

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 August 2015

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

Decision (including any steps ordered)

1. The complainant has requested information from the Charity Commission about its inquiry into a particular charity. The Charity Commission has disclosed some of the information and said that some is already reasonably accessible to the complainant (and so exempt under section 21). The Charity Commission has withheld all of the remainder under section 31 (law enforcement). It says that, in addition, sections 40(1) (personal data of the applicant) and/or 40(2) (third person personal information), and/or 41 (information provided in confidence) and/or 42 (legal professional privilege) and/or 43 (commercial interests) also apply to different elements of the withheld information.
2. The Commissioner's decision is that the Charity Commission has correctly applied the exemption at section 31 to all of the withheld information and that the public interest favours withholding it.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 21 February 2015, the complainant wrote to the Charity Commission ('the Commission') and requested information in the following terms:

*"I request all the information you hold regarding the enquiries made by the Charity Commission into [Named Charity].
I would be very happy to receive the information electronically."*

5. The Commission responded on 18 March. It refused to disclose the information that it holds and cited the exemptions under section 31, section 40 and section 41 as its basis for doing so.
6. Following an internal review the Commission wrote to the complainant on 17 April. It revised its position slightly and disclosed two redacted letters dated 18 February. These showed the conclusions the Commission had reached following its inquiry into certain allegations it had received about the charity. The Commission withheld the remainder under the exemptions it had previously cited and also now relied on the exemptions under section 21, section 40(1) and section 42. With regard to the information being withheld under section 40(1), however, the Commission undertook a Subject Access Review under section 7 of the Data Protection Act (DPA). It then released to the complainant the information that it had withheld under this FOIA exemption, withholding a small amount of the information under section 40(2) and/or section 42.
7. During the Commissioner's investigation, the Commission revisited the disputed information. As a result it wrote to the complainant on 12 August to clarify its reliance on section 21 with regard to some of the information that it has not disclosed. It had withheld the correspondence the complainant had sent to the Commission under this exemption. It now said that it had identified that other information falling within the scope of the complainant's request – extracts from the charity's accounts – are also already available on the Commission's website and so exempt under section 21.
8. The Commission has also subsequently told the Commissioner that the requested information is also exempt from disclosure under section 43.

Scope of the case

9. The complainant contacted the Commissioner on 26 May to complain about the way his request for information had been handled. He confirmed to the Commissioner that he is not satisfied with the Commission's application of sections 31, 40 and 41 to the withheld information. In addition to these exemptions, the complainant is not satisfied with the Commission's review. He considered that the Commission had wrongly interpreted his information request to cover only correspondence. In fact, his request covered ALL related information that the Commission holds and his is particularly interested in any evidence the Commission had received regarding the allegations against the charity.

10. The complainant confirmed that it would not be necessary for the Commissioner to investigate the redactions (under section 40(2) and section 42) that the Commission applied to the information it released under section 7 of the DPA (see paragraph 6).
11. The Commission referred the Commissioner to an email it had sent to the complainant on 29 April. In this email the Commission explained that when it reviewed its original response, it had reviewed all the related information that it holds. This included correspondence and attachments, internal documents, legal advice, minutes of meetings, telephone calls and documents provided as part of the Commission's visit to the charity.
12. Having seen the withheld information, the Commissioner is satisfied that the Charity Commission interpreted the complainant's request broadly, and considered all the information that it holds and that falls within the scope of the request. Following correspondence and clarification from the Commission, the Information Commissioner has focussed his investigation on the Commission's application of section 31 to all the information it has withheld. If necessary, he has been prepared to go on to investigate its additional application of 40(2), 41, 42 and 43 to different elements of the information.

Reasons for decision

13. Section 31(1)(g) of the FOIA says that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice a public authority's ability to exercise its functions for any of the purposes specified under subsection (2).
14. The purposes under subsection (2) specified by the Charity Commission are:
 - 31(2)(a) – the purpose of ascertaining whether any person has failed to comply with the law
 - 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise
 - 31(2)(f) – the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration; and
 - 31(2)(g) – the purpose of protecting the property of charities from loss or misapplication.

15. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in preventing that prejudice must outweigh the public interest in disclosure.
16. To engage the exemption a public authority must:
 - demonstrate that it has been entrusted with a function to fulfil one of the purposes listed in subsection (2)
 - confirm that the function has been specifically designed to fulfil that purpose; and
 - explain how the disclosure would prejudice that function.
17. In reference to the purposes described in sections 31(2)(a) – (e), the Commissioner notes in his guidance on section 31 that they all include the term 'ascertaining' and explains that 'ascertain' should be read as meaning to make certain or prove. The Commissioner goes on to say that in this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty.
18. In the same guidance, the Commissioner says that the Charity Commission is the most obvious public authority with functions for the purposes described in section 31(2)(f) and (g). For example, under section 46 of the Charities Act 2011 the Charity Commission can formally investigate possible misconduct. Importantly, it also has the power, under section 79 of that Act, to suspend a trustee. So not only can it investigate the matter, it has the power to take the necessary steps to effectively protect the charity.
19. The onus will be on the public authority claiming these exemptions to demonstrate that it, or another public authority, has a function described by the particular exemption and how disclosing the requested information would prejudice the performance of that function.
20. The Charity Commission has told the Commissioner that its statutory objectives and functions are set out in sections 14 and 15 of the Charities Act 2011. Its objectives include promoting compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities. The Commission's functions include encouraging and facilitating better administration of charities and identifying and investigating apparent misconduct or mismanagement in the administration of charities. It is charged with taking remedial or protective action in connection with misconduct or mismanagement in charities' administration. The Charity Commission

has rightly identified that, on a number of occasions (for example in [FS50535948](#)), the Commissioner has accepted that the Commission is the public authority that has been established to:

- protect charities from misconduct and mismanagement; and
- protect the properties of charities from loss or misapplication.

21. The effect of the Charities Act is that the Commissioner is satisfied that the first two stages of the test at paragraph 15 have been met; namely that the Charity Commission has been entrusted with a function to fulfil the purposes specified at sections 31(2)(a),(c), (f) and (g) and that the function has been specifically designed to fulfil those purposes. The Commissioner has therefore gone on to consider the third stage of the test. This requires a public authority to be able to demonstrate that disclosure would, or would be likely to, have a prejudicial effect.
22. The requested information concerns allegations the Commission received from a number of individuals (one of which is the complainant in this case) about the governance of a charity and the conduct of its trustees, who have legal duties. The Commission has told the Commissioner that it considered these allegations in detail and sought further information from the charity's trustees, their legal advisors, the complainants and relevant third parties.
23. The Commission has gone on to explain to the Commissioner why releasing the information it is withholding would be likely to prejudice (as opposed to *would* prejudice) its ability to carry out the purposes set out in sections 31(2)(a), (c), (f) and (g). While this places a weaker evidential burden on the Charity Commission to prove that the exemption is engaged, it nevertheless requires that the Commission is able to demonstrate that there is a real and significant risk of the prejudice occurring.
24. In this context, the Commissioner considers that the most obvious example of where disclosure could lead to a prejudicial effect is where the requested information relates to an ongoing investigation. This is because it could affect the willingness of an organisation to co-operate with the investigation. The Commission says that the case in question formally closed in March 2015 but that even though the case is now closed, there remain live issues regarding further complaints about the charity's governance and other allegations. The Commissioner notes, however, that this would mean that at the time of the complainant's request in February, the case was still open.
25. The Commission has argued that if it becomes known that it regularly releases all information concerning a particular case, either while the

case is ongoing or shortly after it has closed and while the outcomes of that case are being worked through, this would be likely to impact detrimentally on the willingness of charities and members of the public to voluntarily supply information to the Commission. In turn, this would inhibit the Commission's ability to gather the information necessary to investigate cases effectively. The Commission says that in order to consider whether it needs to use its powers to protect charities from misconduct and mismanagement, and protect charity property, as the Commission did in the case in question, it needs to have open and candid dialogue with charity trustees and others.

26. As mentioned, the Commissioner has noted that at the time of the request the case appears to have still been open. In its submission, the Commission says that, although the case is now closed, there remain ongoing live issues. These include those previously referred to at paragraph 24 and the fact that, although it has already reviewed its handling of the case, the Commission's handling of the case and the outcome of its investigation could be subject to further review. The Commission says that it therefore requires the ongoing cooperation of the charity's trustees.
27. The Commission has referred to the fact that the Information Commissioner recognises that in cases that are only recently closed (and more so in cases that are still ongoing at the time of the request, as was the situation here) the arguments that disclosure is likely to prejudice a public authority's ability to carry out its functions may remain strong.
28. The Commissioner has accepted arguments regarding the voluntary supply of information on a number of occasions. The Commission has referred to paragraph 94 in FS50184898 which says: *"In reaching this conclusion [ie upholding the Commission's application of section 31] the Commissioner recognises that the Charity Commission's argument is more sophisticated than suggesting the disclosure of information in response to this request will result in trustees refusing to communicate with the Charity Commission at all. Rather it is the nature of those communications that will change and thus both the Charity Commission's formal and informal methods will be affected as well as its ability to gather/receive wider intelligence."*
29. The Commission says that one of the factors in considering the likely prejudice is the content of the information. Having seen the withheld information, the Commissioner agrees that it concerns serious allegations about a number of people, concerns about the governance of the charity and possibly an underlying personal dispute. The Commission says that any disclosure would be damaging to the charity, which has been in a relatively fragile financial position. The charity is

also part of a relatively small geographic community which the Commission says may also increase the seriousness of the disclosure, both for the charity and for the individuals who have contributed to the Commission's case. The Commission consequently argues that all these factors would be likely to lead to people being less willing to cooperate and provide information to the Commission. In turn, the Commission's ability to regulate effectively would be prejudiced.

30. The information being withheld includes information about the Commission's internal procedures for deciding whether the legal test for opening an inquiry under section 46 of the Charities Act had been met, and whether in all the circumstances it would be appropriate to do so. The Commission says that it publishes its risk framework and information about its inquiry powers. However, the Commission says that the information being withheld in this case goes far beyond what is in the public domain. It says that this information, about the Commission's internal investigatory practice, could be used to help trustees in the future to delay or avoid an inquiry being opened. Again, the Commission says that this would be prejudicial to its ability to regulate effectively.
31. Finally, the Commission says that the withheld information also contains exchanges of information with a government department. The Commission says that it helps it if there is a quick exchange of information, including opinions, with officials in relevant departments. It enables the Commission to have important sources of information that would not otherwise be available to it. The Commission argues that if this exchange of information was disclosed it would be likely to prejudice the Commission's ability to fulfil its functions. This is because it considers that disclosing the information may impede this quick access to authoritative information in future.
32. The Commissioner has considered the Charity Commission's arguments and is satisfied that they engage the exemption in respect of the four purposes it has cited in section 31(2). In coming to this view, the Commissioner acknowledges that under sections 47, 48 and 52 of the Charities Act the Charity Commission does have powers to compel a third party to provide the information it requires to fulfil its regulatory role. Even if a party was reluctant to co-operate with the Charity Commission because of the possibility that confidential information could be disclosed, this intransigence could effectively be overcome through the use of the powers in the Charities Act. On the face of it, this would therefore seem to counter the possibility that disclosure could have a detrimental effect on the Charity Commission's ability to discharge its regulatory functions.

33. However, as in FS50535948, when considering what, if any, prejudice could arise, the Commissioner also understands that the Charity Commission will need to receive information from a wide range of third parties when deciding whether it was required to take a pro-active role in protecting a charity from mismanagement and misconduct. In FS50535948, the Charity Commission also argued, and the Commissioner accepted, that the issuing of orders for information is far more administratively bureaucratic than making enquiries informally to a co-operative party. The greater use of formal powers would inevitably slow down and potentially frustrate the Charity Commission's future investigations. The Commissioner considers that this argument is relevant here.
34. Noting that the Commission's inquiry was still open at the time of the request, the Commissioner considers that the third stage of the test at paragraph 15 has been met. He is satisfied that releasing the disputed information would have been likely to have a prejudicial effect on that inquiry, which in turns means that that each of the three conditions connected to the engagement of section 31(1)(g) has been satisfied. The Commissioner is satisfied that the Charity Commission has correctly applied the exemption under section 31. He has therefore gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

35. As mentioned at paragraph 14, section 31 of the FOIA is a qualified exemption and can only be used to withhold information if the public interest in withholding the information outweighs the public interest in releasing it.
36. The Charity Commission has taken into account the genuine public interest in knowing how the Commission operates and spends public money. The public has a legitimate interest in the internal workings of the Commission so that a view can be formed about how effective and efficient this public authority is.
37. The Charity Commission has also acknowledged that charities are established for the public benefit and there is therefore a legitimate public interest in knowing how a particular charity is operating. It notes that the complainant subsequently raised this issue with the Commission at internal review, saying that he did not understand the evidence that enabled the Commission to reach the decisions that it did in this particular inquiry. As mentioned at paragraph 6, on 17 April the Commission had then released to the complainant two closing letters it had sent to the charity which detailed the Commission's conclusions and explained some of the evidence that it had taken into consideration when reaching its decision.

Public interest arguments in favour of maintaining the exemption

38. The Charity Commission says that there is strong public interest in it being an effective and efficient regulator that is able to successfully regulate the charity sector. As detailed in this notice, it has explained to the Commissioner why disclosing the withheld information may impede the willingness of people and organisations to volunteer information that would help the Commission with its inquiry into this particular charity – still open at the time of the request with some issues still ongoing – and charities more generally in the future.

Balance of the public interest

39. The Commissioner has considered whether the combined weight of the arguments for releasing the information is sufficient justification for ordering disclosure in the face of the prejudice to the Charity Commission's regulatory activities that would be likely to arise.
40. He accepts that the complainant has a particular interest in the charity in question but notes that the Charity Commission has investigated the complainant's concerns and provided him with some information regarding the conclusions it reached and the evidence on which it based those conclusions.
41. Disclosure under the FOIA is disclosure to the world at large. The Commissioner does not consider that there is a wider public interest in the disputed information that it is of such significance that it outweighs the public interest in having an effective regulator of the charity sector.
42. The Charity Commission is the independent regulator of charities and has the aim of ensuring that charities are accountable, well run and meet their legal obligations. Members of the public have the opportunity to bring any serious concerns about a charity to the Charity Commission in the expectation that it will then make a decision on whether there was a regulatory issue that warranted its active involvement. In short, there must exist for the public an independent and effective body that can ensure that charities are well-managed.
43. The Commissioner is therefore satisfied that the public interest in this case favours withholding the disputed information.
44. Because the Commissioner has decided that the information is exempt from disclosure under section 31 of the FOIA, and that the public interest favours maintaining this exemption, it has not been necessary to investigate the Charity Commission's additional application of sections 40(2), 41, 42 and 43 to the information it is withholding.

Right of appeal

45. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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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