

Decision Notice



Decision 097/2013 Mr Paul Hutcheon and the Office of the Scottish Charity Regulator

Review of independent schools

Reference No: 201202029
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Summary

On 28 July 2012, Mr Hutcheon asked the Office of the Scottish Charity Regulator (OSCR) for information about its review of independent schools. OSCR disclosed some information, but withheld other information under a number of exemptions in FOISA. Following an investigation, the Commissioner found that OSCR had generally been entitled to withhold the information. However, she found that certain information was not confidential and could not be withheld under section 36(2) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs) 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 28 July 2012, Mr Hutcheon wrote to OSCR requesting the following information:
 - a) Paper 303 as referred to in the board minute of 3 February 2012
 - b) All files and information in relation to the “seminar in January” referred to in the 3 February 2012 minute
 - c) Paper 309 as referred to in the board minute of 8 May 2012
 - d) Paper 293 as referred to in the board minute of 15 November 2011, and the “briefing paper on the EW Tribunal decision” mentioned in the same minute
 - e) All correspondence between OSCR and the Scottish Council of Independent Schools (both ways) on i) the general issue of independent schools and charitable status and ii) individual assessments of schools
 - f) All gift and hospitality registers produced since 2006



- g) All correspondence since 2006 between OSCR and Hutchesons' Education Grammar/Hutchesons' Education Grammar Trust on issues relating to OSCR's assessment of whether this school meets the charity test
 - h) A copy of OSCR's code of conduct in relation to conflict of interests.
2. OSCR responded on 24 August 2012 and provided some documents in full. It withheld other information in terms of sections 30(b)(i) and (ii), 30(c), 33(1)(b) and 36(2) of FOISA. OSCR explained why it believed these exemptions applied and how it had balanced the public interest (where relevant).
 3. On 10 September 2012, Mr Hutcheon wrote to OSCR requesting a review of its decision. He believed certain exemptions had been incorrectly applied by OSCR and that the public had a right to know about its decision making processes.
 4. OSCR notified Mr Hutcheon of the outcome of its review on 28 September 2012. OSCR upheld its original decision to withhold most of the information under the exemptions cited, but released more information from Board paper 303 (point (a) of Mr Hutcheon's request)).
 5. On 8 October 2012, Mr Hutcheon wrote to 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.
 6. The application was validated by establishing that Mr Hutcheon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 12 October 2012, OSCR was notified in writing that an application had been received from Mr Hutcheon and 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.
8. The investigating officer subsequently contacted OSCR, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, OSCR was asked (with particular reference to the requirements of the exemptions cited in its responses to Mr Hutcheon) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. During the investigation, OSCR released further information to Mr Hutcheon. Mr Hutcheon indicated that he did not require the Commissioner to consider this information and wished the decision to deal with the remaining withheld information only.



10. The relevant submissions received from both OSCR and Mr Hutcheon will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Hutcheon and OSCR and is satisfied that no matter of relevance has been overlooked.
12. The document numbers used to refer to the withheld information in this decision are the numbers used by OSCR when supplying the information to the Commissioner, and not the numbering used by OSCR in its initial response to Mr Hutcheon. For clarity, the documents are also named in this decision.

Section 30(b)(i) – inhibition to the free and frank provision of advice

13. OSCR withheld part of the following information under section 30(b)(i) of FOISA:
 - Document 5 – Board paper 303 (18 January 2012).
14. OSCR disclosed parts of Board paper 303 to Mr Hutcheon during the investigation, explaining that, given the time elapsed, it felt that the information could be inferred with a reasonable knowledge of the subject from information it had already put in the public domain. The Commissioner will not consider whether that disclosed information was correctly withheld by OSCR initially and at review.
15. Section 30(b)(i) exempts information where its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The standard to be met in applying the tests contained in section 30(b)(i) is high and the application of this exemption has been considered at length in a number of the Commissioner's decisions.
16. The Commissioner looks for public authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
17. In its submission to the Commissioner, OSCR explained that its Board was responsible for its strategy, future direction, oversight and governance. Board papers informed discussion and provided advice to the Board on recommended actions affecting the strategic direction of OSCR. The board paper in question related to the decisions taken about the charitable status of the fee-charging schools under review and the lessons learned from that process.



