

Decision Notice



Decision 095/2011 Dunnet Head Educational Trust and the Office of the
Scottish Charity Regulator

Letters of objection to reorganisation of trust

Reference No: 201100422
Decision Date: 20 May 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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Summary

Dunnet Head Educational Trust (DHET) requested from the Office of the Scottish Charity Regulator (OSCR) information from objection letters received by OSCR in respect of DHET's proposed reorganisation. OSCR responded by withholding the information in terms of section 35(1)(g) of FOISA. Following a review, as a result of which OSCR provided a synopsis of the information requested, DHET remained dissatisfied and applied to the Commissioner for a decision.

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

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) 35(1)(g), (2)(f) and (g) (Law enforcement)

Charities and Trustee Investment (Scotland) Act 2005 (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

1. On 26 November 2010, DHET wrote to OSCR requesting the following information in relation to DHET's proposed reorganisation:

Under the Freedom of Information Act, I would be grateful if you would send me copies of all of the objectors' letters. I appreciate that the personal details will be redacted.



2. OSCR responded on 23 December 2010. It confirmed that it held 14 documents falling within the scope of the request and explained that it considered the information to be exempt from disclosure in terms of section 35(1)(g) (read with section 35(2)(f) and (g)) of FOISA, because its disclosure would, or would be likely to, prejudice substantially the exercise by OSCR of its functions for the purposes of protecting a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration (section 35(2)(f)) and protecting the property of a charity from loss or mismanagement (section 35(2)(g)). Although DHET had accepted that personal information would be redacted from any information disclosed, OSCR also stated that this information was withheld under section 38(1)(b) of FOISA.
3. On 23 December 2010, DHET wrote to OSCR requesting a review of its decision. It reiterated that it had expected the redaction of any personal data, but objected to the withholding of the remaining information. It also highlighted OSCR's failure to respond to the request within 20 working days. This request was repeated in a letter of 29 December 2010.
4. OSCR notified DHET of the outcome of its review on 17 January 2011. It believed that it had responded to the request within the statutory timescale and upheld the decision to withhold the information under section 35(1)(g) (and also section 38(1)(b), in respect of personal information) of FOISA. OSCR also drew DHET's attention to other correspondence (outwith FOISA) in the course of which DHET had been provided with a summary of the objections to the reorganisation and a summary of the complaints made against the running of the charity. This information was provided again as part of the review outcome.
5. On 5 March 2011, DHET wrote to the Commissioner, stating that it 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 DHET had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 4 April 2011, OSCR was notified in writing that an application had been received from DHET and was asked to provide the Commissioner with any information withheld from it. OSCR responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted OSCR, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, OSCR was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of section 35(1)(g), read with section 35(2)(f) and (g).



9. The relevant submissions obtained from DHET and OSCR will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both DHET and OSCR and is satisfied that no matter of relevance has been overlooked.
11. The Commissioner will first of all consider whether OSCR correctly withheld the information in terms of section 35(1)(g) and 35(2)(f) and (g) of FOISA.

Section 35(1)(g) – law enforcement

12. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. OSCR argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions for two of the purposes specified in section 35(2), i.e. to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration (section 35(2)(f)) and to protect the property of a charity from loss or mismanagement (section 35(2)(g)).
13. The exemptions contained within section 35 are all qualified exemptions in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
14. When considering the use of the exemption in section 35(1)(g), the Commissioner must therefore consider three separate matters. First of all, he must consider whether OSCR has a function in relation to one or more of the purposes mentioned in section 35(2). If he is satisfied that it does, he must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially OSCR's ability to exercise the function(s). Even where he is satisfied that it would, he must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it does, he must order release of the information.



15. The Commissioner is satisfied that the purposes described in section 35(2)(f) and (g) are functions of OSCR by virtue of section 1(5)(d) of the 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 the 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).
16. The Commissioner accepts that the information in the letters requested by the DHET 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.
17. 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.
18. 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.
19. OSCR has submitted that, as a public authority, its statutory functions included acting on information obtained from any source about allegations of misconduct in any body which was a charity, and acting to protect the property of a charity against such misconduct. Disclosure of this information would, OSCR believed, prejudice substantially its intelligence gathering abilities and inhibit the free and frank disclosure of information to it by members of the public.
20. 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 members of the public 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.
21. In addition to the above, OSCR advised that the investigation in question remained ongoing and submitted that disclosure of the requested information would prejudice that investigation.



