

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2012

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

Decision (including any steps ordered)

1. The complainant has requested information held by the Charity Commission on the operation of bank accounts by Outwood Grange School Fund. The Charity Commission provided some information in response to the request but refused to disclose the remainder on the basis of sections 21 (information accessible by other means), 31(2)(b), (c), (f) – (h) (law enforcement), 40(2) (personal data), 41 (information provided in confidence) and section 42 (legal professional privilege) of FOIA. The complainant has subsequently asked the Commissioner to consider the application of the exemptions with the exception of sections 21 and 40(2). During the course of the investigation the Charity Commission chose to release two documents covered by section 31 but continued to withhold the balance of the requested material.
2. The Commissioner's decision is that this remaining information is exempt information under sections 31 and 42 of FOIA. He does not therefore require the Charity Commission to take any steps as a result of this notice.

Request and response

3. On 22 January 2012 the complainant wrote to the Charity Commission and requested information of the following description:

“[...] information held on the operation of Outwood Grange School Fund's bank account(s), including but *not* exclusively copies of any information, including bank statements or other account records, which identify the exact operation of the account(s).”

4. The Charity Commission responded on 20 February 2012. It confirmed that it held information covered by the scope of the request but refused to provide this, citing sections 31(1)(g) and 41 of FOIA as its basis for doing so.
5. The complainant wrote to the Charity Commission again on 22 February 2012 challenging its refusal. The Charity Commission subsequently carried out an internal review, the outcome of which was sent to the complainant on 21 March 2012. This described the information held by the Charity Commission and informed the complainant that the information that was found not to be exempt would be provided to him shortly. For the remainder, the Charity Commission continued variously to claim that sections 31 and 41 applied but also introduced a reliance on the exemptions provided by sections 21, 40 and 42 of FOIA.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request had been handled by the Charity Commission. In particular, he asked the Commissioner to consider the Charity Commission's decision to withhold information covered by the request.
7. It is important to note that the extent of the information which forms the subject of the complaint has been narrowed during the course of the Commissioner's investigation. This is because, firstly, the complainant has agreed that the Charity Commission's application of sections 21 and 40 do not need to be looked at by the Commissioner. Secondly, the Charity Commission has decided to disclose two documents that had previously been withheld. Accordingly, this particular information has been discounted from the Commissioner's decision.

Reasons for decision

Background

8. The issue underlying the request relates to the Charity Commission's investigation of concerns raised about the charity Outwood Grange Academies Trust and an associated charity, Outwood Grange School Fund.

9. The events leading up to the involvement of the Charity Commission were recounted as part of a separate decision of the Commissioner made on FS50430286¹, which was connected with a request made to the Outwood Grange Academies Trust. For context, the Commissioner reproduces below the background information set out in that decision (paragraphs 5 – 9).
10. In 2009 Wakefield Council (the council) became involved in a financial audit of Outwood Grange College (OGC) following receipt of information that funds collected in respect of specific charities might have been retained within the School fund and not paid over to the relevant charities.
11. In September 2009 OGC became an Academy (OGAT).
12. In May 2011 the council published its findings. The report considered the following:
 - the school's treatment of charity income which had been retained within the OGC General School Fund;
 - payments made to the Executive Principal of OGC for activity in the National Leaders in Education Programme (NLE);
 - payments to other staff for consultancy work and additional duties;
 - the use of the School Fund account; and
 - the use of other Delegated budget transactions.
13. The report concluded that there had been a significant breakdown in appropriate standards of governance and accountability at the school. It concluded that most of the key matters requiring further consideration were the responsibility of OGAT and explained that no further audit work would be carried out.
14. The report stated that the council's main responsibility following publication related to liaison with the relevant external organisations that may have an interest in the issues, predominantly the Audit

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50430286.ashx

Commission, HM Revenue and Customs, the National College for School Leadership, other local authorities and the Charity Commission.