18. OSCR highlighted that the document was specifically marked “PROTECT – POLICY ADVICE” and was an advice paper for the Board’s consideration, containing recommendations for the Board to decide on how to proceed with future charitable status reviews. OSCR submitted that such advice needed to be as frank as possible and to be fully recorded should any decisions be referred for review to the Scottish Charity Appeals Panel (SCAP), or onwards for judicial review.
19. OSCR was of the view that the release of the withheld paragraphs would inhibit substantially the free and frank provision of advice between its senior management team and Board, which would have a real and substantial negative impact on OSCR’s high-level decision making processes in general and the conduct of future reviews of charitable status in particular.
20. In terms of timing, OSCR explained that it was conducting (as of the date of its submission to the Commissioner) charitable status reviews into 40 fee-charging school charities and intended “to make announcements on the first stage findings within the next month.” It was of the opinion that release of further information at this stage would substantially inhibit advice provided on the current and future reviews.
21. The Commissioner has studied the information withheld under section 30(b)(i). The Commissioner accepts the arguments of OSCR (stated above) and is satisfied that disclosure in this case would make it much less likely that those involved in advising similar Board meetings would make known their views fully or frankly. The redacted information is within that part of the paper entitled “Lessons learned” (much of which has been disclosed) and contains frank, though measured, opinion on the actual review process.
22. The Commissioner agrees with OSCR’s view that, as it is currently conducting similar charitable status reviews into fee-charging schools, there was (and remains) a real risk of substantial inhibition to the future provision of free and frank advice. She accepts, therefore, that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice, and that the exemption in section 30(b)(i) of FOISA applies to the withheld information in document 5.
23. Having found that the exemption in section 30(b)(i) was properly applied to the information in document 5, the Commissioner must go on to consider the application of the public interest test to this information.

Public interest

24. It was OSCR’s view that disclosing the information was not in the public interest, given the potentially negative and damaging impact on OSCR’s regulatory role. OSCR’s consideration of the public interest test in section 2(1) (b) of FOISA was as follows.
25. The public interest in disclosure of the information included:
 - Disclosure could enhance the scrutiny and transparency of OSCR’s decision making and thereby improve accountability



- Disclosure would contribute to ensuring that OSCR was adequately discharging its regulatory functions and increase public confidence that it was so doing
 - Disclosure would contribute to a debate on a matter of public interest
 - Disclosure would provide evidence of the thoroughness of its charitable status review process
 - Open policy making leads to increased trust and engagement between OSCR and the public.
26. OSCR submitted that the public interest in not disclosing the information included:
- Disclosure would inhibit frankness and candour within OSCR “especially for advice on such sensitive and controversial subject matters”
 - OSCR required a “safe space” to formulate policy and debate decisions internally
 - The timing of the release was significant in the context of the ongoing inquiries into other fee-charging schools
 - OSCR’s high-level decision making process might not be properly recorded in future, to avoid creating information which might be disclosed
 - OSCR’s thinking on the public benefit test is set out in the published report *Protecting Charitable Status* and releasing additional information would not add to this wider discussion
 - OSCR already had communicated, and would continue to communicate, the outcome of its decision-making process, and deliberations which were not yet finalised could undermine its final position.
27. Mr Hutcheon was invited to put forward any public interest arguments favouring disclosure of the information. Mr Hutcheon responded as follows, while noting that he was commenting without being able to see the withheld information:
- He believed there was a public interest in publishing as much information as possible on OSCR’s decisions in relation to charities, including Board papers and minutes
 - Regarding school data, the accounts of private schools (as limited companies and as charities) contain a raft of data on income, expenditure, bursaries and means-tested support, as do the public benefit reports. In this context, releasing further details on the schools’ performance in these areas would build on a precedent of publication, rather than creating one
 - The issue of whether private schools should be charities was clearly a high-profile one, commanding public attention, and the public was entitled to know the full reasoning behind OSCR’s decisions, as well as the “lessons” learned from its investigations.



