

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Atlantic Bridge organisation. The Charity Commission said that some of the requested information was not held. It provided the complainant with some of the information requested which was held. It withheld the remaining information under section 31(1)(g) with subsection (2)(c), (f), (g) and (h), section 21, section 40(2) and section 42 of the Freedom of Information Act 2000 (FOIA). During the course of the Commissioner's investigation it did provide the complainant with some of the withheld information but redacted it under section 40(2) FOIA.
2. The Commissioner's decision is that the Charity Commission correctly applied section 31(1)(g) with subsection 2(f) to the withheld information and section 21 FOIA to the part of the withheld information. He also considers that the Charity Commission correctly made the redactions to the information it disclosed during the course of the investigation under section 40(2) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 6 September 2012 the complainant made the following request for information under the FOIA for:

"It is still unclear how the Atlantic Bridge organisation was funded, so I am writing to ask if you could fully publish all those donors who funded the organisation between February 2010 to

September 2011, when the organisation was finally wound-up. I would also like to request the documentation relating to the tax returns of Atlantic Bridge and the residual accounts after the organisation closed.

Finally, will the Commission disclose all papers submitted to the Charity Commission for England and Wales for its Regulatory Case Report on The Atlantic Bridge Education and research Scheme and any correspondence between the Atlantic Bridge and the Charity Commission during the period of investigation."

5. On 20 September 2012 the complainant wrote to the Charity Commission and set out why he considers it is in the public interest for it to release full details of the whole case relating to Atlantic Bridge.
6. On 21 September 2012 the complainant asked the Commission to confirm whether "in cases where legal proceedings may be considered that the Charity Commission has to seek the consent of the Attorney General to undertake such action". The complainant also asked the Charity Commission to confirm whether, in the case of Atlantic Bridge, it approached the Attorney General.
7. On 2 October 2012 the Charity Commission responded. In relation to the donors/funding of Atlantic Bridge it confirmed that it did not hold the identities of the donors however it did provide the complainant with the Trustee's Report and Financial Statements for Atlantic Bridge for the years 2007-2010.
8. In relation to the tax returns, the Charity Commission explained that this was not held, but suggested that he may want to request this information from HMRC. It said that some of the information he required may be found in the Trustee's Reports and Financial Statements but confirmed that no further information was held.
9. In relation to the correspondence and papers requested, it confirmed this was held, but was exempt from disclosure under section 31(1)(g) with subsection (2)(c)(f) and (g) FOIA. It concluded that the public interest favoured maintaining the exemption in this case.
10. It confirmed that the Attorney General was not approached in this case.
11. The complainant requested an internal review on 27 December 2012, he accepted that section 31(1)(g) with subsection 2(c),(f) and (g) FOIA was engaged in this case however he asked the Charity Commission to reconsider the public interest test in relation to the following parts of

the request:

*1. all papers submitted to the Charity Commission in relation to its Regulatory Case Report on Atlantic Bridge; and
2. any correspondence between Atlantic Bridge and the Charity Commission during the period of investigation".*

12. The Charity Commission sent the outcome of its internal review on 4 February 2013. It upheld its original position but also said that section 31(1)(g) with subsection (2)(h) FOIA was also applicable.

Scope of the case

13. The complainant contacted the Commissioner on 3 April 2013 to complain about the way his request for information had been handled.
14. On 10 September 2013 the Charity Commission disclosed some of the information it had initially withheld. It said that it had taken the view that the release of correspondence which is about process or purely administrative would not be likely to prejudice the ability to carry out its functions. This information was however redacted under section 40(2) FOIA. The Charity Commission also disclosed a press statement released by it at the time the report was published. The Charity Commission applied section 21 FOIA to some information contained in a letter which had been withheld. It said that some of the information contained in the letter was put into the supplementary report which is publicly available. It said that section 40(2) and section 42 FOIA were also applicable to some of the withheld information to which section 31 FOIA had already been applied.
15. 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(c) and (f), (g) and (h) section FOIA. He has also considered whether the Charity Commission was correct to apply section 21, 40(2) and 42 FOIA to this information and whether it was correct to make the redactions under section 40(2) FOIA to the information which was disclosed.

Reasons for decision

Section 21

16. Section 21(1) of FOIA provides that information is exempt from disclosure if it is reasonably accessible to the applicant. Unlike consideration of most other exemptions in FOIA, this allows a public authority to take the individual circumstances of the applicant into account. In order for section 21 to apply there should be an existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.
17. The Charity Commissioner has explained that some factual information contained in the withheld closing letter is accessible by other means as it is contained within the publicly available supplemental report. The Charity Commission explained to the complainant that he already has a copy of this report and it was published in June 2012. The Commissioner is therefore satisfied that the information contained in the supplemental report is readily accessible to the complainant.
18. The Commissioner considers that in relation to the withheld information which is contained in the supplemental report, this is publicly accessible to the complainant and would therefore be exempt under section 21 FOIA.

Section 31

19. The Charity Commission has argued that most of 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.
20. 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):
 - (c) Ascertaining whether circumstances would justify regulatory action;
 - (f) 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; and
 - (h) Recovering the property of charities.
21. 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.

