



Neutral citation number: [2023] UKFTT 1037 (GRC)

Case Reference: EA/2022/0174

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights  
Decision Notice IC-117974-T5Y9**

**Heard at: Norwich Magistrates Court**

**Heard on: 24 November 2023  
Decision given on: 15 December 2023**

**Before**

**TRIBUNAL JUDGE Christopher Hughes  
TRIBUNAL MEMBER Marion Saunders  
TRIBUNAL MEMBER Kate Grimley Evans**

**Between**

**SCOLT HEAD AND DISTRICT COMMON RIGHTHOLDERS  
ASSOCIATION**

**APPELLANT**

**- AND -**

**INFORMATION COMMISSIONER**

**FIRST RESPONDENT**

**- AND -**

**THE CHARITY COMMISSION FOR ENGLAND AND WALES**

**SECOND RESPONDENT**

**Representation:**

For the Appellant: Rod Cooke

For the Respondent: did not attend

For the Second Respondent: Emma Hynes (counsel)

**Decision:** The appeal is Dismissed

**REASONS**

1. There has been discord for some years between the Common Rightholders Association (SHDCRA) and the Burnham and Overy Harbour Trust which is a registered charity (No.287315) and has a role in the management of the harbour and

creek. A letter of 25 August 1995 to the Charity Commission (CC) (attached to the skeleton argument supplied to the tribunal at the hearing) sets out many of the issues which have lain between them. The author of the letter claimed that the Trust (which held a lease from the Earl of Leicester for the common land registered as CL65) was also operating on two areas of common marked in red on the plan of the Common which (the author claimed):-

*“do not belong to the Holkham Estate and are believed to have been an Allotment to the Parish under the Enclosure Acts (the Earl of Leicester makes no claim to ownership of these areas).*

*The Earl of Leicester can lease the soil to anyone he chooses but that does not give them any rights over the land over and above those enjoyed by the landowner. The Common Rights over the land are extensive.*

*The smaller of the two red areas is harbour where a charge is being made by the Burnham Overy Harbour Trust for launching boats. A Charge is also being made for moorings on Common Land.*

*The Burnham Overy Harbour Trust has no right to make a charge for use of land which is neither owned by nor leased to them and they have not as far as we can see any right to use Common Land unless as a Registered Common Right Holder.*

*Is there anything which gives a Registered Charity any rights over and above those enjoyed by the public at large?”*

2. There was further correspondence over the years. In June 2019 the CC informed Mr Cooke (secretary of the SHDCRA) it was not taking action on his complaints. He responded to the chief executive of the CC on 27 June 2019 arguing that the CC was not carrying out its duty

*It seems reasonable that the request by SH&DCRA for an investigation into the unlawful activities by this charity be undertaken by the Charity Commission. Full details have been supplied and I attach them here again for your perusal. This action would assist in bringing the trustees to the table in order to rectify the problems that exist. I do hope that you might be able to carry out your regulatory duties and support the requests made by my Association. If this will not be the case, would you please provide a full and reasoned argument for not doing so that SH&DCRA can refer to their legal adviser.*

3. On 3 March 2020 Mr Cooke wrote to the CC complaining about how it was handling the Commoners’ concerns and arguing that the objectives of the Trust are unlawful and claiming:

*“This common land, CL65, land is protected by the CROW ACT 2000 and the Commons Act 2006 both of which have, it seems, been unlawfully contravened by the Charity Commission and the Burnham Overy Harbour Trust.”*

4. On 25 February 2021 Rod Cooke wrote to the CC raising these issues again asserting illegal acts by the Trust, claiming that the Holkham Estate had unlawfully registered its ownership of land which did not belong to it, that the lease to the Trust was no

longer applicable and indicating that other landowners and conservation bodies had an interest in the Common.

5. On 27 April 2021, Mr Cooke made the following request:

“copies of all correspondence, emails, texts and internal memos relating to the above charity from January 1st 2015 until April 26th 2021”

6. The CC refused some material relying on exemptions in s31, 40 and 41 of FOIA. Mr Cooke complained to the Information Commissioner (ICO). Some material was later disclosed but CC continued to rely on s31, to withhold information comprising correspondence from the trustees, its internal case log and its compliance and risk assessment tool (CRAT) which it uses to guide its “risk-led” regulatory approach. Following an investigation by the ICO a decision notice was issued on 15 June 2022 which upheld the reliance of the CC on the exemption in s31 which provides (so far as is relevant):

*“31 Law enforcement.*

*(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

*.....*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

*...*

*(2) The purposes referred to in subsection (1)(g) to (i) are –*

*(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) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*

*...*

*(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,*

*(g) the purpose of protecting the property of charities from loss or misapplication,”*

7. The CC’s general functions are set out in s15(1) of the Charities Act 2011 and include

*2. Encouraging and facilitating the better administration of charities.*

*3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.*

8. In pursuance of these functions the CC wrote to the Trust and received an account of the dispute relating to the Common (DN para19), it kept a log of the progress of its investigation, including the evolution of the thinking of staff on the issues raised and it considered the issues using CRAT.