28. In coming to a conclusion on the public interest test, the Commissioner considers that there is a strong general public interest (as highlighted by both OSCR and Mr Hutcheon) in making information held by public authorities accessible, to enhance scrutiny of decision-making and thereby improve accountability and public participation. Similarly, it is acknowledged by OSCR that this - the charitable status of fee-charging schools - is a matter of public interest. The Commissioner agrees that disclosure of this information would provide evidence to allow Mr Hutcheon to assess the thoroughness of OSCR's charitable status review process.
29. On the other hand, the Commissioner accepts there is a strong public interest in enabling frank and candid debate when Scottish public authorities are considering relevant facts and opinions before decisions are reached. To this end, the Commissioner considers that there is also a strong public interest in OSCR being able to receive full, considered and impartial internal advice before coming to a decision, and that it would be strongly against the public interest to disclose information if this would discourage or inhibit its Board or its advisers. As noted above, the Commissioner accepts that this would be a likely outcome, should the information in question be disclosed.
30. The Commissioner notes that OSCR has disclosed a large proportion of this Board paper and is of the view that the information disclosed, together with other information disclosed by OSCR, makes a reasonable contribution towards satisfying the public interests detailed in paragraph 25 above.
31. Therefore, having considered the arguments made by both parties to this case, the Commissioner has concluded that the public interest in favour of disclosing the information found to be exempt in terms of section 30(b)(i) is outweighed by the public interest in maintaining that exemption. Consequently, the Commissioner has concluded that OSCR was correct to withhold the information in question under the exemption in section 30(b)(i) of FOISA .

Section 30(b)(ii) – inhibition to the free and frank exchange of views

32. OSCR withheld the following information under section 30(b)(ii) of FOISA:
 - Document 1 – Board paper 293-A (part of) – Hutcheson's Educational Trust (HET) (1 November 2011)
 - Document 4 – Board paper 293-E (part of) – Briefing paper: England and Wales Upper Tribunal decision on fee-charging schools (3 November 2011)
 - Document 6 – Email (30 April 2008) (part of).
33. 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. The same considerations apply to the application of this subsection as to section 30(b)(i) (see above).



34. For the Board Papers (Documents 1 and 4), OSCR explained that the exemption applied because these involved deliberation on issues where there was considerable sensitivity in both subject matter and content. The information comprised frank exchanges between senior management and the OSCR Board, relating in part to an individual charity's compliance with OSCR's founding legislation and in part to the implications of a Tribunal judgement in England and Wales of relevance to the charitable status of fee-charging schools. Disclosure of the withheld paragraphs would, in OSCR's view, have the effect of restricting free and frank internal discussion on sensitive matters of significance.
35. Document 6 was an email forming part of OSCR's ongoing dialogue with HET, for the purposes of determining the level of public benefit provided by the charity. OSCR explained that section 30(b)(ii) applied because it did not wish to inhibit the free and frank exchange of views with individual charities for the purposes of regulation. It believed its ability to have such a dialogue with a charity that was subject to review would be substantially inhibited were this type of information to be released.
36. The Commissioner has considered the withheld information. For documents 1 and 4, the Commissioner notes that the information includes recent comment and expression of opinion of the writers and others on sensitive matters of significance. Given the content and expression of these comments, the Commissioner considers it likely that they were made in the expectation that they would not be publicly disclosed. The Commissioner accepts that disclosure of the information withheld within these documents would make it less likely that OSCR officials would engage in discussions of this type in future with the same degree of openness and frankness.
37. Document 6 is an email from 2008 and the Commissioner is of the view that generally the older the information the less likely that this exemption will be applicable. However, the content (and context) of the communication is also relevant. For document 6, the Commissioner is of the view – given the content – that this email was written with the expectation that it would not be publicly disclosed, and rather that it would only be used to inform OSCR's review of the charity in question.
38. The Commissioner accepts that disclosure of the information specified above would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, and therefore concludes that OSCR correctly applied the exemption in section 30(b)(ii) of FOISA to the information withheld.
39. Having concluded that OSCR correctly applied the exemption in section 30(b)(ii) of FOISA to this information, the Commissioner must next consider the public interest in relation to the information.



