

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2021

Public Authority: The Charity Commission
Address: PO Box 211
Bootle
L20 7YX

Decision (including any steps ordered)

1. The complainant requested a list of fee-paying schools that had charitable status. The Charity Commission originally stated that it did not hold the requested information, but later relied on section 12 of the FOIA (cost exceeds appropriate limit) to refuse the request.
2. The Commissioner's decision is that the Charity Commission is entitled to rely on section 12 of the FOIA to refuse the request. However, as the Charity Commissioner did not issue its refusal notice within 20 working days, it breached section 17 of the FOIA. As the Charity Commission also failed to inform the complainant, within 20 working days, that it held relevant information, it breached section 10 of the FOIA.
3. The Commissioner does not require any further steps.

Request and response

4. On 28 September 2020, the complainant requested information of the following description:

"the list of private schools across the whole age range who gain charitable status through schemes for public benefit and their stated projects that qualify them for this tax concession."
5. On 26 October 2020, the Charity Commission responded. It denied holding the requested information. Whilst it accepted that it would hold details of private schools with charitable status, the information was not held in an easily-searchable format and therefore could not be provided.

6. The complainant requested an internal review. The Charity Commission sent the outcome of its internal review on 3 December 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 January 2021 to complain about the way her request for information had been handled.
8. The Commissioner commenced her formal investigation on 16 July 2021 with a letter to the Charity Commission. She noted that, whilst it may not hold a precise list, the content of its responses indicated that the Charity Commission did in fact hold the building blocks from which a list could be compiled – and that the question of whether particular information was held was a matter of fact and not determined by resources. Given the Charity Commission's previous indications that it would not be able to retrieve the information easily, rather than prolong the investigation, she asked the Charity Commission to reconsider its response and, if it agreed that it would hold information, to provide her with an estimate of the cost of complying with the request.
9. The Charity Commission responded on 17 September 2021. It now accepted that it would (at least in theory) hold the information, but it considered that the burden of complying with the request would be unreasonable. It stated that it now wished to rely on section 12 of the FOIA because the cost of complying would easily exceed the appropriate limit. However, it also stated that it wished to rely additionally on section 14 of the FOIA (vexatious) to refuse the request as the request would impose a grossly oppressive burden. It drew attention to the findings of the First Tier Tribunal in *IPCC v Information Commissioner* (EA/2011/0222) in which the Tribunal had ruled that:

"A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12."

10. The Commissioner considered whether to make a decision on whether or not the request engaged section 14, but decided not to do so. Firstly, decisions of the First Tier Tribunal are not legally binding and the Commissioner is under no obligation to follow them. Her own guidance discourages public authorities from relying on section 14 if their sole reason for doing so is the cost of complying with that request and they would be able to rely on section 12. This echoes the view of the Upper Tribunal in *Craven vs The Information Commissioner & The Department*

of Energy and Climate Change [2012] UKUT 442 (AAC) which stated that:

'...if the public authority's principal reason (and especially where it is the sole reason) for wishing to reject the request concerns the projected costs of compliance, then as a matter of good practice serious consideration should be given to applying section 12 rather than section 14 in the FOIA context. Unnecessary resort to section 14 can be guaranteed to raise the temperature in FOIA disputes...'

11. Given that the Court of Appeal has ruled that a vexatious request is one with "no reasonable foundation," the Commissioner accepts that applying section 14 carries an implication that the requestor has, either in making the request or prior to the request, behaved unreasonably (although the Charity Commission has not suggested that this was the case with this request and its objections were solely on the grounds of burden). Therefore, the Commissioner considered that proceeding to reach a decision on section 14 would have been unfair without offering the complainant the opportunity to make her own representations as to why section 14 was not engaged.
12. Given her findings set out below, the Commissioner considers that whether section 14 is, or is not engaged, is immaterial – as the Charity Commission would not be obliged to comply with the request anyway. If section 12 is engaged, it would be entitled to rely on that exemption. If section 12 is not engaged, the Charity Commission would not be entitled to rely on section 14 either as its estimate of the burden only includes the activities permitted under section 12. Therefore seeking a submission from the complainant on section 14 would only serve to delay the eventual decision even further.
13. The Commissioner considers that the scope of her investigation is to determine whether the Charity Commission is entitled to rely on section 12 of the FOIA to refuse the request.