22. 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.
23. The Charity Commission stated that it believes 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.
24. The Commissioner recognises that the Charity Commission's arguments focus on the prejudice to its regulatory functions that could arise due to the disruption that disclosure could have on the flow of information it receives as part of its role. Taking into account the nature of the Charity Commission's involvement with the Charity in this case, the Commissioner considers that section 31(2)(f) is the most relevant part of the subsections quoted and has therefore focused on this provision in the first instance.
25. The Commissioner has sought to test the validity of these arguments by considering the following questions; Is the Charity Commission formally tasked with protecting a charity against misconduct or mismanagement? What stage had the investigation reached when the request was submitted? Does the Charity Commission have powers to compel engagement in the regulatory process and, if so, do these mean the chances of prejudice occurring are effectively removed?
26. 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 encouraging the better administration of charities and investigating apparent misconduct and mismanagement in the administration of charities with the option that remedial or protective action is taken in this respect.
27. The Charity Commission has explained that one purpose of the investigation into this charity was to identify whether there had been misconduct or mismanagement in its administration. The Charity Commission explained that this function also includes taking remedial or protective action when necessary. It said this includes considering whether it is necessary to act to protect the property of charities

against loss or misapplication. It explained that it might do this by exercising its power under section 85 of the Charities Act 2011 to direct the application of charity property. It said that where it uncovers significant misconduct, it may open a statutory inquiry and use its powers to vest property in the Official Custodian under section 76(3)(c), order someone not to part with particular property under section 76(3)(d), or to restrict transactions in the administration of the charity under section 76(3)(f).

28. The Charity Commission explained that in connection with its function relating to encouraging and facilitating the better administration of charities, it has under section 15(2) of the Charities Act 2011, a power to give such advice or guidance with respect to the administration of charities as the Commission considers appropriate. It said that it exercises this power where it identifies issues in the administration of a charity but considers these can be resolved by giving corrective advice to the Trustees of a charity. It said that the purpose of such advice is often, and in relation to this case was, to ensure that charity assets were not misapplied for non-charitable purposes going forward.
29. It went on to explain that the engagement with the charity in this case was an investigation. This was a formal investigation with the purpose of identifying the extent of the regulatory/legal issues within the charity and considering whether it was necessary to take regulatory action to correct matters. It confirmed that one of the steps taken in this case, as detailed in the supplemental report, was to consider whether the Commission should take any action under the power in section 114 of the Charities Act 2011 to seek recovery from the Trustees of funds lost to the charity in breach of their duties.
30. The Commissioner considers that whilst the role of the Charity Commission is varied, it is clear that it includes investigating potential mismanagement at a charity.
31. Generally speaking, the Commissioner accepts that if an investigation was ongoing at the time of a request, the greater the likelihood that disclosure would detrimentally affect a regulator's ability to gather information from those organisations that it regulates. Furthermore where the investigation had been concluded relatively recently, the likelihood of disclosure impacting on the Charity Commission's regulatory functions would remain relatively high. In this case the Charity Commission has explained that at the time of the original request the investigation into the Charity had only just closed. It confirmed that the supplemental report was published on 19 June 2012 and the request was made on 6 September 2012. It explained that in this case discussions were of a sensitive nature and the Charity

Commission required the Trustees to provide detailed information relating to the activities of the Charity and its relationship with other organisations. In this case the Commission had to look at this Charity a second time and produce a supplemental report. It said that at the time of the request there was a lot of interest in the Charity and although the Charity Commission had closed its case for a second time it was possible that further matters may have come to light as the supplemental report was circulated and accessed by all those interested in the matter. It said that if it had already released the withheld documents relating to its investigation at that stage, it is likely the Trustees would have been much more circumspect in its communications with the Charity Commission.

32. Whilst the Commissioner considers that prejudice of this kind is more likely to occur if an investigation is still ongoing, in this case at the time the request was made the investigation had been completed relatively recently. The Charity Commission has explained that the investigation had already been opened for a second time and there was a possibility that after circulation of the supplemental report further information may come to light to cause the investigation to be opened again. The Commissioner therefore considers that in this case, the fact that the investigation had recently closed at the time of the request, would not weaken the likelihood of the prejudice occurring.
33. The Commissioner has considered whether the Charity Commission has any powers to compel relevant parties, such as the trustees of charities, to provide the information they require. If so, this could potentially offset any disruption to the flow of information received by the Charity Commission pursuant to investigation. This is because the Charity Commission could in principle oblige a party to produce the relevant information where this was not provided on a voluntary basis.
34. The Charity Commission argued that in previous Decision Notices (FS50184898 and FS50443428), the Commissioner has accepted arguments made by the Charity Commission that the disclosure of information in cases will change the nature of communications between trustees and the itself and therefore will affect its formal and informal methods of investigation, as well as its ability to gather and receive wider intelligence. It confirmed that this argument was accepted despite the fact that the Charity Commission has a power in section 52 of the Charities Act 2011 (and in section 47 where it has launched an inquiry under section 46) to compel charities to provide it with information. It said that the Commissioner accepted that the Charity Commission would be likely to be hampered in carrying out its functions if it had to issue an order every time it required information from a charity.

35. Whilst the Commissioner is aware the Charity Commissioner does have statutory powers to compel charity trustees to provide it with information, notwithstanding this it does rely upon charities to voluntarily supply information to it to make the process more streamlined and fluid. The Commissioner accepts that he has previously recognised and allowed the argument which says that despite the powers the Charity Commission has to compel a charity to provide it with information, disclosure of the information requested in this case could have a prejudicial effect, in that it could slow down the Charity Commission's regulatory process and may lead to less timely regulatory action.
36. The Commissioner understands that the Charity Commission will be dependent on its communications with the trustees of a charity being full and frank in nature so that it can effectively provide advice and investigate and check any abuses of charity law. The act of disclosure could therefore make trustees more reluctant to provide their candid submissions on a voluntary basis. This reluctance would not necessarily prevent the Charity Commission from eventually receiving all the information it needed because of the powers afforded by the Charities Act 2011. Yet, the Commissioner agrees that the Charity Commissioner would be hampered in carrying out its functions if it had to issue an order every time it required information from a charity.
37. This point was reinforced by the Commissioner in his decision on FS50184898¹, which also involved the Charity Commission. Regarding the application of section 31(2)(f) to (g), the Commissioner stated that
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- "94. 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 these 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."*
38. Given the nature of the withheld information, the Commissioner accepts that disclosure would be likely to result in the prejudicial

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FS_50184898.ashx

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

39. The Charity Commission has recognised that there is a public interest in it operating transparently and in being held to account for the decisions it makes and by Charity Trustees for the decisions they make. However it explained that accountability of the Charity Commission in its decision making is ensured by the mechanism for review provided by the First Tier Tribunal (charity) and the courts.
40. It argued that the information which is publicly accessible, such as the supplemental report, and the information it had disclosed to the complainant goes some way to meet the public interest arguments in favour of disclosure.

Arguments in favour of maintaining the exemption

41. It argued that there is a strong public interest in the Charity Commission being able to investigate charities, provide advice to charities and deal with issues of charities' compliance with charity law as quickly as possible and at the least cost to the public purse. It said that it is in the public interest that it can operate effectively and efficiently to regulate the charity sector. It went on to argue that having an efficient regulator in turn ensures that charities themselves can operate efficiently which is also in the public interest.
42. It reiterated that in this case the nature of the issues were such that they could not have been addressed except by the intervention of a specialised regulator with the powers and expertise to provide relevant guidance to the trustees. In addition, it said that it could not have identified the full detail of the issues and offered bespoke advice so efficiently if the trustees had not fully co-operated with the Charity Commission. It explained that if trustees became aware that communications may be generally disclosed they may no longer co-operate with the Charity Commission and this would be likely to affect its ability to regulate the sector. If this happens there is a risk that public and charitable resources may be wasted or misapplied. It reasserted that although this case was closed at the time of the request, it had only recently been closed and there was still a lot of

ongoing external scrutiny of issues around the Charity which could have led to other matters which required investigation being brought to the attention of the Charity Commission. If that had been the case, the Charity Commission would have required the co-operation of the trustees with any subsequent investigations. It would not be in the public interest to disclose information which could hamper this process.

Balance of the public interest

43. 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. Furthermore he considers that there is a public interest in assuring that public money is being effectively protected by the bodies that are tasked to ensure this. The Commissioner has viewed the information that has been disclosed to the complainant in response to this request and the information which is publicly available and accepts that this does go some way to meeting the public interest arguments in favour of disclosure.
44. 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.
45. 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 limbs of section 31, section 40(2) (in so far as it was applied to the information also withheld under section 31) or section 42 FOIA any further.

Section 40(2)

46. In this case the Charity Commission did disclose some of the requested information but made redactions under section 40(2) FOIA.
47. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

"Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

48. Section 40(3)(a)(i) of the Act states that:

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"

49. The Commissioner has first therefore considered whether the information redacted under section 40(2) is the personal data of one or more third parties.

50. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

"data which relate to a living individual who can be identified –

(i) from those data, or

(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

51. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

52. The redacted information is the names and details (such as email addresses and telephone numbers) contained within the requested correspondence. The Commissioner does consider that the information withheld under section 40(2) FOIA would amount to third party personal data.

53. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

Likely expectation of the data subjects

54. The Charity Commission has explained that the individuals had not consented to disclosure and have a legitimate expectation that this information would not be disclosed into the public domain.

Legitimate public interest

55. The Commissioner considers there is a legitimate interest in disclosing information which helps the public to understand the working of a public body and whether public funds are being spent wisely.
56. The Charity Commission argued that disclosure of the redacted information is not necessary to pursue any legitimate interests as the substance of the correspondence has been disclosed and the redacted information would not add further to the context or understanding of this.
57. The Commissioner considers that section 40(2) FOIA was correctly applied in this case.

Right of appeal

58. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

59. 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.
60. 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

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