



Case Reference: EA-2023-0313

Neutral Citation Number: [2024] UKFTT 647 (GRC)

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Decided without a hearing
Decision given on: 26 July 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER PIETER DE WAAL
MEMBER EMMA YATES**

Between

MARK WATTS

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) CHARITY COMMISSION**

Respondents

Decision: The appeal is Dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-230531-F9L1 of 31 May 2023 which held that the Charity Commission was entitled to rely on section

31(1)(g) (regulatory powers) of the Freedom of Information Act 2000 (FOIA). The Commissioner found that the Charity Commission was in breach of section 17 FOIA.

2. The Commissioner did not require the public authority to take any steps.
3. The parties and the tribunal agreed that this appeal was suitable for determination on the papers.

Background to the appeal

4. The tribunal adopts the following from the Commissioner's and the Charity Commission's responses.
5. The Charity Commission has statutory responsibility for the registration and regulation of charities in England and Wales. The Charity Commission has statutory objectives and functions under sections 14 and 15 of the Charities Act 2011 ("the 2011 Act").
6. Its objectives are prescribed by section 14 of the Charities Act 2011 and include:
 - (1) The public confidence objective (to increase public trust and confidence in charities)
 - (3) The compliance objective (to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities)
 - (5) The accountability objective (to enhance the accountability of charities to donors, beneficiaries and the general public)
7. Its "general functions" are prescribed by section 15(1) of the Charities Act 2011 and include:
 - (2) Encouraging and facilitating the better administration of charities
 - (3) Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
8. In addition to these general functions, the Charity Commission also has a "general statutory power to institute inquiries": section 46 of the Charities Act 2011.
9. Section 16 of the 2011 Act, which sets out the Charity Commission's general duties, provides:

“16 The Commission's general duties

The Commission has the following general duties

1 So far as is reasonably practicable the Commission must, in performing its functions, act in a way –

(a) which is compatible with its objectives, and

(b) which it considers most appropriate for the purpose of meeting those objectives. 2 So far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of –

(a) all forms of charitable giving, and

(b) voluntary participation in charity work.

3 In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.

4 In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).

5 In performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities.

6 In managing its affairs the Commission must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it.”

10. The Charity Commission has identified limitations to its role as regulator in section 2.2 of its Regulatory and Risk Framework (updated 29 April 2020, “the Framework”):

“2.2 Limitations to our role

Although our objectives and functions are wide-ranging, there are limitations to our role as a regulator:

- we are not a prosecuting authority, although we may ask others to prosecute offences on our behalf. The investigation of alleged criminal offences is the responsibility of law enforcement agencies

- we ordinarily cannot act as a trustee or be directly involved in the administration of a charity, unless particular circumstances apply. This means we can't tell trustees what decisions to make, although we do seek to provide appropriate and accessible guidance to support them with their decisions to ensure they can comply with their duties and responsibilities
- we also have no power to overturn trustees' decisions if they are lawful and reasonable, even if these decisions may be unpopular. However, where trustees' decisions result in significant harm, for example loss or damage to a charity's assets, which could relate to finance or reputation, we will intervene to ensure public trust and confidence in charity as a whole is maintained
- except in limited circumstances where there are indicators of underlying risks (see also section 4.2 below), it is not within our remit to examine complaints about the following:
 - poor service from a charity
 - employment issues, for example, unfair dismissal
 - internal disputes
 - contractual disputes"

11. The way in which the Charity Commission assesses risks within the scope of its functions (which then feeds into what action is taken) is set out, in general and high-level terms, at section 3.2 of the Framework as follows:

"3.2 How we assess risks

When we have identified a risk, we will assess it to enable us to decide the level of priority that should be applied and the action we should take in responding to it. This assessment takes account of the following:

- the impact of the risk (the harm)
- the likelihood of the risk materialising

In assessing the impact, we focus on the type and level of harm that may result if the risk materialises. This includes taking account of the size, profile and activities of the charity concerned.

Our assessment of the impact and likelihood of the risk materialising will also take account of other relevant factors. These might include, for example:

- the reliability of the evidence that is available
- any current or recent regulatory engagement with the charity, including whether we have previously given regulatory advice to the charity about a similar type of risk
- action that a charity may have already taken to manage the risk
- involvement of other agencies and regulators in managing the risk

We are often alerted to incidents where harm has already occurred. In these cases, we will assess the actual harm of the incident and the risk of future harm.”

