

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 August 2012

Public Authority: Charity Commission
Address: PO Box 1227
Liverpool
L69 3UG

Decision (including any steps ordered)

1. The complainant requested information from the Charity Commission relating to a complaint it had received about the administration of a charitable trust.
2. The Commissioner's decision is that the Charity Commission was entitled to rely on section 41 of the FOIA (confidential information) to withhold the disputed information.
3. The Commissioner does not require the Charity Commission to take any steps as a result of this decision.

Request and response

4. On 16 September 2011, the complainant wrote a letter to the Charity Commission containing nineteen points some of which contained requests for information under the FOIA. The relevant extract from the letter for the purposes of this decision notice was as follows:

'8. Please supply copies of all the correspondence between yourselves and the Trustees concerning the issue of the level of their fees? In particular please provide the details of the basis for the calculation of Barclay's [sic] fees at the rate of [removed] per hour. Also please provide information on the hourly charging rate applies [sic] by Withers in respect of services supplied by [removed].'

5. The Charity Commission responded on 14 October 2011. It disclosed some information to the complainant and informed him that it did not hold some of the information he had requested. It withheld the

remaining information under section 21 of the FOIA (information accessible to the applicant by other means), section 40(1) of the FOIA (personal data of the applicant), 40(2) of the FOIA (third party personal data) and section 43(2) of the FOIA (commercial interests).

6. The complainant requested an internal review on 9 November 2011 in relation to the Charity Commission's reliance on section 40(2) and section 43(2) of the FOIA.
7. Following an internal review the Charity Commission wrote to the complainant on 8 December 2011. It disclosed some further information and upheld its original decision in relation to the remaining information. In addition to this it applied section 41 of the FOIA as an additional exemption.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the Charity Commission's reliance on section 43(2) of the FOIA to withhold the information within the scope of part eight of his request as outlined in paragraph 4.
9. In its submissions to the Commissioner the Charity Commission confirmed that it was relying on section 41 and section 43(2) of the FOIA in relation to all of the withheld information falling within the scope of part eight of the complainant's request. There are three documents that contain the withheld information, one of which includes a spreadsheet attachment. They can be described as follows:
 - Document 1 – an email to the Charity Commission from Barclays Wealth with an accompanying spreadsheet containing a summary of the time Barclays Wealth spent on the administration of a particular trust and the chargeable rates it had applied as a professional trustee.
 - Document 2 – a letter to a member of the public from Barclays Wealth concerning their role as a professional trustee of a particular trust, which included details of the fees that Coutts charges for the administration of trusts.
 - Document 3 – an email to the Charity Commission from Barclays Wealth which included a table of hourly rates and a paragraph indicating the rates charged for the administration of a particular trust.

10. The documents have been disclosed to the complainant in a redacted form, except for the spreadsheet attachment which was withheld in full. The Commissioner has therefore focused on whether the Charity Commission was entitled to withhold the redacted information and the content of the spreadsheet under section 41 and section 43(2) of the FOIA.
11. The Commissioner notes that the Charity Commission has stated that it does not hold information about the charging rate of Withers and, as the complainant has not challenged this, it will not be considered as part of the Commissioner's decision.
12. In the course of his investigation the Commissioner has considered all of the arguments made by the complainant and the Charity Commission including those not specifically referenced within this decision notice.

Reasons for decision

Section 41 of the FOIA – information provided in confidence

13. Section 41 of the FOIA states that information is exempt if it was obtained by the public authority from another person and the disclosure of the information, otherwise than under the FOIA, would constitute an actionable breach of confidence by that or any other person.
14. The Commissioner considers that for section 41 of the FOIA to apply in this case the following elements must be satisfied:
 - the information must have been obtained by the public authority from any other person;
 - the information must have the necessary quality of confidence;
 - the information must have been imparted in circumstances importing an obligation of confidence;
 - there must be an unauthorised use of the information to the detriment of the confider; and
 - there must be no defence available to render the breach of confidence unactionable, including a public interest defence.
15. The Charity Commission obtained the withheld information from Barclays Wealth. It considers that disclosing the information to the public otherwise than under the FOIA would constitute a breach of confidence actionable by Barclays Wealth. The Charity Commission sought Barclays Wealth's views on whether the withheld information was

subject to a duty of confidence and/or whether it was commercially sensitive. Barclays Wealth has confirmed that it concurs with the Charity Commission's views.

