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Commissioner  
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# Decision Notice 267/2024

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## Complaints about a charity

Authority: Office of the Scottish Charity Regulator  
Case Ref: 202400618

### Summary

The Applicant asked the Authority for information about the Nevis Ensemble. The Authority disclosed some of the information requested, but withheld information relating to complaints about the Nevis Ensemble under various exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA, but he required it to disclose certain information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs); 35(1)(g) and (h), (2)(f) and (g) (Law enforcement); 47(1) and (2) (Application for decision by Commissioner)

Charities and Trustee Investment (Scotland) Act 2005 (CTISA) sections 1(5)(d) (Office of the Scottish Charity Regulator) and 28(1)(a) (Inquiries about charities etc.)

### Background

1. On 14 February 2024, the Applicant made a request for information to the Authority. He asked for:
  - (i) a copy of the Nevis Ensemble's accounts from 2018-2022
  - (ii) the Nevis Ensemble's application to be a charity
  - (iii) a copy of the Nevis Ensemble's constitution.

- (iv) any complaints made about the Nevis Ensemble: number, date, nature and detail of complaint
  - (v) copies of all communications (notes of telephone conversations, emails etc) between the Nevis Ensemble and the Authority in relation to complaints
2. The Authority responded on 12 March 2024. The Authority provided information relevant to parts (i) to (iii) of the request, but withheld information relevant to parts (iv) and (v) under the exemptions in sections 30(c), 35(1)(g) and 35(1)(h) of FOISA.
  3. On 15 March 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered that the public interest favoured disclosure of the withheld information.
  4. The Authority notified the Applicant of the outcome of its review on 15 April 2024, which fully upheld its original decision without modification.
  5. On 1 May 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he considered that the public interest favoured disclosure and because comparable information had been disclosed in other cases.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 16 May 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and 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. The Authority was invited to comment on this application and to answer specific questions. These related to the exemptions claimed by the Authority and the Applicant's suggestion that comparable information had been disclosed in other cases.

## **Commissioner's analysis and findings**

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 35(1)(g) - Law enforcement***

10. 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.
11. The Authority is a Scottish public authority as defined by FOISA (see Schedule 1 to FOISA).

12. The Authority argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions for two of the purposes specified in section 35(2):
  - to protect a charity against misconduct 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. Section 35(1)(g) is a qualified exemption in that it is subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemption can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information.
14. There is no definition in FOISA of "substantial prejudice", but the Commissioner's view is that the harm in question must 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.
15. There are three separate matters the Commissioner must consider to determine whether this exemption applies:
  - (i) does the Authority have a function in relation to one or more of the purposes mentioned in section 35(2) of FOISA?
  - (ii) If satisfied that it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Authority's ability to exercise the function(s)?
  - (iii) If he accepts that such prejudice would, or would be likely to, occur, the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it does, he must order the Authority to disclose the information.

### ***The Authority's functions***

16. The Commissioner is satisfied that the Authority exercises functions which relate to the purposes described in section 35(2)(f) and (g) of FOISA. Section 1(5)(d) of Charities and Trustee Investment (Scotland) Act 2005 (CTISA) states that one of the Authority'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.
17. In addition, section 28(1)(a) of CTISA provides that the Authority may at any time make inquiries, either generally or for particular purposes, with regard to a charity.

### ***Would disclosure cause, or be likely to cause, substantial prejudice?***

18. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of the functions identified by OSCR.

### ***The Applicant's submissions***

19. The Applicant suggested that disclosure could lead to further information being reported to the Authority and others coming forward, and so disclosure was strongly in the public interest. The Applicant argued that disclosure could in fact assist the Authority's work rather than impeding it.

20. The Applicant also argued that comparable information had been disclosed by the Authority in other cases. The Applicant provided several examples to the Commissioner.