12. The Charity Commission has a power to conduct statutory inquiries into charities (under section 46 of the 2011 Act) to address serious cases of abuse and regulatory concern. It can also address regulatory concerns using a variety of actions without opening a statutory inquiry as part of a regulatory compliance case, including providing regulatory guidance or advice to trustees to ensure that they address the regulatory concerns, including by way of an action plan, and by monitoring charities with identified risk factors.
13. The Charity Commission has published guidance on how it investigates charities on its website. The guidance notes that compliance cases may be opened reactively (in response to complaints) or proactively (where regulatory issues have been identified by work done by the Charity Commission). The guidance explains that, prior to opening a statutory inquiry (pursuant to section 46 of the Charities Act 2011), the Charity Commission may carry out a “pre-investigation assessment”:

“This will include an examination [of] the allegations and causes for concern against our Regulatory and Risk Framework. The purpose of such an assessment is to make sure that we apply our criteria to open an inquiry consistently and fairly. This assessment examines the causes for concern and whether the triggers for an inquiry are met.”
14. The guidance also explains that, once a statutory inquiry has formally been opened, the Charity Commission “can use the full range of our powers to obtain information and to protect the charity, its beneficiaries, assets or reputation.” The Charity Commission’s powers to require obtain evidence in connection with a statutory inquiry are prescribed by Part 5 of the Charities Act 2011.
15. Further, the Charity Commission has powers to issue official warning and appoint and remove trustees outside of statutory inquiries. These regulatory compliance cases are not necessarily a pre inquiry assessment although a case may be reassessed as a statutory inquiry as it progresses. These steps are set out in section 4 of the Framework.
16. The Charity Commission’s decisions are subject to the control of both the First-tier Tribunal (under Part 17 of the 2011 Act) and the High Court on applications for judicial review. It publishes an annual report (under paragraph 11 of Schedule 1 of the 2011 Act) which is laid before Parliament and holds an annual public meeting to enable that report to be considered (under paragraph 12 of Schedule 1 of the 2011 Act).

17. Additionally, the Charity Commission in keeping with its duty to have regard to the principles of best regulatory practice including transparency, has a policy (dated 15 January 2015) on how it reports on its regulatory work (“the Charity Commission’s reporting policy”). It does not routinely publish statements about all its regulatory cases but may do so where releasing a statement would be in the public interest or would increase public trust and confidence in charities.
18. Part 3 of the Charity Commission’s reporting policy reads:

“3. Statements when regulatory cases start

The commission does not routinely inform the media on a proactive basis when it opens regulatory cases.

It decides whether or not to issue a press release or formal public statement on a case-by-case basis. This decision is based on:

- whether it is in the public interest to do so
- consideration of the commission’s objective to increase public trust and confidence in charities

The commission takes a number of factors into account when deciding if it is in the public interest to make a statement on non-inquiry casework. These factors include:

- the extent of previous and/or current media interest in the issue and/or in relation to the charity
- whether it is already in the public domain that the commission is looking into the charity
- whether there are other indications of public interest in the issue
- the nature and gravity of the commission’s regulatory concerns
- the extent and nature of the commission’s previous engagement with the charity
- the public, international, national or local profile of the charity (either generally or in relation to its specialist services) and/or its trustees or other associates/representatives
- how important it is that the commission’s findings and conclusions are on public record and widely promoted

- whether the case raises issues of significant legal and/or policy development or issues that are likely to be of wider interest to the charity sector or the general public.”

19. The Charity Commission also publishes guidance on complaints about charities. This refers back to the Framework, and states:

“Depending on circumstances the Commission may decide not to take further action. If it does not take action it will tell you [i.e. the complainant] why and keep a record of your report.

The Commission will inform you if it takes up a serious concern but it will not give you details of how it handles its casework. It will notify you of the outcome when it has finished its case.”

20. In addition to the Charity Commission’s transparency for reporting on its casework, its obligations as the Registrar of Charities include the requirements under the 2011 Act to make certain information available for public inspection which the Charity Commission achieves by publication on its website. This includes particulars of the Register as well as the Trustees Annual Report and accounts where a charity is required to transmit this information to the Charity Commission. The Charity Commission has also exercised its discretion under section 15 of the 2011 Act to publish additional information about individual charities as part of its Register information for example information about late statutory filings by charities.