Section 31 – Law Enforcement

15. The Charity Commission has argued that parts of the information that fall within the scope of the complainant's request are 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.
16. 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):
 - (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 by other persons) in their administration
 - (g) the purpose of protecting the property of charities from loss or misapplication
 - (h) the purpose of recovering the property of charities
17. 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.
18. 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.
19. The Charity Commission has stated that they believe 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.

20. The Commissioner observes 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.
21. 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?
22. 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. In short, while the role of the Charity Commission is varied, it is clear that it includes investigating potential mismanagement at a charity.
23. 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. In this case the investigation had not been concluded at the time of the request and the Charity Commission has stated that further information was required from the charity in order to establish what had happened.
24. As stated, in the Commissioner's view the fact that the investigation was live at the time of the request makes a stronger case for finding that the risk of prejudice described by the Charity Commission is real than if, say, the investigation had been concluded some time before.
25. Notwithstanding this point, however, the Commissioner must also consider 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.

26. The Charity Commission has confirmed that section 52 of the Charities Act 2011 allows it to make an order to require charity trustees to provide it with information. There are similar powers in section 47 which can be used where the Charity Commission has launched an inquiry under section 46 of the legislation.
27. These powers then would, on the face of it, seem to counter the claim that there could be a significant effect on the way that the Charity Commission was able to discharge its functions. Furthermore, the Commissioner has no doubt that trustees - who are ultimately responsible for ensuring that their charity is legally compliant – will have an incentive to cooperate fully with any investigation carried out by the Charity Commission.
28. However, the Commissioner has previously recognised and allowed the argument which says that disclosure 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.
29. 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.
30. This point was reinforced by the Commissioner in his decision on FS50184898², which also involved the Charity Commission. Regarding the application of section 31(2)(f) to (g), the Commissioner stated that –

² http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FS_50184898.ashx

"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."

31. Using this logic the Commissioner is prepared to accept that disclosure would be likely to result in the prejudicial 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

32. The Charity Commission has recognised that information relating to an investigation will help the public see that charities are regulated and the effectiveness of this regulation. In essence, there is an inherent public interest in the disclosure of information that demonstrates the accountability of organisations for decisions taken by them.
33. Furthermore, the Charity Commission has pointed out that the specific circumstances of the case augment the strength of the arguments in favour of disclosure. This is because of the public interest in knowing more about the financial probity of an organisation.
34. This point has been picked up, and built on, by the complainant. He argues that the longer the Charity Commission's investigation continues so the value the information has to the public for the purposes of accountability diminishes. Transparency is particularly important at this stage because of the confusing, and apparently contradictory, statements given by OGAT in response to previous questions on this issue. The Commissioner appreciates that the information may help the public better understand what had actually occurred, at a point when the issue continued to attract considerable attention.
35. The complainant has also questioned the extent of the harm that could actually arise through disclosure, claiming that the question of whether

action should be taken is one for the Charity Commission alone. Disclosure would not prevent it from making this decision.

Arguments in favour of maintaining the exemption

36. Echoing his considerations on FS50184898, the Commissioner realises that there is a significant public interest in the Charity Commission being able to discharge its functions – whether this means giving advice to, or investigating, charities – as quickly as possible and at the least cost to the taxpayer.
37. Having a regulator that can operate efficiently should ultimately promote the better management of the charities themselves and help safeguard against an inefficient, or improper, use of donations received by the charities.

Balance of public interest arguments

38. The Commissioner has no doubt that the weight of the public interest in disclosure is significant. However, to the Commissioner's mind, a critical feature of the public interest test relates to the issue of timing. At the point at which the request was made, the Charity Commission's investigation had not been concluded, with further information still needed by it in order to discharge its functions.
39. In many instances the public interest in maintaining an exemption will diminish as the sensitivity of the information equally diminishes. Put simply, the older the issue to which the information relates the less likely that it will still be required for decision making purposes. However, this is not the case here. As the information forms part of a 'live' investigation, the Commissioner considers that the disruption caused by disclosure could be severe. This is because it would make the parties involved less likely to cooperate with any subsequent enquiries made by the Charity Commission.
40. In addition, the Commissioner believes it is reasonable to find that, if other charities became aware that regulatory communications may be disclosed during an investigation, they too may be less willing to work with the Charity Commission on a voluntary basis.
41. In the Commissioner's opinion it is strongly in the public interest that the Charity Commission is allowed space in which to carry out its administration of charities unhindered. To do anything that runs contrary to this principle, and therefore to dilute the effectiveness of the Charity Commission, may ultimately lead to a decline in public confidence in the sector and its regulation.