9. In order to carry out its functions including casework relating to individual charities it needs frank and open conversations with trustees about their charities, how they are run, whether there has been compliance with charity law and whether regulatory action is needed. The Commission argued that if it were to disclose such information then those who provide it, members of the public, trustees and charities would be less likely to provide it in future from fear of disclosure and its consequences, this would limit the Commission's ability to identify and investigate misconduct. While its overall risk-led approach to regulation is in the public domain and the outcomes of investigations communicated to trustees where necessary the publication of its deliberations would be likely to prejudice the confidence of the public in charities generally.
10. The ICO concluded that disclosure would be likely to deter individuals and charities providing information, it would diminish the safe space needed to reach decisions and erode public confidence that it could keep information confidential and diminish its ability to gather accurate information from complainants and charities.
11. In weighing the public interest the ICO agreed with Commission in recognising that the provision of information would enable a fuller understanding of its work in general and how it had handled this case; however this was outweighed by the adverse impact on its functioning.
12. The ICO noted the concerns of the Common Rightholders but did not attach great weight to those concerns (DN para 43):

*"The Commissioner appreciates that the complainant has concerns about a particular charity and is considering possible legal steps. First however, that is a local interest and second, there may be other routes through which the complainant can obtain information they are seeking."*
13. The appellant disagreed with the statutory grounds for withholding information set out in s31 FOIA. It argued that the Commission, in accepting the Trust as a charity in 1982 had failed to do due diligence since its objects were unlawful; "hiding the unlawful actions by the Charity Commission and the Burnham Overy Harbour Trust" could not be in the public interest. The grounds of appeal made a specific response to para 43 of the DN:

*"Furthermore, what are "the other routes" by which we might gain the information? We probably know the answer to that one already; take legal action. Unfortunately, whilst the Charity Commission can employ legal advisers at public expense and Burnham Overy Harbour Trust has had a barrister as its chair for years, we are ordinary citizens trying to get justice."*
14. In the hearing Mr Cooke detailed the concerns of the Commoners who he claimed had been trying to get justice for decades. The Commission had failed to apply due diligence when the Trust was set up. The Trust was operating on Common Land interfering with the rights of the commoners. The charitable objectives were unlawful unless they were exercised with the consent of owners and common rights holders. The Trust had blocked a drain on the marsh damaging the fishing, it had

unlawfully erected notices “the Common was plastered with signs”. He submitted that the issue was whether or not the Commission could withhold information which his association needed to right wrongs. He claimed the Trust had carried out works without consent contrary to s38 Commons Act 2006. It had taken over moorings and unlawfully claimed fees from Common Rightholders for placing boats on the marsh – a mooring was an ancillary right similar to the right to place a trough on the marsh. He felt that the Trust had been created and had taken over. The Trust had stopped talking to them. They had approached the MP but he had not supported them in going to the Parliamentary Ombudsman.

15. In resisting the appeal Ms Hynes emphasised that the issue was whether the ICO was correct to allow the Commission to rely on the exemption from disclosure in s31 FOIA. She stated that the Commission published a lot of material, including in reports to Parliament; however it did not disclose specific information on regulatory activities. She argued that the dispute between the Common Rightholders and the Trust was not within the scope of the tribunal hearing, the Commission could not resolve such a dispute and a specific provision of the Charities Act made explicit that the Commission could not resolve land disputes:

*“s70 Restrictions on Commission's concurrent jurisdiction*

*(1)The Commission does not have jurisdiction under section 69 to try or determine –*

*(a)the title at law or in equity to any property as between –*

*(i)a charity or trustee for a charity, and*

*(ii)a person holding or claiming the property or an interest in it adversely to the charity,”*

16. She submitted that the assertion that “the Trust was not acting in accordance with the Commons Act 2006 and that therefore the Commission should intervene” had not been established and was not within the jurisdiction of the tribunal. Disclosure of the material would for the reasons found by the ICO, not be in the public interest.

## **Consideration**

17. The jurisdiction of the tribunal is to determine whether the decision notice against which the appeal is brought is in accordance with the law. The ICO and the Commission have explored the impact of disclosing the withheld material on the effectiveness and ability of the Commission in discharging its regulatory functions and have concluded that, despite the value of transparency, disclosure is not in the public interest. While Mr Cooke asserted that the Charity Commission did not do due diligence in permitting the Trust to be a charity, that alleged failure took place 40 years ago, at the time it could have been challenged by judicial review but that is not possible now. The issue to which Mr Cooke and the Association he represents have returned to over the years is a dispute about the rights of Common Rightholders on a Common against a Trust which has a lease of much of the Common from a landowner. This is a property dispute over which the Charity Commission, the ICO and this tribunal all lack jurisdiction. Mr Cooke has argued that his Association lacks the resources to obtain legal advice and bring court proceedings, however pursuing

a tangential information rights appeal seems unlikely to promote a just resolution of the underlying dispute.

18. The effective functioning of the Charity Commission as a regulator is to a significant extent dependent on the co-operation of charities, their trustees and third parties who are prepared to provide information to the Charity Commission in confidence. Without this free communication its ability to gather information analyse it and evaluate what if any regulatory steps should be taken would be diminished. Disclosure of this information would weaken the ability of the Charity Commission to fulfil its statutory purposes set out in s31(2) FOIA (listed at paragraph 6 above) which is clearly engaged. The ICO was correct in concluding that the balance of public interest lies in withholding the requested information.
19. The tribunal is satisfied that the decision notice is correct in law and no grounds for the ICO to have exercised discretion in a different way. There is no substance in this appeal and it is dismissed.

Signed    Hughes

Date: 13 December 2023