22. 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.
23. When the Freedom of Information (Scotland) Bill was being considered by the Scottish Parliament, the Lord Advocate (in an opening statement to the Justice 1 Committee meeting on 5 December 2001) stated that the existence of a class-based exemption in relation to criminal investigations (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.
24. Whilst the above paragraph relates to criminal investigations, the Commissioner considers that the rationale behind the protection offered is equally relevant to the types of investigations carried out by OSCR for the purposes outlined under section 35(2)(f) and (g) of FOISA, provided of course that substantial prejudice can be established in any given case.
25. The Commissioner has previously considered the exemption in section 35(1)(g), and in *Decision 088/2009 Mr Robert O'Hare and the Office of the Scottish Charity Regulator*,¹ he accepted that the names of the individuals who provided statements to OSCR had been correctly withheld, in that the witnesses would not in the circumstances have expected their names to be divulged outwith the protection of any legal process which might have resulted.
26. In *Decisions 063/2007 Mr David Keown and West Dunbartonshire Council*² and *111/2007 Mr Robert Mathewson and Angus Council*³ (both relating to the regulatory functions of local authorities), the Commissioner also accepted that if information relating to statements (in each case provided voluntarily in the expectation that they would not be made public) were to be disclosed, the likelihood was that the Councils would be unable to rely on the provision of evidence of the same type (in each case on matters of some sensitivity) in the future, to the substantial prejudice of their exercise of the relevant functions. Whilst these previous cases related to names of witnesses and statements, the Commissioner is satisfied that the information under consideration here (in letters to an authority, also provided voluntarily in the expectation that they would not be made public) falls within the same category.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200900605.asp>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200502335.asp>

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200601011.asp>



27. 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 information they provide for such inquiries 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.
28. The Commissioner is satisfied in the circumstances that disclosure to DHET of the full content of the letters would make it much less likely that future potential correspondents would be willing to provide information about such matters, to the substantial prejudice of OSCR's ability to protect a charity against misconduct or mismanagement or to protect the property of a charity from loss or mismanagement. In reaching this conclusion, the Commissioner has taken account of the fact that OSCR's investigation remained current at the time OSCR dealt with DHET's request for information and request for review.
29. 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 consequently that OSCR was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

30. The exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, even where the Commissioner is satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the exercise of 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.
31. 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.
32. In its submissions, OSCR stated that it had considered the public interest as follows, concluding that the public interest in maintaining the exemption outweighed that in disclosure:

Considerations supporting disclosure:

- Public interest in transparency of OSCR's regulatory process;
- Fairness to DHET in being given an opportunity to know the full nature and sources of the objections against the charity reorganisation (which OSCR believed to be more in the interest of DHET than the general public);
- DHET's right to reply and to have the opportunity to address the issues raised.



Considerations against disclosure:

- The allegations pertinent to charity law and OSCR's powers had already been notified to DHET;
 - The request related to an open inquiry instigated by the objection letters received, and in respect of which a response was awaited from DHET. Releasing the information might prejudice the open inquiry;
 - The charity had not been found guilty of any wrongdoing or offence at the time of the request. Disclosure might be harmful to DHET's reputation and that of the wider charity sector;
 - Releasing this information might damage the willingness of the public to provide OSCR with information in confidence. This unwillingness to provide information might seriously undermine the robustness of OSCR's inquiry process;
 - OSCR must have the confidence of individuals and organisations when carrying out its statutory functions. Should organisations or individuals believe that information would routinely be made public, without the protection afforded by relevant criminal or civil proceedings, confidence in OSCR would be undermined.
 - the information is not of wider "public interest", but of specific interest to DHET.
33. In its submissions to the Commissioner, DHET emphasised that it considered the content of the complaints to be the issue, rather than the identity of the complainers. That content must be verified, it argued, and this could only be achieved satisfactorily by provision of the documentation.
34. DHET continued that the public had the right to know that DHET had not committed any offences under the Charities Legislation and that the allegations of its misconduct were purely driven by a particular group. DHET stated that OSCR was currently investigating it as a result of the allegations, and it could not defend its position without sight of the documentation. DHET stated that there was no basis for the allegations, and they only served to put pressure on its trustees. It further submitted that it had a good working relationship with its funders and donators, which should not be jeopardised by unfounded allegations.
35. In the circumstances, the Commissioner considers there to be a strong public interest in maintaining the section 35(1)(g) exemption, with a view to maintaining the effectiveness of OSCR's investigative processes. There would require to be a more compelling public interest in disclosure for that in favour of maintaining the exemption to be outweighed.
36. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities. However, apart from such general considerations (and while noting DHET's particular interests in the matter), the Commissioner cannot identify any arguments of substance to the effect that in this particular case it would serve the interests of the public for the actual content of the letters to be released.



37. The Commissioner notes that OSCR provided DHET with a summary of the objections to the reorganisation of DHET and a summary of the complaints made against the running of the charity. The Commissioner is satisfied that the summaries provided reflect the content of the information held, which to considerable extent satisfies the public interest as it relates to DHET having the ability to know what allegations were made.
38. In all the circumstances, therefore, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. He therefore finds that OSCR was correct to withhold the information under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(f) and (g).
39. Given that the Commissioner has concluded that all of the requested information was correctly withheld in terms of section 35(1)(g) of FOISA, and noting in any event that the applicant did not require the disclosure of personal information, he does not find it necessary in this case to consider the application of exemption in section 38(1)(b) of FOISA.

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 DHET.

Appeal

Should either DHET 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
20 May 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

...

- (2) The purposes are-

...



- (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- (g) to protect the property of a charity from loss or mismanagement;
- ...

Charities and Trustee Investment (Scotland) Act 2005

1 Office of the Scottish Charity Regulator

...

- (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.

...