Public interest test

40. 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 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.
41. In balancing the public interest, OSCR took account of the same factors as for section 30(b)(i) (see paragraphs 25 – 26 above). Mr Hutcheon's comments (above) have also been taken to apply to this exemption.
42. The Commissioner again recognises that disclosure of the particular information withheld under section 30(b)(ii) would reveal OSCR's internal deliberations and the actual content of a communication from a charity that was subject to review.
43. The Commissioner considers that there is a public interest in OSCR being able to conduct such internal discussions, explore the implications of case law and to communicate with those it is reviewing. Such dialogue and deliberation support fully informed decision making, and so contribute to the public interest. In the circumstances, 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 decision making, contrary to the public interest.
44. Again, the Commissioner notes that OSCR has disclosed a large proportion of the Board papers and is of the view that the information disclosed, together with other information disclosed by OSCR, makes a reasonable contribution towards satisfying the relevant public interests in favour of disclosure. Similarly, and to similar effect, OSCR has disclosed parts of its dialogue with HET in document 6.
45. 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 disclosure of the information withheld. She therefore concludes that OSCR was entitled to withhold this information under section 30(b)(ii) of FOISA.

Section 30(c) – prejudice to effective conduct of public affairs

46. OSCR applied the exemption in section 30(c) of FOISA to:
 - Document 7 – Further information supplied by HET (8 August 2008) (part of)
 - Document 8 – Email between OSCR and the Scottish Council of Independent Schools (the SCIS) (19 January 2009) (part of)
 - Document 23 – HET School Development Plan (11 January 2008).



47. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." "Otherwise" is used to differentiate this exemption from the other varieties 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. Section 30(c) is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
48. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The implications of the word "substantial" are discussed above (paragraph 16).
49. OSCR stated the "public affairs" in question were its regulatory duty (under section 3(6)(a) of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act)) to review the charitable status of charities entered on the Scottish Charity Register. To release the information would be likely to prejudice substantially future discussions on further schools reviews, as well as the ongoing free and frank internal discussions on each individual review, given the likely deterrent of disclosure on such discussions.
50. OSCR submitted that its relationship with the SCIS and other representative bodies was a crucial element in exercising its regulatory functions. Maintaining an open and frank dialogue with the SCIS about the fee-charging schools review enabled, in OSCR's view, the effective conduct of its regulatory role. If the SCIS felt unable to share such information in future, that would have an adverse effect on OSCR's reviews process.
51. Similarly, OSCR explained that, in carrying out its review, it might handle sensitive, controversial or incomplete information about the charities under review, and consideration of such information was an essential element of its decision making functions. OSCR submitted that the relationship between it and the regulated charities had to be viewed in the context of the review, in which there was a higher expectation of confidence and requirement for openness between the parties. OSCR was of the view that it was highly unlikely that information such as a school's internal development plan or the extract of the Governors' Bursaries Sub Committee meeting minutes would have been provided to it voluntarily, were there an expectation that it would be made public.
52. The Commissioner acknowledges that such information is valuable to OSCR in its regulatory activity. Having viewed the information withheld in this case, the Commissioner considers it likely that such detailed information might not have been provided, were there to be an expectation of disclosure.
53. Again, the documents at issue here date from 2008 and 2009 and, as above, it has to be considered whether the passage of time from the documents' creation and provision to OSCR make less likely that this exemption will be applicable. The Commissioner notes, however, that there are aspects of documents 7 and 23 which relate to the future rather than the time of their creation.



