

# Decision Notice

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## **Decision 018/2018: The Applicant and the Office of Scottish Charity Regulator**

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### **Complaints against a named charity**

Reference No: 201702148

Decision Date: 19 February 2018



## Summary

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OSCR was asked about complaints raised against a named charity between two dates.

OSCR gave notice that it had already provided the information for part of the specified period and that – insofar as it had already responded to the request – the new request was a repeat request under section 14(2). OSCR also said it did not hold information relating to the remaining period.

Following an investigation, the Commissioner accepted that OSCR had previously responded to a request for information covering part of the time period specified in the request, but found that its earlier response did not cover the whole time stated in the refusal notice. He therefore found that OSCR was not correct to say that the request was a repeat request in relation to the whole period it had specified. However, he accepted that OSCR did not hold information falling within the rest of the period specified in the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 14(2) (Vexatious or repeated requests); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 27 September 2017, the applicant made a request for information to the Office of the Scottish Charity Regulator (OSCR). The information requested was:  
  
“A statistical count and disclosure of all complaints raised against [a named charity (“the charity”)] from any transgender women or any other women that contains reports of sexual or gender based violence between 1/1/2014 – 27/09/2017 please include complaints describing data sharing without consent or breach of trust. Please omit any complaints submitted by the applicant. In all supplied complaints if any, please detail the gender of the complainer and the person complained of.”
2. OSCR responded on 24 October 2017. It stated that in so far as the request was for information about complaints received before 19 February 2017, the request was repeated and, under section 14(2) of FOISA, OSCR was not obliged to comply with it. With respect to information about complaints received after 19 February 2017, it held no information.
3. On 26 October 2017, the applicant wrote to OSCR requesting a review of its decision on the basis that the applicant considered that a complaint had been received about “the charity”.
4. OSCR notified the applicant of the outcome of its review on 23 November 2017. It stated that the complaint to which the applicant had referred did not fall within scope of the request. It had carried out further searches and confirmed that no information was held for the entire period up to and including 7 November 2017. OSCR therefore upheld its previous response.
5. On 25 November 2017, the applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The applicant was dissatisfied with the outcome of OSCR’s review and stated that although the request may have been partially a repeated request, it was not

fully so. The applicant also stated that OSCR had not given a straightforward answer to whether there had been any complaints.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 18 December 2017, OSCR was notified in writing that the applicant had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. OSCR was invited to comment on this application and answer specific questions including justifying its reliance on sections 14(2) and 17(1) of FOISA.
9. On 19 January 2018, OSCR provided its submissions. These are considered below.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the applicant and OSCR. He is satisfied that no matter of relevance has been overlooked.

### Section 14(2) - Repeated request

11. Section 14(2) of FOISA is set out in full in Appendix 1.
12. For section 14(2) of FOISA to apply, the following need to be considered:
  - whether the applicant's previous requests were identical or substantially similar to the requests under consideration here;
  - whether OSCR complied with the applicant's previous requests; and, if so,
  - whether there was a reasonable period of time between the submission of the previous requests and the submission of the subsequent requests.

*Were the requests identical or substantially similar to the previous requests?*

13. OSCR provided copies of three previous requests from the applicant, to support its position that the request under consideration was a repeated request.
14. One of the previous requests (request 3) was referred to in the review response which OSCR sent to the applicant on 23 November 2017. In that letter, OSCR stated that when dealing with request 3, it had checked its records up to and including 19 February 2017, rather than stopping at the end date specified in the request (31 December 2016).
15. OSCR submitted that the previous requests, specifically requests 2 and 3, were substantially similar to the request under consideration. Although the inclusion of some names and sentences made the current request slightly different, the information sought was the same. OSCR stated that the date range was the same.
16. The Commissioner has considered the content and context of these previous requests. Although they are not all expressed in exactly the same terms as the request under

consideration (27 September 2017), the Commissioner is satisfied that all of the requests seek essentially the same information regarding complaints about, and data breaches by, the charity.

17. The Commissioner is satisfied that the wording of the request under consideration is substantially similar to the previous requests identified by OSCR. However, he notes that the time period covered by the previous requests is shorter than that stated in the current request. The Commissioner has therefore concluded that the current request (27 September 2017) is repeated only in as much as it relates to the time period 1 January 2014 to 31 December 2016, which was covered by request 3.
18. The Commissioner notes that, in its review response, OSCR told the applicant that it had previously searched beyond the date specified in request 3 so that, although request 3 asked for information up to 31 December 2016, its previous response actually went beyond this and covered the period up until 19 February 2017. However, this does not appear to have been made clear to the applicant either in the response to request 3 or the initial response to the current request. The applicant was presumably unaware, therefore, that the request of 27 September 2017 sought information for a time period already included in OSCR's searches for a previous request (1 January 2017 to 19 February 2017).
19. Insofar as the current request relates to the time period 1 January 2017 to 19 February 2017, the Commissioner does not accept that it was a repeated request, as the applicant's previous request did not specify an end date of 19 February 2017, and it was not made clear that the response covered the period between 31 December 2016 and 19 February 2017. Insofar as the current request relates to that period, the Commissioner does not accept that OSCR was entitled to rely on section 14(2).
20. The Commissioner will go on to consider whether the request was correctly deemed to be a repeat request, in so far as it covered information from 1 January 2014 to 31 December 2016.

*Were the previous requests complied with?*

21. OSCR provided the Commissioner with copies of its responses to the previous three requests.
22. Having considered the content of OSCR's previous responses to the applicant's information requests, the Commissioner is satisfied that OSCR complied with those previous requests.

*Has a reasonable period of time passed?*

23. There is no definition of "a reasonable period of time" in FOISA; what is reasonable will depend on the circumstances of the case. However, consideration can be given to questions such as:
  - Has the information changed?
  - Have the circumstances changed?
24. OSCR stated that it still did not hold any information falling within scope of the request. It noted that it received a complaint about the charity on 5 December 2016, the investigation of which was concluded in February 2017, but this particular complaint did not fall within scope of the request under consideration.
25. OSCR noted that the previous requests were received within a short time period of each other. It provided copies of the previous requests: the first one was received on 25 June 2016, the next on 30 January 2017 and the third request was received on 19 February 2017.

26. Having considered OSCR's submissions, the Commissioner is satisfied that the information from the time periods covered by those requests has not changed.
27. The Commissioner considers that the simple passage of time between requests may eventually be sufficient to allow the conclusion that a reasonable period of time has passed between two identical or substantially similar requests, irrespective of whether there has been any other change in the circumstances surrounding the requests.
28. In this case, however, having taken into account of the information requested, the Commissioner does not accept that a reasonable period had passed between the requests to allow him to conclude that the request under consideration was not a repeat request.
29. In all the circumstances, therefore, the Commissioner finds that OSCR was not obliged to comply with the applicant's request for information in so far as it related to the period between 1 January 2014 and 31 December 2016, and was entitled to rely on section 14(2) of FOISA.
30. He will now go on to consider whether OSCR held any relevant information from the period 1 January 2017 and 27 September 2017.

### **Section 17(1) of FOISA (Notice that information is not held)**

31. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
32. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
33. OSCR provided the Commissioner with details of the searches it had undertaken of its file management system. All identified records were checked for any information falling within scope of the request, but nothing was identified.
34. OSCR confirmed that it had asked all staff to search their email records or any other locations where relevant information might be stored. No staff member had identified any information falling in scope of the request.
35. Having investigated, the Commissioner is satisfied that OSCR does not hold any of the information requested by the applicant for the time period 1 January 2017 to the date of the request (27 September 2017). (As noted, OSCR has previously confirmed to the applicant that it does not hold any information for the period preceding 1 January 2017.)
36. The Commissioner finds that OSCR was correct to give the applicant notice, in terms of section 17(1) of FOISA, that it does not hold any relevant information for the period between 19 February 2017 and 29 September 2017.

## **Decision**

The Commissioner finds that the Office of the Scottish Charity Regulator (OSCR) generally

complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the applicant.

The Commissioner finds that OSCR was not obliged to comply with part of the request, as it was a repeated request in terms of section 14(2) of FOISA. However, OSCR wrongly relied on section 14(2) in relation to information from a short time period not covered by a previous request.

OSCR complied with Part 1 of FOISA in correctly giving notice that it did not hold information covered by part of the request.

Given that the Commissioner is satisfied that OSCR does not hold the requested information for any period covered by the request, he does not require OSCR to take any further action in response to the applicant's application.

## **Appeal**

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Should either the applicant or OSCR wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**19 February 2018**

### 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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

#### 14 Vexatious or repeated requests

...

(2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

#### 17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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