16. The complainant has argued that the Charity Commission withholding information about the charging rates and chargeable hours of professional trustees is perverse and can't be a correct statement of law. He argues that it prevents those wishing to challenge the charges made by trustees from formulating their case properly and appears contrary to the public interest. He does not consider that there is any commercial sensitivity where the fees relate to a charitable trust as he considers that the public expects any fees that have the effect of reducing charitable giving to be justified.

Does the information have the necessary quality of confidence?

17. The Charity Commission has argued that the information has the necessary quality of confidence as it constitutes commercial information that is not available to the public. It has explained that the information was provided by Barclays following a request from the Charity Commission in furtherance of its statutory objectives, functions and duties. It has explained that Barclays, in its capacity as a professional trustee, understands that had it not provided the information the Charity Commission could compel the relevant charity to cooperate using its powers under the Charities Act 2011. It has also stated that Barclays Wealth was entitled to decide to cooperate but by doing so did not waive or alter the basis upon which the information was provided to the Charity Commission.
18. The Commissioner does not consider that the information is trivial nor is there any evidence to suggest that it is in the public domain. He notes that although some information about the fees charged by professional trustees is publically available this tends to be restricted to '*ad volorem*' rates (fees based on a percentage of the value of a trust). This appears to be the only information available in the public domain about Barclays Wealth's and Coutts' fees. The Commissioner considers that the withheld information, which provides details of hourly chargeable rates and a breakdown of charges in relation to a particular trust, is of a private commercial nature and therefore has the necessary quality of confidence.
19. The Commissioner notes that the information regarding Coutts' fees was disclosed to a member of the public by Barclays Wealth (document 2). He has considered whether this information has lost the necessary quality of confidence.

20. In the case of *S v the Information Commissioner and the General Register Office EA/2006/0030*, the complainant argued that because some aspects of the information requested in that case were known to some people (including the complainant and her family), it no longer retained the necessary quality of confidence. The Tribunal dismissed this argument. It acknowledged that the information may indeed be known to the complainant and her family, and parts of it may be known to others, but drew a distinction between this and information disseminated to the general public. It stated:

*'Whether the information is in the public domain is a matter of degree.'*¹

21. In considering whether the breach of confidence may be actionable, the Tribunal developed the point above, and asked whether information already known to someone independently would have lost its quality of confidence. It concluded:

*"information in the public domain loses the quality of confidentiality but dissemination to a limited number of people does not stop information from being considered to be confidential."*²

22. On this basis, in the circumstances of this case the Commissioner does not consider that the disclosure of the withheld information contained in document 2 to one member of the public has resulted in the information losing its quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

23. The Charity Commission has explained that the withheld information was communicated in a manner which led it to believe that the information was confidential and that it owed a duty of confidence to Barclays Wealth. Barclays Wealth has confirmed that it expected the information to be treated as confidential.
24. The Commissioner considers that, in all of the circumstances of this case, a reasonable person in the Charity Commission's position would have considered that the information was being provided by Barclays Wealth in confidence and that an implied equitable obligation of

¹ *S v the Information Commissioner and the General Register Office EA/2006/0030*, para 43.

² *S v the Information Commissioner and the General Register Office EA/2006/0030*, para 78.

confidence would be imposed upon him under the common law. Therefore, he considers that this element of the test is satisfied.

Would there be an unauthorised use of the information to the detriment of the confider?