42. Therefore, in all the circumstances of the case, the Commissioner has found that the weight of the public interest lies firmly with maintaining the exemption.

Section 42 – Legal Professional privilege

43. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege. The exemption is subject to the public interest test.
44. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. The category of privilege which the Charity Commission consider applies is advice privilege. This covers communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice, where no litigation is in progress or contemplated. Advice privilege will also extend to any part of a document which evidences the substance of such a communication.
45. The withheld information in this case comprises a letter from a professional legal adviser to a charity. The section 42 exemption has also been applied to parts of a letter received by the Charity Commission which quotes from this same letter. The Commissioner has had sight of the disputed information and accepts that it reflects advice given by a lawyer, in his professional legal capacity. It therefore attracts advice privilege.
46. However, the fact that information once attracted privilege does not mean that this privilege cannot subsequently be lost. This could occur where a client has shared the information with third parties, thereby stripping it of its confidential nature.
47. The Commissioner notes that the legal advice was originally sought by, and provided to, a charity rather than the Charity Commission itself. Therefore, a question may then arise as to whether the privilege is lost as a result of the advice being shared with the Charity Commission. The Commissioner is satisfied, though, that the disclosure was on a restricted basis rather than to the wider world. As such, he has decided that the disputed information has not lost its quality of confidence and therefore continues to attract legal professional privilege.

Public interest test

Arguments in favour of disclosure

48. The Commissioner is of the view that the public interest arguments in favour of disclosing the information covered by section 31 of FOIA equally apply here. In summary, the release of the information would

enable the public to better understand whether the charity had been properly managed in light of the concerns raised about its financial administration.

49. This argument is crystallised in relation to the legal advice because of the possibility that it will help clarify the issues that are being addressed and the charity's legal position in respect of these issues.

Arguments in favour of maintaining the exemption

50. The importance of legal professional privilege as a concept is not disputed. It exists because it is critical that a client should have the space to seek advice about the extent of their powers and obligations. Further, it is understood that clients are less likely to be as candid in disclosing facts material to a case when seeking legal advice, or may otherwise refrain from seeking legal at all, if they considered that this advice would be subject to an order of disclosure.

Balance of public interest arguments

51. When considering the public interest test in the context of legal professional privilege, the Commissioner has found it instructive to refer to the Information Tribunal's decision in *Calland v Information Commissioner & Financial Services authority* (EA/2007/0136)³.
52. In that case, the Tribunal observed that there must be some "clear, compelling and specific justification for disclosure...so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."
53. The Commissioner believes that the complainant's reasons for wanting the information disclosed are perfectly understandable and have merit. However, the Commissioner does not consider that these reasons can be found to overcome the weight of the public interest invested in protecting legal professional privilege.
54. In coming to this conclusion, the Commissioner has reflected on the fact that the legal advice was live, in that it was still being relied upon by the charity. As stated previously, this enhances considerably the weight attached to the Charity Commission's arguments. In contrast, the Commissioner cannot see any issues of such magnitude in this case, for

³ Para 37, <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

example because of the amount of money involved or the number of people affected, which would warrant the breaching of privilege. Returning to the test outlined by the Tribunal in *Calland*, the Commissioner is of the opinion that there is an absence of clear, compelling and specific justification for disclosure.

55. On this basis, the Commissioner has found that the public interest favours maintaining the exemption.
56. The Commissioner notes that the Charity Commission considers that section 41 would also apply to the information which it has claimed is legally privileged. He has not, however, deemed it necessary to consider this exemption in light of his decision to uphold the Charity Commission's reliance on section 42 of FOIA.

Right of appeal

57. 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

58. 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.
59. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF