

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to the funding of the charity Keeping Kids Company widely referred to as Kids Company. Some of the information within the scope of the request was revealed to the complainant following the application of section 21(1) FOIA (information accessible to an applicant by other means).
2. The Commissioner's decision is that the public authority was entitled to withhold the remaining information in scope (the withheld information) on the basis of the exemptions at sections 31(1)(g) and 31(2)(a), (b) and (d) FOIA (law enforcement).
3. The Commissioner however finds the public authority in breach of the procedural requirement in section 10(1) FOIA (time for compliance with request).
4. No steps are required.

Request and response

5. The complainant submitted a request for information to the public authority on 10 August 2015 in the following terms:

"I would like to request the following information under the Freedom of Information Act.

Please note that I am only interested in information which relates to the period 1 January 2013 to the present day.

1...During the aforementioned period did any member of the ministerial team (including the Prime Minister) meet with Alan Yentob, the chair of the charity known as Kids Company. If the answer is yes can you please provide details of all meetings including date, time and venue. In the case of each meeting can you provide a full list of those present. In the case of each meeting can you please state the topics under discussion. Please note that I am only interested in those meetings which specifically relate to Kids Company and or Mr Yentob's role with the charity.

2...During the aforementioned period did any member of the ministerial team (including the Prime Minister) and or their private office exchange correspondence and communications (including emails) with Alan Yentob, the chair of trustees at the charity known as Kids Company. Please note that I am only interested in correspondence and communications which in any way relate to the charity and or the services it provides and its clients or its funding and or Mr Yentob's role with the charity. If the answer is yes can you please provide copies of this correspondence and communications including emails. Please do include correspondence and communications with Mr Yentob's private office where relevant.

3...During the aforementioned period did Mr Yentob personally submit and or support an application to the department for funding made on behalf of Kids Company. If the answer is yes can you please provide details. In the case of each application can you state the relevant amounts, and the purpose of the funding. Can you please state whether the application was successful. Can you please provide any relevant documentation held including correspondence and communications with Mr Yentob."

6. On 13 October 2015 the complainant clarified that the reference to "any member of the ministerial team" in his request meant Cabinet Office Ministers only.
7. The public authority issued its response to the request on 15 January 2016. It directed the complainant to information in the public domain which it considered fell within the scope of the first part of his request and therefore exempt from disclosure under FOIA on the basis of the exemption at section 21 FOIA.
8. It provided the complainant with links to the following published information:

- Details of the Prime Minister's and Cabinet Office Ministers' meetings published by the government on a quarterly basis.
 - The Ministerial direction to grant Kids Company £3 million funding.
 - Information about the breakdown of the funding provided to Kids Company in 2012/13, 2013/14, 2014/15 and 2015/16.
9. The public authority also advised the complainant that: some of the information in scope was considered exempt on the basis of section 40(2) FOIA, some of the information in scope was considered exempt on the basis of section 41(1) FOIA, and some of the information in scope was considered exempt on the basis of section 43(2) FOIA.
10. It is pertinent to mention at this point that during the course of the Commissioner's investigation, the public authority clarified with regards to part 1 of the request that the dates, attendees (other than any junior officials) and topics discussed at the meetings were included in information relating to details of the Prime Minister's and Cabinet Office Ministers' meetings published on a quarterly basis. It acknowledged that the published list of Ministerial meetings provide a very broad description of topics discussed, and specifically in the context of the request, it merely states, "Kids Company". It however explained that any unpublished information (ie the withheld information) did not include formal agendas and is in any event exempt from disclosure.
11. With regards to the published information relating to funding, the public authority additionally clarified to the Commissioner that the information relates to part 3 of the request. It explained that the published information relates to the relevant amounts and purpose of the funding. It also explained that the fact that the amounts were published confirm that the applications for funding were successful.
12. Following a request for an internal review by the complainant on 18 January 2016, the public authority wrote back to the complainant on 15 February 2016 with details of the outcome of the internal review. It upheld the original decision to rely on the exemptions at sections 21, 40(2), 41(1) and 43(2).