54. The content (and context) of the communication is also relevant. In this instance, the Commissioner accepts that there appears to have been an (understandable) expectation that the information would not be publicly disclosed, but rather that it would only be used to inform OSCR's review. In the circumstances, the Commissioner accepts OSCR's opinion that disclosure of the withheld information at the relevant time would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs (i.e. OSCR's regulatory activity).
55. 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

56. It was OSCR's view that disclosure of this information was not in the public interest, given the potentially negative and damaging impact on OSCR's regulatory role (i.e. the public interest favoured maintaining the exemption).
57. The public interest considerations identified by OSCR were largely those identified in relation to section 30(b). The following additional points were identified as supporting the public interest in maintaining the exemption:
- HET was a charity and not a public authority, and therefore was not subject to FOISA. It was not publicly funded and the release of its internal documents to the public would not enhance public scrutiny of OSCR or any other Scottish public authority
 - Disclosure of policy thinking at this time would substantially prejudice the current process of the fee-charging schools reviews.
58. Mr Hutcheon's comments on the public interest (above) have also been taken into account.
59. OSCR believed that it had released the factual basis of its decisions whilst protecting the exchange of information between regulator and charity, and was of the view that it must have the confidence of the charities and their beneficiaries during this process. OSCR's opinion was that those with whom it engaged would be deterred from speaking openly if they believe that the information they provided was routinely released.
60. When balancing the public interest, the Commissioner recognises the general public interest in public authorities being transparent and accountable. The Commissioner recognises that there is a significant public interest in ensuring that OSCR can meet its statutory obligations, and in particular that it is able to review bodies with charitable status effectively. Having accepted that disclosure in this case would be likely to cause significant difficulty for OSCR in aspects of its regulatory activity, she also finds there is substantial weight to the public interest in maintaining the exemption in this case.
61. On balance, having weighed up the arguments advanced by Mr Hutcheon and OSCR, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA was not outweighed by the public interest in disclosure of the withheld information.



Section 33(1)(b) – commercial interests and the economy

62. OSCR withheld the following information under section 33(1)(b) of FOISA:
- Document 3 – Board paper 293-D (part of)
 - Document 10 – Note of meeting with HET (part of)
 - Document 11 – Note of meeting with HET: HET track changes version (part of).
63. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
64. There are elements which an authority needs to demonstrate are present when relying on this exemption. It needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.
65. OSCR submitted that the redacted information related to the commercial and trading activities of the charities, namely the running of independent, fee-charging schools and the “sale” of education services. This activity took place in a specific competitive environment that applied equally to non-profit generating organisations. The Commissioner accepts the argument that the fee charging schools are persons which are capable of having commercial interests in terms of section 33(1)(b).
66. OSCR submitted that disclosure of the redacted information would be likely to prejudice substantially these commercial interests, as the information related to a relatively recent financial period and it believed the ongoing commercial interests of the schools would be prejudiced substantially by disclosure. OSCR explained that the redacted information described the financial standing, commercial relationships and business projections of the named charities. None of it was in the public domain, or released to OSCR with the intention that it be put in the public domain. OSCR commented that both redacted documents were clearly marked either “PROTECT — COMMERCIAL” or “PROTECT — COMMERCIAL IN CONFIDENCE” and indicated that the commercial sensitivity of the information was recognised at the time of recording.
67. OSCR further explained to the Commissioner the prejudicial effects it believed disclosure of the information would have. It identified the interests likely to be prejudiced in greater detail, along with the competitive benefit likely to be conferred on other schools in the sector (believing the latter to be especially relevant at a time of increased pressure and competition for fee-charging schools).



68. The Commissioner notes that the information includes detailed commercial information that shows the financial position of the charities. The Commissioner accepts that the information would have given significant (though not complete) insights into the finances of these charities. She also accepts that those insights could be used by competitors to their advantage. For these reasons, the Commissioner accepts that disclosure of the withheld information would be likely to prejudice substantially the commercial interests of the charities, and therefore that the exemption in section 33(1)(b) was correctly applied on that basis.

Public interest test

69. As the Commissioner has found that the exemption in section 33(1)(b) applies, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
70. OSCR explained that it had applied the public interest test by weighing up the public interest in maintaining the exemption against public interest in disclosure of this information. On balance, it was of the view that the public interest lay in maintaining the exemption.
71. The public interest factors identified by OSCR as supporting disclosure of the information included :
- The general public interest in information being accessible, in that disclosure could enhance the scrutiny of OSCR's decision-making processes and thereby improve accountability and overall transparency
 - The enhancement of the debate on a matter of general public interest
 - The public have the right to a copy of a charity's latest statement of account under section 23(1)(b) of the 2005 Act, from the charity directly. Therefore, charity accounts are in the public domain and open to public scrutiny.
72. OSCR explained that it had considered the following public interest factors in support of withholding the information:
- The schools in question were not public authorities and did not use public funds. The information was held by OSCR only by virtue of the school(s) being a charity, and would not contribute to enhanced public scrutiny of OSCR or its regulatory processes
 - The information was unlikely to add to the public debate on fee paying schools
 - This was recent commercial information
 - The information was not currently required to be in the public domain for any charity
 - Were this information to be published, it was highly unlikely that other charities (including those under review) would voluntarily supply OSCR with the same level of detail in the future.



73. OSCR also commented that it had already published a great deal of information on the schools which had been reviewed.
74. Mr Hutcheon's comments on the public interest (above) have also been taken to apply to this exemption.
75. In considering the public interest in favour of disclosure, the Commissioner has recognised the general public interest in disclosing information held by Scottish public authorities. She acknowledges that disclosure in this case would contribute to the public's understanding of OSCR's actions. However, she is of the view that the information in question is unlikely to add significantly to the public debate on fee-paying schools. Rather, the information withheld here is particular to the schools in question.
76. The Commissioner recognises that there are relevant and valid arguments in this case which suggest a strong public interest in maintaining the exemption. These include the likelihood of commercial damage being caused to individual charities through the disclosure of sensitive information. Having already concluded that disclosure in this case would prejudice substantially these charities' commercial interests, she also recognises that it would be contrary to the public interest to place these schools in a disadvantageous position with respect to their competitors.
77. In this case, the Commissioner finds, on balance, that the public interest in disclosure of the information is outweighed by that in avoiding harm to the charities' commercial interests. She agrees that, to a certain extent, the public interest in disclosure of the information has already been satisfied by OSCR's disclosure of other information.
78. Therefore, having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighed that in disclosure of the information under consideration.

Section 36(2) - confidentiality

79. OSCR withheld the following information under section 36(2):
 - Document 9 – Email chain between OSCR and SCIS RE: Bursaries in independent schools (part of)
 - Document 10 – Note of meeting with HET (part of)
 - Document 11 – Note of meeting with HET: HET track changes version (part of)
 - Document 24 – SCIS data Financial Assistance in schools 2010/11 version 1
 - Document 25 – SCIS data Financial Assistance in schools 2010/11 version 2.
80. This exemption contains a two-stage test, both parts of which must be fulfilled. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.



81. The information referred to as the “SCIS data” was (OSCR explained) provided to OSCR by SCIS as part of OSCR’s initial background information gathering exercise on the bursaries and other measures offered by those Scottish Independent Schools which were charities. OSCR explained that the data were compiled by the SCIS using information provided to them by member schools as part of the 2010 SCIS Census. These arguments relate to documents 9, 24 and 25.
82. OSCR explained that the names of third parties referred to by HET in the meeting with OSCR dated 5 September 2011 were obtained from HET. This information was provided to OSCR during that meeting and recorded in the minutes. These arguments relate to documents 10 and 11.
83. The Commissioner accepts that the first part of the test has been satisfied in respect of all of the information under consideration here: that the information must have been obtained by a Scottish public authority from another person (the SCIS and HET respectively).
84. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
85. As the Commissioner has stated in previous decisions, there are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- the information must have the necessary quality of confidence
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
 - unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