Reasons for decision

Section 12 – Cost of Compliance Exceeds Appropriate Limit

14. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

15. Section 12 of the FOIA states that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

16. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £450 for a public authority such as the Charity Commission. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

17. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

18. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible,

realistic and supported by cogent evidence”.¹ The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The Charity Commission's position

19. The Charity Commission explained to the Commissioner that, once it had accepted that it held the building blocks from which the requested information could be compiled, it had turned its attention to the question of the searches that it would need to carry out in order to locate all the data necessary to compile the requested information.
20. The Charities Act 2011 requires the Charity Commission to:

"maintain a Register of Charities. The Register must contain the name of the charity and such other information about the charity as the Commission determines."
21. The current register contains in excess of 170,000 entries and the basic information it contains is already publicly available.
22. The Charity Commission noted that it had tried searching for all charities on its register with the word "school", "academy" or "college" in its name. This had returned over 15,000 entries including charities such as Sunday schools, cooking schools and preservation trusts for former school buildings – which would fall outside the scope of the request. More pertinently, the Charity Commission also identified that some schools which did have charitable status (such as "St Mark's Taunton" or "Educational Trust") did not have names which contained any of these words and so would not be identified by such searches.
23. Alternatively, the Charity Commission considered whether it could instead carry out searches of each organisation's charitable purpose to locate those organisations with words such as "education", "school" or "college" in their title, but again rejected this method. Not only would such searches be likely to throw up a lot of irrelevant results (such as think tanks or research charities which may aim for the "advancement of education" but some schools might still fall outside the scope of such searches – for example, religious schools' charitable purpose may be listed as the advancement of religion, rather than education.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

24. The Charity Commission's IT department also tried some further textual searches of information, but these proved to be too narrow.
25. Therefore, having exhausted these options, the Charity Commission concluded that the only reliable method of identifying all the organisations that would fall within the scope of the request would be to undertake a manual search of all 87,000 charities whose objective is classed as "education/training."
26. Having carried out a sampling exercise on 20 such organisations, the Charity Commission estimated that it would take 5 minutes per organisation, on average, to determine whether the organisation was a fee-paying school. The five minutes included the time taken to locate the relevant files for the organisation and to search the information contained to determine whether or not the organisation was a fee-paying school. On that basis, it estimated that it would take 7,250 hours to locate all relevant information – at a notional cost in excess of £180,000.

The Commissioner's view

27. The Commissioner accepts that the Charity Commission has reasonably estimated that the cost of complying with the request would exceed the appropriate limit.
28. The way in which a public authority holds its records is a matter for the public authority to determine itself – based on statutory requirements and its own business needs. When determining whether an estimate is reasonable, the Commissioner need only concern herself with the way that the information is, as a matter of fact, held – and not whether the public authority *ought* to be able to derive any particular information more easily.
29. In *Kirkham v Information Commissioner (Section 12 of FOIA) [2018] UKUT 126 (AAC)*, the Upper Tribunal judge set out the considerations a public authority must take into account when embarking on searches for information.

"I accept that there is never a guarantee that public authorities will be able to retrieve every piece of information that they hold within the scope of a request. That may be because it was wrongly stored: a document may be put into the wrong file or a name may be misspelt in an email. Or it may be because of a mistake in the search, whether human or electronic. But just because a search may fail to discover all the relevant information does not mean that it will always do so...I do not accept that it is permissible to interpret FOIA in a way that is guaranteed not to allow a public

authority the chance to comply with its duty. Success may not be guaranteed, but failure cannot under the terms of the legislation be the only option."

30. Whilst the search terms the Charity Commission has set itself are considerable, the Commissioner is satisfied that it has provided a detailed submission setting out why narrower searches would be unlikely to locate all relevant information. The Charity Commissioner is not allowed to only carry out searches that it already knows will not identify all relevant information.
31. Having accepted that it will be necessary to search the records of all 87,000 records of charities whose purpose is classed as "education/training", the Commissioner accepts that there is no reasonable prospect of such searches being carried out within the cost limit. She also accepts that the estimate only includes the time that would be needed to carry out the permitted activities that can be included in such an estimate.
32. Even if the Commissioner were to consider that the Charity Commission's central estimate of five minutes per organisation could be substantially reduced, in order to comply without exceeding the 18 hour deadline, the Charity Commission would have to be able to search the records of more than 80 organisations per minute – which the Commissioner does not consider feasible.
33. The Commissioner therefore accepts that the Charity Commission has made a reasonable estimate that the cost of compliance would exceed the appropriate limit. It thus follows that section 12(1) of the FOIA is engaged.

Advice and assistance

34. At the internal review stage, the Charity Commission noted that the Department for Education publishes a list of schools which the complainant could cross-reference with the Register to compile the requested information. As the Charity Commission itself does not hold that information it is not required to acquire it in order to satisfy the request.
35. Although the Charity Commission was not, at that stage, relying on section 12, the Commissioner considers that there is little more useful advice and assistance it could have provided. She is therefore satisfied that the Charity Commission complied with section 16 of the FOIA.

Procedural Matters

36. Section 10 of the FOIA requires a public authority to confirm, within 20 working days, whether it holds any information within the scope of a request.
37. The Charity Commission initially informed the complainant that it did not hold the requested information within the scope of her request and it was only when the Commissioner intervened that it confirmed that it did hold some information.
38. The Commissioner therefore finds that the Charity Commission breached section 10 of the FOIA in responding to the request.
39. Section 17(5) of the FOIA states that:

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
40. The Charity Commission failed to inform the complainant that it was relying on section 12 (or section 14) of the FOIA to refuse her request. The Commissioner therefore finds that the Charity Commission breached section 12 of the FOIA.

Right of appeal

41. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. 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

Roger Cawthorne
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