR withheld the remaining information under sections 30(b)(ii), 30(c) and 35(1)(g) (in conjunction with 35(2)(f) and (g)) of FOISA.
6. On 6 April 2011, Mr N emailed the Commissioner, stating that he was dissatisfied with the outcome of OSCR's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr N 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

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8. On 4 May 2011, OSCR was notified in writing that an application had been received from Mr N and was asked to provide the Commissioner with any information withheld from him. OSCR responded with the information requested and the case was then allocated to an investigating officer.
9. 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.
10. OSCR responded, confirmed that it considered the exemptions in sections 30(b)(ii), 30(c) and 35(1)(g) (in conjunction with 35(2)(f) and (g)) of FOISA applied to the withheld information and provided submissions explaining its reasoning when applying these exemptions.
11. During the investigation, the investigating officer sought further comments from OSCR to confirm that it had identified all information falling within the scope of Mr N's request.
12. Mr N also provided full arguments in support of his position that the withheld information should be disclosed. The arguments presented by both parties will be considered in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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13. 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 N and OSCR and is satisfied that no matter of relevance has been overlooked.

### Information falling within scope

14. Mr N was not satisfied that OSCR had identified all of the information falling within scope of his request. He was initially advised that five items (individual emails or email chains) had been located. Following OSCR's review, a further three internal emails and an internal "compliance and investigation caselog" were identified. Mr N considered that OSCR should hold further information.
15. Submissions were sought and received from OSCR on the searches conducted to identify the requested information.
16. In its submissions, OSCR explained that a separate folder was created to hold information about the investigation of Mr N's complaint and this folder was thoroughly searched for the requested information. OSCR also noted that other folders were held about the charity to which Mr N's complaint related, and it provided details of the purpose of these folders. OSCR confirmed that no information was held about the investigation in these folders.
17. The Commissioner has considered the concerns raised by Mr N, in particular the breadth of the investigation and information he expected to be held. Having considered the withheld information and the searches undertaken by OSCR, the Commissioner is satisfied that all information falling within scope of Mr N's request has been identified.
18. As noted above, OSCR identified nine documents falling within scope of Mr N's information request. Two of these were disclosed in full. The withheld information is contained in documents numbered 1 to 7 by OSCR. Document 1 is the caselog relating to Mr N's complaint, and documents 2 to 7 are individual emails or email chains. Document 2 has been disclosed to Mr N, subject to the redaction of a single paragraph.
19. OSCR's reasons for withholding the information contained in documents 1 to 7 are:
- documents 1 and 3 are exempt from disclosure under section 35(1)(g) (in conjunction with section 35(2)(f) and (g),
  - the redacted text in document 2 is exempt from disclosure under section 30(b)(ii); and
  - documents 5 and 6 are exempt from disclosure under section 30(c) of FOISA.
20. The information within documents 4 and 7 is entirely replicated within documents 5 and 6 respectively and so will not be considered further in this decision.



21. As in any case, the Commissioner has considered OSCR's application of the relevant exemptions based on the circumstances that existed at the point where it notified Mr N of the outcome of its review. In this case, that date is 25 March 2011.

**Document 2 - section 30(b)(ii)**

22. OSCR applied the exemption in section 30(b)(ii) to withhold a paragraph within document 2, which was otherwise disclosed to Mr N.
23. In order for OSCR to rely on the exemption laid down in section 30(b)(ii) of FOISA, it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
24. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the test contained in section 30(b)(ii) is high. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially, the exchange of views.
25. In applying this exemption, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will need to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing. Releasing views whilst a decision was being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than once a decision had been taken.
26. OSCR submitted that it considered that disclosure of the withheld paragraph would have the effect of restricting the free and frank exchanges of views between officials. It noted that the content of this paragraph represented new thinking, on an area of policy where OSCR's position was not finalised.
27. OSCR noted that the issues raised by Mr N's complaint were controversial and the timing was sensitive given that OSCR had not yet formulated its strategy in response to the Equality Act 2010 (the 2010 Act). It noted that it had been carrying out a consultation on the implications of the new legislation.
28. It explained that it would be continuing to look at these issues over the coming months to establish its position on the consequences for charities of the 2010 Act. It submitted that if the internal deliberations in document 2 were made public, then it might substantially prejudice future discussion and consultation on these issues.



29. OSCR noted that the individual sending the email concerned regularly contributes views on matters within his remit to colleagues dealing with complaints and enquiries. It submitted that disclosure of their views would substantially inhibit the collaborative approach to complex, sensitive issues.
30. In his submissions, Mr N commented about the withholding of internal correspondence. In particular, he considered that in today's culture of openness there was not any real or significant risk from releasing emails and correspondence that do not contain input from anyone outside OSCR. He considered that OSCR officers are paid to express a view and share this with the public when they make a judgement concerning a charity request.
31. The Commissioner considers that the timing of Mr N's request for information is a relevant consideration in this case. OSCR notified Mr N of the outcome of its review on 24 March 2011. Its public consultation<sup>1</sup> on its Draft Interim Equality Strategy for 2011-12 was published just three days earlier on 21 March 2011, and asked for responses to be provided to by 13 June 2011. The consultation document indicated that OSCR's final Interim Equality Strategy was expected to be published in the summer of 2011. It is clear from reading the consultation document and the draft equality strategy that, at the time when OSCR responded to Mr N's request for review, there were areas in which OSCR's interpretation of the 2010 Act, and its understanding of its implications for charities and its work, was not yet complete. The consultation and draft plan therein indicates that work would be ongoing over the summer and autumn of 2011 to develop its policy and practice in the light of the 2010 Act.
32. The Commissioner has considered the information withheld and notes that it is of a different tenor than the information that has been disclosed within document 2. The withheld text expresses in candid terms the opinion on the writer on matters relating to the interpretation and implications of the 2010 Act on which OSCR had yet to reach a settled view.
33. The Commissioner has carefully considered the withheld information in document 2, and noted the timing of Mr N's information request, the subject matter of the withheld information and the wider context at that time of OSCR's developing thinking on the impact of the 2010 Act. Having regard to all of the above, the Commissioner accepts that disclosure of the information withheld under section 30(b)(ii) would be likely to make it less likely that the writer or other OSCR employees would engage in discussions or correspondence of this type in future with the same degree of openness and frankness.
34. He therefore accepts that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation and concludes that OSCR correctly applied the exemption in section 30(b)(ii) of FOISA to the withheld information.

<sup>1</sup> <http://www.oscr.org.uk/media/1781/OSCR%20Draft%20Interim%20Equality%20Strategy%202011-12%20-%20consultation.pdf>



*Public interest test*

35. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must therefore 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 in section 30(b)(ii).
36. Having concluded that OSCR correctly applied the exemption in section 30(b)(ii) of FOISA to the information withheld in document 2, the Commissioner must next consider the public interest in relation to this information.
37. In its submissions, OSCR identified a range of issues which it had considered when deciding whether the public interest favoured disclosure, including whether disclosure would:
  - enhance the scrutiny of OSCR's decision-making process and thereby improve accountability and participation;
  - contribute to the administration of justice and the enforcement of the law;
  - contribute to ensuring that OSCR is adequately discharging its regulatory functions;
  - ensure fairness in relation to complaints, reveal malpractice or enable the correction of misleading claims;
  - contribute to a debate on a matter of public interest.
38. OSCR recognised that there was a public interest in disclosure of the information to make public OSCR's wider thinking in relation to the public benefit test (which must be met for charitable status to be held) and to make public internal discussion on the implications of equality legislation.
39. However, OSCR considered that this should be balanced against the fact that the withheld information discusses an extremely sensitive issue on which its policy was still being developed. In this context, OSCR commented that the timing of Mr N's request was important, and it submitted that it had disclosed as much information as possible regarding the broad policy issues relevant to Mr N's complaint. OSCR noted in addition the release of the information would identify another charity in relation to which similar advice had been provided.
40. When invited to comment on the public interest, Mr N submitted that the public interest would be best served if the information was released because he considered OSCR had not attempted to address the issues raised in his complaint in a thorough investigation. He expressed concern in particular as to whether a specific piece of information he had sent to OSCR had been properly considered. He also commented that OSCR's letter to him explaining the outcome of his investigation gave no indication of any reasons or facts behind its decision that could be understood or challenged.



