

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2022

Public Authority: The Charity Commission
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information from the Charity Commission about a specific charity. The Charity Commission withheld the information under section 31(1)(g), 40(1) and 40(2) of FOIA which concern law enforcement and personal data respectively. The Charity Commission subsequently disclosed some of the withheld information but continues to withhold the remainder and has also applied section 41 (information provided in confidence) to one element of the withheld information.
2. The Commissioner's decision is as follows:
 - The Charity Commission has correctly applied section 31(1)(g) of FOIA to information it is withholding as disclosure would be likely to prejudice the exercise of its functions under sections 31(2)(a), (b), (c), (f) and (g). The public interest favours maintaining this exemption.
3. The Commissioner does not require the Charity Commission to take any steps.

Request and response

4. On 27 April 2021 the complainant wrote to the Charity Commission ('the Commission') and requested information in the following terms:

"...copies of all correspondence, emails, texts and internal memos relating to the above charity from January 1st 2015 until April 26th 2021."
5. On 26 May 2021 the Commission responded. It refused the request under section 31, section 40(1) and section 40(2) of FOIA.
6. The Commission provided an internal review on 2 July 2021. It maintained its reliance on sections 31, 40(1) and 40(2).

Scope of the case

7. The complainant first contacted the Commissioner on 7 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner advised the complainant that, based on his decisions in similar cases, he would be likely to find that section 31 was engaged. The Commissioner invited the complainant to withdraw their complaint, but they preferred to progress it.
9. The Commissioner had advised the complainant that he was satisfied that information that is personal data would be exempt from disclosure under section 40 of FOIA. This element of the information was therefore removed from the scope of the complaint. Moreover, from their correspondence to him on 11 January 2022, it appeared that the complainant's focus was the Commission's application of section 31 to some of the information they have requested.
10. In its submission to the Commissioner on 20 May 2022, the Charity Commission confirmed that it was content at that point to disclose some of the information which it had previously withheld under section 31 and 40(2) of FOIA. However, it continues to withhold the remaining information under those exemptions and considers some of the withheld information is also exempt under section 41(1).
11. On 23 May 2022 the Commission disclosed to the complainant some of the information it had previously withheld. It advised the complainant on 31 May 2022 that it had also now applied section 41(1) to a little of the information it continues to withhold.

12. The focus of the Commissioner's investigation will now be to consider whether the Charity Commission can withhold some of the requested information under section 31(1) of FOIA. If necessary, he will consider whether section 41(1) is engaged in respect of a small amount of that same information.

Reasons for decision

Section 31 – law enforcement

13. The Charity Commission has confirmed that it is withholding 1) correspondence from the trustees of the charity concerned 2) an internal Commission case log and 3) a 'CRAT Tool' document under section 31 of FOIA. The Charity Commission has provided the Commissioner with copies of this information.
14. Under section 31(1)(g) of FOIA, information which is not exempt from disclosure by virtue of section 30 (investigations and proceedings) is exempt information if its disclosure under the 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).
15. The Commission has confirmed that it considers that the applicable purposes under subsection 31(2) are as follows:
 - (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; and
 - (g) the purpose of protecting the property of charities from loss or misapplication.
16. The Charity Commission has explained that it derives its powers, objectives and functions from section 14 and section 15 of the Charities Act 2011.

17. The Commission has first discussed its application of section 31(1)(g) to the correspondence from the charity's trustees. It says its interactions with the charity trustees engage section 31(2)(a), (b), (c), (f) and (g) of FOIA.
18. This correspondence was provided in response to a Commission communication under section 15(2) Charities Act 2011 which enables the Commission to give advice or guidance to charities, in pursuance of its section 14(3), section 15(1)(2) and section 15(1)(5) Charities Act 2011 compliance functions and objectives. These are to promote compliance by charity trustees, to encourage and facilitate the better administration of charities and to obtain, evaluate and disseminate information in connection with the performance of any of the Commission's functions or meeting any of its objectives, respectively. These functions and objectives are directly correlated to the purposes as set out in sections 31(2)(a), (b), (c), (f), and (g) of FOIA. In exercising its statutorily mandated functions and objectives, and its powers, the Commission says it is pursuing the purposes cited above in FOIA.
19. In this case, the correspondence from the trustees in relation to the communication they had received from the Commission gave a full and frank disclosure to the Commission of what appears to be a very complicated dispute over common land between the charity trustees and another party. This information, in the Commission's view, is sensitive and confidential as between the charity trustees and the Commission.
20. The Commission says its ability to conduct casework, fulfil its regulatory objectives and functions, and use its powers requires it to be able to have candid, open and honest conversations with charity trustees about their charity, and any issues at their charity. The Commission expects that charities and their trustees will proactively consult with the Commission where concerns have been raised about a charity and/or its trustees, and alleged issues have been raised related to the running of those charities. This necessitates communications with the charity concerned in any particular case, in line with the Commission's purposes as outlined above, to ascertain whether any person has failed to comply with charity law or conducted their trustee duties improperly, and whether regulatory action may be required.
21. Correspondence of this nature is often exchanged so that the Commission can ensure that charity property is protected from loss and/or misapplication and to protect charities against misconduct or mismanagement.
22. The Commission says that if it were to disclose information of this type, which it has obtained as part of its regulatory remit, members of the public, the charity sector and/or trustees of charities would be less likely

to provide information to the Commission for fear of disclosure, or reprisal from that disclosure. This in turn would impact on the Commission's ability to identify and investigate apparent misconduct or mismanagement in how charities are administered. This could prevent the Commission from taking remedial or protective action in connection with misconduct or mismanagement in line with its statutorily mandated objectives and functions.

23. The Commission confirmed its position that, therefore, disclosing the correspondence from trustees would be likely to prejudice its functions and objectives as set out.
24. The Commission has next discussed the case log that it produces internally and that it is withholding under section 31(1)(g)/sections 31(2)(a), (b), (c), (f) and (g).
25. It has explained that the relevant information associated with the case log concerns certain internal communications, notes, mentoring points, internal escalation and complaints received about the charity from third parties. Generally, there is a case log opened for each case of this type and this document is where the Commission keeps evidence of the progress of a case and makes confidential notes on the issues that may arise during the case.
26. Referring to some of the arguments outlined above in respect of the correspondence from trustees, the Commission re-states that it is required to pursue its statutorily mandated objectives and functions. Part of this obligation is to keep robust and detailed evidence and deliberations before it assesses what the most appropriate outcome should be in any particular case according to the applicable policies and rules. These objectives, functions and powers necessarily engage the section 31(2) subsections as outlined above. Disclosing the requested information would prejudice those purposes. The Commission says its staff need space and time in which to fully consider casework options. It keeps the appropriate related documentation (such as the case log), to enable it to reach an impartial and appropriate decision, away from public interference. Once the Commission has reached an impartial and appropriate decision, it communicates this where necessary.
27. The Commission says it strongly argues that it would prejudice its section 14(1) Charities Act 2011 public confidence objective to share deliberations prior to it making a decision. As it has previously stated, it would also have a detrimental impact on the charity sector and public's confidence in the Commission's ability to handle sensitive information confidentially.

28. In its submission, the Commission has then discussed the Compliance and Risk Assessment Tool (CRAT) document that it is also withholding under section 31(1)(g). This document provides a record of how the Commission has assessed the matter in this case on a risk basis.
29. As part of its work in being proportionate and targeting cases where action is needed, the Commission has published its Regulatory and Risk Framework. The purpose of this Framework is to outline:
 - how the Commission operates as a risk-led regulator; and
 - how it decides when and how to engage and the possible outcomes of its engagement.
30. However, the detailed CRAT that the Commission uses as part of its approach to assessing risk associated with an individual complaint is not in the public domain. Disclosing how the Framework is actually applied in an individual case would be likely to be prejudicial to the efficient and effective operation of the Commission. Information in the CRAT goes into more detail than that contained in the Framework. This has the potential to prejudice the Commission in the exercise of its objectives and functions as outlined above. It would undermine the Commission's ability to collect accurate information from complainants and charities and could be used in the future to help trustees delay or avoid regulatory action. This would be prejudicial to the Commission's ability to regulate effectively.
31. The Commission has noted that, although it recognises that the Commissioner considers each case on its facts, in previous cases he has accepted that the Commission's risk assessment tool (CRAT) should be protected from disclosure under section 31, such as case reference FS50905671¹
32. Finally, in its submission to the Commissioner, the Charity Commission has confirmed that it considers that disclosure would be likely to prejudice its functions, rather than would prejudice its functions.

Conclusion

33. The Commissioner accepts that the Charity Commission is formally tasked with certain regulatory functions under the Charities Act 2011.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617824/fs50905671.pdf>

34. The Commissioner agrees that disclosing the correspondence it has received from the trustees about a particular charity, its case log about that charity and the associated CRAT would be likely to prejudice the Commission's functions, for the reasons it has given. First, disclosure would be likely to deter individuals and charities from providing information to the Commission. Second, it would be likely to erode the safe space it needs to reach decisions and to erode public trust in its ability to handle information confidentially. And third, it would undermine the Commission's ability to collect accurate information from complainants and charities, if it were known how the Commission assesses risk.
35. Having considered all the circumstances in this case, the Commissioner has therefore decided that section 31(1)(g), with subsections 31(2)(a), (b), (c), (f) and (g), is engaged. He has gone on to consider the public interest.

Public interest test

Public interest in disclosing the information

36. The Commission has acknowledged that there is a public interest in it being open and transparent about its regulatory activities. Being transparent helps to promote public awareness and understanding of the Commission's regulatory functions and this factor weighs in favour of disclosure. The withheld information would explain in more detail what factors led the Commission to take the regulatory approach that it did.
37. The Commission also notes that there is public interest in the general subject of how it uses its Commission Charities Act 2011 powers and, more generally, how it exercises its section 14 objectives and section 15 functions.
38. Finally, the Commission says it understands that there might be a public interest in presenting the "full picture" in this case so that the public has a better understanding of the reasoning behind its refusal to act further on the issues in this case.

Public interest in maintaining the exemption

39. Under the Charities Act 2011, in carrying out its functions the Commission says it must, so far as is relevant, have regard to the principles of best regulatory practice. This includes the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

40. In addition, the Commission relies on charities, and other interested parties, to provide it voluntarily with information fully and frankly without the need for the Commission to obtain information by exercising its statutory powers. This allows the Commission to identify issues falling within its regulatory remit. The Commission says it would be difficult for it to be aware of all relevant regulatory issues if charities and individuals were not prepared to fully disclose information, including confidential information, voluntarily. The Commission's view is that disclosure would have a chilling effect on its engagement with the charity sector. This would be likely to prejudice its abilities to perform its functions and objectives as set out above.
41. The Commission considers it is in the public interest that it has space and time in which to fully consider its policy and casework options, to enable it to reach an impartial and appropriate decision, away from public interference.

Balance of the public interest

42. Weighed in the round and considering the details discussed above, the Commission's view is that the public interest lies in maintaining the section 31(1)(g) exemption. It acknowledges that there is a strong argument in favour of openness and transparency regarding the Commission's regulatory role and the issues affecting charities. However, the Commission says it has given greater weight to the argument against disclosure for the reasons above – namely, the adverse effect that disclosure would be likely to have on the Commission's effectiveness as the charity regulator.
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. The Commissioner also notes that the Charity Commission has disclosed some of the information the complainant has requested which satisfies to an adequate degree the public interest in transparency. The Commissioner is satisfied that there is greater, wider public interest in the Charity Commission being a robust and efficient regulator of the charity sector through withholding certain information in this case.
44. Because he has found that the Charity Commission has correctly applied section 31 to information it is withholding, it has not been necessary for the Commissioner to consider its application of section 41 to a small amount of the same information.

Right of appeal

45. 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

46. 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.
47. 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

Cressida Woodall
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