

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Charity Commission's consideration of concerns raised about the registered charity Imamia Mission London (UK). The Charity Commission explained that some of the specified information was no longer retained. For the material it did hold, the Charity Commission provided some of the information but advised the remaining items were variously subject to the exemptions to disclosure provided by sections 21 (information accessible by other means), 31(1)(g) (law enforcement) and 40(2) (personal data) of FOIA. The complainant has asked the Commissioner to consider whether the Charity Commission correctly withheld 14 of these documents under section 31(1)(g) and in part section 40(2). The Commissioner's decision is that each of the documents engages section 31(1)(g) by virtue of sections 31(2)(c) and (f) and that the balance of the public interest favours maintaining the exemption. The effect of the finding is that the Charity Commission is not required to take any steps to ensure compliance with FOIA, which has also meant that the Commissioner has not had to go on to consider the application of section 40(2).

Request and response

2. On 3 December 2013 the complainant made a request for copies of the evidence upon which the Charity Commission had reached a decision about concerns made about Imamia Mission. The request was broken down into 17 items.

3. The Charity Commission responded on 19 December 2013. It explained that information relating to complaints made in 2002 and 2003 was no longer held. For the material it did hold, the Charity Commission supplied some of the information but considered the remainder was subject to the exemptions to disclosure set out at sections 21, 31 and 40 of FOIA.
4. The complainant wrote to the Charity Commission again on 18 February 2014 to challenge its decision to refuse the release of parts of the requested information. In particular, the complainant questioned the Charity Commission's reliance on section 31 of FOIA, arguing that the balance of the public interest firmly favoured disclosure.
5. The Charity Commission carried out an internal review in light of the complainant's dissatisfaction, the outcome of which was provided on 12 March 2014. The reviewer found that the Charity Commission had correctly applied FOIA with regard to most of the requested items. The reviewer did, however, release a further document that she considered was potentially relevant to one item.

Scope of the case

6. The complainant contacted the Commissioner to complain about the Charity Commission's decision to withhold information covered by items 2 and 10 of the request. The wording of these items is reproduced below:

2. Copies of any communication/correspondence to and from commission to Imamia Mission and/or [named individuals] from 1st March 2012 until 3rd December 2013 including communication to and from commission to current trustees.

10. Copy of the correspondence to and from all four trustees of 2002; 10 in number whom the commission contacted and they responded.

7. During the course of the Commissioner's investigation, the Charity Commission revisited the disputed information and voluntarily decided to release 6 of the 20 documents that been withheld, subject to some redactions of personal data. The complainant confirmed that he did not wish to pursue the redacted information in the 6 documents. It has therefore been left for the Commissioner to determine whether the remaining 14 documents were correctly withheld.

8. With regard to the disputed information, the Commissioner has found that a small part is likely to be the complainant's personal data. Insofar as requested information represents the applicant's personal data, an organisation should treat this as a subject-access request made under section 7 of the Data Protection Act 1998 (DPA) rather than under FOIA (which by virtue of section 40(1) provides an automatic exemption to first-party personal data). The Commissioner has therefore contacted the Charity Commission separately about the information and does not consider it further as part of this decision notice which is issued under FOIA.

Reasons for decision

Section 31 – law enforcement

9. The Charity Commission has argued that each of the 14 documents that make up the disputed information is subject to section 31(1)(g) of FOIA. This provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions specified in section 31(2). The section 31 exemption is qualified by the public interest test.
10. In this case the Charity Commission considers that section 31(1)(g) is engaged by virtue of sections 31(2)(c) and (f). These refer to the following purposes exercised by a public authority:
 - (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 the property of charities from loss or misapplication.
11. For either limb to be engaged a public authority must be able to satisfy each part of what effectively represents a three-stage test: (1) identify the public authority that has been entrusted with a function to fulfil the specified purpose, (2) confirm that the function has been specifically designed to fulfil that purpose, and (3) explain how the disclosure would prejudice that function. In reference to the purposes described by sections 31(2)(a) – (e), the Commissioner notes in his guidance on

section 31¹ that they all include the term “ascertaining” and explains that “ascertain” should be read as meaning to make certain or prove. The Commissioner goes on to say that in this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty.

12. Section 31(2)(c) reflects the fact that many activities and sectors of the economy are subject to statutory regulation. It is engaged where a public authority can demonstrate that disclosure would, or would be likely to, harm its ability as a regulator to determine whether it was required to use any of the regulatory tools at its disposal to ensure compliance with the legislation for which it is responsible.
13. In respect of section 31(2)(f), the Commissioner states in his guidance that the Charity Commission is the most obvious public authority with functions for the purposes described. As an example, the guidance refers to section 46 of the Charities Act 2011 (the Act) by which the Charity Commission can formally investigate possible misconduct. It also notes that under section 79 of the Act the Charity Commission has the power to suspend a trustee.
14. As evidenced in previous decisions involving the Charity Commission, the Commissioner recognises that the Charity Commission’s role as the regulator of charities is set out at section 14 of the Act, which describes five statutory objectives. In addition, section 15 of the 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, as mentioned above in the examples, remedial or protective action is taken in this respect.
15. The effect of the Act is that the Commissioner is satisfied that the first two stages of the aforementioned test are satisfied; namely that the Charity Commission has been entrusted with a function to fulfil the purposes specified at sections 31(2)(c) and (f) and that the function has been specifically designed to fulfil those purposes. The Commissioner has therefore gone to consider the third stage of the test, which requires a public authority to be able to demonstrate that disclosure would, or would be likely to, have a prejudicial effect.

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx

16. As with any prejudice-based exemption, a public authority must decide on the likelihood of the prejudice occurring through disclosure – the first option is that the public authority considers that prejudice 'would' occur, the second that prejudice 'would be likely' to occur. The Charity Commission is relying on the lower threshold of likelihood, namely that the prejudice is one that is likely to arise. While this places a weaker evidential burden on the Charity Commission to prove that the exemption is engaged, it nevertheless requires that the Charity Commission is able to demonstrate that there is a real and significant risk of the prejudice occurring.
17. In this context, the Commissioner considers that the most obvious example of where disclosure could lead to a prejudicial effect is where the requested information relates to an ongoing investigation. This is because it could affect the willingness of an organisation to co-operate with the investigation. This is not relevant here, however, as the Charity Commission has confirmed that its case had been closed at the time the request was made. Nevertheless, it maintains that there remains a real risk of prejudice occurring.
18. Firstly, the Charity Commission has informed the Commissioner that dealing with the concerns raised about the charity has been a difficult and resource-intensive process. In its view the result of disclosure would be likely to lead to further concerns or questions. Dealing with these would place further demands on its finite resources, which would inevitably impact on the Charity Commission's ability to look into the conduct of other charities. Secondly, it has pointed to the problems of carrying out investigations in the future, in that parties relevant to a complaint will be less likely to provide confidential information voluntarily.
19. The Commissioner has some sympathy with the Charity Commission in respect of the first argument. He does not rule out the possibility that disclosure could lead to further enquiries about its investigation into the charity, which could be distracting. However, the Commissioner has also found that he has not been presented with sufficient evidence to find that there is a real risk that the Charity Commission's regulatory activities would be likely to be compromised by the release of the information into the public domain.
20. The Commissioner has found however that the Charity Commission's second argument does engage the exemption in respect of both the purposes cited in section 31(2). In coming to this view, the Commissioner acknowledges that under sections 47, 48 and 52 of the Act the Charity Commission does have powers to compel a third party to provide the information it requires to fulfil its regulatory role. Therefore, even if a party was reluctant to co-operate with the Charity Commission

because of the possibility that confidential information could be disclosed, this intransigence could effectively be overcome through the use of the powers in the Act. On the face of it, this would seem to counter the possibility that disclosure could have a detrimental effect on the Charity Commission's ability to discharge its regulatory functions.

21. Yet, when considering what if any prejudice could arise, the Commissioner also understands that the Charity Commission will need to receive information from a wide range of third parties when deciding whether it was required to take a pro-active role in protecting a charity from mismanagement and misconduct. The Charity Commission argues, and the Commissioner accepts, that the issuing of orders for information is far more administratively bureaucratic than making enquiries informally to a co-operative party. The greater use of the formal powers would inevitably slow down and potentially frustrate the Charity Commission's future investigations. The Commissioner has therefore found that the release of the disputed information would be likely to have a prejudicial effect, which in turn means that each of the three conditions connected to the engagement of section 31(1)(g) has been satisfied. The Commissioner has therefore gone on to consider the balance of the public interest test.

Public interest arguments in favour of disclosure

22. In his correspondence with the Charity Commission the complainant has made a number of different claims, all of which in principle could lend significant weight to the case for disclosure. The Commissioner considers it appropriate here to summarise the central arguments underpinning the complainant's position rather than reciting each of the points made in detail. Nevertheless, the Commissioner has taken care to consider all of the submissions put before him.

- The complainant alleges that the Charity Commission may have adopted an 'unsafe' approach to investigating the concerns raised about Imamia Mission.
- The Charity Commission's lack of transparency opens the door to suspicions of bias.
- The decision to withhold evidence is contrary to the interests of justice, in that it prevents any party seeking to safeguard the existence of the charity from knowing the extent and severity of any mismanagement that may have taken place.
- Non-disclosure prevents the possibility of the public establishing whether the evidence provided to the Charity Commission was credible.

23. The Charity Commission has also accepted that it has an important public role as regulator in demonstrating to the public that charities and their assets are being properly administered. It recognises there is a clear public interest in an open and transparent regulator that is ready to release information about how it operates and reaches its decisions.

Public interest arguments in favour of maintaining the exemption

24. Charities play a vital role in providing help for those disadvantaged or neglected areas of society that may not otherwise receive the level of support they require. It is the Charity Commission's responsibility to promote the better management of charities, which includes taking steps to stop any misconduct at a charity.
25. The Charity Commission has argued that the importance of this task means there is a strong public interest in ensuring it is able to operate in an effective and efficient manner; an effectiveness that could be put at risk by disclosure. That disclosure could impair the Charity Commission's ability to resolve investigations in a timely fashion would also have a cost implication on the public purse.

Balance of the public interest

26. As referred to above, the complainant has made a number of arguments that if correct would represent a powerful case for finding that the public interest favoured disclosure. As the Charity Commission also recognised, its position as a regulator of a sector dependent on public trust means there will be a significant public interest in the Charity Commission being transparent and accountable. The issue for the Commissioner is to consider whether the combined weight of these arguments is sufficient justification for ordering disclosure in the face of the prejudice to the Charity Commission's regulatory activities that would be likely to arise.
27. A critical consideration is that the release of the information under FOIA is to the world and large and not only to an individual. Consequently, there will be occasions when an applicant may have entirely understandable reasons for seeking the requested information but the public interest arguments for disclosure are relatively weak. In this case the Commissioner does not share the complainant's view that the wider public interest in the information is as strong as suggested or that disclosure would otherwise dispel all of the concerns listed above.
28. Firstly, the Commissioner is reminded that the Charity Commission is the independent regulator of charities, with the aim of ensuring that charities are accountable, well run and meet their legal obligations. Pursuant to this role, members of the public have the opportunity to bring any serious concerns about a charity to the Charity Commission in

the expectation that a decision will then be made about whether there was a regulatory issue that warranted its active involvement. In short, there exists for the public an independent body that is designed to ensure charities are well-managed.

29. Secondly, and flowing from the first point, the Commissioner considers that the very nature of its role means the Charity Commission will be entrusted with confidential information that it would not be appropriate to release into the public domain. That this may mean the Charity Commission is not always in a position to disclose requested information should not be interpreted as a sign of bias.
30. Thirdly, from his analysis of the information the Commissioner has not found anything that would support the view that the Charity Commission has adopted an 'unsafe' approach in its investigation. In this regard, he considers that as part of its regulatory role the Charity Commission will frequently have to test, and ultimately make its own mind up on, the integrity of contested evidence presented as part of an investigation.
31. The Commissioner does accept though that disclosure would allow the evidence presented to the Charity Commission to be analysed and further arguments provided where it was felt that the Charity Commissioner's decision had been based on unreliable grounds. However, the Commissioner considers that the public interest in disclosure ultimately suffers in comparison with the strong public interest that exists in having an effective and efficient regulator. On this basis the Commissioner has determined that in all the circumstances the public interest in favour of maintaining the exemption with regard to the entirety of the disputed information outweighs the public interest in disclosure. Therefore, section 31(1)(g) by virtue of sections 31(2)(c) and (f) applies. In light of this finding, the Commissioner has not been required to consider the Charity Commission's separate application of section 40(2) of FOIA.

Right of appeal

32. 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

33. 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.
34. 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