41. Mr N also highlighted OSCR's duties to promote equality, and he indicated that he considered that OSCR acted in breach of its stated commitments in its Interim Equality Strategy 2011/12 and the previous 2007 strategy by giving charitable status to the organisation of concern to him. He indicated that he believed the withheld information would prove that this was the case, and so it was in the public interest for this information to be disclosed.
42. Mr N commented also that the public interest would be served by revealing the basis upon which OSCR reached its conclusions, allowing assessment of whether it complied with its duties under equality legislation. He also submitted that failure to disclose in order to protect organisational failings was not in the spirit of FOISA and in the long run was not in the best interests of OSCR or the public.
43. He went on to comment that when a planning decision is reached then the correspondence surrounding that decision is disclosed and such decisions are usually more contentious and fraught than charity work, so he could not understand why OSCR correspondence cannot be disclosed.
44. The Commissioner has considered all of the comments from Mr N and OSCR (including those not fully summarised in this decision). He recognises that there is a genuine public interest in allowing understanding of the steps taken by OSCR to investigate the matters of concern to Mr N, the basis upon which it drew its conclusions and whether, in fulfilling its functions, OSCR is meeting its obligations under equality legislation. The information redacted within document 2 would offer insights in these areas, and so its disclosure would make some contribution to the public interest.
45. However, the Commissioner has given only limited weight to Mr N's comments regarding his concerns about OSCR's compliance with the commitments in its Interim Equality Strategy 2011-12. This is because that document existed only in a draft form at the time when OSCR advised Mr N of the outcome of its review. Since the Interim Equality Strategy and OSCR's commitments therein were not finalised until some time after the point that is relevant for the Commissioner's decision, it could not be said at that time that it had acted in breach of those commitments.
46. Given the timing of Mr N's request, the Commissioner again recognises that disclosure of the particular information withheld under section 30(b)(ii) would reveal internal deliberations ongoing in OSCR, which related to matters with relevance beyond the consideration of Mr N's complaint. The relevant paragraph reveals the thinking of one employee on those issues, at a stage when that person and OSCR had not had the opportunity to consider the views of other interested parties, or form a definitive policy on these matters.
47. The Commissioner considers that there is a public interest in OSCR being able to conduct such internal discussions, to explore and test its thinking on the issues raised by new legislation before finalising its interpretation and policy regarding the implications of that law. Such internal discussions support high rigorous policy and decision making, and so contribute to the public interest.



48. The Commissioner accepts that if disclosure would limit the scope or frankness of such discussions in future, this could diminish the quality of OSCR's policy and decision making, contrary to the public interest.
49. On balance, the Commissioner has concluded that in this instance, and at the relevant time, the public interest in maintaining the exemption in section 30(b)(ii) outweighed that in the disclosure of the information withheld within document 2. He therefore concludes that OSCR was entitled to withhold this information and that it acted in line with Part 1 of FOISA by doing so.

### **Documents 5 and 6 – Section 30(c) – Prejudice to effective conduct of public affairs**

50. OSCR applied the exemption in section 30(c) of FOISA to documents 5 and 6 (which were withheld in their entirety). Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate this particular exemption from the other types of substantial prejudice - such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30.) This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
51. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The Commissioner's published guidance<sup>2</sup> on this exemption makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
52. In its submissions on this exemption, OSCR stated that the information withheld under section 30(c) related to internal discussions about the closure of an inquiry into a Scottish charity. OSCR advised that the content and context of these discussions are important as they relate to a sensitive issue. It noted that within the email exchanges, an officer solicited feedback from their manager and legal advisor as to the conduct of the inquiry and its conclusions.
53. OSCR considered it is reasonable to expect managers to have oversight of the decisions of their staff and to have the freedom to debate sensitive issues and potentially arrive at different decisions to that member of staff. Release of these documents, OSCR considered, would have an inhibiting effect and would lead to a change in the way managers and legal advisors communicate with colleagues, leading to less freedom to openly express ideas. This would, OSCR maintained, be to the detriment of its decision-making as it relates to inquiries into Scottish charities.
54. As noted above, Mr N has commented that in today's culture of openness there was not any real or significant risk from releasing emails and correspondence that do not contain input from anyone outside OSCR. He considered that OSCR officers are paid to express a view and share this with the public when they make a judgement concerning a charity request.

<sup>2</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&sID=117>



55. As stated in his published guidance on the use of the exemption in section 30(c), and as noted above, the Commissioner expects any public authority citing this exemption to show what specific harm (which must be at the level of substantial prejudice) would, or would be likely to, be caused to the effective conduct of public affairs by release of the information under consideration.
56. The Commissioner notes that the withheld information contains discussions surrounding OSCR's conclusions following its investigation of Mr N's complaint, and the reasoning for and presentation of those conclusions. The withheld information includes feedback and guidance from a manager to a case officer, and some discussion of the issues raised by Mr N's complaint.
57. The Commissioner again notes that Mr N's complaint raised issues of some sensitivity, which in turn raised questions about the effect of the 2010 Act which were not yet clear. Given the nature and substance of the discussion contained in these documents, the Commissioner accepts that disclosure would have a substantially inhibitive effect, and would as a consequence impact upon OSCR's ability to manage and support the conduct of its casework effectively.
58. In coming to a conclusion, the Commissioner has given weight to the fact that he considers that the disclosure of the information would inhibit future discussions between case officers and their manager or legal adviser within OSCR about individual complaints. He considers that such discussions are essential to the effective operations of complaint handling organisations, and so he considers disclosure would be likely to undermine the effective conduct of OSCR's functions with regard to the regulation of Scottish charities. In the circumstances, the Commissioner accepts that the exemption in section 30(c) applied at the relevant time to the information withheld in documents 5 and 6.
59. However, as noted above, the exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **Consideration of the public interest test**

60. In its submissions on the public interest in relation to section 30(c), OSCR noted again that it had considered the range of issues set out in paragraph 37.
61. In concluding why the public interest favoured withholding of the information, OSCR considered that information has already been supplied to Mr N on the conduct and outcome of OSCR's inquiry. It noted that this was a confidential and sensitive inquiry and it considered that disclosure would not contribute to the administration of justice. It noted that the charity and its trustee were not found guilty of any offence or misconduct. It also commented that internal deliberations relating to the conduct of one inquiry do not have wider public interest and to disclose would be detrimental to such internal processes.



62. In line with its public interest submissions on section 30(b), OSCR acknowledged that there was a public interest in the disclosure of its thinking on equality legislation but as the thinking on the topic was extremely sensitive and still being developed it was not in the public interest to disclose the withheld information.
63. Mr N's submissions on the public interest test (as summarised in paragraphs 40 to 43 above) have also been considered in relation to the information withheld under section 30(c).
64. All of the points made by Mr N and OSCR have again been fully considered by the Commissioner in coming to a decision on the information withheld under section 30(c) of FOISA.
65. The Commissioner recognises that the information withheld in documents 5 and 6 would contribute to understanding of OSCR's deliberations with respect to Mr N's complaint, and would contribute to an assessment of whether that had been handled appropriately and thoroughly. As noted above, there is a public interest in enabling members of the public to understand the decision making of public authorities, and the Commissioner recognises that there is some weight to that public interest in this case.
66. However, the Commissioner has also noted that Mr N has been notified of the outcome of OSCR's consideration of his complaint, and given some information about the reasons for its decision. As such, he considers that the public interest identified above has been at least partly met by OSCR's communications with Mr N regarding his complaint, and the disclosure of some additional information in response to his information request.
67. Balanced against the public interest in the disclosure of the information in documents 5 and 6, however, is the public interest in ensuring that, when determining a complaint, OSCR's staff are able to seek and receive advice and support from more senior and expert colleagues regarding the handling of complaints, prior to their completion, to test and feedback on the conclusions and the manner in which these are expressed. Such oversight supports the quality and thoroughness of such complaint handling, and as such contributes to the successful performance of OSCR's functions, and the wider public interest in the effective oversight of charities.
68. Given these observations, he also considers that this would be contrary to the public interest.
69. On balance, having considered the particular information under consideration, and the submissions from both Mr N and OSCR, the Commissioner has concluded that in this instance, and at the relevant time, the public interest in maintaining the exemption in section 30(c) outweighed that in the disclosure of the information withheld within documents 5 and 6. He therefore concludes that OSCR was entitled to withhold this information and that it acted in line with Part 1 of FOISA by doing so.



**Documents 1 and 3 - Section 35(1)(g) – law enforcement**

70. 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)).
71. 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.
72. 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.
73. 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 Trustee Investment (Scotland) Act 2005 (CTISA), 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. Section 28 of CTISA provides that OSCR may make inquiries with regard to charities and, in connection with such an inquiry, direct a charity not to carry out specified activities. OSCR submitted, and the Commissioner accepts, that these powers of direction permit the taking of steps to protect the property of a charity or secure a proper application of such property for its purposes (the relevant text of CTISA is reproduced in the Appendix below).
74. The Commissioner accepts that the information requested by Mr N relates to an investigation being carried out by OSCR, in the exercise of its functions to protect a charity against misconduct or mismanagement in its administration, and as such falls within the scope of section 35(2)(f) of FOISA.



75. Whilst "property" is not defined by FOISA for the purposes of section 35(2)(g), the Commissioner has taken this to include the effects the day to day management and organisation of a charity will have on the finances and other assets of a charity, and therefore is satisfied that the investigation could equally be said to be carried out to protect the property of a charity from loss or mismanagement within the meaning of section 35(2)(g). He is satisfied that the functions described in this and the preceding paragraph fall within the scope of section 1(5)(d) of CTISA.
76. 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 would be exempt under 35(1)(g) of FOISA.
77. 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 the information contained in documents 1 and 3 (its Compliance and investigation caselog, and an email exchange respectively) would, OSCR contended, prejudice substantially its intelligence gathering abilities and inhibit the free and frank disclosure of information to it by members of the public.
78. It maintained that disclosure of such information would greatly inhibit OSCR's ability to investigate alleged misconduct or mismanagement, the consequence of which could lead to a reduction in public confidence in Scottish charities and in OSCR as regulator.
79. OSCR further argued that, when receiving evidence in respect of charities, 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. Disclosure of this information, it contended, would deter others from providing information to OSCR in the future. This would, it believed, greatly inhibit OSCR's ability to investigate alleged misconduct and/or mismanagement, and its ability to protect charities from such misconduct or mismanagement. The consequence of this could, it argued, be a reduction in public confidence in Scottish charities; it could also undermine the public's confidence in OSCR as a regulator.
80. In addition to the above, OSCR advised that the documents withheld contained views expressed by others and consideration of sensitive issues by OSCR staff members and if disclosed would substantially prejudice the conduct of inquiries by OSCR into allegations of misconduct, by inhibiting the disclosure of information by others and the analysis of findings by case officers.

*Comments and conclusions on section 35(1)(g)*

81. The information withheld under this exemption contains a detailed log of the actions taken to investigate Mr N's complaint, along with details of the information and opinions gathered in the course of that investigation, and the analysis thereof.



82. In relation to the provision of evidence, 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.
83. 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 (in 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.
84. 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.
85. The Commissioner is satisfied 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 at the Court of Session with significant potential sanctions. Should organisations or individuals come to believe that OSCR's investigations will routinely be made public, without the protection afforded by relevant criminal or civil proceedings, then the Commissioner accepts that it is likely that such confidence would be undermined.
86. The Commissioner is satisfied in the circumstances that disclosure of the information within documents 1 and 3 in response to Mr N's information request would make it much less likely that in the future that OSCR would be able to conduct such investigations in a free and frank manner, whilst receiving candid input from other parties. The Commissioner considers that the disclosure of such information would substantial prejudice OSCR's ability to protect a charity against misconduct or mismanagement or to protect the property of a charity from loss or mismanagement.
87. Having considered all the circumstances, therefore, the Commissioner is satisfied that disclosure of the requested information would have prejudiced substantially, or would have been 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 that OSCR was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.