The request

21. On 27 October 2022 Mr. Watts made the following refined request (‘the Request’) to the Charity Commission:

““In making my request for a copy of material held by the Charity Commission and created since 2017 in relation to Transparency International UK, I was seeking information concerning Transparency International UK only. Accordingly, I was not seeking information it may have provided that was wholly about other charities ... I am particularly interested in any material generated, or received, by the Charity Commission since 2017 in connection with any investigation or compliance query of Transparency International UK.”

22. That is the request that is the subject of this appeal.
23. Mr Watts’ original request (‘the Original Request’) was made on 30 October 2021 as follows:

“I am making a request under the Freedom of Information Act for a copy of material held by the Charity Commission and created since 2017 in relation to Transparency International UK.

To be clear, I am not requesting material filed by Transparency International UK as a charity to the Charity Commission as part of its routine regulatory filings and which are already publicly available by searching on the charity register. I am particularly interested in any material generated, or received, by the Charity Commission since 2017 in connection with any investigation or compliance query of Transparency International UK.”

24. In relation to the Original Request the Charity Commission initially refused to confirm or deny whether this information was held, pursuant to section 31(3) of the Act. Following the Commissioner’s intervention, the Charity Commission issued a fresh decision (dated 29 April 2022) in which it refused the Original Request under section 12 of the Act. The Charity Commission estimated that complying with the request would take more than 56 hours, based on a sample review.

The response to the request

25. On 13 December 2022 the Charity Commission responded to the Request. It confirmed that it held information within the terms of the request. The Charity Commission refused to disclose the information, applying exemptions under sections 31(1)(g), 40(2) and 41 FOIA.
26. In the course of the Commissioner’s investigation the Charity Commission confirmed that it was relying on the statutory purposes specified in section 31(2)(c), (f) and (g) FOIA.

The decision notice

27. In a decision notice dated 31 May 2023 the Commissioner decided that the Charity Commission was entitled to rely on section 31(1)(g) FOIA.
28. The Commissioner noted that the Charity Commission had confirmed that it was relying on section 31(1)(g) in relation to all the withheld information.
29. The Commissioner referred to a number of his previous decisions and considered that there was no need to repeat in the Decision Notice the same detailed comments about the public authority’s regulatory functions; the Commissioner’s finding that disclosure would likely harm the public authority’s exercise of its functions, for the purposes specified in section 31(2)(c), (f) and (g); the relevant public interest considerations, including the weight of the public authority’s point that disclosure would likely have a chilling effect on the voluntary supply of information to the public authority; and the Commissioner’s determination regarding the balance of the public interest.
30. The Commissioner also drew attention to his published guidance which emphasises (at pages 33 – 34) the public interest in not deterring the voluntary

supply of information, in the context of investigations and cooperation between organisations being regulated and the regulator. His guidance (at pages 6 – 8) also refers specifically to the public authority, regarding section 31(1)(g).

31. In a relatively recent previous decision notice (at paragraphs 29 – 30), the Commissioner noted that the public authority's pro-active publishing of (for example) case reports and inquiry results, where there are high risk investigations and inquiries, meets the public interest in transparency and accountability. The Commissioner stated that that point was relevant to the present case.
32. The Commissioner found that section 31(1)(g) was engaged and should be maintained. He stated that he did not need to consider the other exemptions cited.
33. The Commissioner found a breach of section 17 FOIA.

Notice of appeal

34. In essence, the grounds of appeal are that the Commissioner was wrong to conclude that the Charity Commission was entitled to rely on section 31(1)(g) to withhold the information. In particular, the appellant submits that the public interest favours disclosure.
35. The appellant concedes that section 31(1)(g) is undoubtedly engaged in relation to at least some of the requested information but submits that it is impossible to know whether it applies to all the information without seeing it.
36. The appellant submits that it is wrong to take a blanket approach, assuming that in principle disclosure would harm the exercise of the relevant functions or have a chilling effect. The balance depends on the specific information in question.
37. The appellant submits that the Charity Commission and the Commissioner have exaggerated the possibility that charities would be discouraged from cooperating with the Charity Commission in the future. This could only arise from the disclosure of voluntary disclosures or information based on voluntary disclosures.
38. The appellant submits that there is particularly strong public interest in disclosure given the public disquiet about the charity in question.
39. It is submitted that the Commissioner failed to give proper weight to the inconsistent approach by the Charity Commission to section 31.
40. The appellant submits that it is not appropriate to withhold disclosure in part because such disclosure would be embarrassing to the charity.
41. The Commissioner failed to take into account the manner in which the Charity Commission dealt with the request.

The Commissioner's response

42. The Commissioner submits that the Charity Commission has unequivocally confirmed its position that all the requested information was exempt under section 31(1)(g) in an email to the Commissioner dated 4 May 2023. The Commissioner was therefore correct to consider the case on that basis.
43. As to whether the exemption was engaged the Commissioner submits that the requested information comprises what was described in the Charity Commission's original decision as "reports and correspondence" pertaining to six "compliance cases" which had been opened by the Charity Commission in relation to Transparency International UK ("TIUK") since 2017. The Commissioner understands "compliance cases" to refer to pre-investigation assessments which the Charity Commission carries out prior to opening a statutory inquiry under section 46 of the Charities Act 2011 (see paragraph 18 above).
44. Accordingly, the Commissioner submits that it is clear that these compliance cases were opened pursuant to statutory regulatory functions exercised by the Charity Commission for the purposes specified in sections 31(2)(c), (f) and (g) of the Act.
45. In relation to prejudice, the Commissioner submits that disclosure of the requested information would be likely to prejudice the voluntary supply of information to the Charity Commission in connection with the exercise of its regulatory functions, taking into account:
 - 45.1. The content of the information - which the Commissioner understands concerns allegations of bullying and harassment within TIUK as well as safeguarding processes and financial controls.
 - 45.2. The timing of the request - the Commissioner understands that none of the compliance cases was live at the time the refined request was submitted.
 - 45.3. The public authority's statutory powers to compel engagement in the investigatory process - these powers are not available to the Charity Commission at the pre-investigation stage.
 - 45.4. Incentives that may encourage third party engagement - the Commissioner has previously accepted that trustees of charities (and their advisors) have an in-built incentive to communicate with the Charity Commission in a free and frank manner, however, the Commissioner has also previously accepted the Charity Commission's argument that - as a small regulator - reliance on the information-gathering powers in Part 5 of the Charities Act 2011 would result in it receiving far less information and being able to deal with far fewer cases.
 - 45.5. The nature of the damage caused by disclosure that the third party foresees - disclosure of the requested information risks giving a misleading impression about the Charity Commission's recent engagement with TIUK, which "has great potential to damage the reputation of this charity and its

trustees, and by implication the wider sector. This could potentially lead to defunding of that particular charity of those like them.”

- 45.6. Whether there is evidence of lower levels of engagement following disclosure under the Act - the Commissioner has not been provided with evidence in this or any previous case that indicates reduced levels of engagement by charities with the Charity Commission since the introduction of the Act.
- 45.7. Whether there is a statutory bar which prevents disclosure of the information provided - there is no statutory bar which implies a greater likelihood of prejudice.

46. The Commissioner also considers that disclosure would be likely to prejudice the exercise of those regulatory functions:

- 46.1. if the amount or quality of information provided to the Charity Commission voluntarily by charity trustees is diminished, that would be likely to undermine the Charity Commission’s ability to effectively regulate charities and to promote its statutory objectives.
- 46.2. Given the small size of the Charity Commission and the large number of charities it regulates, even if a relatively small percentage of these charities altered their behaviour following disclosure of this information, this could still have a real and significant effect on the Charity Commission’s ability to carry out its regulatory functions.

47. For those reasons the Commissioner submits that the exemption is engaged in relation to all of the requested information.

48. In relation to the public interest test, the Commissioner acknowledges the following factors which weigh in favour of disclosure:

- 48.1. The general public interest in promoting transparency, accountability and public understanding of how the Charity Commission carries out its regulatory functions.
- 48.2. Given the reported allegations of potential wrongdoing, there is also a particular public interest in disclosing information about the Charity Commission’s engagement with TIUK.
- 48.3. Given that the outcomes of the compliance cases opened by the Charity Commission into TIUK have not been made public, there is a public interest in presenting a fuller picture as to the Charity Commission’s engagement with TIUK.

49. The Commissioner acknowledges the following factors in favour of maintaining the exemption:

- 49.1. The Charity Commission already makes public some information in connection with its regulatory functions.
- 49.2. There is a strong public interest in preserving the Charity Commission’s ability to carry out its regulatory functions efficiently and effectively.

50. On balance, the Commissioner submits that the public interest in this case is in favour of maintaining the exemption.

The open response of the Charity Commission

51. In relation to the public interest test, the Charity Commission submits that the public interest in transparency, accountability, and public awareness of how it handles regulatory complaints and concerns is to a very great extent met by disclosure under its reporting policy and its publication of its own policies, guidance and annual report. Disclosure of information in specific cases beyond publication covered by the Charity Commission's reporting policy does not add substantially to the public interest in disclosure.
52. The Charity Commission submits that real and significant risks of prejudice to its functions from disclosure would ordinarily outweigh the general public interest in disclosure for the sake of transparency, accountability and public awareness. That is especially the case where the risks of prejudice arise in multiple ways: not only to the free and frank provision of information, but also by enabling active frustration of its functions.
53. The Charity Commission does have wide information gathering powers outside of a statutory inquiry (section 52 2011 Act). The Charity Commission's experience is that asking for information by issuing an order is far more administratively bureaucratic than making a simple request in correspondence. If the Charity Commission could only obtain information from charities following the use of a formal order it would receive far less information and be able to deal with far fewer cases which would be likely to be prejudicial to its ability to function effectively. In addition, some of its most effective work with charities takes place when there is an open free flowing discussion.
54. The Charity Commission regulates over 168,000 registered charities. Even if only a small percentage altered their behaviour following the disclosure under FOIA, there would be a real and significant impact on the Charity Commission's ability to carry out the functions described at sections 31(2)(c), (f) and (g).
55. The Charity Commission confirms that it considered that section 31(1)(g) applied to all the requested information.
56. Disclosure of the Charity Commission's internal communications and correspondence with a registered charity about sensitive matters would be likely to lead to a 'chilling effect' on the Charity Commission's regulatory work with other charities, which would be likely to prejudice the Charity Commission's functions. The Charity Commission encourages charities to disclose information and concerns voluntarily. If charities feared that information provided would subsequently have to be disclosed under FOIA, then this would be likely to prejudice the Charity

Commission's ability to carry out its functions effectively. The Charity Commission would be more likely to have to use its formal powers to obtain information, resulting in the provision of more limited information and in a less timely manner, and with each of the Charity Commission's investigations absorbing more of its time and resources.

57. The Charity Commission does not take a blanket approach to FOI requests. An assessment is made about the information in each individual case and where disclosure of the information would be prejudicial.

Replies of the appellant

Reply to the Commissioner's response

58. The appellant has submitted replies in relation to the responses of both respondents.
59. The appellant sets out the procedural history of how the Charity Commission dealt with his requests. He submits that this illustrates its over-zealous use of section 31 in this case.
60. The appellant submits that the Commissioner has failed to address a number of points made by him in the grounds of appeal.
61. The appellant clarifies that he has only addressed section 40 and section 41 in case the tribunal finds that section 31 does not apply.
62. The appellant submits that even if the Charity Commission has now confirmed that it relies on section 31(1)(g) in relation to all the information, the question remains as to why it changed its story.
63. The appellant submits that the information requested includes, but is not – as suggested by the response of the Commissioner at paragraph 30 – limited to, what the Charity Commission described in its decision of 13.12.22 as “reports and correspondence pertaining” to “six compliance cases into the charity Transparency International UK since 2017.”
64. The appellant submits that there is a failure to address why there would be or would like be prejudice in relation to the specific information concerned. There is a failure to address what is different about this case compared with previous cases where the Charity Commission has been prepared to disclose comparable information in relation to FOIA requests concerning other charities, such as the five cases cited in the grounds of appeal. There is no evidence that prejudice in fact occurred as a result of those cases, including the well-publicised one concerning the Universal Church of the Kingdom of God (UCKG).

65. The appellant submits that the narrow interests of the charity concerned is not a proper basis for assessing the public interest. To the extent that there is concern that disclosing information that “is part of a much more detailed body of information and which may give a false impression”, the Charity Commission is capable of disclosing fuller information in order to avoid giving any such misleading impression. The appellant submits that whether disclosure has the potential to damage the reputation of the charity, its trustees or the wider sector – notwithstanding the point that it is inconceivable that it could possibly be true for the last of those – and could lead to defunding is not the correct test under FOIA.
66. The appellant submits that if disclosure could do anything like approaching such damage it raises the question as to why the public should not know about it.
67. The appellant disagrees that an absence of statutory protection for the information should imply a greater likelihood of prejudice.
68. In relation to the public interest the appellant points out the information made public by the Charity Commission does not serve the particularly high public interest in relation to this specific case.

Reply to the Charity Commission’s response

69. The appellant highlights the “accountability objective” under section 14(5) of the Charities Act, which “is to enhance the accountability of charities to donors, beneficiaries and the general public.” The appellant notes that this is omitted from the reporting policy.
70. The appellant notes that the Charity Commission’s reporting policy gives the following as an example of when a statement might be released: “There is significant public interest, and/or media coverage of a charity or the commission’s regulatory engagement with the charity on a particular issue.”
71. The appellant notes that the Charity Commission’s guidance on complaints about charities warns complainants about potential disclosure under FOIA.
72. The appellant notes that section 15(1)(a) of the Charities Act sets out the function of “Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives,” which in turn includes the publishing of the register of charities.
73. The appellant submits that while the Charity Commission states at paragraph 18 of its response that it is “committed to the principle of transparency”, that is not manifest in how it conducted itself through the history of this request.
74. The appellant submits that the Charity Commission’s has a propensity, including in this case, to take into account its role in increasing public trust and confidence in

charities, at the expense of – and while overlooking – its statutory role in enhancing accountability of charities.

75. The Charity Commission does not explain why disclosure of the specific information would prejudice its ability to regulate charities and why it has not arisen as a result of the five comparable requests cited in the grounds of appeal.
76. The appellant does not accept that disclosure material from the investigation of regulatory concerns about a charity crosses the bar of being likely to prejudice its functions. It is accepted that the potential for prejudice under s31(1)(g) of the Freedom of Information Act should be considered in relation at least to some of the requested information. To that limited extent is section 31(1)(g) engaged. Nonetheless, it is submitted that the actual risk is negligible, if it exists at all and is hugely outweighed by the public interest in disclosure of the specific information.
77. The appellant submits that there has been a failure – by both respondents – to consider the public-interest balancing exercise in relation to the specific information requested.
78. As to the Charity Commission’s claim that the risk is higher in relation to a “larger charity with a higher public profile”, the appellant submits that it is worth comparing the charity concerned with the five bodies cited in the grounds of appeal which are large and have a high or quite high public profile where the Charity Commission took a fundamentally different approach to disclosing comparable information. If the concerns as expressed by the Charity Commission about disclosing information about Transparency International UK were valid, they would have prevented disclosure of information in relation to the other five cases.
79. The appellant submits that the Charity Commission have failed to address the public interest in disclosure of this specific information.

Legal framework

Section 31(1)(g)

80. Section 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

Section 31 Law enforcement

(1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

...

(2) The purposes referred to in subsection (1)(g) ... are –

...

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

...

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication

...

81. For the purposes of section 31(1)(g), a public authority's "functions" are any power or duty exercisable by it for a specified purpose whether conferred by or under statute, common law or royal prerogative: Stevenson v Information Commissioner [2013] UKUT 181 (AAC).
82. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice.

The role of the tribunal

83. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

84. We read and took account of an open bundle and a closed bundle and a closed response from the Charity Commission. It was necessary to withhold the closed material from the appellant because otherwise the purpose of the proceedings would have been defeated.

85. We adjourned our deliberations to order the Charity Commission to provide a gist of the closed response of the Charity Commission. We approved the draft gist. We gave the appellant permission to provide further submissions once he had been provided with that gist.
86. The tribunal notes that the appellant states in his further closing representations dated 9 July 2024 that he has not been provided with a copy of the open closing submissions of the respondents. For the assistance of the appellant, the tribunal confirms that no open closing submissions were provided by the respondents. The reference to open submissions in the gist are to paragraphs in the Charity Commission's response which is at page 56 of the open bundle. The tribunal did not consider any open submissions from either respondent that were not contained in the open bundle, other than the gist.

Appellant's submissions dated 1 December 2023

87. The appellant made written submissions dated 1 December 2023. He submitted that disclosure of the kind of information sought by in this case has not compromised the Charity Commission's functions to date. He submitted that charities operate in an environment in which they are fully aware that information passed by them – including information passed voluntarily – to the Charity Commission may be disclosed by it to the public at large as a result, *inter alia*, of a request under the Act. It is submitted that the respondents have only asserted generalised arguments about the risks posed by disclosure and so the exemption is not engaged.
88. If the exemption is engaged, it is submitted that the tribunal should decide, based on the withheld material whether disclosure would be likely to prejudice the Charity Commission's functions sufficiently to outweigh the public interest in disclosure.
89. The appellant noted that the Charity Commission has been inconsistent in relation to whether it relies on section 31 in relation to some or all of the withheld information.

Appellant's further submissions dated 9 July 2024

90. These submissions were filed following the provision of a gist of the Charity Commission's closed submissions.
91. The appellant submitted that the Charity Commission refers to the "sensitive quality", in a generalised way, of information held on its casefiles. He submitted that there is no cogent case as to how disclosure of the specific material in this case would, or would be likely to, prejudice the Charity Commission's functions.
92. The Charity Commission hints that there may be particular sensitivity surrounding information supplied by "third parties", notably "intelligence sources", about a

charity, which the appellant submitted underlines his previous submission that the tribunal could only reach a conclusion that disclosure would, or would be likely to, prejudice the Charity Commission's functions sufficiently to outweigh the public interest in disclosure by examining the specific information concerned to assess for itself.

93. It is submitted that the Charity Commission makes only generalised assertions about the public interest balance. It is submitted that it provides no basis for its judgment that any adverse comment would be unjustified, and in any event this is irrelevant to the issues before the tribunal.
94. The appellant submitted that the Charity Commission is unable to point to any adverse effects from its inadvertent disclosure on 13 December 2022. It is submitted that this underlines the appellant's submission that disclosure of this kind of information has not prejudiced the Charity Commission's functions. It is submitted that the Charity Commission is taking a hugely exaggerated view of the risk of prejudice, a risk which the appellant submitted, is in reality non-existent or negligible.

Issues

95. The issues the tribunal has to determine are:
 - 95.1. Would disclosure of the withheld information prejudice or be likely to prejudice the exercise by the Charity Commissioner of its functions for the purposes of:
 - 95.1.1. ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise and/or
 - 95.1.2. protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration and/or
 - 95.1.3. protecting the property of charities from loss or misapplication.
 - 95.2. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosure?

Discussion and conclusions

Other issues raised by the appellant

96. The appellant complains that the Commissioner failed to examine the requested information before making his determination. We conduct a full merits review and consider the matter afresh. We have seen the withheld information and taken full account of it in making our decision.

97. The appellant complains about the Charity Commission's 'track-record' in repeatedly failing to comply with FOIA and argues that the Commissioner ought to have taken this track-record into account. As we stand in the shoes of the Commissioner we have taken into account matters that we consider relevant. We do not consider the Charity Commission's 'track-record' assists us in determining the issues before us.
98. The appellant complains that the Charity Commission has changed its position in relation to whether it relies on section 31(1)(g) in relation to some or all of the information. The Charity Commission is entitled to rely on new exemptions before tribunal. We stand in the shoes of both the Commissioner and the public authority when determining the appeal and the question for us is whether or not the exemption is engaged and whether or not the public interest balance favours disclosure. The question of why the Charity Commission changed its position does not assist us in determining these issues.

Section 31(1)(g)

99. The first question for us to answer is what is the applicable interest within the exemptions relied upon. Here, the relevant interest is clear on the face of the exemptions. It is the protection of a public authority's ability to exercise its functions for the purposes set out in the subsections relied on.
100. The next question is whether the Charity Commission has functions which it exercises for those purposes. A function is a power or duty exercised by a public authority for a specified purpose, whether conferred by or under statute. It includes only those functions assigned to the public authority and does not also include anything conducive or incidental to those functions (**DVLA v Information Commissioner** [2021] 1 WLR).
101. On the basis of the statutory framework set out above, we accept that the Charity Commission's functions include:
- 101.1. Encouraging and facilitating the better administration of charities
 - 101.2. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
102. We accept that the Charity Commission exercises these functions for the purposes of, *inter alia*:
- 102.1. ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise and/or
 - 102.2. protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration and/or
 - 102.3. protecting the property of charities from loss or misapplication.

103. The next question is whether the claimed prejudice relates to the applicable interest or purpose.
104. The first claimed prejudice is that charities would be inhibited from voluntarily disclosing information freely and frankly to the Charity Commission if it became known that this particular information had been disclosed.
105. The Charity Commission further asserts that disclosure of information related to thematic reviews would disclose the thematic review threads and certain aspects of the information and intelligence sources used for thematic reviews which are not currently in the public domain. The Charity Commission submits that this would also inhibit the supply of information by charities.
106. We accept that these claimed prejudices relate to the purposes set out in section 31(2)(c), (f) and (g). If charities are inhibited from voluntarily disclosing information freely and frankly to the Charity Commission this would make it more difficult for the Charity Commission to: ascertain if circumstances which would justify regulatory action exist or may arise; protect charities against misconduct or mismanagement; and protect the property of charities from loss or misapplication.
107. The Charity Commission also asserts that disclosure might cause damage to the reputation of the charity in question. The Charity Commission argues that this relates to the applicable interest because it prejudices the Charity Commission's ability to fulfil its public confidence objective, its charitable resources objective and protecting charity property. **DVLA v Information Commissioner** [2021] 1 WLR and **Williams v ICO** [2023] UKUT 57 (AAC) make clear that a focussed approach should be taken to the specific purposes listed in section 31(2). In our view potential damage to a charity's reputation does not impact on the exercise of the Charity Commission's functions for those specified purposes and we have disregarded this asserted prejudice.
108. In respect of each claimed prejudice, we must determine if causality has been demonstrated between disclosure of the withheld information and the occurrence or likely occurrence of the prejudice claimed, and if the risk of prejudice in the event of disclosure is real and significant.
109. The withheld information consists of information (reports and correspondence) relating to six compliance cases opened in relation to the charity in question. The information falls broadly into two categories:
 - 109.1. Information relating to the Charity Commission's proactive theme-based casework.
 - 109.2. Information relating to information provided by a charity

110. This reflects the Charity Commission guidance that compliance cases may be opened reactively or proactively.
111. In relation to the information relating to the theme-based casework, the Charity Commission argues that disclosure would reveal disclose the thematic review threads and certain aspects of the information and intelligence sources used for thematic reviews which are not currently in the public domain. The Charity Commission submits that this would be likely to prejudice the exercise of their functions for the specified purposes and would be likely to inhibit the supply of information by charities.
112. We accept that disclosure of the withheld information would reveal some information about the Charity Commission's thematic review threads and certain aspects of the information and intelligence sources used for thematic reviews. We accept that this information is not currently in the public domain. We accept that charities would be likely to be less free and frank in the routine provision of information to the Charity Commission if they were aware of this information. Further we accept that it would be likely to make the Charity Commission's exercise of its intelligence gathering functions more difficult if this information, including information about certain thematic review threads was widely known.
113. For those reasons we accept that there is causative link and we are satisfied that there is a real and significant risk of prejudice.
114. In relation to the withheld information that relates to information provided by a charity, the Charity Commission argues that the factual content of this information is particularly sensitive.
115. This part of the withheld information relates to three matters raised by a charity with the Charity Commissioner. It is not possible to provide details of the facts of these three matters, but we have read the information and taken this into account.
116. Having reviewed the withheld information we accept that the factual nature of these matters is particularly sensitive. In our view there is a clear causative link between disclosure of this information and an impact on the willingness of other charities in the future to provide full, free and frank disclosure of information to the Charity Commission. It is not suggested that charities would not provide any information to the Charity Commission, but we accept that they there is real and significant risk that they would provide less detailed information and be less candid in their disclosure. This, in our view, would clearly carry a real and significant risk of prejudice to the Charity Commission's ability to exercise its functions for the relevant purposes.
117. The Charity Commission accepts that it has disclosed information about its case work previously, but it submits that this is because it considers disclosure on a case by case basis, and argues that it is the particular sensitive content of the requested information in this case that would be likely to cause the asserted prejudice. We

accept that it is the particularly sensitive nature of this information what would be likely to lead to the asserted chilling effect.

118. We accept that the Charity Commission does have wide information gathering powers, however we acknowledge that if the Charity Commission could only obtain information from charities by way of a formal order, it would receive less information, would be able to deal with fewer cases and would not be able to work as effectively by means of open and free flowing discussion.
119. We conclude accordingly that the exemption in section 31(1)(g) is engaged.

Public interest balance

120. There is a clear strong public interest in the Charity Commission being able to operate as a effective regulator. There is a clear strong public interest in this sector being effectively regulated. It is in the public interest that charities are encouraged to give full and frank disclosure to the regulator in a safe space.
121. We accept that there is a general public interest in transparency in relation to compliance cases opened by the Charity Commission. This is served to some extent by the Charity Commission's reporting policy under which it publishes statements about its regulatory cases where this would be in the public interest or would increase public trust and confidence in charities. We accept that there is some enhanced public interest in transparency in relation to this particular charity, in part because of the matters contained in the media reporting we have been referred to and in part because it has fallen within the Charity Commission's thematic review threads. This increases the public interest in disclosure.
122. Having weighed all the different factors in the balance we have concluded in all the circumstances of this case that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Signed Sophie Buckley

Date: 24 July 2024

Judge of the First-tier Tribunal

Promulgated on: 26 July 2024