

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2019

Public Authority: Charity Commission for Northern Ireland
Address: 257 Lough Road
Lurgan
Craigavon
Northern Ireland
BT66 6NQ

Decision (including any steps ordered)

1. The complainant has requested the Charity Commission for Northern Ireland (CCNI) to disclose any communication between the CCNI and the Northern Ireland Public Service Ombudsman (NIPSO) in relation to the publication or withholding of NIPSO's investigation report on an named individual and the CCNI. Initially, CCNI refused to confirm or deny whether it held any recorded information citing section 44(2) of the FOIA. However, during the Commissioner's investigation the application of section 44(2) was withdrawn and CCNI confirmed that it now wished to rely on section 44(1)(a) of the FOIA.
2. The Commissioner's decision is that CCNI is entitled to refuse to disclose the requested information in accordance with section 44(1)(a) of the FOIA. The Commissioner therefore does not require any further action to be taken.

Request and response

3. On 26 July 2018, the complainant wrote to CCNI and requested information in the following terms:

"Any communication between the Charity Commission and the Northern Ireland Public Services Ombudsman in relation to the publication or

withholding of NIPSO's investigation report on [named redacted] and the Charity Commission."

4. CCNI responded on 16 August 2018. It refused to confirm or deny whether the requested information is held in accordance with section 44(2) of the FOIA.
5. The complainant requested an internal review on 9 November 2018. In earlier correspondence, he provided a link to information already published on the BBC News website and disputed the application of section 44(2) of the FOIA.
6. CCNI carried out an internal review and notified the complainant of its findings on 6 December 2018. It upheld its initial position and stated that it can neither confirm nor deny whether the requested information is held as to do so is prohibited by or under any enactment, in this case section 49 of the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act).

Scope of the case

7. The complainant contacted the Commissioner on 31 August 2018 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether CCNI is entitled to rely on section 44(2) of the FOIA in this case.
8. During the Commissioner's investigation CCNI withdrew its application of section 44(2) of the FOIA. It noted that due to the statements and coverage it was inappropriate to rely on section 44(2). It confirmed that it does hold recorded information falling within the scope of the request but it now wished to rely on section 44(1)(a) of the FOIA.
9. The Commissioner has therefore proceeded to consider whether CCNI is entitled to rely on section 44(1)(a) of the FOIA, as its basis for refusing to disclose the information it does hold falling within the scope of the request.

Reasons for decision

10. Section 44 of the FOIA states that information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - (a) is prohibited by or under any enactment,

- (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
11. Section 44 is an absolute exemption, which means that if the information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to the public interest test.
 12. CCNI confirmed that the relevant enactment in this case is the 2016 Act. It argued that this legislation, which governs the operations of NIPSO, contains a statutory bar on disclosure of information gathered in the course of their investigations that is common for regulators and ombudsman bodies across the public sector.
 13. It stated that section 49 of the 2016 Act states:
 - (1) The information to which this section applies is –
 - (a) Information obtained by the Ombudsman –
 - (i) in deciding whether to begin an investigation,
 - (ii) in the course of an investigation,
 - (iii) in resolving a complaint under section 10,

Subsection (2) states that this information 'must not' be disclosed save for specific circumstances in that section. One of those exemptions, (2(d)), is disclosure for the purposes of a statement or report about an investigation.
 14. CCNI said that section 30(5) of the 2016 Act states that 'an investigation must be conducted in private', thereby protecting the confidentiality of the Ombudsman's investigations and information obtain for those purposes.
 15. It referred to the Commissioner's own guidance on section 44 and confirmed that this makes it clear that the Commissioner will not interfere with the Ombudsman's exercise of discretion not to apply any of the exemptions that would allow its disclosure.
 16. It also stated that in its view the statutory prohibition would encompass all correspondence entered into with NIPSO and that this is supported by the wording of section 49 of the 2016 Act. CCNI also advised that it is of the opinion that the statutory prohibition is not only applicable to NIPSO itself but extends to CCNI in this instance. Additionally, CCNI confirmed that it had assessed the contents of the withheld information and believed it all related to the course of the investigation. It commented that one communication could be seen to relate to a matter of process

rather than the substance of investigation and the draft report. However, in its view it is still caught by the exemption because the submission on publication was made as part of CCNI's response to the draft report at a time when the investigation cannot be said to be concluded and the submission on publication is tied to the substance of the investigations and any objections it had to the findings of fact in the draft report.

17. The Commissioner considers section 49 of the 2016 Act places restrictions on the disclosure of information obtained by NIPSO in the course of or for the purposes of an investigation.
18. The relevant consideration here is whether the Commissioner agrees the requested information falls within the scope of the prohibition; in other words whether the requested information is information obtained by the Ombudsman in the course of an investigation.
19. The Commissioner has reviewed the contents of the withheld information and she is satisfied that it does fall within the scope of the prohibition. CCNI's responses to NIPSO are quite clearly information obtained by the Ombudsman in the course of an investigation. With regards to NIPSO's communications with CCNI, it is the Commissioner's view that these can only have been written during an investigation during which NIPSO will have obtained information about the merits of the complaint from the complainant and complained against. The correspondence will be the result of and discuss the information obtained, its merits and NIPSO's decision both in terms of the complaint itself and the decision whether to publish a final report or not. She considers that it cannot be said that this correspondence is more general correspondence which does not relate to a specific investigation, because it quite clearly does.
20. The Commissioner is also satisfied that the statutory bar extends to CCNI. If it did not it could create a back door to information which would otherwise be withheld pursuant to section 44. She has considered the wording of this particular statutory bar and is satisfied that it is wide enough to allow CCNI to claim section 44 of the FOIA in relation to the information it has provided to or obtained from NIPSO.
21. The Commissioner considers that if NIPSO relies on a gateway (which provides an exemption from the prohibition in section 49 of the 2016 Act) to publish a final version of its determinations (different to the draft report sent to CCNI), it is to the discretion of NIPSO in a given case whether it uses the exemption to dis-apply the prohibition and therefore use the gateway or not. It is not within the Commissioner's remit to question the use, or not, of the exemption in a particular case. This is a decision for NIPSO alone. Therefore for these reasons, if NIPSO decides

not to use the exemption to the prohibition in a particular case, the prohibition from disclosure under section 44(1)(a) must continue to apply.

22. The Commissioner is of the view that if one wishes to challenge the use, or not, of an exemption, this can only be done with NIPSO direct or via judicial review. There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large.
23. For the above reasons, the Commissioner has concluded that the requested information is exempt from disclosure under section 44(1)(a) of the FOIA.

Right of appeal

24. 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@justice.gov.uk

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

25. 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.
26. 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

Samantha Coward
Senior Case Officer
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Wycliffe House
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