88. The exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. As noted above, 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 OSCR's functions 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 its disclosure.
89. 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.

*Public interest test*

90. Regarding the public interest in relation to the exemption in section 35(1)(g), OSCR explained that it had identified various considerations (similar to those considered in relation to the other exemptions considered above) favouring both disclosure and the maintenance of the exemption in relation to documents 1 and 3.
91. In favour of disclosure, OSCR highlighted the public interest in transparency of OSCR's regulatory process and in allowing Mr N and the wider public to know what activities and actions OSCR undertook during the inquiry, and the source(s) of information provided.
92. Against disclosure, it noted that the charity concerned was not found guilty of any wrongdoing or offence and commented that releasing the information into the public domain, which could be harmful to the charity's reputation and that of the wider charity sector.
93. OSCR commented also that some of the information is highly sensitive and OSCR considered that its disclosure could be inflammatory and could potentially result in detriment to the public or a section of the public.
94. It also maintained that disclosure of this information may damage the willingness of the public to provide OSCR with information in confidence. This unwillingness to provide information may seriously undermine the robustness of OSCR's inquiry process.
95. OSCR noted that it must have confidence of individuals and organisations when carrying out its statutory functions. It commented that should organisations or individuals believe that information will be routinely made public, without the protection afforded by relevant criminal or civil proceedings, confidence in OSCR will be undermined.
96. The Commissioner has again noted the submissions made by Mr N which are summarised in paragraphs 40 to 43 above. In addition, he has noted in particular Mr N's comments that he was unclear how the disclosure of the requested information would lead to an unwillingness of the public or professionals to provide information. He observed that the withheld information related to a charity, not to a secret organisation, and he considered that the only people and organisations that had information to share had already publicly made their views known. He expressed the view that if the charity had failed in its duties and responsibilities and if OSCR had failed to undertake a proper charity test or failed in duties to promote equality then it is in the public interest that this information should be disclosed.



97. As noted above, the Commissioner is mindful of the general public interest in transparency and accountability in Scottish public authorities, and in allowing public scrutiny of the decision making and actions of such authorities. Once again, he recognises that some public interest would be served by allowing fuller understanding of the process followed by OSCR following receipt of Mr N's complaint, to allow consideration of whether that process was thorough and considered that matters he had raised appropriately.
98. The Commissioner therefore acknowledges and has given some weight to the general public interest identified by Mr N in transparency in the investigations conducted by OSCR.
99. However, given the nature of OSCR's investigations and the consequences that may follow from them, he considers there to be a stronger public interest in maintaining the exemption in section 35(1)(g) in relation to the information contained in documents 1 and 3.
100. Given the importance of the effective oversight of the charity sector, the Commissioner considers that there is a significant public interest in ensuring that all parties involved are willing to engage fully and openly with OSCR's investigations.
101. This public interest is served by ensuring that OSCR's investigations are conducted on a confidential basis, in which all parties providing information to inform OSCR's consideration can do so with confidence that it will not be routinely disclosed, outwith the formal process that might be prompted by the outcome of such investigations.
102. The Commissioner considers that the disclosure of the withheld information in documents 1 and 3, which provides details of OSCR's investigations, the sources consulted and the information gathered, would therefore be detrimental to its ability to conduct such investigations successfully in future, and so to the public interest.
103. Having conducted the required balancing exercise, the Commissioner has concluded that the public interest in maintaining the exemption in section 35(1)(g) is greater than that in disclosing the information contained in documents 1 and 3 in response to Mr N's request for information. 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), and it acted in compliance with Part 1 of FOISA in doing so.

## 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 N.



## Appeal

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Should either Mr N or OSCR 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**  
**9 January 2012**



## Appendix

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### 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 30 Prejudice to effective conduct of public affairs

...

- (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.



### 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

...

- (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,
- ...



- (2) OSCR may make inquiries under subsection (1) of its own accord or on the representation of any person.

...