Scope of the case

13. The complainant contacted the Commissioner on 15 March 2016¹ in order to complain about the public authority's decision to withhold the information held within the scope of his request. He provided the Commissioner with submissions to support his view that the withheld information was not exempt from disclosure under FOIA and the Commissioner has referred to these submissions at the relevant parts of her analysis below. To be clear, he has not challenged the application of section 21. He however expressed his dissatisfaction at the length of time it took the public authority to initially respond to his request.
14. During the course of the investigation the public authority provided the Commissioner with copies of the withheld information which included correspondence between officials and between officials and officers acting on behalf of Kids Company. However, on further consideration of the request, the public authority expressed the view that it had interpreted the request unduly widely by including exchanges relating to policy officials within the scope of parts 1 and 2 of the request. It submitted that parts 1 and 2 only cover communications relating to the Ministerial team including the Minister's private office. On that basis it concluded that communications relating to policy officials did not fall within the scope of the request and should not have been so considered when the request was submitted. The Commissioner has commented on this further below.
15. The public authority also sought to additionally rely on the exemption contained at section 31(1)(g) FOIA to withhold all of the information it now considered fell within the scope of the request (in view of its position above) save the information exempt on the basis of section 21 (ie the published information).
16. Therefore, in addition to determining whether the information that the public authority has sought to exclude from the scope of the request ought to be considered within the scope of the request, the Commissioner has considered whether the public authority was entitled to rely on the exemptions at sections 31(1)(g), 40(2), 41(1) and 43(2).

¹ He had previously been in contact with her office to complain about the public authority's lack of response to his request.

Reasons for decision

Background

17. The public authority provided the following background information to assist the Commissioner with her investigation.
18. The charity Keeping Kids Company (widely referred to as "Kids Company") was founded in 1996. It provided support to young people, mainly through its projects in London and Bristol. Most children and young people using its services referred themselves directly to Kids Company, which had a policy not to turn away any child seeking help. The charity was funded through private donations and, for much of its history, received grants from central government. In June 2015 there was a Cabinet Office ministerial direction to award a grant of £3 million to Kids Company. The charity had already received a grant payment of £4.3 million for 2015-16. In August 2015 Kids Company closed and filed for insolvency.
19. There have been a number of investigations/inquiries in relation to the funding and subsequent closure of Kids Company by the National Audit Office, the Public Accounts Committee and the Public Administration and Constitutional Affairs Committee. All of these bodies have published their findings.
20. There are however ongoing investigations by the Official Receiver (OR) and the Charity Commission (CC). The CC's investigation will address concerns about the administration, governance and financial management of Kids Company, and identify wider lessons for other charities and trustees. The OR has a statutory duty to identify the cause of failure and report on the conduct of the charity's directors.

Scope of the request

21. The public authority has submitted that the parts 1 and 2 of the request are specific to information relating to Cabinet Office Ministers and their private office. On that basis, it has argued that some of the information originally thought to be within the scope of the request is not.
22. The Commissioner does not disagree that parts 1 and 2 of the request are for relevant communications relating to Cabinet Office Ministers and their private office. However, part 3 of the request is slightly broader in that it is not restricted to communications with a Minister or their private office but extends to the public authority as a whole in the context of an application for funding by Kids Company. Given the specific nature of the first two parts of the request, the Commissioner can appreciate why the public authority has sought to exclude part of the withheld

information from the scope of these parts of the request. However, she is satisfied that part 3 of the request is broad enough to include the excluded information (which she has inspected) and therefore falls within the scope of the request. An application for funding by a charity to a government department would necessarily have to be considered by officials before a decision is recommended to the appropriate Minister. Therefore, the Commissioner considers that the excluded information falls within the scope of part 3 of the request which is broad enough to include communications relating to officials and Ministers relevant to the consideration of the charity's application for funding.

23. She has therefore concluded that all of the information originally provided by the public authority pursuant to her investigation falls within the scope of the request. She has consequently considered whether the information (the withheld information) is exempt from disclosure.

Section 31(1)(g)

24. The Commissioner first considered whether the public authority was entitled to rely on the exemption at section 31(1)(g).

25. The exemption states:

"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 the exercise by any public authority of its functions for any of the purposes specified in subsection (2)..."

26. The public authority considers that the relevant purposes are those specified in sections 31(2)(a), (b) and (d) which respectively state:

"..the purpose of ascertaining whether any person has failed to comply with the law.."

"..the purpose of ascertaining whether any person is responsible for any conduct which is improper.."

"..the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.."

27. The public authority considers that disclosing the withheld information would be likely to prejudice the OR's and CC's investigative functions by inhibiting the responses that they receive pursuant to their investigations. Both the OR and the CC were consulted by the public authority further to its reliance on these specific exemptions. The OR expressed concern that releasing the withheld information might result

in some officers it plans to interview further to its on-going investigation of Kids Company being constrained from providing full and frank information to the OR, and that this could hamper its on-going investigation which it noted is being conducted with a view to establishing the extent to which the matters described in sections 31(2)(a), (b) and (d) apply. The CC expressed the view that disclosures and speculation about the charity is unhelpful and damaging to its ability to resolve some of the matters being considered as part of its on-going investigation.