#### *The Authority's submissions*

21. The Authority explained that information requested related to an inquiry regarding the Nevis Ensemble, which was ongoing at the time the request was made and at the time of the review.
22. The Authority considered that release of the information requested before the conclusion of its inquiry may be damaging to the Nevis Ensemble, its trustees and their reputations, without the protection afforded by the Authority's inquiry process or the courts.
23. The Authority explained that there were avenues of inquiry still to be explored as part of the ongoing inquiry and that disclosure of the information requested before its inquiry had concluded could compromise the investigation. The Authority noted that the outcome of the inquiry could require it, or another authority, to take formal statutory action.
24. The Authority also argued that disclosure of the information requested could damage the willingness of the public and others to provide the Authority with information in confidence, which could seriously undermine the robustness of its inquiry process.
25. The Authority submitted that it must have the confidence of individuals and organisations when carrying out its statutory functions. This confidence would be undermined if organisations or individuals believed that information would routinely be made public without the protection afforded by relevant criminal or civil proceedings.
26. The Authority also commented that in some inquiries the nature of the issues involved might make it obvious who raised a concern with it and it was required to ensure the protection of individuals' right to privacy. Disclosure under FOISA of anonymised copies of complaints about a charity could, due to the nature of the complaint, still enable individual complainants to be identified.
27. The Authority was specifically asked to comment on why it did not follow the same approach to disclosure in this case as it took in an apparently comparable case. The Authority explained that, in the apparently comparable case, information was already in the public domain, via several reported press articles, that a complaint had been made by a whistleblower and that it was otherwise distinguishable in other respects from the Nevis Ensemble case.

#### *The Commissioner's view*

28. The Commissioner has considered the submissions made by both the Applicant and the Authority as well as the withheld information and the context in which it is held.
29. It is not possible for the Commissioner to publish all his reasoning, as to do so would involve direct reference to the withheld information. However, in all the circumstances of the case, he is satisfied that disclosure of the majority of the withheld information would have prejudiced substantially, or would have been likely to prejudice substantially, the Authority's exercise of its functions for the purposes listed in section 35(2)(f) and (g) of FOISA.
30. The Commissioner considers the prejudice claimed by the Authority to be pertinent in this case, particularly that disclosure of the majority of the withheld information prior to the completion of its inquiry would have been, or would have been likely to have been, damaging

to the Authority's inquiry (and to future inquiries) and to the Nevis Ensemble, its trustees and their reputations.

31. However, the Commissioner will go on to consider separately the number and date(s) of complaints received about the Nevis Ensemble.
32. The Commissioner has considered the examples provided by the Applicant of the Authority releasing information he considered comparable. The majority of these examples relate to information disclosure in the context of concluded investigations, which cannot be directly compared to an ongoing investigation (as in this case).
33. However, in a case involving South Lanarkshire College (available through the [What Do They Know website](#)<sup>1</sup>) the Authority disclosed the number of complaints it had received about the College (a registered charity) while its investigation was ongoing.
34. The Commissioner has considered the Authority's explanation that these cases were not comparable given the media attention in the South Lanarkshire College case. However, there was, prior to the Applicant making his request, [media reporting](#)<sup>2</sup> of the Nevis Ensemble's decision to close due to financial difficulties. The Commissioner therefore considers it reasonable for a member of the public to expect that complaints may have been received by the Authority about the Nevis Ensemble.
35. The Commissioner notes that the Authority has not relied on the exemption in section 18 of FOISA, in conjunction with section 35(1)(g) of FOISA, which would permit it to neither confirm nor deny whether any complaints had been received about the Nevis Ensemble.
36. In all the circumstances, therefore, the Commissioner does not accept that disclosure of the number and date(s) of complaints would have prejudiced substantially, or would have been likely to prejudice substantially, the Authority's exercise of its functions for the purposes listed in section 35(2)(f) and (g) of FOISA.
37. In summary, the Commissioner is satisfied that the Authority was correct in finding the majority of the withheld information to be exempt from disclosure in terms of section 35(1)(g) of FOISA. However, he does not accept that the Authority was entitled to withhold the number and date(s) of complaints under that exemption.
38. For the information he has found to be exempt from disclosure under section 35(1)(g) of FOISA, the Commissioner will go on to consider the public interest test contained in section 2(1)(b) of FOISA.
39. For the number and date(s) of complaints, the Commissioner will consider later in his decision notice whether this information was properly withheld under the exemptions in section 35(1)(h) or section 30(c) of FOISA.