25. The Charity Commission has argued that disclosing the withheld information would result in a detrimental impact on the commercial interests of Barclays Wealth. The Charity Commission's reasoning as to how the detriment would occur differs in relation to the nature of the withheld information.
26. Firstly, the Charity Commission has argued that the disclosure of the information in document 1 and 3 concerning Barclays Wealth's hourly chargeable rates and a breakdown of charges for the administration of a particular trust as a professional trustee would put it at a commercial disadvantage in relation to its competitors who would not be required to disclose this information.
27. Secondly, the Charity Commission has argued that the disclosure of the information in document 2 regarding Coutts' fees would have a detrimental effect on Barclays Wealth by impacting upon its professional relationship with Coutts. It argues that Coutts only provided this information to Barclays Wealth as a result of its professional relationship, the information is not publically available and if the Charity Commission disclosed the information it would impact upon Coutts willingness to provide information to and liaise with Barclays Wealth in the future, which is in Barclays Wealth's commercial interests.
28. The Commissioner is of the view that disclosing the hourly chargeable rates charged by Barclays Wealth and the breakdown of charges for the administration of a particular trust as a professional trustee would put it at a commercial disadvantage in relation to its competitors. Barclays Wealth's competitors could use this information to attempt to win business from Barclays Wealth by undercutting their fees. He also considers that the disclosure of Coutts' fees by the Charity Commission would have the described effect on Coutts' relationship with Barclays Wealth, that an open and cooperative relationship is in the commercial interests of both parties and that the effect on this relationship would cause commercial detriment to Barclays Wealth.
29. The withheld information was only held by the Charity Commission as a result of its regulatory role and Barclays Wealth has expressly stated that it would not authorise a disclosure.
30. For the reasons outlined above the Commissioner considers that this element of the test is satisfied.

Is there a defence available to render the breach of confidence unactionable?

31. If the Charity Commission could establish a defence to a breach of confidence for disclosure of the withheld information, otherwise than under the FOIA, the breach of confidence would be rendered unactionable and section 41 of the FOIA would not be engaged.
32. The Commissioner has considered whether there would be a public interest defence to a breach of confidence available to the Charity Commission. For a public interest defence to be available the public interest in disclosure must exceed the public interest in maintaining the confidence.
33. The Charity Commission does not consider that it could rely on a public interest defence. It considers that the public interest is served by the publication of accountancy and financial information regarding the charitable trust as required by statute. It does not consider that there is a particular public interest in the withheld information being disclosed in this case.
34. The complainant has argued that the public interest in disclosure is substantial. He has stated that he would like to challenge further the fees charged by the professional trustees and argues that the disclosure of the withheld information is fundamental to his case. He considers that the public expect transparency in relation to fees where these are paid from charitable funds.
35. The Commissioner considers that there is a wider public interest in preserving the principle of confidentiality. He considers that in this case it would damage the relationship of trust between the Charity Commission and Barclays Wealth, which would discourage Barclays Wealth from providing information voluntarily in the future. He also considers that there is a public interest in protecting the confider, Barclays Wealth, from the detriment that would result from a breach of confidence as outlined above.
36. The Commissioner has taken into account the complainant's public interest arguments. These are based on an allegation of wrongdoing which has not been upheld by the Charity Commission - the relevant regulator in relation to the issues raised. The Commissioner recognises that this is an issue that the complainant feels strongly about. However, in the absence of any independent evidence of wrongdoing he does not consider that he can attribute any particular weight to the complainant's argument as to why the disclosure would be in the public interest.

37. In all of the circumstances of the case, the Commissioner does not consider that a public interest defence would be available to the Charity Commission.
38. For the reasons outlined above, the Commissioner considers that the Charity Commission was entitled to rely on section 41 of the FOIA to withhold the disputed information. It is not therefore necessary to go on to consider its reliance on section 43(2) of the FOIA.

Right of appeal

39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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