Commissioner's findings

28. In order for prejudice based exemptions such as those contained within sections 31(1)(g) and 31(2)(a), (b) and (d) to be engaged, the Commissioner considers that three criteria must be met.

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, the Commissioner considers that this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

29. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemptions cited above are designed to protect.

The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the withheld information and the prejudice which the exemptions are designed to protect. However, the Commissioner must establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).

30. Having inspected the withheld information the Commissioner is satisfied that the public authority was correct to conclude that its disclosure would be likely to prejudice the OR's and CC's on-going investigations (pursuant to the compulsory liquidation of Kids Company) because it might inhibit the provision of full and frank information to the OR and the CC. While the charity's officers could be compelled to cooperate with the OR and the CC by requiring them to provide information to assist with the investigations, the officers could be inclined to withhold information or be less candid with investigators if sensitive information pertinent to the investigations is released to the public before they have been given the opportunity to defend themselves against possible accusations. This would affect the OR's and the CC's ability to conduct their on-going investigations of the charity effectively as well as their ability to resolve the matter using all of the options available to them.
31. Therefore, in the circumstances, especially in view of the high profile nature of the case, the Commissioner considers that disclosing the withheld information would indeed pose a real and significant risk of prejudice to the on-going investigations by the OR and the CC. She consequently finds that the public authority was entitled to engage the exemptions at sections 31(1)(g) and 31(2)(a), (b) and (d).

Public interest test

32. The exemptions are however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

33. The public authority acknowledged that there is a general public interest in openness in government, and recognised that this increases trust in and engagement with the government. It also acknowledged that there are a considerable number of people such as donors and employees who have an interest in the events at Kids Company which led up to it being placed into compulsory liquidation.
34. The complainant pointed out that the financial affairs of Kids Company have been at the centre of intense public debate, and in his view, a great deal of attention has also been paid to the role played by Alan Yentob in lobbying on behalf of and/or securing funds for the charity. He therefore argued that the withheld information should be disclosed in order to ensure that there is a maximum degree of transparency as

possible when it comes to matters relating to public expenditure especially in the circumstances of this case.

Public interest arguments in favour of maintaining the exemption

35. The public authority has argued that there is a strong public interest in the ability of the OR and the CC to conduct their investigations into the circumstances surrounding the compulsory liquidation of Kids Company. It argued that it won't be in the public interest for these very significant investigations to be impeded by or otherwise affected by premature disclosure of the withheld information particularly because in its view, there is already a significant amount of information in the public domain regarding the matter.
36. It argued that disclosure in the circumstances of this case would prejudice the OR's and the CC's investigative functions more generally as responses in relation to similar investigations could be tentative or less full and frank and that would not be in the public interest.

Balance of the public interest arguments

37. Given the events leading up to the compulsory liquidation of Kids Company, the Commissioner considers that there is a strong public interest in disclosing the withheld information in light of the amount of public money awarded to the charity just before it filed for insolvency. It is also in the public interest to fully understand the extent to which due diligence was exercised before £3 million additional grant was awarded to the charity given the fact that it filed for insolvency two months after the additional grant was released. The public authority is of course correct to note that there have been a number of investigations/inquiries which have shed some light on this as well as on the events leading up to the closure of the charity. Nevertheless, the Commissioner considers that the withheld information would enhance public understanding on this very important question of whether appropriate due diligence was conducted before the request for additional funds by the charity was granted.
38. The strong public interest in releasing the withheld information however has to be balanced against the significant public interest in withholding the information in the Commissioner's view. She considers that in the circumstances, there is a significant public interest in not disclosing the withheld information given the real and significant risk it would pose to the on-going investigations by the OR and the CC. It is certainly not in the public interest to impede the ability of the OR and the CC to carry out effective investigations in order to address the very important concerns about the administration, governance and financial

management of Kids Company, and identify wider lessons for other charities.

39. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions is significant and outweighs the public interest in disclosing the withheld information.
40. In view of her decision that the public authority was entitled to rely on the exemptions pursuant to section 31(1)(g), the Commissioner has not considered the applicability of the remaining exemptions in dispute.

Procedural matters

41. A public authority is required, by virtue of section 10(1) FOIA, to comply with a request for information promptly and in any event no later than 20 working days following the request.
42. The public authority failed to do so in this case having issued its response to the request five months after it was initially submitted on 10 August 2015. The Commissioner therefore finds the public authority in breach of the requirement in section 10(1).

Right of appeal

43. 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

44. 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.
45. 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

Gerrard Tracey
Principal Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF