



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2017/0286

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50688200
Dated: 21 November 2017

Appellant: Jonathan Baggs

Respondent: The Information Commissioner

Papers Considered: Fleetbank House London EC

On: 11 May 2018

Before

Chris Hughes

Judge

Anne Chafer and Mike Jones

Tribunal Members

Date of Decision: 29 May 2018

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 21 November 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Baggs has, for some time, been concerned about the funding of Melness and Tongue Community Development Trust (the trust). He contacted the Big Lottery Fund (BLF) in 2015 seeking information about complaints the BLF had received about the trust. On that occasion BLF refused to confirm or deny whether information was held relying on the provisions of s31(3) FOIA.

(3)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

2. S31(1) provides an exemption from disclosure of matters relating to law enforcement.
3. Mr Baggs made a further request to BLF on 3 April 2017 seeking information about the trust. In doing so he noted that the Office of the Scottish Charity Regulator (OSCR) had released information about a concern raised with it in 2011. He therefore requested:-

Copies of all documents and letters with regard to this complaint/investigation. I would also like to have viability [sic] of any subsequent complaints as per my original Request.

4. BLF replied on 25 April explaining how it understood the complaint. It confirmed that it had not been aware of the OSCR activity and relied on s31(3) to neither confirm nor deny whether it held material for the period 6 August 2015 (the date of the first request) to 3 April 2017.
5. Mr Baggs sought a review of that decision and on the same date (27 April) made a further request (repeated on 2 May) in which he sought '*all information from all time periods, on complaints or investigations [into the Melness and Tongue Community Development Trust and associated bodies] or any known to Big Lottery or any organisation associated with the Big Lottery Fund that you have information stored on.*' On 3 May he extended the request to other apparently associated entities.
6. BLF responded to Mr Baggs confirming that it relied on s31(3) and maintained that position on review of all the various requests.

7. Mr Baggs complained to the Information Commissioner (IC) stating that in response to an information request OSCR had informed him that a complaint about the trust had been received in 2011 he continued:-

'This changes everything. I feel that it may be correct for the BLF not to give details such as the person/persons/group complaining, but to simply refuse to divulge anything is not in the Public Interest. It has also transpired, according to the BLF. OSCR failed to inform the BLF of concerns raised, therefore I believe intercommunications between these organisations may be lacking. I therefore feel as much details as possible should be released as this would not jeopardise the Organisations ability to carry out investigations, but would help it. I can see no evidence whatsoever that either BLF or OSCR have monitored this group of Charities effectively or in anyway manner that would give the public confidence that money has not been wasted or misused, or indeed well spent.'

8. In responding to the IC's investigation the BLF confirmed that it took protection of public funds seriously and investigated all concerns raised with it, however confirming or denying whether information was held in response to these requests 'would be likely to prejudice its ability to protect public funds and take appropriate action' with respect to all organisations whether under review now or in the future. It explained that an organisation's knowledge of an investigation could lead to destruction of records and prejudice investigations, giving excessive information of BLFs anti-fraud activities could assist fraud, revealing sources of concern could discourage further reporting. The BLF underlined the differences in function between it and OSCR and the differences of approach to requests between the two bodies did not affect BLF's response (decision notice paragraphs 18-20).
9. In considering the issue the IC recognised that the prejudice feared by BLF fell within the exemption: there was a direct connection with the prevention and detection of crime and the prejudice to BLF's investigations could undermine its ability to gather and share relevant information with the police. The IC noted the generic nature of the response which addressed the impact on all BLF investigations current and future. She agreed that *'for a NCND exemption to operate effectively, public authorities need to adopt a consistent approach to requests and to consistently refuse to confirm or deny whether information of a particular type is held.'* She concluded that s31(3) was engaged by the facts of the case (decision notice 21-27). In weighing the balance of

public interest the IC considered the arguments and genuine concerns of Mr Baggs and that there was a public interest in BLF being transparent about whether it had received complaints about bodies which receive grants. However she concluded that the balance of public interest lay in protecting BLF's ability to prevent and detect crime (decision notice 28-36).

10. In his appeal, which he asked to be considered on the papers, Mr Baggs argued that BLF had failed to demonstrate any significant harm, specific issues in the case around revealing what had been done to share information and specific steps BLF had taken to regulate the trust. He considered the argument with respect to prejudice weak and there was no evidence that disclosure would undermine BLF's investigations. It is clear that he did not consider that s31(3) was engaged. He submitted a decision notice of the Scottish Information Commissioner relating to a request he had made to OSCR concerning the trust's affairs. This indicated that OSCR had disclosed certain information and withheld other information.
11. In resisting the appeal the IC relied on the reasoning of the decision notice. The IC had correctly identified the pre-requisites for the exemption and had established that there was a real and significant risk of prejudice to prevention and detection of crime and the grounds of appeal had contained nothing to shake this analysis. The IC argued that the question for the tribunal to decide was there was a real and significant risk of prejudice to law enforcement, the IC had correctly concluded that there was. She had considered the public interest in disclosure and found it outweighed by the interest in maintaining the exemption because of the broader impact on BLF's ability to conduct effective investigations. She had considered the public interest in transparency of investigations and co-operation with other bodies but this was outweighed by the need to prevent the prejudice identified to the prevention and detection of crime.
12. In replying Mr Baggs raised specific issues relating to the use of funds by the trust and asked the tribunal to order disclosure of similar information to the information he stated had been released by OSCR.

The question for the Tribunal

13. It is important to emphasise that the issue for this tribunal is not whether any specific information should or should not be disclosed. The question is whether BLF is

entitled to rely on s31(3) and neither confirm nor deny that it holds information requested by Mr Baggs.

14. While Mr Baggs clearly feels strongly about the issues raised the tribunal is satisfied that he has not brought forward any tenable argument to interfere with the IC's conclusion that there is a real risk to effective law enforcement with respect to fraud against BLF, and that the public interest decisively lies in favour of BLF applying s31(3). The reasons found by the IC in her decision notice and summarised at paragraphs 8-9 above are compelling and cogent.
15. The tribunal is satisfied that the IC's decision is correct in law and dismisses the appeal.

Judge Hughes

Date: 29th May 2018

Promulgation date: 30th May 2018