**Public interest test – section 35(1)(g)**

40. The exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that even where the Commissioner accepts substantial prejudice for the purposes of section 35(1)(g) of FOISA, he must still order the information to

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<sup>1</sup> [https://www.whatdotheyknow.com/request/whistleblowing\\_complaints\\_south\\_3#incoming-2060852](https://www.whatdotheyknow.com/request/whistleblowing_complaints_south_3#incoming-2060852)

<sup>2</sup> <https://www.thirdsector.co.uk/music-charity-ordered-pay-30000-former-employees/management/article/1857949>

be disclosed unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.

41. The Applicant submitted that disclosure of the information requested would help inform the public as to the background of any decision taken and that there was also a strong public interest in understanding how public money, including that received by the Nevis Ensemble, had been spent.
42. The Applicant also noted the general principle of the value of accountability and openness in the work of public organisations such as the Authority.
43. The Authority recognised that disclosure of the information requested would enhance the scrutiny and transparency of its decision-making process, contribute to ensuring it was discharging its regulatory functions adequately and provide evidence of the thoroughness of its investigation process.
44. However, the Authority argued that there was a greater public interest in maintaining the exemption. In particular, the Authority argued that:
  - disclosure of the information would be damaging to the Nevis Ensemble, its trustees and their reputations, without the protection afforded by the Authority's inquiry process or the courts
  - it must have the confidence of individuals and organisations when executing its statutory functions and this would be undermined if organisations or individuals believed that information would routinely be made public, without the protection offered by relevant criminal or civil proceedings
  - the information requested related to an open and ongoing inquiry and disclosure of the information prior to the conclusion of the inquiry would substantially prejudice the Authority's ability to carry out its functions and inhibit its ability to investigate misconduct or mismanagement in this and other cases.
45. The Commissioner has considered all of the relevant submissions made by the Applicant and the Authority as to the application of the public interest.
46. The Commissioner acknowledges that disclosure of the information requested would enhance scrutiny of the Authority's functions in carrying out its regulatory functions. However, he has to balance the broad public interest in transparency against the strong public interest in maintaining the section 35(1)(g) exemption in FOISA, with a view to maintaining the effectiveness of the Authority's investigative process.
47. In all the circumstances of the case, the Commissioner is satisfied, on balance, that the public interest in maintaining the exemption (and, by extension, the effectiveness of the Authority's statutory processes) outweighs that in disclosure. He therefore finds that the Authority was correct to withhold the information it withheld (other than the number and date(s) of complaints) under section 35(1)(g) of FOISA.
48. Given that the Commissioner is satisfied that the majority of the information withheld by the Authority was properly withheld in terms of section 35(1)(g) of FOISA, he is not required to (and will not) go on to consider whether the other exemptions relied on by the Authority could also apply.

49. However, the Commissioner must now go on to consider whether the Authority was entitled to withhold the number and date(s) of complaints under the exemptions in section 35(1)(h) or section 30(c) of FOISA.

**Section 35(1)(h) – Law enforcement**

50. This exemption applies where release of information would, or would be likely, to prejudice substantially any civil proceedings brought and arising out of any investigations conducted for one of the purposes set out in section 35(2) of FOISA, by a public authority or Scottish public authority under either His Majesty's prerogative or statutory power.
51. "Civil proceedings" can refer to any non-criminal case heard before a court or tribunal. The civil proceedings must:
- have been brought by or on behalf of a UK or Scottish public authority, and
  - have arisen out of an investigation authorised by or under statute or by virtue of His Majesty's prerogative, and
  - have arisen out of an investigation carried out for one or more of the purposes listed in section 35(2) of FOISA.
52. In [Decision 103/2006](#)<sup>3</sup>, the Commissioner determined that the exemption in section 35(1)(h) of FOISA applies only where release would be substantially prejudicial to civil proceedings arising out of an investigation. It is not intended to apply where release would have a detrimental impact on an investigation but not on any current, pending or contemplated civil proceedings.
53. The Commissioner accepts that the Authority has the power to make an application to the Court of Session. While the inquiry was ongoing at the time of the review outcome, the Commissioner notes that Authority identified that one possible outcome of its inquiry was an application to the Court of Session to obtain power to suspend or remove any person concerned in the management or control of the charity or body.
54. Section 45 of FOISA makes it a criminal offence for the Commissioner or a member of his staff to disclose without lawful authority information which he has obtained, or which has been furnished to him, under or for the purposes of FOISA, if the information is not at the time of the disclosure, and has not previously been, available to the public from another source
55. In the circumstances, the Commissioner does not consider it possible to set out in greater detail the reasons for his conclusions without potentially breaching section 45 of FOISA.
56. Whether civil proceedings were contemplated or not, the Commissioner cannot accept that disclosure of the information in question (i.e. the number and date(s) of complaints) would have prejudiced substantially, or would have been likely to prejudice substantially, any civil proceedings brought and arising out of any investigations conducted for one of the purposes set out in section 35(2) of FOISA, by a public authority or Scottish public authority under either His Majesty's prerogative or statutory power.
57. The Commissioner therefore finds that the Authority wrongly applied the exemption in section 35(1)(h) of FOISA in this case to the information in question.

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<sup>3</sup> <https://www.foi.scot/decision-1032006>

58. Given that the Commissioner is satisfied that the exemption in section 35(1)(h) of FOISA does not apply to the information in question, he is not required to go on to consider the public interest test.

***Section 30(c) – Prejudice to the effective conduct of public affairs***

59. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
60. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
61. There is no definition of "substantial prejudice" in FOISA, 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: therefore, the authority 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.

***The Authority's submissions about the exemption***

62. The Authority explained that its functions include identifying, investigating and addressing apparent misconduct in the administration of charities. In addition to its own investigations, the Authority noted that it can refer cases to other public authorities, such as His Majesty's Revenue and Customs and the police, to carry out their own inquiries.
63. The Authority noted that its investigations bear substantial reputational risks for the individuals and organisations involved. The Authority submitted that disclosure of information about its investigations, prior to their conclusion, would prejudice its inquiry and undermine its ability to investigate allegations of misconduct.

***The Applicant's submissions about the exemption***

64. As outlined above, the Applicant argued that disclosure would serve the interests of openness and transparency, the scrutiny of the use of public funds, and could encourage more witnesses to come forwards.

***The Commissioner's view***

65. The Commissioner agrees that the disclosure of information gathered or created in the course of an investigation would often prejudice substantially, or be likely to prejudice substantially, the investigation and the Authority's function(s) under which it is carrying out the investigation, particularly where the investigation in question was ongoing.
66. However, it is important for public authorities to treat each request for information on a case-by-case basis. That information is withheld in one case should not be taken to imply that information of a particular type will be routinely withheld in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.



67. Having already found that the prejudice that would be caused by, or be likely to be caused by, disclosure of the number and date(s) of complaints was insufficient to engage the exemptions in section 35(1)(g) and section 35(1)(h) of FOISA, the Commissioner cannot identify any reason why disclosure would, or would be likely to, prejudice substantially the conduct of public affairs or the Authority's functions more broadly.
68. The Commissioner therefore finds that the Authority was not entitled to rely on the exemption in section 30(c) of FOISA to withhold the information in question.
69. Given that the Commissioner is satisfied that the exemption in section 30(c) of FOISA does not apply, he is not required to go on to consider the public interest test.

## **Decision**

The Commissioner finds that the Authority partially 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 by correctly withholding the majority of the withheld information under the exemption in section 35(1)(g) of FOISA, the Authority complied with Part 1.

However, by wrongly withholding details of the number and date(s) of complaints under the exemptions in sections 30(c), 35(1)(g) and 35(1)(h) of FOISA, the Authority failed to comply with Part 1.

The Commissioner therefore requires the Authority to disclose the number and date(s) of complaints, by **Friday 10 January 2025**.

## **Appeal**

Should either the Applicant or the Authority 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**26 November 2024**