86. OSCR submitted that the SCIS data were not in the public domain, nor were they readily accessible to the public or other organisations. OSCR clarified that information about the bursaries given by individual fee-charging schools with charitable status was published by those schools, but the statistical data withheld here and produced by the SCIS related to all their members, including many non-charities with whom OSCR had no regulatory relationship.
87. The Commissioner has not considered in detail whether a person could, by using information that is in the public domain (i.e. information about the bursaries published by certain individual fee-charging schools) compile similar or identical statistical data. On this occasion, it could be argued that without knowing the identity of those schools who contributed their data to the SCIS, it would be at least very difficult.



88. Whilst the SCIS has published¹ information about independent schools, including statistical data, the Commissioner could find no evidence that the data in question were at any time published by the SCIS or otherwise put in the public domain.
89. For the information redacted in terms of section 36(2) from documents 10 and 11, again there is no indication that this minute and the information contained within has been circulated beyond those involved in the meeting (OSCR and HET).
90. Having considered OSCR's submissions, the Commissioner is satisfied in the circumstances that the withheld information is not common knowledge and could not readily be obtained by Mr Hutcheon through any other means. Consequently, she is satisfied that it has the necessary quality of confidence.

Obligation to maintain confidentiality

91. OSCR submitted that the information obtained from SCIS contained information provided in confidence to the SCIS from the fee-charging schools: this was clearly stated in the information itself. OSCR argued that while the SCIS data were not initially provided to OSCR with an express statement of confidentiality, in the circumstances it was reasonable to imply an obligation of confidence in the provision of the information to OSCR. OSCR stated that, following discussions, the SCIS had confirmed that the information was provided to OSCR in confidence and their view was that the obligation continued.
92. Having considered the circumstances of the SCIS's provision of the information to OSCR, the Commissioner is not satisfied that it was received in circumstances which imposed upon OSCR an obligation to maintain confidentiality. The Commissioner notes that the school-specific information which informed the statistics appears to have been provided to the SCIS in confidence by its members. This is not, however, the information in documents 24 and 25.
93. The data in documents 24 and 25 are not those of the individual schools, but rather the product of analysis, created by the SCIS from the individual schools' data. In the circumstances, the Commissioner cannot accept that the content of the data is such that it would carry with it a reasonable expectation that confidentiality would be maintained. The same reasoning applies to the covering emails which provided the data.
94. For documents 10 and 11, however, the Commissioner does accept that the information on third parties provided during the HET meeting and recorded in that minute was received by OSCR in circumstances which imposed upon it an obligation to maintain confidentiality. That is clear from the terms of the note.

¹ <http://www.scis.org.uk/facts-and-statistics/>



Unauthorised disclosure which would cause detriment

95. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
96. For completeness, the Commissioner has considered OSCR's submissions in respect of all the information withheld under section 36(2), including that in documents 9, 24 and 25.
97. OSCR submitted that disclosure of the information would be detrimental to SCIS in that it could leave the SCIS open to being pursued for an actionable breach of confidence. OSCR explained that the detrimental effect to the SCIS did not just relate to potential financial damage from an actionable breach of confidence, but also reputational damage and a loss of trust and confidence from its members, the schools.
98. The Commissioner notes that information which informed the statistics appears to have been provided in confidence to the SCIS by its members. However, the Commissioner is not convinced by OSCR's submission that disclosure (of the withheld information in documents 9, 24 and 25) could leave the SCIS open to being pursued for an actionable breach of confidence.
99. The data provided to OSCR by the SCIS does not allow the identification of any individual school. It is not, as indicated above, the information obtained from the individual schools, but rather the product of statistical analysis derived from the school-specific information. In the circumstances, it does not appear to the Commissioner that there could be any potential for harm to those individual schools in the information created by the SCIS. Consequently, the Commissioner must question how disclosure could make the SCIS the subject of any action for breach of confidence. Similarly, given the nature of the information (as distinct from anything more specific to the individual schools which may be held by the SCIS), the Commissioner does not accept that disclosure could result in what might broadly be termed "reputational damage" i.e. a loss of trust and confidence from its members (the schools).
100. The Commissioner would emphasise that all cases will be decided on their specific facts and does acknowledge that there might be circumstances where data provided by individual schools to the SCIS and then provided to OSCR could engage section 36(2). However, in this instance, considering the information actually provided to OSCR by the SCIS, the Commissioner is of the view that this is not the case here.
101. The Commissioner does accept OSCR's submission in relation to the information provided to it during its meeting with HET and narrated in documents 10 and 11. Here, there would be the potential for at least some detriment as a result of disclosure.
102. In the circumstances, having considered all relevant submissions, the Commissioner accepts in this case that OSCR has established the degree of detriment required for an actionable breach of confidence in relation to documents 10 and 11, but not documents 9, 24 and 25.



Public interest

103. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence have been met for certain information in this case. Nonetheless, there may still be circumstances in which the disclosure of confidential information is required in the public interest. The courts have identified a public interest defence in cases where withholding information would cover up serious wrongdoing, or where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. In such cases the courts are required to balance the competing interests in disclosure and in maintaining confidentiality, but the public interest in confidentiality remains strong and there is no presumption in favour of disclosure.
104. OSCR submitted that it did not consider there to be a public interest defence in this instance. It was of the view that, where a duty of confidence exists, there is a general public interest in keeping that confidence and no public interest in disclosing such confidential information.
105. If the public interest in keeping the confidence is to be outweighed, OSCR submitted, then there must be compelling reasons for doing so. For the following reasons, it could identify no such compelling reasons in this case:
- Withholding the SCIS data would not mislead the public in any sense or inhibit the public's awareness of bursaries provided by individual fee-charging schools with charitable status
 - Nor would it attempt to cover up any wrongdoing or enhance the public's scrutiny of OSCR in terms of how it conducted the review
 - The SCIS data also contained information supplied by fee-charging schools which were not charities and did not fall within OSCR's regulatory remit, which further detracted from a public interest defence in relation to those which were charities
 - As with the public interest arguments presented for other exemptions above, not enough time had elapsed for the risk of disclosure causing harm to be negated.
106. The Commissioner notes the arguments presented. She has also taken into account the information disclosed to the applicant in response to his request. While acknowledging that there is a clear public interest in transparency and effective scrutiny, she is not persuaded in this case that arguments advanced in support of disclosure are sufficiently compelling to outweigh the strong public interest in the maintenance of confidentiality in relation to the withheld information.
107. Having considered all the arguments, therefore, the Commissioner does not consider there to be any basis for the disclosure of confidential information on public interest grounds, and consequently she is satisfied that OSCR was entitled to withhold certain information (in documents 10 and 11) under section 36(2) of FOISA.
108. As the Commissioner can only conclude that OSCR was not entitled to withhold documents 9, 24 and 25 under section 36(2) of FOISA, and as no other exemptions were applied to that information by OSCR, the Commissioner therefore requires OSCR to provide Mr Hutcheon with that withheld information.



DECISION

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

The Commissioner finds that OSCR was entitled to withhold information under sections 30(b)(i), 30(b)(ii), 30(c) and 33(1)(b) of FOISA. It was also entitled to withhold some of the information to which it applied section 36(2) of FOISA.

In respect of the remaining information to which OSCR applied section 36(2) of FOISA, the Commissioner finds that OSCR was not entitled to apply this exemption. No other exemption having been applied to this information, the Commissioner requires OSCR to provide the information (as further described in paragraph 108 above) to Mr Hutcheon, by 5 July 2013.

Appeal

Should either Mr Hutcheon or the Office of the Scottish Charity Regulator wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement
21 May 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (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.

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.