

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2017

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

Decision (including any steps ordered)

1. The complainant has requested communications relating to a complaint he made to the Charity Commission about a particular charity. The Charity Commission refused to disclose the requested information under section 31(1)(g) with subsection (2)(a), (b), (c), (f) and (g) FOIA.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(1)(g) with subsection 2(f) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 7 February 2016 the complainant made the following request for information under the FOIA relating to a complaint about a specific named charity:
 1. Information about the correspondence between the Charity Commission and the charity's trustees.
 2. Answers provided by the charity's trustees.

5. On 25 February 2016 the Charity Commission responded. It refused to disclose the requested information under section 31(1)(g) with subsection (2)(a), (b), (c), (f) and (g) FOIA.
6. The complainant requested an internal review on 28 February 2016. The Charity Commission sent the outcome of its internal review on 7 April 2016. It upheld its original position.

Background

7. The Charity Commission explained that the named charity has been subject to a series of long running disputes dating back to 1986 relating to its governing deed, the validity of trustees appointments and the occupation and possession of the charity's property at [specified address]. The dispute resulted in a number of different separate court proceedings both in the High Court and Court of Appeal. The former chairman of the named charity and former founder members contributed to the purchase of the property at [specified address] but were replaced by other trustees forming the subject matter of court actions including dispute over possession of the property. The named charity itself incurred considerable debts arising from the legal actions the enforcement of which ultimately led to the sale of the property.

Scope of the case

8. The complainant contacted the Commissioner on 2 June 2016 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Charity Commission was correct to withhold the information which was withheld under section 31(1)(g) with subsection 2(a), (b), (c), (f) and (g) FOIA.

Reasons for decision

10. The Charity Commission has argued that the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority the functions set out in 31(2) of FOIA.

11. The purposes that the Charity Commission has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2):
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) The purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) ascertaining whether circumstances would justify regulatory action;
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) protecting the property of charities from loss or misapplication;
12. In order for section 31(1)(g) of FOIA to be engaged, the Charity Commission must be able to demonstrate that the potential prejudice being argued relates to at least one of the interests listed above.
13. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
14. The Charity Commission has stated that they believe the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the Charity Commission to discharge, it still requires the Charity Commission to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
15. The Commissioner has considered the application of section 31(2)(f) FOIA in the first instance. The Commissioner has therefore looked at whether the Charity Commission is formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration.
16. The Charity Commission's role as the regulator of charities is set out at section 14 of the Charities Act 2011, which describes five statutory objectives. In addition, section 15 of the Charities Act expresses the Charity Commission's general statutory functions. These include

protecting charities from misconduct and mismanagement and protecting the property of charities from loss or misapplication.

17. The Charity Commission explained that the request arose in the context of a complaint about a named charity and the Charity Commission's response to that complaint. The withheld information is correspondence with the trustees and the Charity Commission's response to the complaint that it had written to the trustees. The specific regulatory engagement by the Commission with the trustees concerned an allegation that property had been sold at an undervalue and that the named charity was not pursuing its object.
18. The Charity Commission explained that the ICO has, on a number of occasions, accepted that the Charity Commission is the public authority that has been established to:-
 - protect charities from misconduct and mismanagement and
 - protect the property of charities from loss or misapplication.

For example in case FS50535948 at para 15 the Commissioner stated that, "The effect of the Act is that the Commissioner is satisfied that the first two stages of the aforementioned test are satisfied; namely that the Charity Commission has been entrusted with a function to fulfil the purposes specified at sections 31(2)(c) and (f) and that the function has been specifically designed to fulfil those purposes."

19. In this case the Commissioner is satisfied that the Charity Commission has been formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration and that this function was specifically designed to fulfil this purpose.
20. The Commissioner has therefore gone on to consider how disclosure would be likely to prejudice this function.
21. The Charity Commission explained that at the time of the request the Commission was still in the process of seeking information from the trustees. The release of information at the time the Charity Commission is actively engaged in seeking to establish the full circumstances from the trustees is likely to impact on the willingness of trustees to continue to engage fully and openly with the Charity Commission in that process.
22. It said that although the Charity Commission's case from which the subject of the request arises was closed in April 2016, and the prejudice above may be said to no longer apply to the specific question in relation to the sale of the land, the Charity Commission may still

wish to continue to engage with the trustees in relation to its further application of sale proceeds and the pursuit of its charitable objectives including the purchase of an alternative property. The ability to do so is likely to be prejudiced if disclosure is made. If the trustees believe each item of correspondence will be subject to disclosure and the engagement conducted in a public forum they are unlikely to be willing co-operate. This will apply equally to all correspondence either from the Commission seeking information or the answers provided.

23. It said that a further consideration of disclosure at the present time is that if it becomes known that the Charity Commission regularly releases all correspondence concerning a particular case either while the case is ongoing or shortly after it has closed, this is likely to impact detrimentally on the willingness of charities and members of the public to voluntarily supply information to the Charity Commission. This would significantly inhibit its ability to gather information. In order to consider whether the Charity Commission needs to use its powers and protect charities from misconduct or mismanagement and protect charity property it needs to have open and candid dialogue with charity trustees and others.
24. It went on that although the Charity Commission does have formal information gathering powers in section 52 of the Charities Act 2011, asking for information by issuing an order is far more administratively bureaucratic than making a simple request in an email or over the telephone. 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 thus prejudicing 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. Such communication cannot take place if the Charity Commission can only obtain information by using its powers.
25. It summarised that the Commissioner has accepted arguments regarding the voluntary supply of information on a number of occasions. For example in FS50184898 at para 94 the Commissioner stated "In reaching this conclusion the Commissioner recognises that the Charity Commission's argument is more sophisticated than suggesting that 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."

26. The Commissioner considers that the Charity Commission is formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration. Its ability to fulfil this function effectively is dependent upon a charity's willingness to voluntarily supply and openly share information to assist with a Charity Commission investigation. In this case the Charity Commission confirmed that its investigation concluded in April 2016 however the request predated this as it was made in February 2016. Furthermore the Charity Commission has explained that it may still wish to continue to engage with the trustees relating to potential ongoing matters. The Commissioner therefore accepts that disclosure would be likely to result in the prejudicial effects to the Charity Commission's purposes described at sections 31(2)(f) of FOIA. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Arguments in favour of disclosing the information

27. The Charity Commission argued that charities are established for the public benefit and therefore there is a legitimate public interest in knowing how a particular charity is operating and that it has complied with the requirements for disposal of property and that it has not done so at an undervalue. There is also a public interest in the openness and transparency of decision making of the Commission which weighs in favour of releasing the information.

Arguments in favour of maintaining the exemption

28. The Charity Commission argued that there is a strong public interest in an effective regulator, able to effectively and efficiently regulate the sector and promote the effective use of charitable resources. Disclosure would be likely to have a negative impact on the Charity Commission's ability to regulate charities, and those considerations weigh against releasing the information in question. Similarly it said in case reference FS50488815 at para 37 the Commissioner stated, "The Commissioner does also consider that there is a strong public interest in not disclosing information which would be likely to impede the Charity Commission's ability to carry out its functions effectively. Therefore, disclosing information which would be likely to frustrate the voluntary

flow of information between charities and the Charity Commission would not be in the public interest.”

Balance of the public interest

29. The Commissioner considers that there is a strong public interest in the Charity Commission operating openly and being accountable in its effectiveness in carrying out its statutory functions and in particular how it interacts with the charities it regulates. In addition the Commissioner understands that the complainant has private interests in the withheld information, however this cannot be confused with the wider public interest.
30. As referenced above, the Commissioner does consider that there is a strong public interest in not disclosing information which would be likely to impede the Charity Commission's ability to carry out its functions effectively. Therefore disclosing information which would be likely to frustrate the voluntary flow of information would not be in the public interest. This is particularly so in this case as the request was made prior to the completion of the Charity Commission's investigation in April 2016.
31. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(f) FOIA was correctly applied in this case to the withheld information. The Commissioner has not therefore gone on to consider the application of any of the other exemptions any further.

Right of appeal

32. 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

33. 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.
34. 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

Gemma Garvey
Senior Case Officer

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